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EXPERT ANALYSIS

Plea Bargained vs. Open Pleas: What the Data Reveal

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Federal Rule of Criminal Procedure 11 governs guilty pleas for federal criminal defendants. This expert analysis examines the raw sentencing data published by the U.S. Sentencing Commission regarding the types of pleas defendants enter and the sentences they receive.[1]

In particular, we examine the number and rate of pleas under agreements (whether written or oral, conditional or not) versus open pleas.

The results are rather surprising, and we suggest there are increasing strategic reasons for defendants to consider pleading open, that is, pleading guilty without benefit of a plea agreement with the government.

There are four ways to plead guilty:

- Under a written (or oral) plea agreement with the government, which can either bind the court to a sentencing recommendation or not, depending on which provision of Rule 11 the plea agreement is drafted.[2]
- Under a conditional plea (also written), which preserves a defendant's ability to appeal adverse pretrial evidentiary rulings, but may occur only with the consent of both the government and the court.[3]
- Plead no contest, but only with the consent of the court.
- Plead "straight up" or "open" to an indictment.[4]

Generally, when charged with a federal offense, defendants often decide to plead guilty to avoid risking greater penalty resulting from a conviction at trial.

As the U.S. Supreme Court long ago observed:

> For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious: exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the state, there are also advantages: a promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment. Defendants who plead guilty and avoid trial also help conserve scarce judicial and prosecutorial resources.[5]

This is why about 97 percent of all federal defendants plead guilty, a rate that has remained roughly consistent for many years.[6]

By pleading guilty under a plea agreement, defendants generally are able to minimize the number of counts charged, which in turn limits the maximum statutory penalty they might face.

The trend has been that open pleas result in increasingly lower average sentences while pleas under agreements result in increasingly higher sentences.

Furthermore, they can provide themselves with some certainty, or at least probability, about what sentence to expect.

If a defendant pleads guilty under a binding "C plea" agreement (named for Federal Rule of Criminal Procedure 11(c)(1)(C)), the court is bound to the stipulated sentence if it accepts the plea.

Otherwise, if the defendant pleads guilty under a nonbinding "B plea" agreement (from Rule 11(c)(1)(B)), the government is bound only to "recommend" to the court an agreed-upon sentence, but that recommendation is just and only that.

When pleading under a plea agreement, a defendant gives up an enormous panoply of rights that sometimes are not fully appreciated. Of course, and most obviously, a defendant gives up the right to go to trial by pleading guilty, and all the protections and procedures inherent in that.

Furthermore, defendants generally are required to waive virtually all appellate rights unless the plea was a conditional one. (Sometimes a plea agreement will be drafted in such a way that a defendant may appeal a sentence that is greater than an agreed-upon amount, in which case, it is a limited waiver. Defendants always may appeal a sentence that exceeds the statutory maximum penalty). This type of appellate waiver covers even errors in calculating the guidelines correctly, unless that is expressly reserved.

Furthermore, appellants are generally required to waive their right to collaterally attack their plea or sentence on appeal, unless they assert ineffective assistance of counsel (which strictly is not an appeal, but a collateral civil proceeding under 28 U.S.C.A. § 2255).

Finally, some U.S. attorneys' offices are now requiring defendants to waive their ability to seek a future sentence reduction under 18 U.S.C.A. § 3582(c).

Section 3582(c) permits a district court to modify a sentence in only three limited circumstances:

- On motion of the director of the Bureau of Prisons if special circumstances exist, such as compassionate release.
- If otherwise expressly permitted by statute or Federal Rule of Criminal Procedure 35, such as where the defendant has provided post-sentencing cooperation.
- If the sentencing range is subsequently lowered by the U.S. Sentencing Commission.[7]

In addition to giving up the right to trial, appeal, collaterally attack and move for a later sentencing modification under Section 3582(c), defendants often must stipulate to a particular sentencing guidelines calculation.

In so doing, defendants must stipulate to relevant conduct, i.e., additional facts not contained within the information or indictment that are used to determine the final sentencing range.

Thus, defendants also waive their right to litigate critical sentencing matters that could significantly affect the length of the ultimate sentence imposed and/or greatly reduce any mitigating evidence a defendant wishes a sentencing court to consider, including arguments for departures and variances.

This has led to what some refer to as "coercive plea bargaining," which, in effect, can result in overly onerous plea agreements that require defendants to stipulate to sentences that might be the same or even greater than what they could expect had they gone to trial.[8]

While going to trial brings a high likelihood of conviction, at least in those instances, defendants preserve their right to litigate any and all sentencing matters, appeal both the conviction and sentence, collaterally attack their conviction or sentence, or seek a later Section 3582(c) reduction.

Finally, the presentence investigation report, or PSR, authored by a probation officer, occasionally includes additional relevant conduct and guidelines sentencing enhancements not contemplated by the parties.

If the plea agreement was a "C plea," a defendant is protected from additional aggravating factors. If the plea agreement was a "B plea," the defendant's bargain with the government may be easily undermined by an unfavorable PSR. As a result, "B pleas" sometimes do not afford all that much protection or certainty to a defendant.

It is also important to recognize the widely disparate plea bargaining practices among the districts.

Some districts require defendants to stipulate to guidelines calculations (and, therefore, relevant conduct) in the plea agreement and waive any and all arguments in favor of departures or variances, such as the Northern District of Ohio. Others require sentencing stipulations, but allow for departures and variance advocacy, such as the Northern District of California.

And still others, such as the District of New Mexico, remain silent on any calculations and simply enter into binding Rule 11(c)(1)(C) agreements for a specified period of time.

In each of these situations, the exact same defendant likely will receive very different sentences with absolutely no justification for the disparity other than accident of geography and/or probation officer (who again may include sentencing enhancements in the PSR that the parties did not contemplate).

But the choice between trial and pleading guilty under a plea agreement (which, to be sure, often is a better alternative than trial) is not necessarily a Hobbesian one; it is not necessarily the choice between horrific and tragic. There is middle ground: the open plea.

When pleading under a plea agreement, a defendant gives up an enormous panoply of rights that sometimes are not fully appreciated.

Defendants who plead guilty without benefit of a plea agreement, by pleading "open" or "straight up," are not required to admit any relevant conduct. An open plea contains no waivers other than a waiver of the right to trial. As a result, a defendant can preserve an enormous range of protections.

The downside of pleading open, however, is that no charges will be dismissed and, of course, there is no agreed-upon sentencing calculation.

But due to the guidelines' sophisticated grouping rules at Part 3D, multiple counts of even disparate conduct can be grouped together and treated as one overall offense. As such, multiple counts of conviction often have little to no substantive impact on the final guidelines calculation.

PLEAS BY AGREEMENT VS. OPEN PLEAS: A STATISTICAL OVERVIEW

As indicated in the figures below, the number and percentage of open pleas have remained a not-insubstantial portion of guilty pleas overall since *United States v. Booker*, 543 U.S. 220 (2005) (holding Sixth Amendment required guidelines to be merely advisory), fundamentally changed the nature of the guidelines and sentencing practice.

In fact, open pleas now make up nearly a quarter of all resolutions of federal criminal matters as of fiscal year 2015, which was a rather surprisingly high result.

As noted in Figure 1, there has been an overall trend since *Booker* of defendants increasingly entering into open pleas (although the rate varies by offense type).

What is particularly interesting is that, overall, those who pleaded open (and thereby preserved their right to challenge all relevant conduct in terms of sentencing factors) have received lower sentences on average.

In fact, the trend has been that open pleas result in increasingly lower average sentences while pleas under agreements result in increasingly higher sentences. This is reflected in Figure 2.

To be sure, these trends are specific to offense types. For example, fraud defendants sentenced under U.S. Sentencing Guidelines § 2B1.1 have experienced the same trend since 2010: increasingly lower sentences for open pleas while those pleading under plea agreements have received increasingly higher sentences on average.

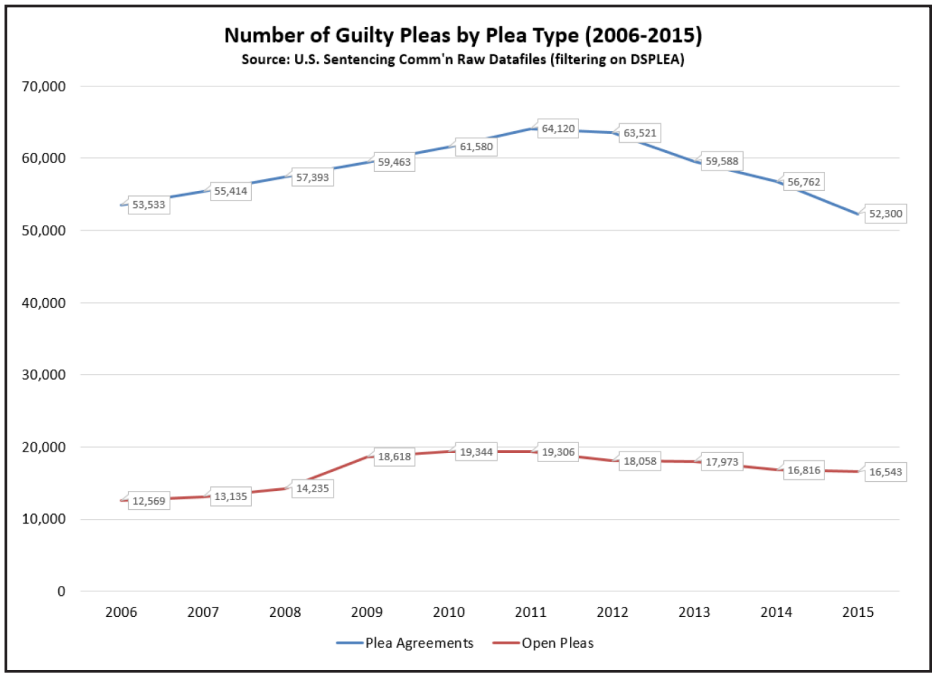

Figure 1

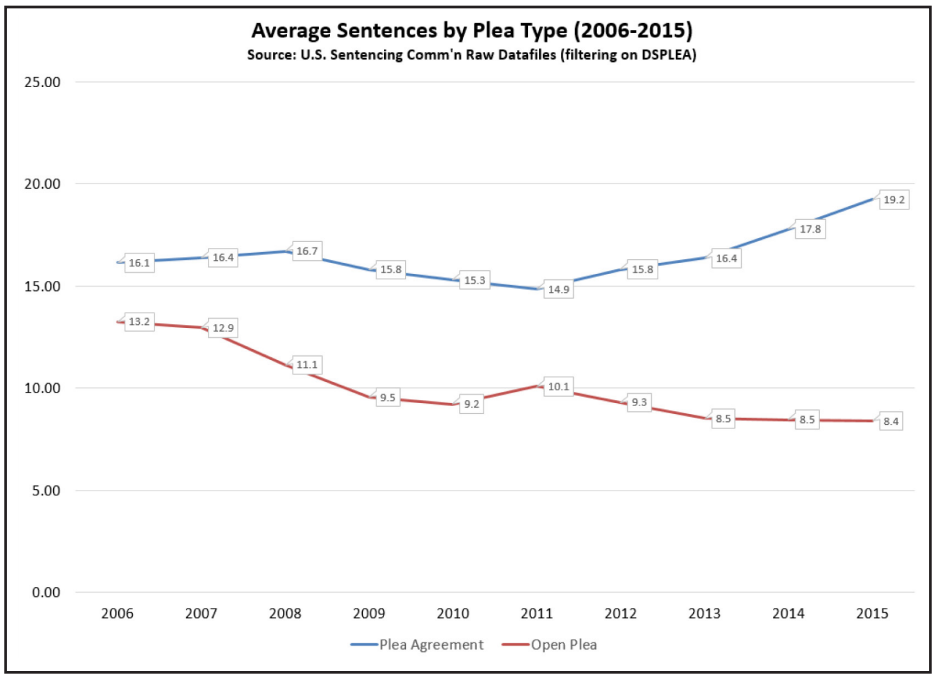

Figure 2

Figure 3 compares those pleading guilty under a plea agreement with those pleading open where all defendants were sentenced under USSG § 2B1.1, were in Criminal History Category I[9] and were not subject to any mandatory minimum.

However, tax defendants sentenced under USSG § 2T1.1, have experienced the opposite trend with but a brief respite in 2011. And those pleading open for tax offenses have experienced a far more variable average sentence than those sentenced under USSG § 2B1.1.

Figure 4 compares those pleading guilty under a plea agreement with those pleading open where all defendants were sentenced under USSG § 2T1.1, were in Criminal History Category I and were not subject to any mandatory minimum.

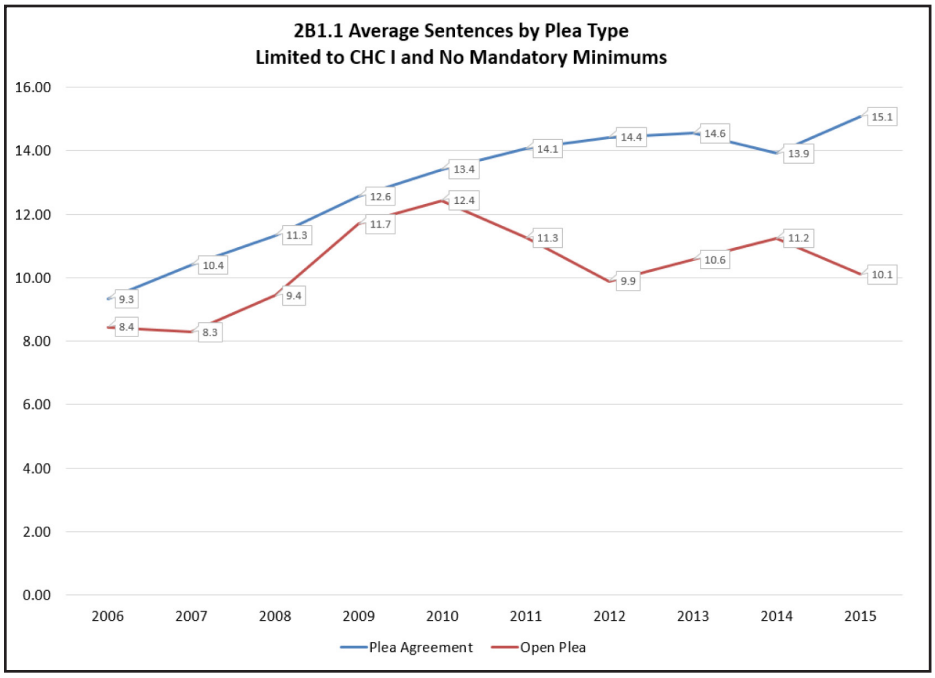

Figure 3

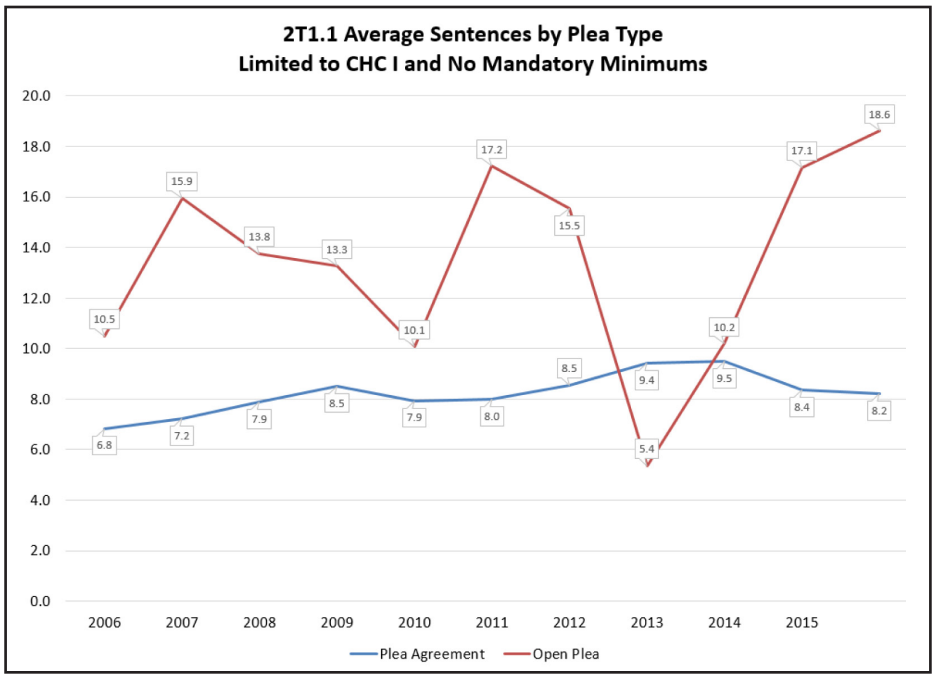

Figure 4

Thus, at least in some cases, pleading open can be advantageous, at least statistically speaking. This will come down to how successful plea negotiations are with the government and the merits of any challenges to relevant conduct or appellate issues.

CONCLUSION

"Of course," as the Supreme Court long ago recognized, "the prevalence of guilty pleas ... does not necessarily validate those pleas or the system which produces them."[10]

The specter of "coercive" plea agreements is real but, again, a defendant need not choose between a theoretically horrific result by going to trial and a tragic one as determined by what the government is willing to offer by way of a plea agreement.

As the statistical review above reveals, sometimes the perhaps underutilized option of the open plea may result in a more advantageous result for a defendant.

Furthermore, one corollary benefit to the open plea is the development of case law on the often arcane and complex sentencing factors contained within the guidelines.

A more robust sentencing jurisprudence certainly will help guide future plea negotiations and thereby provide a more equitable ground for defendants facing federal criminal charges rather than succumbing to coercive pleas.

NOTES

[1] The U.S. Sentencing Commission's data files use the variable DSPLEA to record the types of guilty pleas defendants enter into. The analyses contained herein lumps together those pleas recorded as "Received" (DSPLEA = 1), "Received, Alternate Document" (DSPLEA = 2) and "Oral Plea Agreement" (DSPLEA = 3) as "Pleas Pursuant to Agreement." "Straight up Plea, No Agreement" (DSPLEA = 5) are treated as "Open Pleas."

[2] Federal Rule of Criminal Procedure 11(c)(1)(B) provides that the parties may "recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request *does not bind* the court)" (emphasis added). In contrast, Federal Rule of Criminal Procedure 11(c)(1)(C) provides that the parties may recommend "a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request *binds* the court once the court accepts the plea agreement)" (emphasis added). Such binding pleas commonly are referred to as "C pleas."

[3] Federal Rule of Criminal Procedure 11(a)(2) provides that "[w]ith the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea."

[4] Federal Rule of Criminal Procedure 11(a)(1) provides that "[a] defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere."

[5] *Brady v. United States,* 397 U.S. 742, 752 (1970).

[6] *See* U.S. Sentencing Comm'n, 2015 Sourcebook of Federal Sentencing Statistics, fig. C.

[7] *See United States v. Sharkey,* 543 F.3d 1236, 1239 (10th Cir. 2008).

[8] *See* generally H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System,* 61 CATH. U. L. REV. 63 (2012).

[9] There are six criminal history categories, which correspond to the severity and nature of a defendant's criminal history. "I" corresponds to those with little to no criminal history, and "VI" corresponds to those with the most serious in terms of number and nature.

[10] *Brady*, 397 U.S. at 752-53.

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