

Background: The Federal Rules of Criminal Procedure were amended, effective December 1, 2002, to incorporate into Rule 32(h) the holding in Burns v. United States, 501 U.S. 129, 138-39 (1991). This policy statement parallels Rule 32(h), Fed. R. Crim. P.

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PART B - PLEA AGREEMENTS

Introductory Commentary

~~Policy statements governing the acceptance of plea agreements under Rule 11(e)(1), Fed. R. Crim. P., are intended to ensure that plea negotiation practices:~~

- ~~(1) promote the statutory purposes of sentencing prescribed in 18 U.S.C. § 3553(a); and~~
- ~~(2) do not perpetuate unwarranted sentencing disparity.~~

~~These policy statements are a first step toward implementing 28 U.S.C. § 994(a)(2)(E). Congress indicated that it expects judges "to examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines." S. Rep. 98-225, 98th Cong., 1st Sess. 63, 167 (1983). In pursuit of this goal, the Commission shall study plea agreement practice under the guidelines and ultimately develop standards for judges to use in determining whether to accept plea agreements. Because of the difficulty in anticipating problems in this area, and because the sentencing guidelines are themselves to some degree experimental, substantive restrictions on judicial discretion would be premature at this stage of the Commission's work.~~

~~The present policy statements move in the desired direction in two ways. First, the policy statements make clear that sentencing is a judicial function and that the appropriate sentence in a guilty plea case is to be determined by the judge. This is a reaffirmation of pre-guidelines practice. Second, the policy statements ensure that the basis for any judicial decision to depart from the guidelines will be explained on the record. Explanations will be carefully analyzed by the Commission and will pave the way for more detailed policy statements presenting substantive criteria to achieve consistency in this aspect of the sentencing process.~~

Policy statements governing the acceptance of plea agreements under Rule 11(c), Fed. R. Crim. P., are intended to ensure that plea negotiation practices: (1) promote the statutory purposes of sentencing prescribed in 18 U.S.C. § 3553(a); and (2) do not perpetuate unwarranted sentencing disparity.

These policy statements make clear that sentencing is a judicial function and that the appropriate sentence in a guilty plea case is to be determined by the judge. The policy statements also ensure that the basis for any judicial decision to depart from the guidelines will be explained on the record.

§6B1.1. Plea Agreement Procedure (Policy Statement)

~~(a) If the parties have reached a plea agreement, the court shall, on the record, require disclosure of the agreement in open court or, on a showing of good cause, in camera. Rule 11(c)(2), Fed. R. Crim. P.~~

~~(b) If the plea agreement includes a nonbinding recommendation pursuant to Rule 11(e)(1)(B), the court shall advise the defendant that the court is not bound by the sentencing recommendation, and that the defendant has no right to withdraw the defendant's guilty plea if the court decides not to accept the sentencing recommendation set forth in the plea agreement.~~

~~(c) The court shall defer its decision to accept or reject any nonbinding recommendation pursuant to Rule 11(e)(1)(B), and the court's decision to accept or reject any plea agreement pursuant to Rules 11(e)(1)(A) and 11(e)(1)(C) until there has been an opportunity to consider the presentence report, unless a report is not required under §6A1.1.~~

(a) The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera. Rule 11(c)(2), Fed. R. Crim. P.

(b) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or, ^{req. 05-2019} Rule 11(c)(3)(B), Fed. R. Crim. P.

(c) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report. Rule 11(c)(3)(A), Fed. R. Crim. P.

Commentary

This provision parallels the procedural requirements of Rule ~~11(e)~~11(c), Fed. R. Crim. P. Plea agreements must be fully disclosed and a defendant whose plea agreement includes a nonbinding recommendation must be advised that the court's refusal to accept the sentencing recommendation will not entitle the defendant to withdraw the plea.

Section 6B1.1(c) deals with the timing of the court's decision whether to accept the plea agreement. Rule 11(e)(2) gives the court discretion to accept the plea agreement immediately or defer acceptance pending consideration of the presentence report. Prior to the guidelines, an immediate decision was permissible because, under Rule 32(c), Fed. R. Crim. P., the defendant could waive preparation of the presentence report. Section 6B1.1(c) reflects the changes in practice required by §6A1.1 (Presentence Report) and amended Rule 32(c)(1). Since a presentence report normally will be prepared, the court must defer acceptance of the plea agreement until the court has had an opportunity to consider the presentence report.

Section 6B1.1(c) deals with the timing of the court's decision regarding whether to accept or reject the plea agreement. Rule 11(c)(3)(A) gives the court discretion to accept or reject the plea agreement immediately or defer a decision pending consideration of the presentence report. Given

that a presentence report normally will be prepared, the Commission recommends that the court defer acceptance of the plea agreement until the court has reviewed the presentence report.

§6B1.3. Procedure Upon Rejection of a Plea Agreement (Policy Statement)

~~If a plea agreement pursuant to Rule 11(e)(1)(A) or Rule 11(e)(1)(C) is rejected, the court shall afford the defendant an opportunity to withdraw the defendant's guilty plea. Rule 11(e)(4), Fed. R. Crim. P.~~

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

- (a) inform the parties that the court rejects the plea agreement;
- (b) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and
- (c) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

Rule 11(c)(5), Fed. R. Crim. P.

cited in S. v. Temkin, No. 12-50103 archived on September 25, 2015

This provision implements the requirements of Rule ~~11(e)(4)~~11(c)(5). It assures the defendant an opportunity to withdraw his plea when the court has rejected a plea agreement ~~that would require dismissal of charges or imposition of a specific sentence.~~

APPENDIX A - STATUTORY INDEX

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18 U.S.C. § 4 2X4.1
18 U.S.C. § 25 2X6.1

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cited in U.S. v. Temkin, No. 12-50103 archived on September 25, 2015