

CHAPTER SIX - SENTENCING PROCEDURES AND PLEA AGREEMENTS

PART A - SENTENCING PROCEDURES

Introductory Commentary

This Part addresses sentencing procedures that are applicable in all cases, including those in which guilty or nolo contendere pleas are entered with or without a plea agreement between the parties, and convictions based upon judicial findings or verdicts. It sets forth the procedures for establishing the facts upon which the sentence will be based. Reliable fact-finding is essential to procedural due process and to the accuracy and uniformity of sentencing.

Historical Note: Effective November 1, 1987.

§6A1.1. Presentence Report (Policy Statement)

A probation officer shall conduct a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is information in the record sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. § 3553, and the court explains this finding on the record. Rule 32(b)(1), Fed. R. Crim. P. The defendant may not waive preparation of the presentence report.

Commentary

A thorough presentence investigation is essential in determining the facts relevant to sentencing. In order to ensure that the sentencing judge will have information sufficient to determine the appropriate sentence, Congress deleted provisions of Rule 32(c), Fed. R. Crim. P., which previously permitted the defendant to waive the presentence report. Rule 32(b)(1) permits the judge to dispense with a presentence report, but only after explaining, on the record, why sufficient information is already available.

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 58); November 1, 1989 (see Appendix C, amendment 293); November 1, 1997 (see Appendix C, amendment 574).

§6A1.2. Disclosure of Presentence Report; Issues in Dispute (Policy Statement)

Courts should adopt procedures to provide for the timely disclosure of the presentence report; the narrowing and resolution, where feasible, of issues in dispute in advance of the sentencing hearing; and the identification for the court of issues remaining in dispute. Rule 32(b)(6), Fed. R. Crim. P.

Commentary

Application Note:

1. Under Rule 32, Fed. R. Crim. P., if the court intends to consider a sentence outside the applicable guideline range on a ground not identified as a ground for departure either in the presentence report or a pre-hearing submission, it shall provide reasonable notice that it is contemplating such ruling, specifically identifying the grounds for the departure. Burns v. United States, 501 U.S. 129, 135-39 (1991).

Background: In order to focus the issues prior to sentencing, the parties are required to respond in writing to the presentence report and to identify any issues in dispute. Rule 32(b)(6)(B), Fed. R. Crim. P.

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 59); November 1, 1991 (see Appendix C, amendment 425); November 1, 1997 (see Appendix C, amendment 574).

§6A1.3. Resolution of Disputed Factors (Policy Statement)

- (a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.
- (b) The court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(c)(1), Fed. R. Crim. P.

Commentary

In pre-guidelines practice, factors relevant to sentencing were often determined in an informal fashion. The informality was to some extent explained by the fact that particular offense and offender characteristics rarely had a highly specific or required sentencing consequence. This situation no longer exists under sentencing guidelines. The court's resolution of disputed sentencing factors usually has a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair.

Although lengthy sentencing hearings seldom should be necessary, disputes about sentencing factors must be resolved with care. When a dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. See, e.g., United States v. Ibanez, 924 F.2d 427 (2d Cir. 1991). An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. See, e.g., United States v. Jimenez Martinez, 83 F.3d 488, 494-95 (1st Cir. 1996) (finding error in district court's denial of defendant's motion for evidentiary hearing given questionable reliability of affidavit on which the district court relied at sentencing); United States v. Roberts, 14 F.3d 502, 521(10th Cir. 1993) (remanding because district court did not hold evidentiary hearing to address

defendants' objections to drug quantity determination or make requisite findings of fact regarding drug quantity); *see also*, United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. *See* 18 U.S.C. § 3661; *see also* United States v. Watts, 117 S. Ct. 633, 635 (1997) (holding that lower evidentiary standard at sentencing permits sentencing court's consideration of acquitted conduct); Witte v. United States, 515 U.S. 389, 399-401 (1995) (noting that sentencing courts have traditionally considered wide range of information without the procedural protections of a criminal trial, including information concerning criminal conduct that may be the subject of a subsequent prosecution); Nichols v. United States, 511 U.S. 738, 747-48 (1994) (noting that district courts have traditionally considered defendant's prior criminal conduct even when the conduct did not result in a conviction). Any information may be considered, so long as it has sufficient indicia of reliability to support its probable accuracy. Watts, 117 S. Ct. at 637; Nichols, 511 U.S. at 748; United States v. Zuleta-Alvarez, 922 F.2d 33 (1st Cir. 1990), *cert. denied*, 500 U.S. 927 (1991); United States v. Beaulieu, 893 F.2d 1177 (10th Cir.), *cert. denied*, 497 U.S. 1038 (1990). Reliable hearsay evidence may be considered. United States v. Petty, 982 F.2d 1365 (9th Cir. 1993), *cert. denied*, 510 U.S. 1040 (1994); United States v. Sciarrino, 884 F.2d 95 (3d Cir.), *cert. denied*, 493 U.S. 997 (1989). Out-of-court declarations by an unidentified informant may be considered where there is good cause for the non-disclosure of the informant's identity and there is sufficient corroboration by other means. United States v. Rogers, 1 F.3d 341 (5th Cir. 1993); *see also* United States v. Young, 981 F.2d 180 (5th Cir.), *cert. denied*, 508 U.S. 980 (1993); United States v. Fatico, 579 F.2d 707, 713 (2d Cir. 1978), *cert. denied*, 444 U.S. 1073 (1980). Unreliable allegations shall not be considered. United States v. Ortiz, 993 F.2d 204 (10th Cir. 1993).

The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (*see* Appendix C, amendment 294); November 1, 1991 (*see* Appendix C, amendment 387); November 1, 1997 (*see* Appendix C, amendment 574); November 1, 1998 (*see* Appendix C, amendment 586).

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.

Historical Note: Effective November 1, 1987.

§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(e)(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.

Commentary

This provision parallels the procedural requirements of Rule 11(e), 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.

Historical Note: Effective November 1, 1987.

§6B1.2. Standards for Acceptance of Plea Agreements (Policy Statement)

- (a) In the case of a plea agreement that includes the dismissal of any charges or an agreement not to pursue potential charges [Rule 11(e)(1)(A)], the court may accept the agreement if the court determines, for reasons stated on the record, that 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.

However, a plea agreement that includes the dismissal of a charge or a plea agreement not to pursue a potential charge shall not 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.

- (b) In the case of a plea agreement that includes a nonbinding recommendation [Rule 11(e)(1)(B)], the court may accept the recommendation if the court is satisfied either that:
- (1) the recommended sentence is within the applicable guideline range; or
 - (2) the recommended sentence departs from the applicable guideline range for justifiable reasons.
- (c) In the case of a plea agreement that includes a specific sentence

[Rule 11(e)(1)(C)], the court may accept the agreement if the court is satisfied either that:

- (1) the agreed sentence is within the applicable guideline range; or
- (2) the agreed sentence departs from the applicable guideline range for justifiable reasons.

Commentary

The court may accept an agreement calling for dismissal of charges or an agreement not to pursue potential charges if the remaining charges reflect the seriousness of the actual offense behavior. This requirement does not authorize judges to intrude upon the charging discretion of the prosecutor. If the government's motion to dismiss charges or statement that potential charges will not be pursued is not contingent on the disposition of the remaining charges, the judge should defer to the government's position except under extraordinary circumstances. Rule 48(a), Fed. R. Crim. P. However, when the dismissal of charges or agreement not to pursue potential charges is contingent on acceptance of a plea agreement, the court's authority to adjudicate guilt and impose sentence is implicated, and the court is to determine whether or not dismissal of charges will undermine the sentencing guidelines.

*Similarly, the court should accept a recommended sentence or a plea agreement requiring imposition of a specific sentence only if the court is satisfied either that such sentence is an appropriate sentence within the applicable guideline range or, if not, that the sentence departs from the applicable guideline range for justifiable reasons (*i.e.*, that such departure is authorized by 18 U.S.C. § 3553(b)). See generally Chapter 1, Part A, Subpart 4(b)(Departures).*

A defendant who enters a plea of guilty in a timely manner will enhance the likelihood of his receiving a reduction in offense level under §3E1.1 (Acceptance of Responsibility). Further reduction in offense level (or sentence) due to a plea agreement will tend to undermine the sentencing guidelines.

The second paragraph of subsection (a) provides that a plea agreement that includes the dismissal of a charge, or a plea agreement not to pursue a potential charge, shall not prevent the conduct underlying that charge from being considered under the provisions of §1B1.3 (Relevant Conduct) in connection with the count(s) of which the defendant is convicted. This paragraph prevents a plea agreement from restricting consideration of conduct that is within the scope of §1B1.3 (Relevant Conduct) in respect to the count(s) of which the defendant is convicted; it does not in any way expand or modify the scope of §1B1.3 (Relevant Conduct). Section 5K2.21 (Dismissed and Uncharged Conduct) addresses the use, as a basis for upward departure, of conduct 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.

The Commission encourages the prosecuting attorney prior to the entry of a plea of guilty or nolo contendere under Rule 11 of the Federal Rules of Criminal Procedure to disclose to the defendant the facts and circumstances of the offense and offender characteristics, then known to the prosecuting attorney, that are relevant to the application of the sentencing guidelines. This recommendation, however, shall not be construed to confer upon the defendant any right not

otherwise recognized in law.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 295); November 1, 1992 (see Appendix C, amendment 467); November 1, 1993 (see Appendix C, amendment 495); November 1, 2000 (see Appendix C, amendment 604).

§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.

Commentary

This provision implements the requirements of Rule 11(e)(4). 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.

Historical Note: Effective November 1, 1987.

§6B1.4. Stipulations (Policy Statement)

- (a) A plea agreement may be accompanied by a written stipulation of facts relevant to sentencing. Except to the extent that a party may be privileged not to disclose certain information, stipulations shall:
 - (1) set forth the relevant facts and circumstances of the actual offense conduct and offender characteristics;
 - (2) not contain misleading facts; and
 - (3) set forth with meaningful specificity the reasons why the sentencing range resulting from the proposed agreement is appropriate.
- (b) To the extent that the parties disagree about any facts relevant to sentencing, the stipulation shall identify the facts that are in dispute.
- (c) A district court may, by local rule, identify categories of cases for which the parties are authorized to make the required stipulation orally, on the record, at the time the plea agreement is offered.
- (d) The court is not bound by the stipulation, but may with the aid of the presentence report, determine the facts relevant to sentencing.

Commentary

This provision requires that when a plea agreement includes a stipulation of fact, the stipulation must fully and accurately disclose all factors relevant to the determination of sentence. This provision does not obligate the parties to reach agreement on issues that remain in dispute or to present the court with an appearance of agreement in areas where agreement does not exist. Rather, the overriding principle is full disclosure of the circumstances of the actual offense and the agreement of the parties. The stipulation should identify all areas of agreement, disagreement and uncertainty that may be relevant to the determination of sentence. Similarly, it is not appropriate for the parties 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. Rather, the parties should fully disclose the actual facts and then explain to the court the reasons why the disposition of the case should differ from that which such facts ordinarily would require under the guidelines.

Because of the importance of the stipulations and the potential complexity of the factors that can affect the determination of sentences, stipulations ordinarily should be in writing. However, exceptions to this practice may be allowed by local rule. The Commission intends to pay particular attention to this aspect of the plea agreement procedure as experience under the guidelines develops. See Commentary to §6A1.2 (Disclosure of Presentence Report; Issues in Dispute).

Section 6B1.4(d) makes clear that the court is not obliged to accept the stipulation of the parties. Even though stipulations are expected to be accurate and complete, the court cannot rely exclusively upon stipulations in ascertaining the factors relevant to the determination of sentence. Rather, in determining the factual basis for the sentence, the court will consider the stipulation, together with the results of the presentence investigation, and any other relevant information.

Historical Note: Effective November 1, 1987.