

Plea-Bargaining

—A Transparent System for The South Korea—

Stella J. Lee*

Contents

I. Introduction	1. Agencies' Policies Dealing with Cooperating Individuals
II. Nuts and Bolts of the Plea-Bargaining System	2. Plea-Bargaining for Information
1. Plea-Bargaining in the Federal Courts	3. Scrutiny and Transparency-The Judge's Role
2. Plea-Bargaining in California Courts	IV. Conclusory Remarks
III. Plea-Bargaining with Cooperating Individuals	

I . Introduction

It was early 2006. Opening arguments were about to begin in the criminal case against Enron Corporation's CEOs Kenneth Lay and Jeffrey Skilling. But, the prosecutors were struggling.¹⁾ They knew that Lay and Skilling were guilty, but would a jury believe it based on mere circumstantial evidence? Would a jury convict without any direct evidence of actual knowledge? Neither Lay nor Skilling made slip-ups-nothing on paper showing their knowledge, not even emails. In fact, Lay never used email, and Skilling rarely used email.

Enron prosecutors' greatest weapon was the Global Galactic Agreement

* Attorney and Former San Diego County District Attorney

1) John C. Hueston, "Behind the Scenes of the Enron Trial: Creating the Decisive Moments", *44 Am. Crim. L. Rev.* 197(2007).

(GGA). The GGA contained the terms of a series of illegal side deals between Enron and shell limited partnerships. These limited partnerships were run by Andrew Fastow, Chief Financial Officer of Enron. In the GGA, Enron agreed to sell and then buy back assets from Fastow's partnerships within months after selling. This suggested that these partnerships were mere accounting shams, set up to inflate Enron's quarterly earnings.²⁾ And, Fastow had used these partnerships to embezzle money. For prosecutors, the problem was that only Fastow and Richard Causey, Enron's Chief Accounting Officer had initialed the GGA. How could they show that the former Enron CEOs knew and approved?

The answer was in gaining the testimony of other Enron insiders. First, they gained the testimony of Fastow, the most trusted lieutenant for the two CEOs, with a plea-bargain. Even though Fastow had embezzled and even though it was Fastow's name on the GGA, the prosecution had no other direct evidence of Lay's or Skilling's knowledge without Fastow.³⁾ Prosecutors, however, needed more than Fastow; they needed corroboration. It would be too easy for defense attorneys to make the jury hate Fastow, leaving them with nothing. Prosecutors then found corroboration-former Corporate Treasurer, Ben F. Glisan, Jr, a man who also conceived and executed other accounting schemes, embezzling millions in the process as well.⁴⁾

Glisan's cooperation was unexpected. Glisan had previously pled guilty,

2) Roger Parloff, "Skilling's Global Galactic Problem", *CNN Money*(Jan. 26, 2006), http://money.cnn.com/2006/01/26/news/newsmakers/pluggedin_fortune/index.htm.

3) Michael Orey, "Enron: Something A Jury Can See", *Business Week Online*(March 20, 2006), http://www.businessweek.com/magazine/content/06_12/b3976062.htm.

4) Alexei Barrionuevo, "Jury Told Lay Lied On Enron", *N.Y. Times*(March 23, 2006), <http://www.nytimes.com/2006/03/23/business/businessspecial3/23enron.html?pagewanted=print>.

agreeing to 5-years in prison. His plea agreement was also clear-he would give *no cooperation*. Glisan had pled, because he faced 20 years after trial, and he wanted to see his children grow up.⁵⁾ Prosecutors gave him this deal, because he was the first, at a time when all major players were keeping silent behind the corporate veil.⁶⁾ Glisan knew he had to be first to get the best deal. Glisan went directly to prison to begin serving his sentence.

Prosecutors took a chance that jail may have changed Glisan's mind about cooperating. He was subpoenaed and questioned under a grant of immunity.⁷⁾ Glisan had nothing to lose by testifying: he confirmed that Lay and Skilling knew everything. Both CEOs had participated in secret meetings of top managers to discuss Enron's dire financial situation⁸⁾and both encouraged the accounting fraud schemes created by Fastow and Glisan.

Although Glisan gained no other benefits, his early plea made him available as a witness and, in fact, made him a more believable witness.⁹⁾ Also, with the grant of immunity, he could tell the whole truth. This story illustrates how plea-bargaining, utilized strategically by prosecutors, can aid in investigating and unraveling the most sophisticated criminal conspiracies.¹⁰⁾

5) John C. Hueston, "Behind the Scenes of the Enron Trial: Creating the Decisive Moments", *44 Am. Crim. L. Rev.* 197(2007).

6) Ibid.

7) Ibid.

8) Barrionuevo, *supra* note 4.

9) Hueston, *supra* note 1; Barrionuevo, *supra* note 4.

10) See "SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations", *Press Release*(Securities and Exchange Commission, Jan. 6, 2010), <http://www.sec.gov/news/press/2010/2010-6.htm>. See also "Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions", *Securities Exchange Act Release No. 44969, Accounting and Auditing Enforcement*

Sophisticated criminal conspiracies involving large organizations also exist in South Korea. The South Korean Ministry of Justice had advocated for a plea-bargaining system since 2008 to gain cooperation from individuals with insider knowledge. In particular, the Ministry of Justice believes plea-bargaining would enable more efficient investigations into cases of corruption, large-scale corporate and securities fraud, organized crime, and drug trafficking, areas of crime inextricably dependent upon the testimony of confidential, cooperating witnesses as well as whistle blowers.¹¹⁾ However, in May of 2011, the latest proposal was again shelved.¹²⁾ Citing criticism by the Korean Human Rights Agency(HRA) and other critics, the Korean government declared the Korean public was not ready for plea-bargaining.¹³⁾

The KHRA declared plea-bargaining would violate the separation of government principle and infringe upon the victim's right to testify in court.¹⁴⁾ However, these critiques merely prevent meaningful discussion about an important law enforcement imperative. Regarding the critique about depriving victims of their rights, critics fail to consider: First, the vast majority of victims rarely desire to testify in court.¹⁵⁾ Second, the supposedly beneficial

Release No. 1470 (Oct. 23, 2001), <http://www.sec.gov/litigation/investreport/34-44969.htm>, (The usefulness of cooperation to penetrate the corporate veil of silence has also been recognized by United States Securities Exchange Commission, who has adopted policies to bargain with those cooperating with the S.E.C.)

11) Si-soo Park, "Plea-bargaining Plan Put On Hold", *Korea Times*(May 3, 2011), http://m.koreatimes.co.kr/www/news/nation/2011/08/117_86372.html.

12) *Ibid.*

13) *Ibid.* See also Tae-Jong Kim, "Rights Agency Opposes US-Style Plea-bargaining", *Korea Times*, http://www.koreatimes.co.kr/www/news/nation/nation_view.asp?newsIdx=84321&categoryCode=117.

14) *Ibid.*

15) Anna Sweeting et al., Evaluation Of The Victims' Advocate Scheme Pilots

role of testifying for a victim's emotional recovery is still in doubt,¹⁶ especially for children and victims of violent crime.¹⁷ Third and perhaps most importantly, victims can get satisfaction in a plea-bargaining situation-for example, victim impact statements¹⁸ given at sentencing can be equally beneficial. Fourth, as in California State, the legislature may guarantee victims rights in plea-bargaining situations by requiring prosecuting agencies to inform victims of potential pleas, giving victims opportunities to express oppositions or concerns, as well as the opportunity to be heard at the sentencing hearing.¹⁹ Finally, some of the most common crimes

57–58, *U.K. Ministry of Justice* (2008), <http://www.justice.gov.uk/publications/docs/research-victims-advocates.pdf>; Aroan Ilic, *Psychological Preparation of Torture Victims as Witnesses toward the Prevention of Retraumatization, in Torture in War: Consequences and Rehabilitation of Victims* (2004) 379–380, <http://www.ian.org.rs/publikacije/tortura/booktortura.htm>.

- 16) David Mendeloff, "Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice", *31 Hum. Rts. Q.* 3, 592–623 (2009) (Arguing that though "there is little evidence that truth-telling in general dramatically harms individuals, the notion that formal truth-telling processes satisfy victims' need for justice, ease their emotional and psychological suffering, and dampen their desire for vengeance, remains highly dubious.")
- 17) See UNICEF, *Handbook for Professionals and Policymakers on Justice Matters involving Child Victims and Witnesses of Crime* 10 (United Nations Publication, 2009), http://www.unicef.org/protection/files/UNODC_Handbook_on_Justice.pdf.
- 18) Jo-Anne Wemmers, "Victim Participation and The rapeutic Jurisprudence: A Canadian Perspective, Workshop, Victim Participation in Justice and The rapeutic Jurisprudence: A Comparative Analysis" (Onati, Spain March 8–9, 2007).
- 19) A 'victim' is defined under the California Constitution as "a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act. The term 'victim' also includes the person's spouse, parents, children,

committed by criminal organizations, do not have direct victims. So, the criminal justice system can ensure victims' rights while still giving prosecutors the essential tools they need to fight sophisticated organizational crimes.

Regarding the critique about separation of powers, critics fail to consider: First, far from infringing on separation of powers, plea-bargaining falls under the umbrella of traditional executive branch duties-namely, it is about the enforcement powers attributed to the executive branch.²⁰⁾ The enforcement powers include, by necessity, the charging power. Without the charging power, there would be no need for a prosecutor in addition to the judge. The charging power includes the power to not file an indictment and the

siblings, or guardian, and includes a lawful representative of a crime victim who is deceased, a minor, or physically or psychologically incapacitated. The term 'victim' does not include a person in custody for an offense, the accused, or a person whom the court finds would not act in the best interests of a minor victim," (Cal. Const., art. I, § 28(e).) Under California's Marsy's Law, codified under article I, section 28, subsection (b) of the California Constitution, a victim has the right to reasonable notice of all public proceedings, including delinquency proceedings, upon request, at which the defendant and the prosecutor are entitled to be present and of all parole or other post-conviction release proceedings, and to be present at all such proceedings. Further, upon request, a victim has the right to be heard, at any proceeding, including any delinquency proceeding, involving a post-arrest release decision, plea, sentencing, post-conviction release decision, or any proceeding in which a right of the victim is a tissue.

- 20) Joseph L. Hoffmann/Marcy L. Kahn/Steven W. Fisher, "Plea-bargaining in the Shadow of Death", 69 *Fordham L. Rev.* 2313, 2390(2001). (In America, legislatures and courts have long been reluctant to curb the discretionary charging power of the prosecutor, particularly when it involves the death penalty, because of constitutional separation of powers issues and because the lack of a judicially enforceable legal standard. So, American scholars have a contrary view on the separation of powers issue.)

power to modify the class of crimes based on new evidence or new circumstances, including justice. The desire to cooperate is a valid change in circumstance to consider in charging, not only in sentencing. Especially for organized criminal enterprises, cooperation is essential to prosecute the normally untouchables, which includes not just the leaders of violent gangs but also men such as Lay and Skilling. It is form over function to declare that plea-bargaining is overreaching.

Looking at these critiques of plea-bargaining, there seems to be a lack of detailed knowledge and misconceptions about the actual practice. Importantly, the judge's essential role in federal plea-bargaining has been recklessly overlooked.²¹⁾ From the beginning of plea-bargaining's history, judges approved plea bargains, and judges had power to stop unjust plea bargains.²²⁾ Judges were not mere observers, therefore, but functioned as checks on the executive branch's power. The judge's role remains important today, although with some limitations placed on judges by federal as well as state legislatures.²³⁾ Also clearly absent is knowledge about the states'

21) See George Fisher, *Plea-bargaining's Triumph: A History of Plea-bargaining in America* (Stanford University Press, 2003) (arguing that plea-bargaining, far from a prosecutorial tool that prosecutors utilized indiscriminately or clandestinely, only thrived in America due to the complicity and approval of all the key players in the criminal justice system—judges, prosecutors, and defense attorneys. Judges were crucial in making plea-bargaining thrive.)

22) Ibid.

23) See James B. Burns/Barry Rand Elden/Brian W. Blanchard, "We Make the Better Target (But the Guidelines Shifted Power from the Judiciary to Congress, Not from the Judiciary to the Prosecution)", *91 Nw. U. L. Rev.* 1317 (1996–1997) (arguing that the Federal Sentencing Guidelines had the effect of disrupting the system of checks and balances in the courtroom between judges, prosecutors and defense attorneys. Instead, the Guidelines created a system that in actuality

systems, which handle the vast majority of cases in the U.S. Different states have different plea-bargaining systems, tailored to the desires of the People. So, there are multiple models and not just one “American plea-bargaining system.”

Overall, large holes exist in the picture labeled the “American plea-bargaining system.” These glaring holes prevent meaningful discussions about plea-bargaining. In particular, critics never acknowledge law enforcement’s need to gain cooperation from those involved in special types of crimes and therefore, fail to offer any other possibilities, other sufficient methods, for dealing with organized criminal enterprise or bribery.

This paper is an attempt to begin meaningful discussions for a real solution to the problem. Part I provides a brief overview of two different models-the federal and California plea-bargaining systems. The study shows the law and practice of plea-bargaining, which includes checks on prosecutorial discretion. The study also highlights the legislatures role in shaping plea-bargaining. Part II provides insights into plea-bargaining with confidential informants or cooperating individuals (CI) in the United States. CI cases are handled very carefully by police, prosecutors, and courts-more supervision exists; more guidelines are given; more steps are required; more documentation is required; more follow-up is necessary; and less room exists for shirking responsibility. This study then concludes with recommendations for a Korean plea-bargaining system.

leaves little room for prosecutors to unduly influence sentencing decisions, even with their charging discretion.)

II. Nuts and Bolts of the Plea-Bargaining System

Since the beginning of the 20th century, plea-bargaining has become the mostutilized method of case disposition in the U. S. Plea-bargaining shows the power of prosecutors; at the same time, it is and has been a significant opportunity for mercy in an increasingly unbending system. Many attempts have been made in the U.S. to eradicate plea-bargaining; however, those attempts have failed. The reality is that practitioners, including judges, continue to see value in the plea-bargaining system.²⁴⁾

Plea-bargaining is a product of an adversarial system. In adversarial systems, criminal cases and civil cases have many similarities.²⁵⁾ Like negotiations in civil cases, plea-bargaining involves the freedom of an individual to make a contract over criminal punishment.²⁶⁾ In this adversarial system, the important thing is for the prosecutor to do what is in the best interest of the client-in the prosecutor's case, the client ultimately being the Government as representative of society.²⁷⁾ Both parties gain something-prosecutors gain a conviction as opposed to the uncertainties of jury trials

24) See Candace McCoy, "Determinate Sentencing, Plea Bargaining Bans, and Hydraulic Discretion in California", *9 Just. Sys. J.* 256 (1984); Stephen J. Schulhofer/Ilene H. Nagel, "Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period", *91 Nw. U. L. Rev.* 1284 (1997); Robert A. Weninger, "The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas", *35 UCLA L. Rev.* 265 (1987-88).

25) William Burnham, *Introduction to the Law and Legal System of the United States* 92 (4 ed. 2006).

26) Robert E. Scott/William J. Stuntz, "Plea Bargaining As Contract", *101 Yale L. J.* 1909, 1910 (1992).

27) Burnham, *supra* note 25, at p.116

while defendants gain a lower sentence as opposed to the uncertainties of sentencing after a jury's guilty verdict.²⁸⁾

1. Plea-Bargaining in the Federal Courts

Federal Rule of Criminal Procedure [hereinafter "Rule"] 11(c)(1) and United States Sentencing Commission, Guidelines Manual [hereinafter U.S.S.G.] section 6B1.2 describe three of the most common forms of federal plea-bargaining. These three forms are charge bargaining, sentence recommendation, and specific agreed sentence. Each form has important consequences for sentencing under the U.S.S.G., more commonly known as the sentencing guidelines.²⁹⁾ The federal plea-bargaining system is very formal and structured by rules.

1.1 Charge Bargaining

Charge bargaining is defined by U.S.S.G. section 6B1.2(a). Section 6B1.2(a) authorizes federal courts to accept a defendant's plea to one or more charges under Rule 11(c)(1)(A), in exchange for dismissal of others, under certain circumstances-if "the remaining charges adequately reflect the seriousness of the actual offense behavior" and "accepting the agreement

28) *Id.* at pp. 118–119 (noting that in 1992, 75% of all civil tort cases were disposed of through an agreed settlement or voluntary dismissal, as opposed to 92% convictions resulting from guilty plea in criminal cases).

29) After *United States v. Booker*, 125 S. Ct. 738, 755–56 (2005), the previously mandatory sentencing guidelines became advisory. Therefore, all the pre-2005 law review articles, journal articles, and cases reference the mandatory sentencing guidelines.

will not undermine the statutory purposes of sentencing or the sentencing guidelines.” This type of agreement is typical for federal plea-bargaining. Under this agreement, a defendant has the right to withdraw his plea if the court fails to dismiss the other charges or if the court rejects the plea for another reason.³⁰⁾

Because of two related considerations contained in the sentencing guidelines, the multiple-count grouping and relevant conduct, charge bargains often have little effect on the applicable sentencing range. Section 6B1.2(a) states that “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 ... (Relevant Conduct).” Even if the prosecutor agrees to dismiss some charges, judges may consider the underlying charges.³¹⁾ In addition, the judge must also determine the

30) The power of the court to accept, reject or defer a decision regarding plea agreement is specified in Rule 11(c)(3), which states:

(3) Judicial Consideration of a Plea Agreement.

(A) 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 §11(c)(3) presentence report.

(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 request.

31) For example, if a defendant is charged with multiple counts of selling cocaine but pleads guilty to only one count of selling cocaine, the defendant may not be better off by pleading to just one count. Usually, the sentencing base level for that defendant will still be determined based on the total amount of drugs involved in all the counts including the dismissed counts. In addition, if the defendant was part of a conspiracy or plan, the direct and foreseeable actions of co-conspirators will also be considered as relevant conduct by the judge before the judge accepts the plea agreement. So, the

sentencing guideline range applicable based on relevant conduct. So, the plea agreement calling for dismissal of may have no effect on the judge's sentencing.³²⁾

The other related guideline concept is multiple-count grouping. Section 3D1.2 requires grouping of charges when separate charges involve substantially the same harm. When grouped, the charge with the highest offense level is applied.³³⁾ On the other hand, even if convicted of multiple counts, the offense level will not be adjusted. When dealing with charges that the guidelines do not group, the guidelines may require upward adjustments for multiple convictions. In the latter case, dismissing counts would avoid the upward adjustments, as long as the defendant does not stipulate to the elements of the dismissed offenses as part of the plea bargain.³⁴⁾

1.2 Sentence Bargaining: Sentence Recommendations and Specific Sentence Agreements

Rule 11 also authorizes prosecutors to make binding and nonbinding

defendant's sentencing base level may be determined by the total amount of drugs sold and possessed for sale by all the members of the conspiracy.

32) With relevant conduct being considered, why would a defendant plead to a charge bargain? There can be other important benefits gained by charge bargaining. For example, the single charge may have a lower offense level which means a lower guideline range overall or the single charge may carry a lower statutory maximum, there by limiting the maximum amount of time a defendant spends in prison, or the single charge may avoid a statutory minimum that would raise a sentence above the otherwise-applicable guideline range. The single charge could also qualify for a non-guideline sentence based on the sentencing factors in 18 U.S.C. § 3553 (a).

33) U.S.S.G. §3D1.3(a).

34) See 18 U. S. C. § 924(c).

agreements about the sentence. Under Rule 11(c)(1)(B), a prosecutor can recommend or agree not to oppose a particular sentence, a particular sentencing range, the application of a particular guideline, or the application of a particular policy statement. These sentencing recommendations or agreements not to oppose are nonbinding. Under this type of plea agreement, the defendant may not withdraw his plea because the court rejects the recommendation.³⁵⁾

Under Rule 11(c)(1)(C), a prosecutor can enter an agreement with a defendant for a specific sentence, for a sentence within an agreed upon guideline range, or for the application of a particular guideline or policy statement. These sentence agreements are binding, and a defendant may withdraw his plea if the court rejects the sentencing agreement. However, according to Sentencing Guidelines section 6B1.2, subsections (b) and (c), a court may accept a specific sentence plea only if the proposed sentence is within the applicable guideline range or departs from the range for a justifiable reason.³⁶⁾ So, these offers are not readily given and rarely approved

35) Fed. R. Civ. P 11(c)(3)(B).)

36) There are several statutorily justifiable reasons for a downward departure from the sentencing guidelines. Many times the only guideline-range benefit a defendant can gain by pleading guilty is the adjustment for acceptance of responsibility. Statutorily justifiable reasons are contained in U.S.S.G. § 3E1.1. Section 3E1.1's Application Note 1 provides guidance for determining acceptance of responsibility: "(A)truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction ... However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility."

by judges.

It is important to remember that there is transparency, judicial oversight, and legislative checks in the federal system. Rule 11(c)(2) and Rule 11(c)(3) require transparency. Rule 11(c)(2) states, “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.” No hidden camera is required to discover that a plea agreement. Similarly, Rule 11(c)(3) provides judges with the discretion to reject a plea agreement or to defer a decision until after a pre-sentencing report (PSR), which provides the court with full and complete details as to not only the nature of the crime but the background of the defendant.

Even after *United States v. Booker*³⁷⁾, which made the Sentencing Guidelines voluntary, studies show federal prosecutors and federal courts follow the Sentencing Guidelines in the majority of cases.³⁸⁾ So, plea-bargaining in the federal system represents a merging of legislative prerogatives and executive branch necessities. To suggest that adopting an American-type plea-bargaining system would provide more discretion, less transparency, and more opportunities for abuse by prosecutors disregards reality.

37) 543 U.S. 220 (2005). In *Booker*, the United States Supreme Court determined that mandatory application of the federal sentencing guidelines violated the right to trial by jury contained in the Sixth Amendment of the Constitution.

38) United States Sentencing Commission, *Final Report on the Impact of United States v. Booker On Federal Sentencing* (March 2006).

2. Plea-Bargaining in California Courts³⁹⁾

In *People v. West*⁴⁰⁾, the California Supreme Court formally approved the practice of plea-bargaining, although it was the practice long before. Unlike the federal system, however, California's plea-bargaining practice is not heavily rule-based. While the California Supreme Court gives guidance, the plea-bargaining practiced on the whole is based on local customs and local norms, similar to most counties in the United States.

Although informal, these local practices are highly efficient and reasonable. The reason is simple. There are just too many cases. So, there must be reasonable, predictable practices upon which the usual players can rely. California courts, in contrast to the federal courts, are extremely high-volume and fast-paced.⁴¹⁾ In 2009, California prosecutors handled

39) The Life Of A Felony Criminal Case Is Described. In The San Diego County Superior Court Website, Only One Opportunity To Change A Plea Is Listed. However, There Is A Readiness Between The Arraignment On The Complaint And The Preliminary Hearing. (See [Http://Www.Sdcourt.Ca.Gov/Portal/Page?_Pageid=55,1643434&_Dad=Portal&_Schema=Portal](http://www.sdcourt.ca.gov/Portal/Page?_Pageid=55,1643434&_Dad=Portal&_Schema=Portal)). For The Practices In The Alameda County Superior Courts, See [Http://Www.Alameda.Courts.Ca.Gov/Pages.aspx/Trial-Process](http://www.alameda.courts.ca.gov/Pages.aspx/Trial-Process). For The Los Angeles County Superior Court, See [Http://Www.Courts.Ca.Gov/Selfhelp/1069.Htm](http://www.courts.ca.gov/selfhelp/1069.htm) (Similarly Describing That There Are Opportunities To Change The Plea But Not Listing An Actual Date Set For Plea-Bargaining)

40) 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970)

41) In 2009, federal district courts handled 77,106 criminal case filings; of those, California federal district courts handled 8,144 case filings. (Caseload Statistics 2009–2010, Federal District Courts, <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2010.aspx>) In contrast, California criminal courts alone handled 8.36 million case filings in 2009. (Data points, Trial Court Caseload Increases to Over 10 Million Filings 3 (Aug. 2010), <http://www.courts.ca.gov/documents/datapoints10.pdf>)

259,849 felony filings as compared to the 8,144 total federal criminal filings. California is not unusual-state and local prosecutors handle the majority of criminal cases in the U.S.

The vast majority of these cases were disposed of through plea bargains. In California, 64% of the cases filed reached a disposition and 62% of cases reached disposition before trial by way of plea-bargain.⁴²⁾ The majority of those plea bargains were reasonable, predictable plea offers made by seasoned prosecutors to seasoned defense attorneys.⁴³⁾ Without reasonableness and fairness, this system would crumble.⁴⁴⁾ Moreover, conscientious judges and

(summarizing court filings in California courts in 2009.) Of this number, California prosecutors handled all the misdemeanor and felony filings, which add up to 1,870,401 filings. (Judicial Council of California, *2010 Court Statistics Report: Statewide Caseload Trends, 1999–2000 through 2008–2009*, 51 (2010).)

42) *Id.* at p. 52.

43) RAND Corporation, “Just Cause or Just Because? Prosecution and Plea-Bargaining Resulting in Prison Sentences on Low-Level Drug Charges in California and Arizona”, xxiii (2005). (This study discovered readily discernable and reasonable patterns for the type of pleas/sentencing decisions that came out of relatively low-level drug charges in both California and Arizona. This is not random. This is due to consciously reasonable charging, pleading and sentencing decisions of the practitioners involved in the criminal justice process in those jurisdictions.) Scott, *supra* note 29, at 1910, fn. 4. (Scott and Stuntz talk about the academic and public opposition to plea-bargaining. However, they rightly point out that academia hates plea-bargaining for being too harsh while the public hates plea-bargaining because it is too lenient on the defendants.)

44) Stephan Bibas, “Regulating the Plea-Bargaining Market”, *99 Cal. L. Rev.* 1177, 1143–1145 (2011) (Bib as describes the plea-bargaining system as a market system relying on lawyers’ professional sense of the going rate. In such a system, the experienced defense attorney knows the going rate of criminal cases and therefore, has a distinct advantage over those attorneys who are new to their roles or too ideological. Bib as states that this type of information–marketplace

conscientious defense attorneys would not allow unfair pleas.

Consider the local practice in San Diego County. For the majority of “usual” cases, the prosecutor making offers is a highly experienced prosecutor. The offers will be based on the criminal history; the criminal conduct as contained in the police reports; the victim/witness statements; and the going rate in that jurisdiction for the charged crime, given the defendant’s history. The going rate is known by all repeat players-seasoned prosecutors, defense attorneys and judges. The offers will be charge specific and/or sentence-specific. Sometimes the offer will be a sentence lid or a sentence to the court, meaning the judge decides. On rare occasions, the plea agreement will be a sentencing minimum with the possibility of the court imposing more time.

At readiness, prosecutors and defense attorneys will inform the judges of the offers. A judge will have some basic information on the defendant in the court’s file-the judge will have a copy of the charging document; the judge may have copies of a summary of the defendant’s criminal history if the defendant was in jail at the time of arraignment; and the judge may have the files of defendant’s open cases or cases on which the defendant is on probation or parole. Included in those cases could be a sentencing report that includes a detailed personal history of the defendant and detailed

information—should be available to all lawyers, as a way to make the plea-bargaining system fair to the defendants.)

See also Scott, *supra* note 29, at 1959 (Scott and Stuntz describe the phenomena of the experience defense attorney who may have a two-minute conversation with a prosecutor in the hallway about a particular criminal defendant, whose plea-bargaining skill is based on his knowledge of the “market value” of similar types of crimes with a similar profile of defendant. Far from being critical of such a defense attorney, they describe this experienced defense attorney as a fixture in the criminal legal system.)

summary of the defendant's prior criminal conduct.

Sometimes, the judge will ask the prosecutor or defense attorney questions about the defendant or the conduct involved. Most times, for charge bargains or sentencing lid bargains, the judge will actually give an indicated sentence. The judge will not promise a sentence but will let the defense attorney know that if there is nothing "unusual" in the pre-sentencing report, the judge will sentence the defendant to X.

Sometimes, based on the defense attorney's objections, the judge will express agreement or disagreement with the offer. The judge also makes suggestions to the defense attorney what the case may require-I think we need to have a preliminary hearing on this case, for example. If the judge believes the prosecutor will not be fair and in cases where the defendant is not charged with allegations that have mandatory minimum sentences, the judge may invite the defendant to plead to the court. The judge usually makes a conditional offer-"if I don't see anything unusual on the pre-sentencing report, I will give your client Y." Sometimes a defense attorney asks for an indicated sentence should his client plea to the court.

Those defendants who accept the offers fill out change of plea forms with their attorneys and actually plead guilty on that same day. The plea form is signed by the defendant, the defense attorney, the prosecutor, and eventually the judge. The plea form will also include the conditions and possible consequences of the plea. By signing the plea form, all parties are agreeing to the terms of the plea in this written form. Sentencing may occur on the same day for sentence-bargains or at a later date for charge-bargains. With some variations, this informal but effective localized plea-bargaining process can be found throughout California.

There are also unseen players in California's plea-bargaining process-the

legislature and the people of California, by way of laws passed to restrict the discretion of the parties in the plea-bargaining process. Some examples of these restrictions follow: In 1977, the legislature passed the California Determinate Sentencing Law, which effectively lessened the discretionary power of the judges as to sentencing.⁴⁵⁾ In 1982, the People passed Proposition 8, adding restrictions to plea-bargaining for 25 specified serious felonies, although subsequent court rulings have limited its effect.⁴⁶⁾ Most recently, the people of the state of California passed Proposition 9, better known as “Marsy’s Law,” which requires victims to be notified of any potential plea bargain envisioned by the prosecuting agency upon request by the victim.⁴⁷⁾ Under Marsy’s Law, the victim has the right present in court when the plea occurs and has the right to address the court upon request. While the victim cannot legally object to a plea agreement, judges and prosecutors would be wary about making plea bargains that victims find unreasonable.⁴⁸⁾ The legislature and the People have provided definite parameters for plea-bargaining.⁴⁹⁾

This system would work because most of the cases in all criminal systems can be classified as “the usual.” The usual refers to less serious criminal conduct and involves defendants without serious or violent felony criminal backgrounds.⁵⁰⁾ These “usual cases” will have predictable plea offers based

45) See McCoy, *supra* note 24.

46) See Cal. Pen. C. § 1192.7.

47) Cal. Const. Art. I, § 28 (b)

48) Erika Ritchie, “DA Withdraws Plea Bargain in Stabbing Case”, *O.C. Register* (April 16, 2011), available at <http://www.ocregister.com/news/murillo-243961-wahidi-through.html> (last visited Nov. 3, 2011).

49) See McCoy, *supra* note 24.

50) See Cal. Pen. Code § 1192.7 (serious felonies list) and Cal. Pen. Code § 667.5 (violent felonies list).

on the underlying criminal conduct, the defendant's criminal history, and any mitigating or aggravating circumstance.⁵¹⁾ Therefore, contrary to critics' view of the American plea-bargaining system as an arbitrary system, the actual practice of plea-bargaining even in high volume, fast paced criminal jurisdictions like California, shows that it is predictable and reasonable. In addition, the legislature can played an active, important role in guiding the practice of plea-bargaining.

Ⅲ. Plea-Bargaining with Cooperating Individuals

Despite the official and unofficial checks of power by judges, some still view the plea-bargaining system as too secretive. A plea-bargaining system specifically tailored for more accountability and more transparency could be implemented. An example of tailoring can be seen in the way federal and local prosecutors plea-bargain with CIs.

The term "confidential informant"(CI) is the preferred term utilized by the United States Department of Justice (DOJ). CI is defined as "any person who knowingly provides information to law enforcement related to anothers' criminal activity, whose motivation for doing so is other than that of an uninvolved witness ... and who, as a general rule but not necessarily, expects some sort of personal benefit or advantage or the same for another

51) RAND Corporation, *supra* note 43. (Study shows that in California the "pattern" for low-level labeled drug offenders in prison was that these offenders tended to be perceived as presenting a greater danger to the community because of criminal histories showing involvement in a variety of criminal offenses, showing cases involving large quantities of drugs, or both.)

individual.”⁵²⁾ In exchange for information, benefit is usually given in the form of financial benefit, reduced punishment for criminal conduct, or some other type of favorable treatment given in exchange for information.

1. Agencies’ Policies Dealing with Cooperating Individuals

Plea-bargaining is a highly valuable tool for prosecutors in obtaining insider information about sophisticated criminal enterprises. As recognized even by many courts in the U.S., CIs rarely volunteer information unless faced with the prospect of spending time in prison themselves. On the other hand, because many who commit crimes do want to avoid spending time in prison, false information is always a danger. With several high profile cases of CIs giving false information, the issue of vetting CIs has been under immense.⁵³⁾ This vetting must begin before the initial registration of a CI, with a standard agency policy containing three essential features-registration, reporting and supervisory approval. In Constitutional terms, agency policy is required because the Constitutional duty of discovery regarding exculpatory and impeachment information.⁵⁴⁾

52) Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Gang Prosecution Manual 20* (2009).

53) See Joint Hearing On Law Enforcement Confidential Informant Practices, House of Representatives, Committee on the Judiciary, Sub-Committee on Crime, Terrorism, and Homeland Security, and Sub-Committee on the Constitution, Civil Rights, and Civil Liberties, July 19, 2007.

54) Discovery obligations of prosecutors in the United States are a subject too lengthy and complicated for this paper. For detailed information about the varied discovery requirements as well as its timing, see *Brady v. Maryland*, 373 U. S. 83 (1963) and Laura L. Hooper/Jennifer E. Marsh/Brian Yeh, “Treatment of Brady v. Maryland Material in United States District and State Courts’ Rules, Orders and Policies”, Report to the Advisory Committee on

Federal discovery rules are guided by Federal Rules of Criminal Procedure 16 and 26.2; (the Jencks Act⁵⁵⁾); *Brady v. Maryland*⁵⁶⁾ and *Giglio v. United States*⁵⁷⁾. In addition, federal prosecutors must also follow the DOJ policies regarding disclosure of exculpatory and impeachment information.⁵⁸⁾ As these policies pertain to CIs, prosecutors are required to obtain all exculpatory and impeachment information about CIs from all members of the prosecution team. Prosecution team usually includes agents and law enforcement officers who are inside the relevant district working on the case or those with a close relationship to the case.

The credibility of CIs will always be at issue if they provide material testimony at trial or material statements. Therefore, any and all information regarding the relationship with the CI must be disclosed if it can be used as impeachment or exculpatory information. This includes: length of time the CI has “worked” for law enforcement; number of cases the CI has provided information and the truthfulness of that information provided; number of times the witness has testified for law enforcement; benefits received while working as a CI-monetary benefits and non-monetary benefits; promises made by law enforcement to the CI at various times, including promises of immunity; relationship with the CI’s primary handler at a particular agency; the opinion of the CI’s handler about the CI’s credibility and prior credibility assessments; and criminal history of the CI.

Therefore, policing agencies and prosecutorial agencies must maintain detailed files about every cooperating witness utilized, even for minor

Criminal Rules of the Judicial Conference of the United States, 26 (2004).

55) 18 U.S.C. §3500

56) 373 U.S. 83 (1963);

57) 405 U.S. 150 (1972).

58) See USAM §9-5.001.

investigations such as placing a monitored phone call to a potential suspect. Agencies must also systematically and periodically update those files while the CI is working for them. Because this discovery requirement continues after a defendant is convicted, regular detailed reporting of all contacts with a CI and conversations with the CI, especially any promises made, must be reported.

In addition, all agencies' files must be accessible to prosecutors for review and must be organized in a manner ensuring pertinent information is not missed. When this classification of information as impeachment information or exculpatory information is done in hindsight, detailed and systematic cataloguing of all information is an important factor. Missed information, even if the product of mere human error, creates an enormous credibility problem for the agencies involved with the courts.

All agencies, including the prosecutorial agency, should have procedures or criteria that must be met before a prosecutor can access these files about CIs. It is important to remember that CIs provide information because there have been guarantees about a certain level of privacy and security that would be given to them. Should the agencies readily provide the information and files of CIs to anyone who asks, CIs will no longer want to provide information at all.

Similarly, California discovery rules are guided by Penal Code section 1054 et seq. and the federal Constitutional guidelines promulgated in *Brady* as well as *Giglio*. The *Brady* and *Giglio* requirements for discovery, therefore, is the same for California and the rest of the 50 states.

2. Plea-Bargaining for Information

To deal with the culpability of CIs, federal as well as many states' law enforcement agencies-prosecutorial agencies as well as police agencies-have procedural protections above and beyond the protections in the normal plea-bargaining system. This system is criticized because it protects information defendants deem necessary for their defense-much more information than merely exculpatory or impeachment information. However, the flip side of protecting information that may otherwise be disclosed to defendants is that there is a very real danger posed by early exposure of to the cooperating witness' information. The procedures, therefore, not only protect CIs from real harm but also ensure that decisions to protect information are neither arbitrary nor for personal benefit of individual officers/agents/prosecutors.

Prosecuting agencies who work closely with policing agencies in the initial stages of an investigation may be involved with all the levels of approval and reporting; however, when a case is brought to the prosecuting agency with a CI issue, the prosecuting agency must engage in its own vetting process like an agency's initial suitability determination.⁵⁹⁾ CI issues refer to cases where the CI is central to an investigation; cases where a CI is called as a witness to a crime unrelated to the CI's work for the agency; cases where a CI is being investigated for criminal activities unrelated to the CI's work for the agency; and cases where a CI volunteers information about a crime in exchange for leniency.

59) "Initial Suitability Determination" is the term used by federal agencies. Suitability determination is dependent upon 17 different factors. See U.S. Dept. of Justice, The Attorney General's Guidelines Regarding the Use of Confidential Informants 8-9(2002).

It is also common for a prosecutor to be approached by a potential CI requesting benefits after having been arrested for committing a crime or after having been formally charged with committing a crime. From the moment a prosecutor is approached with this information or with information from an officer about a registered CI who is requesting benefits, the prosecutor must begin the prosecuting agency's documentation of the CI's involvement. For some prosecuting agencies, that means writing notes in the paper files⁶⁰ or filling out official paperwork for the chain of command.

Before having plea-bargaining discussions, many prosecuting agencies may request a debriefing or a "free talk," another method of vetting. The name speaks for itself—it is a chance for both sides to talk freely without making any commitments. Similar to a conduct agreement, the potential CI would be instructed about the terms of being a CI for the prosecuting agency. In addition, it is a chance to hear the CI's information so that the prosecutor can reasonably assess the information's value. Issues to consider are: Is the information relevant? Is the information merely corroboration of evidence already in the prosecution's hands? Is the information able to be corroborated by other evidence? How believable is the information and how credible is the potential CI? How much damage, if at all, would using a CI do to the case overall? On the flip side, after speaking with the prosecutor and hearing the terms, the CI may change his mind and should be allowed to do without actual detriment.

Procedural and substantive criminal laws facilitate this free exchange of

60) It is important to note that many agencies including policing agencies do not keep electronic records of CIs. The reason for this practice is the possibility of human mistakes in dealing with electronic records. The security and usefulness of the CI is dependent upon secrecy surrounding the information until such a time as disclosure is legally required.

information and ensure that potential CIs are protected. Federal Rules of Evidence 410 makes inadmissible in any civil or criminal proceeding, any statement made in the course of plea discussions with a prosecutor, even if the discussions do not ultimately result in a plea.⁶¹⁾ Moreover, Sentencing Guidelines section 1B1.8 and its comments allow agreements that information provided by a cooperating defendant will not be used for an upward departure in the sentence and will not be used to increase the applicable guideline range.

There can be no cooperation or use of confidential information until a formal contract is signed. The final agreement contains the same information as a police agency's conduct agreement or written instructions for the CI. In addition, the final agreement may also include⁶²⁾: name so fall the parties to the agreement; CI's criminal history-cases, charges, investigations, and already sentenced cases (if CI is on probation or parole); specific plea terms, especially any special terms-e.g. Search and seizure waiver or random drug testing; and specific promises made in exchange for cooperation and any specific limitations on the benefits. Recall that the final agreement is discoverable at a future date. The final agreement or the key terms of the final agreement, will be given to all defendants against whom the CI testifies in the future. So, the agreement must be written with the view that it will be publicly scrutinized in the future.

61) See also Fed. R. Crim. P. 11(f).

62) See Susan E. Brune, "White Collar Crime Policy: The SEC's New Cooperation Policy", 33, *The Champion* 43 (2010), <http://www.nacdl.org/champion.aspx?id=14604> (SEC borrowed liberally from the US Attorney's Office in enacting their new cooperation policy.)

3. Scrutiny and Transparency-The Judge's Role

In the federal system, cooperation discounts cannot be readily offered by the prosecuting agency. 28 U.S.C. §994(n) guides when prosecutors can enter into an agreement for a sentence reduction. In deciding to impose a lower sentence, prosecutors and the courts must “take into account a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.” Not only does the requirement of “substantial assistance” make it hard to offer cooperation discounts, policy statement §5K1.1 makes it even harder. Policy statement §5K1.1 requires a motion by the prosecutor before the court can depart for substantial assistance.⁶³⁾ The motion requirement ensures the court does not act arbitrarily.⁶⁴⁾ On the other hand, the motion requirement means that prosecutors do not have sole power. When the court considers a cooperation motion, it must give substantial weight to “the government’s evaluation of the extent of the defendant’s assistance.” However, the ultimate determination is for the court to make.⁶⁵⁾ Even without a reduced sentence, a defendant can still benefit from cooperating; courts may consider cooperation a mitigating factor in imposing the low term on the scale.⁶⁶⁾

In California, the court does not have the final say in sentencing. More than the “usual” cases, courts will usually abide by the sentencing wishes

63) See *Wade v. United States*, 504 U. S. 181, 185 (1992); 18 U. S. C. §3553(e).

64) *Ibid.*

65) U.S.S.G. §5K1.1(a)(1), p.s. & comment.

66) See 18 U.S.C. §3553(a); United States Sentencing Commission, Final Report on the Impact of United States v. Booker on Federal Sentencing 112–115 (Mar. 2006), http://www.ussc.gov/booker_report/Booker_Report.pdf (hereinafter Final Report); cf. U.S.S.G. §5K1.2, p.s. (stating a defendant’s refusal to assist authorities may not be considered an aggravating sentencing factor).

of the parties when it involves a CI. However, courts' involvement with CI issues is hardly hands-off.

In a subsequent case where the CI is called as a witness or where the CI is accused of committing a subsequent criminal act, the court may order disclosure of the CI's files. If the courts deem the CI a material witness, the CI's file will be subjected to in-camera viewing by the court.⁶⁷⁾ The in-camera review takes place without the defense attorney and the defendant. After review, the court will determine if disclosure is required. Sometimes the in-camera review will involve testimony by a police officer or the CI's control officer. Should the court determine disclosure is required, the prosecutor's office has an election to make-to disclose, to dismiss the charge(s) where the CI is a material witness, or to dismiss the entire case.⁶⁸⁾ If the prosecutor does not decide, the court will dismiss on its own motion if the court determines the defendant cannot get a fair trial without disclosure.⁶⁹⁾

67) See Alameda County District Attorney, *Confidential Informants: Protecting their Identity, Point of View* 15 (2006) (Alameda County DA); See also Cal. Evid. Code § 1042(d).

68) Attorney General's Guidelines, *supra* note 59, at 26-27; Brune, *supra* note 62.

69) California Evidence Code section 1042, subsection (d) provides:

(d) When, in any such criminal proceeding, a party demands disclosure of the identity of the informant on the ground the informant is a material witness on the issue of guilt, the court shall conduct a hearing at which all parties may present evidence on the issue of disclosure ... During the hearing, if the privilege provided for in Section 1041 is claimed ... the prosecuting attorney may request that the court hold an in camera hearing. If such a request is made, the court shall hold such a hearing outside the presence of the defendant and his counsel. At the in camera hearing, the prosecution may offer evidence. ... The court shall not order disclosure, nor strike the testimony of the witness who invokes the privilege, nor dismiss the criminal proceeding, if the party offering the witness refuses to disclose the identity of the informant, unless ... the court concludes that there is a reasonable

Although the California CI disclosure practice is not directly tied to the CI's plea-bargain, it is important to note that the possibility of disclosure and the possibility of judicial scrutiny are significant deterrents.⁷⁰⁾ Because of these requirements, it is important that each prosecutor's office develop a system to record information, to store information, and also to make the information available only to prosecutors who need it. For example, the information can be made available to only the heads of the branch offices or made available to only one unit of the office that acts as a gatekeeper. At the least, there must be a central database that can be accessed to alert prosecutors throughout the relevant jurisdiction that there is sensitive information about this particular individual that must be disclosed in subsequent cases.⁷¹⁾ The information can then be provided to prosecuting attorneys as needed-preferably, when a prosecutor is first notified that a witness, victim, or defendant was or is a CI.⁷²⁾

Although the case law and rules in this area are complex, the highly structured or tailored system furthers three separate goals of the prosecutorial agencies-the goal of gaining sensitive information from individuals necessary for justice to reach to those most responsible, the sometimes contradictory

possibility that non disclosure might deprive the defendant of a fair trial.
(Emphasis Added)

70) Alameda County DA, *supra* note 67.

71) See also Los Angeles County District Attorney, *Legal Policies Manual* (April 2005)(The LACDA, as of 2005, kept informant information in the hands of the Habeas Corpus Litigation Team. Similarly, other District Attorney's offices in California have special teams or divisions charged with the responsibility of keeping these records and for providing the records to their prosecutors when relevancy has been shown.)

72) Attorney General's Guidelines, *supra* note 59, at 26-28; *Gang Prosecution Manual*, *supra* note 52, at 22-23.

goal of safeguarding the sensitive information to ensure that these CIs gain protection, and the goal of having a system in place to ensure that there is accountability as well as transparency built into the system if something should go wrong.

IV. Conclusory Remarks

Plea-bargaining is not the only way to obtain cooperation of individuals. As alluded to when discussing the discovery requirements, a prosecuting agency can decide not to file charges at all against the CI or can decide to dismiss the case against the CI even after charges are filed. However, both actions can be seen as extreme and contrary to criticism, these actions would not aid the goals of transparency.

In South Korea, there are additional reasons why plea-bargaining can be a beneficial tool: first, in Korea, should a prosecutor decide not to file charges against an individual, the decision not to file charges can be appealed to the courts.⁷³⁾ Therefore, a prosecutor cannot guarantee a case will not be filed even with substantial cooperation. Second, although more troublesome for the agency, a CI who is on probation or on work furlough has more incentive to stay honest and has more oversight on a day-to-day level. Third, because of the fast pace of criminal actions in Korea, whether an individual has material information may not be known until after indictment. Fourth, society has a great interest in punishing those who engage in criminal conduct,

73) 2009 *The White Paper On Crime* 265–270, “Republic of Korea Ministry of Justice”(Legal Research & Training Institute, 2010)(stating that in 2008, there were 17,397 appeals of non-prosecution decisions by victims).

even CIs. Although CIs may obtain benefits for volunteering information about other, more egregious crimes, there is an interest in the CI suffering some punishment. Fifth, an individual oftentimes has no incentive to provide information until after the filing of criminal charges or until after having served some prison time, as with Ben Glisan. Without criminal penalty as a hammer and without immunity from prosecution for disclosing information, there may be more incentive to *not* cooperation.⁷⁴⁾ Finally, the charging decision is not completely discretionary, as critics suggest. For example, there is no legally authorized avenue to even charge a lesser crime, for having aided in the prosecution of another.

So, plea-bargaining can provide the Korean prosecutors with more tools to combat increasingly sophisticated domestic as well as international criminal networks. The courts can balance the power of the prosecutors through their sentencing discretion. In addition, the legislature can provide safeguards and statutory guidance to ensure that there are power checks on the system of plea-bargaining.

(투고일 2011년 12월 1일, 심사(의뢰)일 2012년 1월 12일, 게재확정일 2012년 2월 8일)

74) See Brune, *supra* note 62. (In response to the SEC's new cooperation policy, commenting, "And even for that rare insider possessing key information, facing no actual investigation and nonetheless desiring to cut a deal, the SEC is not ordinarily the right place to start. The SEC policy provides no guarantee against criminal prosecution absent an immunity order, something that the SEC can provide only with the consent of the federal criminal authorities.")

Key Words : Plea-Bargain, Pleas, Change of Pleas, Criminal Law, Criminal Justice, United States, South Korean Ministry of Justice, Prosecutor, California, Federal, Cooperating Individuals, White-collar Crimes, Fraud, Corporations, Criminal Enterprise, Criminal Organizations, Bribery

References

1. Books

- Anna Sweeting et al., *U.K. Ministry of Justice, Evaluation Of The Victims' Advocate Scheme Pilots*, 2008.
- Gang Prosecution Manual, *Department of Justice*, Office of Juvenile Justice and Delinquency Prevention, 2009.
- George Fisher, *Plea-bargaining's Triumph: A History of Plea-bargaining in America*, Stanford University Press, 2003.
- Judicial Council of California, *2010 Court Statistics Report: Statewide Caseload Trends, 1999-2000 through 2008-2009*, 2010.
- K. Jack Riley/Nancy Rodriguez/Greg Ridgeway/Dionne Barnes-Proby, *Just Cause of Just Because? : Prosecution and Plea-Bargaining Resulting in Prison Sentences on Low-Level Drug Charges in California and Arizona*, RAND Corporation, 2005.
- Los Angeles County District Attorney, *Legal Policies Manual*, April 2005.
- UNICEF, *Handbook for Professionals and Policymakers on Justice Matters involving Child Victims and Witnesses of Crime*, United Nations Publication, 2009.
- United States Sentencing Commission, *Final Report on the Impact of United States v. Booker On Federal Sentencing*, March 2006.
- U.S. Dep't of Justice, *The Attorney General's Guidelines Regarding the Use of Confidential Informants* 8-9, 2002.
- William Burnham, *Introduction to the Law and Legal System of the United States* 92 4 ed., Thomson West, 2006.

2. Articles

Alameda County District Attorney, *Confidential Informants: Protecting their Identity, Point of View*, 2006.

Candace McCoy, "Determinate Sentencing, Plea Bargaining Bans, and Hydraulic Discretion in California", *9 Just. Sys. J.* 256, 1984.

David Mendeloff, "Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice", *31 Hum. Rts. Q.* 3, 2009.

James B. Burns/Barry Rand Elden/Brian W. Blanchard, "We Make the Better Target (But the Guidelines Shifted Power from the Judiciary to Congress, Not from the Judiciary to the Prosecution)", *91 Nw. U. L. Rev.* 1317, 1996-1997.

Jo-Anne Wemmers, "Victim Participation and The rapeutic Jurisprudence: A Canadian Perspective, Workshop, Victim Participation in Justice and The rapeutic Jurisprudence: A Comparative Analysis", Onati, Spain, March 8-9, 2007.

John C. Hueston, "Behind the Scenes of the Enron Trial: Creating the Decisive Moments", *44 Am. Crim. L. Rev.* 197, 2007.

Joseph L. Hoffmann/Marcy L. Kahn/Steven W. Fisher, "Plea-bargaining in the Shadow of Death", *69 Fordham L. Rev.* 2313, 2390, 2001, <http://ir.lawnet.fordham.edu/flor/vol69/iss6/5>.

Legal Research & Training Institute, "Republic of Korea Ministry of Justice", *2009 The White Paper On Crime*, Legal Research & Training Institute, 2010.

Laura L. Hooper/Jennifer E. Marsh/Brian Yeh, "Treatment of Brady v. Maryland Material in United States District and State Courts'

Rules, Orders and Policies”, Report to the Advisory Committee on Criminal Rules of the Judicial Conference of the United States, 2004.

Robert A. Weninger, “The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas”, 35 *UCLA L. Rev.* 265, 1987-88.

Robert E. Scott/William J. Stuntz, “Plea Bargaining As Contract”, 101 *Yale L. J.* 1909, 1910, 1992.

Stephan Bibas, “Regulating the Plea-Bargaining Market”, 99 *Cal. L. Rev.* 1177, 2011.

Stephen J. Schulhofer/Ilene H. Nagel, “Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period”, 91 *Nw. U. L. Rev.* 1284, 1997.

Zroan Ilic, *Psychological Preparation of Torture Victims as Witnesses toward the Prevention of Retraumatization, in Torture in War: Consequences and Rehabilitation of Victims*, 2004.

3. Others

Alexei Barrionuevo, “Jury Told Lay Lied On Enron”, *N.Y. Times*, 2006. 3. 23.

AOC Office of Court Research, “Trial Court Caseload Increases to Over 10 Million Filings”, DataPoints, Aug. 2010, <http://www.courts.ca.gov/documents/datapoints10.pdf>

Erika Ritchie, “DA With draws Plea Bargainin Stabbing Case”, *O.C. Register*, 2011.

Joint Hearing On Law Enforcement Confidential Informant Practices,

House of Representatives, Committee on the Judiciary, Sub-Committee on Crime, Terrorism, and Homeland Security, and Sub-Committee on the Constitution, Civil Rights, and Civil Liberties, July 19, 2007.

Michael Orey, “Enron: Something A Jury Can See”, *Business Week Online*, March 20, 2006, http://www.businessweek.com/magazine/content/06_12/b3976062.htm.

Roger Parloff, “Skilling’s Global Galactic Problem”, *CNN Money*, Jan. 26, 2006, http://money.cnn.com/2006/01/26/news/newsmakers/pluggedin_fortune/index.htm.

Securities and Exchange Commission, “SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations”, *Press Release*, Jan. 6, 2010, <http://www.sec.gov/news/press/2010/2010-6.htm>.

Securities and Exchange Commission, “Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions”, *Securities Exchange Act Release No. 44969, Accounting and Auditing Enforcement Release No. 1470*, Oct. 23. 2001, <http://www.sec.gov/litigation/investreport/34-44969.htm>.

Si-soo Park, “Plea-bargaining Plan Put On Hold”, *Korea Times*, May 3, 2011, http://m.koreatimes.co.kr/www/news/nation/2011/08/117_86372.html.

Susan E. Brune, “White Collar Crime Policy: The SEC’s New Cooperation Policy”, *The Champion*, 2010, <http://www.nacdl.org/champion.aspx?id=14604>.

- Tae-Jong Kim, "Rights Agency Opposes US-Style Plea-bargaining", *Korea Times*, 2011. 4. 1.
- U.S. Courts, "Federal District Courts", *Caseload Statistics 2009-2010*, <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2010.aspx>).

[국문초록]

플리바겐(유죄답변 형량거래) - 투명성 확보를 위한 시스템의 한국으로의 도입 -

Stella J. Lee*

미국의 플리바겐 제도는 한국에서 잘못 이해되고 잘못 전달되고 있다. 2008년 이래, 한국의 법무부는 특정범죄에 대해서 플리바겐 제도에 대한 권한을 반복적으로 요구해오고 있는데, 이는 플리바겐이 그 특정범죄에 가장 책임이 있는 사람들의 체포를 매우 용이하게 할 수 있는 경우이다. 이러한 잘못된 이해로 인하여, 입법부와 학자들은 지나치게 남용되기 쉬운 도구를 얻으려는 검사에 의한 또 다른 시도라고 보면서 플리바겐을 계속해서 임의적으로 반대하고 있다.

그러나 미국에서 실제로 시행되고 있는 플리바겐 제도를 보면, 투명성을 구체화하고 있는 시스템을 볼 수 있다; 법원의 적극적인 감독, 입법부에 의한 적극적인 법률제정, 그리고 마지막으로 책임만큼이나 더 많은 감시. 또한 미국에서 어떻게 검사가 사법협조자(cooperating individuals(CI))와 함께 플리바겐을 하는지 사례를 살펴보면, 한국에서 감독, 책임 그리고 감시라는 유사한 시스템을 마련하는 데 참고가 될 수 있을 것이다.

주제어: 플리바겐, 답변, 답변의 변경, 형법, 형사 사법, 미국, 대한민국 법무부, 검사, 캘리포니아, 연방, 사법협조자, 화이트칼라 범죄, 사기, 회사, 범죄기업, 범죄조직, 뇌물

* 변호사