

ANNOTATED PLEA LITANY

FOR PLEAS TAKEN BY

FEDERAL DISTRICT COURT JUDGE B. LYNN WINMILL

Annotated with Supreme Court, 9th Circuit, and statutory authority

Last update -- 9/19/00

PLEA LITANY

For Defendant _____

A. SWEARING OF DEFENDANT

[Interpreter sworn?]

1. _____, the court is informed that you wish to change the plea you have previously entered to the Indictment. Is that correct? ¹

2. Before accepting your guilty plea, there are a number of questions I will ask you to assure that it is a valid plea.

If you do not understand any of the questions or at any time wish to consult with your attorney, please say so since it is essential to a valid plea that you understand each question before you answer.

3. The Clerk will please swear the defendant. ²

4. Do you understand that, having been sworn, your answers to my questions

¹ Trial judge acted improperly in announcing at opening of plea hearing that he would not, after that day, accept a plea on fewer than all counts of indictment. *U.S. v. Anderson*, 993 F.2d 1435 (9th Cir. 1993).

² An oath is not required under Fed. R.Crim.P. 11 but is strongly recommended to avoid later contention in proceeding under 28 U.S.C. § 2255 that Defendant did not answer truthfully because he/she was not sworn.

will be subject to the **penalties of perjury** or making a **false statement** if you do not answer truthfully?

B. COMPETENCE OF DEFENDANT TO PLEAD.

1. _____, how old are you?

2. How far did you go in school?

3. Have you taken any drugs, medicine or pills or consumed any alcoholic beverages in the past 24 hours?

4. Do you understand what is happening today? Tell me your understanding of the purpose of these proceedings.

5. **[to defense counsel or prosecutor]**

Do either of you have any doubt as to the defendant's competence to plead at this time?

6. Based on this record, it is the finding of this court that the defendant is competent to enter a plea this day.³

C. ADEQUACY OF REPRESENTATION

1. Have you had adequate time to discuss your case with your attorney?
2. Are you satisfied with your attorney's representation?

D. SENTENCING GUIDELINES

1. This case is covered by the Sentencing Guidelines. Has your attorney discussed the Sentencing Guidelines with you?
2. *[Not applicable for Rule 11(e)(1)(C) Plea Agreement]* Under the

³ Defendant is competent to plead guilty only if he has capacity for reasoned choice among alternatives. *U.S. v. Myers*, 993 F.2d 713 (9th Cir. 1993). Standard of competence to plead guilty is the same as the standard for competence to waive counsel. *Moran v. Godinez*, 57 F.3d 690 (9th Cir. 1994), *cert. denied*, 116 S.Ct. 479 (1995).

Sentencing Guidelines, the sentencing judge must select a sentence from within the guideline range. If, however, your case presents unusual features, the law permits the judge to depart from the guidelines and impose a sentence either above or below the recommended guideline range. Although most sentences will be imposed within the guideline range, there is no guarantee of this. Do you understand this?

3. Also under the guidelines, **parole** has been abolished. Thus, if imprisonment is ordered in your case, the sentence imposed by the court will be the sentence you will serve, less good time credit if you earn it. Do you understand this?

4. Under the guidelines, the court is required to take into account all conduct, circumstances and injuries associated with your criminal conduct, whether or not this conduct is charged by the Government in the crime to which you are pleading guilty. In other words, there is no limitation placed on the information the court can consider at the time of sentencing concerning

the background, character and conduct of a person convicted of a crime so long as the information is reliable. Thus, the court will consider all relevant conduct at the time of sentencing. Do you understand this? ⁴

5. Do you understand that if you cooperate with the Government and provide substantial assistance to the investigating authorities, this may permit the court (if it chooses to do so) upon the Government's request to impose a sentence below the recommended range? ⁵

6. Do you understand that under the guidelines, a United States **Probation Officer** will be assigned to conduct a thorough presentence investigation to develop all relevant facts concerning your criminal conduct?

7. Do you understand that if you do not tell the truth to the **Probation Officer**, this could increase or enhance your punishment under the guidelines?

⁴ See Sentencing Guidelines § 1B1.3; *U.S. v. Hahn*, 960 F.2d 903 (9th Cir. 1992).

⁵ See Sentencing Guidelines § 5K1.1.

E. PRIOR OFFENSES

[Skip this entire section and proceed to Section F (“Defendant’s Right To Trial and Nature Thereof”) if you have a Rule 11(e)(1)(C) Plea Agreement]

1. Do you understand that under the sentencing guidelines, if you have had a criminal conviction within the past 15 years, such convictions may serve to increase your sentence in this case? ⁷

2. Do you understand that under the guidelines, if you committed the present offense while on probation or supervised release, this may serve to increase your sentence in this case? ⁸

3. Do you understand that if you committed the present offense (offenses) **less**

⁶ See Sentencing Guidelines § 2J1.2(b)(2).

⁷ See Sentencing Guidelines § 4A1.2(e)(1).

⁸ See Sentencing Guidelines § 4A1.1(d).

than two years after being released from prison, this may serve to increase or enhance your sentence under the guidelines? ⁹

4. Do you understand that if you committed the present offense(s) as part of a **pattern of criminal conduct** from which you derived a substantial portion of your income, that this may serve to increase your sentence under the guidelines? ¹⁰

5. Do you understand that if this offense is a crime of violence or a drug trafficking offense, and that if you have two prior felony convictions of either a crime of violence or a drug trafficking offense, you could be sentenced as a **career offender** which could greatly enhance the punishment you receive? ¹¹

F. DEFENDANT'S RIGHT TO TRIAL AND NATURE THEREOF

⁹ See Sentencing Guidelines § 4A1.1(e).

¹⁰ See Sentencing Guidelines § 4B1.3 implementing 28 U.S.C. § 994(i)(2).

¹¹ See Sentencing Guidelines § 4B1.1. The 9th Circuit has upheld the constitutionality of this provision. *U.S. v. McDougherty*, 920 F.2d 569 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 1119 (1991).

1. Do you understand that under the Constitution and laws of the United States, you are entitled to a trial by a jury on the charges contained in the Indictment related to this case?

2. Do you understand that at that trial, you would be presumed to be innocent, and the Government would be required to prove you guilty by competent evidence and beyond a reasonable doubt before you could be found guilty, and you would not have to prove that you were innocent?

3. Do you understand that you and your counsel would participate in the selection of the jury to hear your case and that if you wanted to call witnesses the cost and process in bringing those witnesses would be paid for you if you could not afford to bring the witnesses yourself?

4. Do you understand that at that trial, you would be **presumed to be innocent**, and the Government would have to come to court and present witnesses to testify in your presence and your counsel could cross-examine the

witnesses for the Government, object to evidence offered by the Government and offer evidence on your behalf?

5. Do you understand also that at a trial, while you would have the right to testify if you chose to do so, you also would have the right not to testify, and no inference or suggestion of guilt could be drawn from the fact that you did not testify?

6. Do you understand that after your trial, that you would have the **right to appeal** and if you cannot afford an attorney for the appeal, **one would be appointed.**

7. If you plead guilty and I accept your plea, do you understand that you will **waive your right to a trial** and the other rights I have just discussed; there will be no trial, and I will enter a judgment of guilty and sentence you on the basis of your guilty plea after considering the presentence report?

8. If you plead guilty, do you understand that you will also have to **waive your right not to incriminate yourself** since I may ask you questions about what you did in order to satisfy myself that you are guilty as charged, and you will have to acknowledge your guilt?¹²

9. Having heard this discussion of your rights, do you still want to plead guilty and waive your rights (with the exception of the right to further assistance of counsel)?

G. NATURE OF CHARGES AND CONSEQUENCES OF PLEA

1. Have you received a copy of the Indictment?

¹² Fed. R. Crim. P. 11(c) requires the Court to advise defendant of various rights he is giving up. Rule 11 requires the Court to advise defendant that at trial, he would have a 5th Amendment right not to incriminate himself, and that he is giving up his right to assert his 5th Amendment right at trial. But Rule 11 does not state that the defendant should be advised that he is giving up his 5th Amendment rights in post-guilty-plea hearings by pleading guilty. That is because the defendant does not waive his 5th Amendment rights by pleading guilty. *Mitchell v. U.S.*, 119 S.Ct. 1307 (1999). Because a defendant who pleads guilty retains his 5th Amendment rights, the sentencing court cannot take into consideration the defendant's failure to testify at the sentencing hearing. *Id.* While *Mitchell* seems to hold that a defendant cannot waive his 5th Amendment rights no matter how far he goes in admitting the crime during his plea hearing, that is by no means clear from *Mitchell*. In most plea colloquys, the Court asks defendant various detailed questions about the crime, and defendant usually admits to certain acts. Has the defendant waived his 5th Amendment rights as to those items he testified about? *Mitchell* seems to say no, but is not clear.

2. Have you read it? **Do you understand the charges?**

3. I understand that you have entered into a Plea Agreement whereby you agree to plead guilty to Counts _____ of the Indictment. Is that correct?

4. Count_____of the Indictment reads as follows:¹³

5. Count_____of the Indictment reads as follows:

6. Have you discussed with your attorney the charges in the indictment to which you intend to plead guilty?

7. Do you understand that the maximum possible penalty under the Indictment

¹³ Defendant cannot waive the reading of the indictment or some summary of the charges in open court. *U.S. v. Odedo*, 1998 WL 537936 (9th Cir. Aug. 26, 1998); *U.S. v. Smith*, 60 F.3d 595, 597 (9th Cir. 1995). The Prosecutor may, at the Court's discretion, explain the nature of the charges in open court at the plea hearing. *U.S. v. Sharp*, 941 F.2d 811, 816 (9th Cir. 1991), *questioned on other grounds*, *U.S. v. Johnson*, 132 F.3d 1279, 1285 (9th Cir. 1997). But it is much safer for the Court to read the indictment. In *U.S. v. Longoria*, 113 F.3d 975 (9th Cir. 1997), the trial court did not read the indictment but had the defendant describe in his own words what the charges were. The defendant stated that he was accused of distributing cocaine, but neglected to add that he was also charged with distributing heroin. The Circuit noted that error, and also took the trial court to task for not reading and explaining the charges. The case was reversed and remanded.

is _____ years imprisonment, and/or a fine of \$ _____ on each count, plus a special assessment of \$ _____ on each count? ¹⁴

6(a) *If the offense carries a maximum sentence of 25 years, inform defendant that a sentence of probation is not available.* ¹⁵

7. ***[notify of any mandatory minimums]*** ¹⁶

¹⁴ In *U.S. v. Barrios-Gutierrez*, 2000 WL 966914 (9th Cir. July 14, 2000), the Circuit found that a district judge had failed to notify the defendant of the maximum penalty during a plea negotiation. The defendant pled guilty to illegal entry. The maximum prison term was 2 years, and Judge Broomfield so notified the defendant. The Judge then asked the U.S. Attorney if they might seek an enhancement because defendant had a prior aggravated felony. The Government said they would. So Judge Broomfield told the defendant that if the enhancement applies, "your sentence could be up to 20 years and a fine of \$250,000. Do you understand that?" To which the defendant replied, "yes." But 9th Circuit judges Betty Fletcher and Marcus Canby found that Judge Broomfield had never "unambiguously" informed defendant of the maximum sentence. They find that "the most definitive statement by the district court was its initial statement that [the defendant] could face a prison term of not more than two years." O' Scannlain dissents, finding this to be a misreading of the transcript. It appears this decision means that Judge Broomfield's statement that "if the enhancement applies, the sentence could be 20 years" is not definitive enough -- it contains too many qualifiers and is ambiguous. What Judge Broomfield should have said -- according to the Circuit -- was simply that the maximum sentence is 20 years.

The Special Assessment is \$100 for crimes committed after April 24, 1996, and is \$50 if the crime was committed before that date. See, Mandatory Victim Restitution Act of 1996 contained in Antiterrorism and Effective Death Penalty Act of 1996, Public Law 104-132, 110 Stat. 1214 (1996).

¹⁵ See 18 U.S.C. § 3561(a)(1).

¹⁶ Where a statute provides for a mandatory minimum sentence, that sentence is imposed rather than a lesser sentence that would be derived by applying the Guidelines. See, Sentencing Guidelines § 5G1.1(b). But 18 U.S.C. § 3553(f) allows the Court to disregard the statutory minimum in sentencing first time, nonviolent drug offenders who played a minor role in the offense and who have made a good-faith effort to cooperate with the Government. *U.S. v. Sherpa*, 110 F.3d 656 (9th Cir. 1997) (§ 3553(f) is known as the "safety valve" statute). In addition, the Government could move under 18 U.S.C. 3553(e) to avoid the mandatory minimums if the defendant provides substantial assistance. The Court cannot apply (e) without a government motion, but can apply (f) without a motion.

8. *[If Defendant is pleading to more than one count] [Not applicable for Rule 11(e)(1)(C) Plea Agreement]* Do you understand that your sentences for each count could be consecutive? ¹⁷

9. *[If Restitution is applicable] [Not applicable for Rule 11(e)(1)(C) Plea Agreement]* Do you understand that the Court may order you to pay restitution to any victim in this case? ¹⁸

10. *[Not applicable for Rule 11(e)(1)(C) Plea Agreement]* Do you understand that the Court may order you to pay all or part of your **costs of incarceration and supervision** if you have the ability to pay the same and, if you do not, the court can order you to do community service as a part of your

¹⁷ If state charges are pending against defendant, and he has not yet been sentenced on those state charges, the Court must advise defendant that it has no authority to order that his federal sentence run concurrent with whatever state sentence he later receives. *U.S. v. Neely*, 38 F.3d 458 (9th Cir. 1994).

¹⁸ Restitution may only be required when it is demonstrated that a person or entity has suffered as a result of the underlying conduct giving rise to the conviction. *U.S. v. Baker*, 25 F.3d 1452, 1459 (9th Cir. 1994). Since a November 29, 1990, amendment to the Victim and Witness Protection Act (VWPA), restitution may be ordered for losses to persons harmed in the course of Defendant's scheme even beyond the counts of conviction. *U.S. v. Rutgard*, 116 F.3d 1270 (9th Cir. March 6, 1997). Restitution cannot be imposed under the VWPA for conduct occurring prior to November 29, 1990. *U.S. v. DeSalvo*, 41 F.3d 505, 515 (9th Cir. 1994). The failure of the Court to advise the defendant that he is facing required restitution under the VWPA is error, but might be harmless if it does not affect the "substantial rights" of defendant. *U.S. v. Crawford*, 1999 WL 228383 (9th Cir. April 21, 1999).

supervised release.

11.. *[Applicable for Forfeiture claim cases] [Not applicable for Rule 11(e)(1)(C) Plea Agreement]* Do you understand that the court may require the defendant to **forfeit** certain property to the Government?

12. *[If the offense involves fraud or other intentionally deceptive practices]*
Do you understand that the Court may order that you provide notice of your conviction to victims of the offense?

13. Do you understand that you are pleading guilty to a felony offense, and that if the court accepts your plea and finds you guilty, you may be deprived of valuable **civil rights**, such as the right to vote, the right to hold public office, the right to serve on a jury, and the right to possess any kind of firearm?

14. *[If the offense involves drugs]* Do you understand that you may lose

any accrued or future **federal benefits such as food stamp and social security benefits?**¹⁹

15. *[If applicable]* Do you understand that if you are not a citizen of the United States, a felony conviction may affect your **alien status?**

16. In addition, there is what I call a second sentence. After you complete serving whatever the first sentence might be, you will be on **supervised release** for whatever term the court sets, up to a maximum of _____ years, without any credit for time served.²⁰

H. DETERMINING FACTUAL BASIS FOR GUILTY PLEA

1. **[To Government Attorney]** Will the government please set forth the **elements** of the offense and what their evidence would show.

¹⁹ A defendant convicted of possession or distribution of a controlled substance may be declared ineligible for any or all federal benefits. *21 U.S.C. § 862(a)(1)*. The 9th Circuit has held that a defendant must be notified that his right to food stamps and social security benefits could be lost. *U.S. v. Littlejohn, 2000 WL 1277294 (9th Cir. Sept. 11, 2000)*.

²⁰ Failure to inform Defendant of supervised release provisions is not harmless error. *U.S. v. Roberts, 5 F.3d 365 (9th Cir. 1993)*.

2. _____, do you agree with the prosecutor's summary of what you did?

2a. _____, tell me what you did in your own words.²¹

3. **[if answer to 2 is negative]** With what do you disagree?

4. Are you satisfied that if the jury accepted as true the evidence as stated by the government attorney, that would be a proper factual and legal basis for a finding of guilty on these charges?²²

5. **[if defendant's statement constitutes denial of guilt of one of essential**

²¹ We have found that if we ask the prosecutor to first summarize the evidence, the defendant will have a framework to work with when he or she tells us in her own words what she did. When we have asked the defendant to tell us what he did without asking the prosecutor first to summarize the charges, the defendant is often inarticulate and stumbling in describing his conduct. Rule 11(f) requires the Court to be satisfied that there "is a factual basis for the plea." The Supreme Court has held that "the sentencing judge must develop, on the record, the factual basis for the plea, as, for example, *by having the accused describe the conduct that gave rise to the charge.*" *Santobello v. New York*, 404 U.S. 257 (1971).

²² If Defendant enters guilty plea while continuing to maintain innocence, the Court can accept it without finding beyond reasonable doubt that Defendant is guilty so long as Court "is convinced there is sufficient evidence to justify reaching conclusion" of guilty. *U.S. v. Alber*, 56 F.3d 1106, 1110 (9th Cir. 1995). This type of plea is known as an "Alford" plea, after the Supreme Court case holding that when a defendant intelligently concludes that his interests require entry of a guilty plea, a guilty plea should not be refused simply because it carries with it a protestation of innocence. *See North Carolina v. Alford*, 400 U.S. 25 (1970). We will refuse to accept *Alford* pleas unless the Government expressly agrees on the record. Judge Trott of the 9th Circuit refused to accept *Alford* pleas while he served as U.S. Attorney in Los Angeles -- he hated the prospect of a defendant holding a press conference after a plea hearing, and telling the world that he was innocent and never admitted anything to the Court.

elements of crime charged:]

Since you state under oath that you are in effect not guilty as charged in the Indictment, I cannot accept your guilty plea.

I. VOLUNTARINESS OF PLEA AND PLEA AGREEMENT

1. Has anyone **threatened** you or anyone else or forced you in any way to plead guilty?²³
2. Do you understand the terms of the Plea Agreement that you signed?
3. Could the Assistant United States Attorney please summarize the terms of the Plea Agreement?²⁴
4. **[To AUSA]** Is there any provision in the Plea Agreement whereby the defendant waives his right to appeal the conviction and/or sentence? ²⁵

4A. **[If yes]** Could you please read that provision to the defendant?

²³ Threat or promise will void guilty plea if it deprives plea of voluntary character. *Sanchez v. U.S.*, 50 F.3d 1448 (9th Cir. 1995).

²⁴ Voluntariness standard requires that Defendant be notified when the plea agreement is dependant on “package deal” which requires cooperation of multiple defendants. *U.S. v. Caro*, 997 F.2d 657 (9th Cir. 1993).

²⁵ Defendant may waive the right to appeal a sentence if the waiver is knowing and voluntary. *U.S. v. Buchanan*, 59 F.3d 914 (9th Cir.), *cert. denied*, 116 S.Ct. 430 (1995). But a claim of ineffective assistance of counsel can be reviewed by the 9th Circuit even if the defendant signed a waiver. *U.S. v. Pruitt*, 32 F.3d 431 (9th Cir. 1994).

4B. *[If yes]* Do you understand that by signing the Plea Agreement, you are waiving your right to appeal [the conviction] [and] [the sentence]?

4C. *[if applicable]* Your plea agreement contains a provision whereby you stipulate to administrative deportation. You have a right to a hearing before an immigration judge on the question of whether you should be deported. At that hearing, you would have the right to submit evidence in your own behalf, and cross-examine those who testify against you. You would also have the right to appeal any adverse determination made by the immigration judge. Do you understand that you are waiving those rights by signing the plea agreement?²⁶

5. *[To AUSA]* Are there any factual stipulations in the Plea Agreement that would affect the Guideline calculation?

5A. *[If yes]* Do you understand that the Court is not bound

²⁶ Unless the U.S. Attorney agrees, a district court lacks authority to order deportation under 8 U.S.C. § 1252a(c)(1), or to depart downward under § 5K2 on the ground that defendant is facilitating his own deportation. *U.S. v. Flores-Uribe*, 106 F.3d 1485, 1487-88 (9th Cir. 1997). The U.S. Attorney only has authority to agree to a deportation of an alien convicted of a nonviolent offense other than alien smuggling. *See* 8 U.S.C. § 1252(h).

by the stipulations but may with the aid of the presentence report, determine the facts relevant to sentencing, and that you cannot withdraw your plea simply because the Court declined to adopt part or all of the stipulations?²⁷

5. Do all parties agree that the substance of the plea agreement has been correctly stated?

{if so, have the written plea agreement filed in the record}

6. Has anyone **made any promise** other than those made in the plea agreement that induced you to plead guilty?²⁸

6. **{if yes}** What was that promise? **{clarify before proceeding}**²⁹

²⁷ The first half of this sentence is taken directly from Guideline §6B1.4(d), and the last half is supported by *U.S. v. Mason*, 961 F.2d 1460 (9th Cir. 1992).

²⁸ Court must guard against statements that could be construed as attempts by the Court to persuade a Defendant to plead either guilty or not guilty. *U.S. v. Frank*, 36 F.3d 898 (9th Cir. 1994).

²⁹ Prosecutors may not breach promises made in plea agreements. *U.S. v. Childs*, 5 F.3d 1328 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 1385 (1994).

IF PLEA AGREEMENT IS UNDER RULE 11(e)(1)(B) AND DOES NOT CONTAIN ANY PROVISION FOR THE DISMISSAL OF COUNTS -- OR ANY AGREEMENT NOT TO PURSUE POTENTIAL CHARGES -- UNDER RULE 11(e)(1)(A) AND DOES NOT CONTAIN A “BINDING” SENTENCE UNDER RULE 11(e)(1)(C).

1. Do you understand that the court is **not required to accept or be bound by the terms of the plea agreement** which you have entered into and may reject it and impose a more severe sentence than anticipated by the parties?

2. Do you also understand that, after your guideline range has been determined, the court has the authority in some circumstances to depart from the guidelines and impose a sentence that is more severe or less severe than the sentence called for by the guidelines?³⁰

3. If the court accepts your plea of guilty today, you **will not have the opportunity to withdraw your plea even if the court later rejects the terms**

³⁰ Downward departure may only be in accord with plea agreement -- Court's discretion does not extend to modifying the plea agreement. *U.S. v. Mukai*, 26 F.3d 953 (9th Cir. 1994).

and/or sentencing recommendations in the plea agreement and your sentence is longer than you think it will be at this time and more severe than the sentence called for by the guideline range. Do you understand this?

IF THE PLEA IS BASED ON A PLEA AGREEMENT CONTAINING A PROVISION FOR THE DISMISSAL OF COUNT(S) AND/OR AN AGREEMENT NOT TO PURSUE POTENTIAL CHARGES (pursuant to Rule 11(e)(1)(A)) BUT NOT CONTAINING ANY RECOMMENDED SENTENCE (under Rule 11(e)(1)(B)) OR BINDING SENTENCE (under Rule 11(e)(1)(C)).

1. If you plead guilty today, a presentence report will be prepared, and the Court will examine that report along with the plea agreement and determine whether or not to accept your plea and the Plea Agreement. If the Court rejects your agreement [that certain counts be dismissed] [and] [that certain potential charges not be pursued], the Court will notify you at the time of

sentencing and give you the opportunity to withdraw your plea(s) of guilty. If you then choose not to withdraw your plea(s) at that time, the Court may impose a more severe sentence, without being bound by the Plea Agreement, and may, under certain circumstances, depart from the guideline range and impose a sentence that is more severe or less severe than the sentence called for by the guideline range. Do you understand this?

IF THE PLEA IS BASED ON A PLEA AGREEMENT CONTAINING A PROVISION FOR THE DISMISSAL OF COUNT(S) AND/OR AN AGREEMENT NOT TO PURSUE POTENTIAL CHARGES (pursuant to Rule 11(e)(1)(A)) ALONG WITH A RECOMMENDED SENTENCE (pursuant to Rule 11(e)(1)(B)).

1. The Plea Agreement you signed contains two important provisions. First, the Government [will move to dismiss certain count(s)] [and] [has agreed not to pursue certain potential charges against you]. Second, the Government has agreed to recommend a certain sentence. Do you understand this?

2. If you plead guilty today, a presentence report will be prepared, and the

Court will examine that report along with the plea agreement and determine whether or not to accept your plea and the Plea Agreement. The Court will determine here whether your pleading guilty to ___ count(s) adequately addresses the totality of your criminal conduct. If the Court rejects your agreement [to dismiss counts] [and] [to not pursue potential charges], the Court will notify you at the time of sentencing and give you the opportunity to withdraw your plea(s) of guilty. If you then choose not to withdraw your plea(s) at that time, the Court will proceed to impose a sentence.

Do you understand this?

3. With regard to the second important provision of your Plea Agreement -- the Government's agreement to make recommendations regarding your sentence -- **the Court is not required to accept or be bound by the recommendation and may reject it and impose a more severe sentence than anticipated by the parties. After the Guideline range has been determined , the Court has the authority in some circumstances to depart from the Guidelines and impose a sentence that is more severe or less severe than the sentence called for by the Guidelines. If the Court does reject the**

recommendation, you will not have the opportunity to withdraw your plea even if the sentence is longer than you think it will be at this time and more severe than the sentence called for by the Guideline range. Do you understand this? ³¹

4. Let me make this plain: If I reject the agreement [to dismiss count(s)] [and] [not to pursue potential charges], you will have the opportunity to withdraw your plea. But if I accept the agreement to [dismiss count(s)] [and] [not pursue potential charges], I will accept your plea at that time, and you will not thereafter have the opportunity to withdraw your plea even if I reject the recommended sentence. Do you understand?

IF THE PLEA IS BASED ON A PLEA AGREEMENT CONTAINING A “BINDING” SENTENCE UNDER RULE 11(e)(1)(C).

1. If you plead guilty, a presentence report will be prepared, and the Court will examine that report along with the plea agreement and determine whether

³¹ The 9th Circuit has held in a case involving a Rule 11(e)(1)(A)&(B) Plea Agreement, that it is reversible error to fail to advise the defendant that he cannot withdraw his plea if the Court rejects the recommendation. *U.S. v. Graibe*, 946 F.2d 1428 (9th Cir. 1991).

or not to accept your plea and the plea agreement. If the Court chooses not to follow the terms of the plea agreement [*identify the terms of the agreement that are “binding,” i.e., that a specific sentence be imposed and -- if applicable -- that certain counts be dismissed or that certain potential charges not be pursued.*] at the time of sentencing, the Court will so advise you, and will give you the opportunity to withdraw your plea(s) of guilty. If you then choose not to withdraw your plea(s) at that time, the court may impose a more severe sentence, without being bound by the plea agreement, and may, under certain circumstances, depart from the guideline range and impose a sentence that is more severe or less severe than the sentence called for by the guideline range. Do you understand all this?

ANY PROMISES OR PREDICTIONS

1. Has anyone made any prediction, prophecy or promise to you as to what your sentence will be?
2. **{if yes}** What was it and who made it? **{clarify before proceeding}**

TAKING PLEA

1. **Counsel**, are you satisfied that _____ plea of guilty to Count(s) _____ of the Indictment is a **knowledgeable and voluntary plea**?
2. The Court now asks: **What is your plea to Count(s) _____ as charged in the Indictment/Information?**

ACCEPTING PLEA

[IF PLEA IS PURSUANT TO AN 11(e)(1)(B) PLEA AGREEMENT AND DOES NOT CONTAIN ANY PROVISION FOR THE DISMISSAL OF COUNTS -- OR AN AGREEMENT NOT TO PURSUE POTENTIAL CLAIMS -- UNDER 11(e)(1)(A) OR A “BINDING” SENTENCE UNDER RULE 11(e)(1)(C)].

Since you are satisfied in all respects with the services of counsel and since you acknowledge that you are in fact guilty as charged in Count(s) _____ of the indictment; you know your right to a trial; you know what the maximum possible punishment is; you are aware that the court is not bound by the plea agreement and that if the court accepts your plea, you

will not be able to withdraw your plea; and you have advised the court that you are voluntarily pleading guilty, I hereby find that your plea of guilty to Count(s) _____ of the Indictment is a knowing and voluntary plea supported by an independent basis in fact containing each of the essential elements of the offense(s). I hereby accept your plea and enter a judgment of guilty as to the crime charged in Counts _____ of the Indictment.

[IF PLEA IS BASED ON PLEA AGREEMENT THAT CONTAINS EITHER A PROVISION CONCERNING THE DISMISSAL OF COUNTS -- OR AN AGREEMENT NOT TO PURSUE POTENTIAL CLAIMS -- UNDER RULE 11(e)(1)(A) OR A “BINDING” SENTENCE UNDER RULE 11(e)(1)(C)]

Since you are satisfied in all respects with the services of counsel and since you acknowledge that you are in fact guilty as charged in Count(s) _____ of the Indictment; that you know your right to a trial; and that you know what the maximum possible punishment is; I hereby find that your

plea is knowing and voluntary. I hereby accept your plea of guilty. I reserve ruling, however, on whether to accept the plea agreement until I review the pre-sentence report.³²

J. PRESENTENCE INVESTIGATION REPORT

COURT: I will order a presentence investigation report. It is in your best interest to cooperate with the probation officer in furnishing information for that report since the report will be important in my decision as to what your sentence will be. You and your counsel have a right and an opportunity to examine the report and to file any objections you may have to it.

The Local Rules for this District require that parties lodge their objections to the presentence report prior to the sentencing hearing. If counsel fail to communicate to the probation officer any objections they may have as to any material information, sentencing classifications, sentencing guidelines

³² Under *United States v. Hyde*, 137 L. Ed. 2d 935 (1997), the district court may--in Rule 11(e)(1)(A) or (C) type pleas--accept the *plea* but defer acceptance of the *plea agreement* until the Court can examine the presentence report. Sentencing Guideline § 6B1.1(c) states that the District Court “*shall*” defer acceptance of all Type A and Type C plea agreements until the Court has read the presentence report.

ranges, and policy statements contained in or omitted from the report, the report of the presentence investigation may be accepted as accurate.

I want to remind you that the probation officer is an officer of the court. Subject to objections on advice of counsel, if the probation officer directs you to do something, or report at a time certain, treat it as though it came directly from the court.

K. SENTENCING SCHEDULE --

Date of Sentencing:

Original Report to Counsel:

Notification of Objections:

Final Report Due:

L. CUSTODY (Court must make findings on the record)

1. Does the Government seek to detain _____ prior to sentencing?

2 *[If yes] [For all crimes of violence, drug crimes carrying a maximum sentence of 10 years or more, and any crime punishable by a term of life (or sentence of death)]* Pursuant to Section 3143 of the Comprehensive Crime Control Act of 1984, a defendant who is found guilty of a **crime of violence, a drug offense carrying a maximum sentence of 10 years or more, or any offense carrying a maximum sentence of life (or death), must be detained unless:**

a. The Court finds there to be a substantial likelihood that a motion for acquittal or a new trial will be granted; **or** the Government has recommended that no sentence of imprisonment be imposed;

and

b. The Court finds by clear and convincing evidence that you do not pose a risk of flight or a danger to another person or the community.³³

³³ Even if a defendant meets all these conditions, it appears he may also have to satisfy the condition enumerated in 18 U.S.C. § 3145(c) to be released: that is, that “there are exceptional reasons why such person’s detention would not be appropriate. *See U.S. v. Koon*, 6 F.3d 561, 565 (9th Cir. 1993) (opinion of Judge Rymer and dissent by Judge Reinhardt).

FOR ALL OTHER OFFENSES (If Government seeks to detain)

Pursuant to Section 3143 of the Comprehensive Crime Control Act of 1984, the Court must detain you pending further disposition of your case unless the Court finds by clear and convincing evidence that you do not pose a risk of flight or a danger to another person or the community.

IF THE GOVERNMENT DOES NOT SEEK TO DETAIN

Based on the record before the court, I find by clear and convincing evidence that if you are released, you will not pose a risk of flight or a danger to another person or to the community. I make this determination because of your past record of appearances and in reliance on the statements of the attorney for the Government. Having so found, the court will continue your release pending sentencing, but all existing pre-trial release conditions shall continue to be in effect, and if those conditions are violated, the penalty could be severe.

4. Failure to appear at your sentencing is a criminal offense for which you

could be sentenced to a term of imprisonment.

5. *[Direct this question to Government Counsel if the plea was based on a Plea Agreement containing an agreement that the Government would move to dismiss certain counts under Rule 11(e)(1)(A)]*: Counsel, do you intend to make a motion that the Court dismiss [the Defendant from] Counts _____?

Have AUSA make that motion.

Take motion under advisement until sentencing.

[] If there is a factual dispute on which testimony is expected at the sentencing hearing, the Court needs to know and we will set up a pre-sentencing hearing to discuss the logistics of the sentencing hearing. Do counsel know now whether they will be calling witnesses at the sentencing hearing?

[] *[if yes, set up a pre-sentencing hearing]*

[] *[if unsure, advise counsel to inform Court by date certain -- 3 or 4 weeks prior to sentencing hearing]*

Counsel is there anything else?