



## Plea Bargaining

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### Background

There is no perfect or simple definition of [PLEA BARGAINING](#). Black's Law Dictionary defines it as follows:

"[t]he process whereby the [ACCUSED](#) and the [PROSECUTOR](#) in a criminal case work out a mutually satisfactory [DISPOSITION](#) of the case subject to court approval. It usually involves the defendant's pleading guilty to a lesser offense or to only one or some of the counts of a multi-count [INDICTMENT](#) in return for a lighter sentence than that possible for the graver charge."

In practice, [PLEA](#) bargaining often represents not so much "mutual satisfaction" as perhaps "mutual acknowledgement" of the strengths or weaknesses of both the charges and the defenses, against a backdrop of crowded criminal courts and court case dockets. Plea bargaining usually occurs prior to trial but, in some jurisdictions, may occur any time before a verdict is rendered. It also is often negotiated after a trial that has resulted in a [HUNG JURY](#): the parties may negotiate a plea rather than go through another trial.

Plea bargaining actually involves three areas of negotiation:

- **Charge Bargaining:** This is a common and widely known form of plea. It involves a negotiation of the specific charges (counts) or crimes that the [DEFENDANT](#) will face at trial. Usually, in return for a plea of "guilty" to a lesser charge, a prosecutor will dismiss the higher or other charge(s) or counts. For example, in return for dismissing charges for first-degree murder, a prosecutor may accept a "guilty" plea for [MANSLAUGHTER](#) (subject to court approval).
- **Sentence Bargaining:** Sentence bargaining involves the agreement to a plea of guilty (for the stated charge rather than a reduced charge) in return for a lighter sentence. It saves the prosecution the necessity of going through trial and proving its case. It provides the defendant with an opportunity for a lighter sentence.
- **Fact Bargaining:** The least used negotiation involves an admission to certain facts ("stipulating "to the truth and existence of provable facts, thereby eliminating the need for the prosecutor to have to prove them) in return for an agreement not to introduce certain other facts into [EVIDENCE](#).

The validity of a plea bargain is dependent upon three essential components:

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- a knowing [WAIVER](#) of rights
- a voluntary waiver
- a factual basis to support the charges to which the defendant is pleading guilty

Plea bargaining generally occurs on the telephone or in the prosecutor's office at the courtroom. Judges are not involved except in very rare circumstances. Plea bargains that are accepted by the judge are then placed "on the record" in [OPEN COURT](#). The defendant must be present.

One important point is a prosecuting attorney has no authority to force a court to accept a plea agreement entered into by the parties. Prosecutors may only "recommend" to the court the acceptance of a plea arrangement. The court will usually take proofs to ensure that the above three components are satisfied and will then generally accept the recommendation of the prosecution.

Moreover, plea bargaining is not as simple as it may first appear. In effectively negotiating a criminal plea arrangement, the attorney must have the technical knowledge of every "element" of a crime or charge, an understanding of the actual or potential evidence that exists or could be developed, a technical knowledge of "lesser included offenses" versus separate counts or crimes, and a reasonable understanding of sentencing guidelines.

### Pros and Cons

Although plea bargaining is often criticized, more than 90 percent of criminal convictions come from negotiated pleas. Thus, less than ten percent of criminal cases go to trial. For judges, the key incentive for accepting a plea bargain is to alleviate the need to schedule and hold a trial on an already overcrowded [DOCKET](#). Judges are also aware of prison overcrowding and may be receptive to the "processing out" of offenders who are not likely to do much jail time anyway.

For prosecutors, a lightened caseload is equally attractive. But more importantly, plea bargaining assures a [CONVICTION](#), even if it is for a lesser charge or crime. No matter how strong the evidence may be, no case is a foregone conclusion. Prosecutors often wage long and expensive trials but lose, as happened in the infamous O. J. Simpson murder trial. Moreover, prosecutors may use plea bargaining to further their case against a co-defendant. They may accept a plea bargain arrangement from one defendant in return for damaging [TESTIMONY](#) against another. This way, they are assured of at least one conviction (albeit on a lesser charge) plus enhanced chances of winning a conviction against the second defendant. For the defendants, plea bargaining provides the opportunity for a lighter sentence on a less severe charge. If represented by private [COUNSEL](#), defendants save the cost for trial and have fewer or less serious offenses listed on their criminal records.

### U. S. Supreme Court Cases

Article III, Section 2[3] of the U. S. Constitution provides that "The trial of all crimes, except in Cases of **IMPEACHMENT**, shall be by Jury." However, it has never been judicially determined that engaging in a plea bargaining process to avoid trial subverts the Constitution. To the contrary, there have been numerous court decisions, at the highest levels, that discuss and rule on plea bargains. The U. S. Supreme Court did not address the constitutionality of plea bargaining until well after it had become an integral part of the criminal justice system.

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In *United States v. Jackson*, 390 U.S. 570 (1968), the Court questioned the validity of the plea bargaining process if it burdened a defendant's right to a jury trial. At issue in that case was a [STATUTE](#) that imposed the death penalty only after a jury trial. Accordingly, to avoid the death penalty, defendants were waiving trials and eagerly pleading guilty to lesser charges. Justice Potter Stewart, writing for the majority, noted that the problem with the statute was not that it coerced guilty pleas but that it needlessly encouraged them.

Two years later, the Court actually defended plea bargaining in *Brady v. United States*, 397 U.S. 742 (1970), pointing out that the process actually benefited both sides of the adversary system. The Court noted that its earlier opinion in *Jackson* merely required that guilty pleas be intelligent and voluntary. The following year, in *Santobello v. New York*, 404 U.S. 260 (1971), the Court further justified the constitutionality of plea bargaining, referring to it as "an essential component of the administration of justice." The Court added that "[as long as it is] properly administered, [plea bargaining] is to be encouraged."

### The Alford Plea

But the most cited and most familiar Supreme Court case on plea bargaining is *North Carolina v. Alford*, 400 U.S. 25 (1970). In 1970, North Carolina law provided that a penalty of life [IMPRISONMENT](#) would attach to a plea of guilty for a capital offense, but the death penalty would attach following a jury verdict of guilty (unless the jury recommended life imprisonment). Alford faced the death penalty for first-degree murder. Although he claimed innocence on all charges (in the face of strong evidence to the contrary), Alford pleaded guilty to second-degree murder prior to trial. The prosecutor accepted the plea, and he was sentenced to 30 years' imprisonment. Alford then appealed his case, claiming that his plea was involuntary because it was principally motivated by fear of the death penalty. His conviction was reversed on appeal. However, the U. S. Supreme Court held that a guilty plea which represents a voluntary and intelligent choice when considering the alternatives available to a defendant is not "compelled" within the meaning of the Fifth Amendment just because it was entered to avoid the possibility of the death penalty. (Alford had argued that his guilty plea to a lesser charge violated the Fifth Amendment's prohibition that "No person . . . shall be compelled in any criminal case to be a witness against himself.") The Supreme Court reversed the court of appeals and reinstated Alford's conviction and sentence.

The term "Alford Plea" has come to apply to any case in which the defendant tenders a guilty plea but denies that he or she has in fact committed the crime. The Alford plea is expressly prohibited in some states and limitedly allowed in others. In federal courts, the plea is conservatively permitted for certain defenses and under certain circumstances only.

### Plea Bargaining in Federal Courts

The Federal Rules of **CRIMINAL PROCEDURE** (F.R.Crim.P), and in specific, Rule 11(e), recognizes and codifies the concept of plea agreements. However, because of United States Sentencing Guideline (USSG) provisions, the leeway permitted is very restrictive. Moreover, many federal offenses carry mandatory sentences, with no room for plea bargaining. Finally, statutes codifying many federal offenses expressly prohibit the application of plea arrangements. (See "Sentencing and Sentencing Guidelines.")

Federal criminal practice is governed by Title 18 of the [U.S. CODE](#), Part II (Criminal Procedure). Chapter 221 of Part II addresses arraignments, pleas, and trial. The U. S. Attorney's Manual (USAM) contains several provisions addressing plea agreements. For example, Chapter 9-16.300 (Plea Agreements) states that plea agreements should "honestly reflect the totality and seriousness of the defendant's conduct," and any departure must be consistent with Sentencing Guideline provisions. The Justice Department's official policy is to

stipulate only to those facts that accurately represent the defendant's conduct. Plea agreements require the approval of the assistant attorney general if counts are being dismissed, if defendant companies are being promised no further prosecution, or if particular sentences are being recommended (USAM 7-5.611).

## Prohibitions and Restrictions

Aside from legal considerations as to the knowing or voluntary nature of a plea, there are other restrictions or prohibitions on the opportunity to plea bargain. In federal practice, U. S. attorneys may not make plea agreements which prejudice civil or tax liability without the express agreement of all affected divisions or agencies (USAM 9-27.630). Moreover, no attorney for the government may seek out, or threaten to seek, the death penalty solely for the purpose of obtaining a more desirable negotiating position for a plea arrangement (USAM 9-10.100). Attorneys are also instructed not to consent to "Alford pleas" except in the most unusual circumstances and only with the recommendation of assistant attorneys general in the subject matter at issue. In any case where a defendant has tendered a plea of guilty but denies that he or she committed the offense, the attorney for the government should make an offer of proof of all facts known to the government to support the conclusion that the defendant is in fact guilty (USAM 9-16.015). Similarly, U. S. attorneys are instructed to require an explicit stipulation of all facts of a defendant's [FRAUD](#) against the United States (tax fraud, Medicare/Medicaid fraud, etc.) when agreeing to plea bargain (USAM 9-16.040).

## State Provisions

Plea bargaining is not a creature of law: it is one of legal practice. Therefore, state statutes do not create the right to plea bargain, nor do they prohibit it, with one exception. In 1975, Alaska's attorney general at the time, Avrum Gross, banned plea bargaining in Alaska. Although the ban remains officially "in the books," charge bargaining has become fairly common in most of Alaska's courts. Nonetheless, Alaska has not suffered the unmanageable caseloads or backlogged trials that were predicted when the ban went into effect.

If plea bargaining appears at all in state statutes, it is generally in the context of being prohibited or restricted for certain matters or types of cases. For example, many states have prohibited plea bargaining in drunk driving cases, sex offender cases, or those involving other crimes that place the public at risk for repeat offenses or general harm. Another common provision, found in a majority of states, is a requirement that a prosecutor must inform a victim or the victim's survivors of any plea bargaining in a case. In many states, victims' views and comments regarding both plea bargaining and sentencing are factored into the ultimate decisions or determinations.

At least one state (Alabama) has expressly ruled that once a plea bargain is accepted, or there is detrimental reliance upon the agreement before the plea is entered, it becomes binding and enforceable under constitutional law (substantive due process). *Ex Parte Hon. Orson Johnson*, (Alabama, 1995).

## Additional Resources

"The Core Concerns of Plea Bargaining Critics." Douglas D. Guidorizzi. Available at <http://www.law.emory.edu/ELJ/volumes/spg98/guido.html>.

*The Court TV Cradle-to-grave Legal Survival Guide*. Little, Brown and Company, 1995.

"Criminal Procedure: an Overview." Available at [http://www.law.cornell.edu/topics/civil\\_procedure.html](http://www.law.cornell.edu/topics/civil_procedure.html)

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"Federal Rules of Criminal Procedure." Available at [http://www.law.cornell.edu/topics/civil\\_procedure.html](http://www.law.cornell.edu/topics/civil_procedure.html)

"Plea Bargains: Why and When They're Made." Available at <http://www.nolo.com/lawcenter/ency/category>.

*United States Attorneys Manual*. (USAM. Office of the U. S. Attorney General, Dept. of Justice. Available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/titl...](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/titl...)

*U. S. Code, Title 18: Crimes and Criminal Procedure, Part II: Procedure, Chapter 221: Arraignment, Pleas and Trial*. U. S. House of Representatives. Available at <http://caselaw.lp.findlaw.com/cascode/uscodes/18/parts/ii/...> .

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