

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

No. CR10-4025

STEVEN KEITH VANDEBRAKE,

TRANSCRIPT OF
STATUS CONFERENCE

Defendant.

The Status Conference held before the Honorable Mark W. Bennett, Judge of the United States District Court for the Northern District of Iowa, at the Federal Courthouse, 320 Sixth Street, Sioux City, Iowa, May 26, 2010, commencing at 7:59 a.m.

APPEARANCES

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1 THE COURT: Thank you. Good morning. Please be
2 seated.

3 This is United States versus Steven Keith VandeBrake,
4 Criminal Number 010-4025. The defendant is personally present
5 represented by Lee Goodwin, and we have some Justice Department
6 lawyers here so -- Mr. Geverola, are you the lead lawyer?

7 MR. GEVEROLA: Yes, Your Honor.

8 THE COURT: Okay. Why don't you turn your microphone
9 on. I guess they didn't teach you that at Department of
10 Justice, huh?

11 MR. GEVEROLA: They have not, Your Honor. Sorry about
12 that.

13 THE COURT: It's just a little button right in front.
14 That way our court reporter can take everything down.

15 MR. GEVEROLA: Thank you, Your Honor.

16 THE COURT: Okay. Why don't you introduce your
17 co-counsel.

18 MR. GEVEROLA: With me today is Robert Jacobs and
19 Heidi Manschreck also of the Justice Department.

20 THE COURT: And pardon my inquiry, but why would you
21 spend the taxpayers' money to send three people to this hearing?

22 MR. GEVEROLA: Judge, we've been here since Monday in
23 relation to other activities in addition to today's hearing. So
24 I guess to elaborate on the story a little bit, the trip was
25 more involved than just today's hearing, and all of us were

1 required to be there.

2 THE COURT: Okay. Thank you. Okay. I entered a
3 order, a short order, on May 20 declining to accept the
4 11(c)(1)(C) plea agreement, and then my -- I'm a notoriously
5 poor historian, so my recollection of what happened was that --
6 and I don't know the details because it was all filtered through
7 my judicial assistant Jennifer Gill, that the same day the order
8 was filed the parties called my chambers and wanted to meet with
9 me and suggested kind of a meeting in chambers. I said I don't
10 meet in chambers on criminal cases but I'd be glad to meet in
11 the courtroom on the record. And then we set the hearing for
12 today. Does that essentially jive with your recollection?

13 MR. GEVEROLA: Yes, Judge.

14 THE COURT: Okay. So you called for the hearing.
15 What do you want to do?

16 MR. GEVEROLA: Judge, first, thank you for allowing us
17 to be heard on this issue. Our intent for this hearing was to
18 provide for Your Honor's consideration the reasons for the plea
19 agreement entered by the parties. And in addition, we'd welcome
20 an opportunity to address any concerns Your Honor might have.
21 And if you'll permit me a few minutes, I'd like to go into the
22 reason --

23 THE COURT: Sure. Just so you know -- I just want to
24 let you know what I've done -- I've read the plea agreement.
25 I've read the transcript from the digital recording of the plea.

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1 And I've read your offense conduct statement dated May 19, 2010.
2 And let me tell you this. That's the best offense conduct
3 statement I've seen in 16 1/2 years and in sentencing over 2,600
4 defendants.

5 MR. GEVEROLA: Thank you, Judge.

6 THE COURT: So I'd be happy to hear anything you have
7 to say.

8 MR. GEVEROLA: Thank you. First, I want to begin by
9 saying that we understand the imposition of criminal sentences
10 is a role reserved for the Court. And the 11(c)(1)(C) agreement
11 was not in any way intended to usurp the Court's role in that
12 process.

13 THE COURT: Of course it is. That's the most
14 disingenuous thing I've ever heard. Of course it is. That's
15 the whole purpose of an 11(c)(1)(C) agreement.

16 MR. GEVEROLA: Well, Judge, that was not our intent
17 going in.

18 THE COURT: Of course it is. You want to bind me to
19 your view of what the appropriate sentence should be. That's
20 what an 11(c)(1)(C) is.

21 MR. GEVEROLA: I'd like to explain our view in the
22 hopes that the Court will accept it.

23 THE COURT: Your -- but that was just an incredibly
24 disingenuous thing to say. That's the whole purpose of an
25 11(c)(1)(C) agreement. Let me -- do you know what you said?

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1 The 11 -- and the 11(c)(1)(C) agreement was not in any way
2 intended to usurp the Court's role in the process. Well, fine.
3 Then don't do an 11(c)(1)(C) agreement if you don't want to
4 usurp my role.

5 MR. GEVEROLA: I understand, Judge. If we could
6 explain our reasoning . . .

7 THE COURT: Well, why don't you explain your reasoning
8 about why you want to usurp my role because that's what you're
9 doing, and then I'll decide whether I'll agree to that. But to
10 start off by saying you're not trying to take away my discretion
11 and usurp my role is, I think, ridiculous because that's exactly
12 what you're trying to do. The rule allows you to do it but only
13 with my acquiescence. But why would you tell me you're not
14 trying to usurp my role? Because you're not?

15 MR. GEVEROLA: Well, Judge, what I'm hoping for is
16 your acquiescence in the 11(c)(1)(C) agreement.

17 THE COURT: But that involves usurping my role and
18 giving up all of my discretion, doesn't it?

19 MR. GEVEROLA: I think that's certainly a fair point,
20 Judge.

21 THE COURT: So why would you say the purpose of the
22 11(c)(1)(C) agreement is not to usurp my role? Of course it is.
23 A first-year law student taking criminal procedure would know
24 that. Am I missing something?

25 MR. GEVEROLA: As a matter of law, Judge, I think

1 you're exactly right.

2 THE COURT: So why don't you be a little bit more
3 forthcoming with me.

4 MR. GEVEROLA: Okay.

5 THE COURT: Okay?

6 MR. GEVEROLA: The parties negotiated for this
7 agreement, and as with any negotiation, there was back and
8 forth, and both parties stood to gain from the agreement, and
9 I'd like to explain that to you, Judge.

10 THE COURT: Okay.

11 MR. GEVEROLA: I think we should start with some
12 background. In this case counsel for defendant approached the
13 government to initiate plea discussions soon after the
14 investigation went over and requested that the government
15 consider a plea agreement pursuant to Rule (c)(1)(C) in order to
16 afford the defendant with greater predictability regarding the
17 applicable penalty given that he had approached the government
18 fairly early on in the process.

19 After substantial negotiations between the parties,
20 the government accepted the proposal and reached the agreed
21 sentence primarily for two reasons: First, because we believe
22 that it's in the public interest for guilty parties to come
23 forward and accept responsibility promptly rather than seeking
24 to evade responsibility and to prolong the proceedings.

25 THE COURT: Now wait a minute. Why is that in the

1 public interest? The public interest is the Sixth Amendment
2 right to a fair trial. That's equally important. So a
3 defendant who does not plead guilty but demands their right to a
4 jury trial under the Sixth Amendment, that's just as much in the
5 public interest, matter of fact, more because the Sixth
6 Amendment is a constitutional guarantee and a guilty plea is a
7 rule.

8 So how can you say that it's in the public interest
9 for somebody to plead guilty? It's just as much in the public
10 interest for somebody to demand their constitutional right to
11 trial by jury.

12 MR. GEVEROLA: Those are both certainly public
13 interests, Judge. What I'm saying is in the event that the
14 defendant has decided that he is guilty and that there is
15 evidence to support guilt rather than seeking to prolong the
16 proceedings, it's in the public interest to save resources to
17 enter those negotiations early on in the process so --

18 THE COURT: I don't agree with that at all. You're
19 saying that because there's evidence of guilt that it's in the
20 public interest for a defendant to plead guilty. I don't agree
21 with that. It's just as much in the public interest to put the
22 government to the burden of proof to rely on the presumption of
23 innocence and see if you can prove him guilty even if there is
24 some evidence. So I totally disagree with your rationale.

25 MR. GEVEROLA: Okay, Judge. I accept that.

1 THE COURT: Okay.

2 MR. GEVEROLA: I'd like to move on to the second
3 rationale.

4 THE COURT: Sure.

5 MR. GEVEROLA: We also believe the sentence is
6 appropriate given the applicable 3553(a) factors.

7 THE COURT: Okay. Let me interrupt you for a second.
8 How many sentencings have you been involved in?

9 MR. GEVEROLA: This is my first as a lead, Judge, but
10 I've been involved in one or two others as assistant counsel.

11 THE COURT: I've been involved in over 2,600. I think
12 I have a little bit more expertise in analyzing the 3553(a)
13 factors, with all due respect to the Justice Department, than
14 you do. So why would I refer -- have you ever had a jury trial?

15 MR. GEVEROLA: Yes, Judge.

16 THE COURT: How many?

17 MR. GEVEROLA: One.

18 THE COURT: Okay. Why would I defer to somebody who's
19 had one trial -- I've had more than 400. Why would I defer to
20 somebody who's had one trial and a couple of sentencings in
21 terms of the application of the 3553(a) factors?

22 MR. GEVEROLA: I'm not asking you to defer, Judge.
23 I'm just presenting our view on the 3553(a) factors, and Your
24 Honor is certainly free to disregard that reasoning.

25 THE COURT: But you didn't answer my question. My

1 question is why should I defer to someone with such little,
2 infinitesimal experience? You could be the greatest lawyer
3 since Clarence Darrow. That remains to be seen. But I'm saying
4 based on what you've told me you have zilch, nada, none,
5 virtually no real-world experience. So why should I defer to
6 your judgment about how the 3553(a) factors would apply in a
7 case? Give me one reason why I should.

8 MR. GEVEROLA: We've been investigating this issue and
9 dealing with the defendant since -- for over a year now, Judge.
10 So we do have some familiarity with the facts of the case.

11 THE COURT: Much greater than I do.

12 MR. GEVEROLA: That's correct, Judge. But obviously
13 our experience is more fact specific to this case. And as far
14 as broader experience, Your Honor certainly has more of that.
15 That's not even a question.

16 THE COURT: Okay.

17 MR. GEVEROLA: So --

18 THE COURT: So I should defer to your lack of
19 experience in sentencings to apply the 3553(a) factors fairly
20 because you know more about the facts of this case than I do.

21 MR. GEVEROLA: In addition, Judge, if I may.

22 THE COURT: Yes.

23 MR. GEVEROLA: The sentence was reached in
24 consultation with attorneys in Washington, D.C., who do have far
25 more experience than I do and who monitor cases all across the

1 country on specifically antitrust cases to make sure that there
2 is a level of -- or I should say to reduce unwanted disparities
3 between similar cases.

4 So this is not a personal decision that I made. The
5 sentence in this case was reached in consultation with multiple
6 lawyers in the Justice Department including those with much more
7 experience than I do and who have significant experience with
8 criminal antitrust cases. Those are the two primary reasons I
9 would present, Judge.

10 THE COURT: And that's your basis for trying to
11 persuade me to accept an 11(c)(1)(C) agreement?

12 MR. GEVEROLA: I certainly have more prepared for Your
13 Honor but --

14 THE COURT: I'd be -- I want to hear everything you
15 have to say.

16 MR. GEVEROLA: Thank you, Judge. I mentioned the
17 facts of this case. I'd like to address some of the facts that
18 we did consider and present them for Your Honor's consideration.

19 First, regarding the defendant, he was a high-level
20 executive at his company.

21 Two, the defendant was involved in three separate
22 conspiracies, although the conspiracies were short-lived in
23 comparison with other conspiracies that the antitrust division's
24 dealt with.

25 Three, the volume of commerce affected by the

1 conspiracies was in our measure over one million but under ten
2 million which is not -- certainly not a small conspiracy, but
3 it's certainly smaller than the, you know, hundred million-,
4 billion-dollar conspiracies that the division also works on.

5 Four, as I mentioned, the defendant promptly notified
6 the government of his intent to accept responsibility.

7 Five, the defendant had no prior criminal offenses.

8 And, six, the government also considered the
9 importance of deterring similar conduct. As Your Honor may be
10 familiar with, our office had a case in Ind -- in the state of
11 Indiana just approximately five years ago involving price fixing
12 in the ready-mix concrete market in Indiana, so we do believe a
13 sentence is warranted to attempt to deter that conduct.

14 THE COURT: Oh, I totally agree with you. I think a
15 sentence is warranted to deter conduct. I may or may not agree
16 with you that a 19-month sentence is what it takes to achieve
17 that goal of deterrence. But I totally agree with you on that.

18 MR. GEVEROLA: Thank you, Judge, and there's --

19 THE COURT: But I'm not willing to defer to your
20 judgment on it.

21 MR. GEVEROLA: I understand, Judge. In addition, the
22 government considered restitution for victims but decided not to
23 request restitution in this case.

24 THE COURT: Because of the civil litigation that
25 inevitably follows.

1 MR. GEVEROLA: That's exactly right, Judge. And as I
2 mentioned, 3553(a) also requires consideration of the need to
3 avoid unwanted sentence disparities among defendants with
4 similar records who have been found guilty of similar conduct.

5 Consequently, we -- before agreeing with this plea
6 agreement, we consulted with attorneys in Washington, D.C., who
7 do have the role of monitoring cases specifically in the
8 antitrust realm all across the country to -- in an effort to
9 minimize sentencing disparities. These discussions involved the
10 case facts and factors that I just mentioned.

11 And for the sake of comparison, if Your Honor's
12 interested, I'd like to provide for Your Honor the average
13 sentence lengths for defendants prosecuted by the antitrust
14 division in the last several years if Your Honor's interested
15 in --

16 THE COURT: Well, I'm not really interested unless
17 you've done some multiple regression analysis or chi-square
18 analysis looking at all of the 3553(a) factors. And you used
19 the phrase unwanted disparity. That's not the law. It's
20 unwarranted disparity. There's a huge difference between
21 unwarranted disparity and unwanted disparity.

22 MR. GEVEROLA: Absolutely, Judge.

23 THE COURT: So unless you can, you know, show me
24 through application of the 3553(a) factors, I'm really not
25 interested. Now, on the other hand --

1 MR. GEVEROLA: Judge, if I may.

2 THE COURT: Yeah.

3 MR. GEVEROLA: I misspoke. I intended to say
4 unwarranted.

5 THE COURT: Well, there's a huge difference between
6 unwanted and unwarranted.

7 MR. GEVEROLA: Absolutely. And I apologize for
8 misspeaking.

9 THE COURT: You used it three times.

10 MR. GEVEROLA: It says unwarranted in my notes, and I
11 tried to say unwarranted, and I apologize.

12 THE COURT: That's okay.

13 MR. GEVEROLA: It came out as unwanted.

14 THE COURT: That's okay. I misspeak plenty.

15 Well, with all due respect, you're not getting very
16 far in terms of talking me out of -- I appreciate you're trying,
17 and I'm willing to hear everything you have to say.

18 One of the things I would suggest would be that if we
19 have a trial and if the defendant is found guilty and if there's
20 a sentencing or if the defendant pleads without an 11(c)(1)(C)
21 agreement and we have a sentencing, I'd certainly be willing to
22 take testimony if you want to put somebody on about national
23 averages. But then I'm going to have a whole lot of questions,
24 and unless I have the presentence reports for any of the cases
25 that go into that national average so I can look at the 3553(a)

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1 factors, I'm not going to find it very persuasive.

2 MR. GEVEROLA: I understand, Judge. And I haven't
3 prepared that today but --

4 THE COURT: No, no, I wouldn't expect you to.

5 MR. GEVEROLA: If we get to that stage, I appreciate
6 that guidance.

7 I also reviewed facts, although I didn't review PSRs,
8 of the three most recent announced criminal antitrust cases by
9 the division, the first one being United States v. Nusbaum in
10 the District of Maryland where the defendant was sentenced
11 May -- in May of this year to one year and one day plus an
12 \$800,000 fine for a single 5-year bid rigging conspiracy
13 relating to tax lien auctions. So that was one case we
14 considered.

15 And two additional cases we considered which are
16 related cases, United States versus Ho in the Northern District
17 of California. The defendant was charged in April of this year,
18 and the department announced a plea agreement involving a
19 14-month sentence with a \$50,000 fine for a single 5-year
20 price-fixing conspiracy relating to the sales of LCD screens.

21 One important factor for Your Honor's consideration is
22 that that plea agreement involved a cooperation provision which
23 does not exist in this case, so I thought I should point that
24 out.

25 The next case is United States v. Yang, Y-a-n-g, in

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1 the Northern District of California where the defendant was
2 sentenced to -- in April of this year to 9 months plus \$25,000
3 criminal fine for 2 years of involvement in the same
4 price-fixing conspiracy relating to the sales of LCD screens.
5 That plea agreement also involved a cooperation provision.

6 I understand Your Honor's point about the public
7 interest and the right to a criminal trial. But to kind of
8 elaborate on those last two cases a little bit, the Ho case and
9 the Yang case, I've personally reviewed the Yang plea agreement
10 which is an 11(c)(1)(C) agreement. I haven't reviewed the Ho
11 plea agreement because it's not publicly filed, but I wouldn't
12 be surprised if that were an 11(c)(1)(C) agreement as well. And
13 the reason for that is both those individuals are foreign
14 resident defendants, and typically when the division is dealing
15 with foreign resident defendants, they're willing to agree to
16 essentially greater predictability in sentencing through an
17 11(c)(1)(C) kind of as a bargain for the defendant voluntarily
18 submitting himself or herself to U.S. jurisdiction. Typically
19 defendants ask for that before they leave their home countries
20 and come to the U.S. and subject themselves to criminal
21 penalties.

22 I believe that reasoning applies here as well in that
23 the defendant, you know, is voluntarily submitting himself early
24 on in the process and has requested greater predictability in
25 exchange for that.

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1 THE COURT: Well --

2 MR. GEVEROLA: And I'm not asking Your Honor to agree
3 with it. I'm just saying --

4 THE COURT: But, you know, if the United States
5 Supreme Court was concerned about greater predictability, they
6 would have decided United States versus Booker and United States
7 versus Gall the other way.

8 MR. GEVEROLA: That's certainly a fair point, Judge.
9 But I'm just --

10 THE COURT: Part of the independence of the federal
11 judiciary is the lack of predictability.

12 MR. GEVEROLA: Certainly.

13 THE COURT: I understand as a lawyer because I was one
14 for 17 years, still am, that predictability is a valued
15 commodity in terms of being able to negotiate resolution of
16 cases. I certainly understand that. And because I'm fairly
17 predictable, I'm unwilling to accept your 11(c)(1)(C) agreement
18 based on what I've heard so far.

19 MR. GEVEROLA: Okay, Judge. Well, I don't have much
20 more to say, Judge, so --

21 THE COURT: Well, have at it. You're doing a good
22 job.

23 MR. GEVEROLA: Having mentioned those cases, I do want
24 to point out one significant difference for Your Honor's
25 consideration, is that those cases involved single-count

1 conspiracies as opposed to three-count conspiracies just in
2 fairness.

3 Those are essentially the reasons I was prepared to
4 present for Your Honor, and I'll cede the floor to Mr. Goodwin
5 unless Your Honor has questions for me.

6 THE COURT: Well, I have a question about a couple of
7 the factors you listed.

8 MR. GEVEROLA: Sure, Judge.

9 THE COURT: For example, you listed his kind of early
10 acceptance of responsibility. Why isn't that fully taken into
11 consideration in your guideline calculations where he's getting
12 three points for acceptance of responsibility? He gets the
13 third point because he did it early, saved the government time
14 and money and energy. And so what's so extraordinary about his
15 acceptance that that's not already reflected in the guideline
16 calculation and needs to be reflected in the 3553(a) factors?

17 MR. GEVEROLA: Certainly the three-level reduction
18 reflects his acceptance of responsibility, Judge. I mentioned
19 it in the 3553(a) factors because I believe his prompt
20 acceptance and very early communication that, you know, he was,
21 in fact, guilty, intended to plead guilty advanced the
22 investigation not only with regard to this defendant but with
23 regard to other culpable individuals being investigated and, as
24 I mentioned earlier, although I know it may not be persuasive,
25 that it did save significant public resources given that he

1 promptly notified the government of his intent.

2 THE COURT: Well, let me ask you this. If you were
3 truly concerned about unwarranted sentencing disparity, why
4 would you try and bind me to an 11(c)(1)(C) agreement before all
5 of the other defendants in either this case or related cases --
6 I don't know how you're charging them, if you're charging them
7 in the same case or not. Wouldn't you want me to see the
8 offense conduct statements for all of the defendants and see the
9 presentence reports for all of the defendants so that I could
10 make an independent decision about whether I agree with your
11 assessment of unwarranted sentencing disparity, because in my
12 view I would be more concerned about not having disparity in
13 these groups of -- in this case or groups of cases that all --
14 you know, the three counts that this defendant has pled guilty
15 to?

16 I'm very concerned about in multi-defendant cases like
17 this you have to know all the information about all the
18 defendants in order to try and make sure that the most culpable
19 defendants receive the most appropriate sentence and that the
20 least culpable defendants receive the most appropriate sentence
21 and try and figure out the various degrees of culpability which
22 is often a very daunting task because there are different
23 factors. You know, some defendants, part of what they did makes
24 them more culpable, but part of what they did makes them less
25 culpable. The 3553(a) factors can vary so widely when you have

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1 two, three, four, or five defendants.

2 So I guess you're asking me to totally defer to your
3 judgment on relative culpability and disparity because you're
4 not even -- you're trying to bind me to this plea agreement
5 before some of the other people I think have even pled guilty
6 let alone had an offense conduct statement prepared or PSR
7 prepared. And I want you to try and see it from my perspective
8 because I'm the one that actually imposes the sentence.

9 How many defendants have you ever visited that you
10 prosecuted in federal prison?

11 MR. GEVEROLA: I visited defendants but in my prior
12 career as a criminal defense lawyer.

13 THE COURT: Okay. Well, last year I visited 226
14 defendants in 10 federal prisons that I personally sentenced.
15 So I take my sentencing obligation incredibly seriously. And
16 it's very important to me because when I was sworn in on August
17 26, 1994, I didn't see you raising your right hand. You know
18 what I mean? I'm the one that took the oath. No disrespect.
19 I'm the one that took the oath. It's my obligation to make sure
20 in my mind that there's no unwarranted sentencing disparity,
21 3553 -- what is that? -- (6) or (7) factor. I take that very
22 seriously. And in order for me to perform that judicial
23 function, I need to have all the information on all the
24 defendants. Would you agree with that?

25 MR. GEVEROLA: We certainly will present information

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1 on all the defendants, Judge, and we also seek to avoid
2 unwarranted disparities between defendants and plan and hope
3 that what we present to you in this and subsequent cases would
4 be consistent with that.

5 THE COURT: I understand that. But essentially -- and
6 you're not going to like my choice of language, but essentially
7 you're asking me to abdicate my independent judicial decision
8 making and judgment and defer 100 percent to your judgment about
9 what would be unwarranted sentencing disparity in order for me
10 to accept an 11(c)(1)(C) agreement before I've even seen the
11 PSRs and the offense conduct statement for the other defendants.
12 Isn't that what you're asking me to do?

13 MR. GEVEROLA: I certainly understand that it
14 restricts Your Honor's discretion to a large degree but . . .

15 THE COURT: Aren't you asking me to totally abdicate
16 my independent judgment and accept your judgment in lieu of
17 mine? Isn't that what an 11(c)(1)(C) agreement is?

18 MR. GEVEROLA: Well, unless Your Honor were to agree
19 after reviewing the PSR that we did, in fact, look at the proper
20 factors given the facts in the PSR and the offense conduct
21 statement that, you know, our views are consistent with Your
22 Honor's.

23 THE COURT: Right. And they could be. I'm absolutely
24 open to the possibility that they could be totally congruent. I
25 doubt it, but I'm open to the possibility that it could be.

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1 And I'm also open to the possibility that despite your
2 lack of experience that you and your office are specialists and
3 have far greater knowledge about price-fixing cases around the
4 country than I would have. And I want that input because that's
5 input that I don't have the ability probably to know about. So
6 that's very important to me.

7 So I'm not trying to minimize your expertise. But I'm
8 just having a hard time figuring out why I would want to
9 abdicate my judicial responsibility which is how I view an
10 11(c)(1)(C) agreement.

11 Now, a lot of times I agree with what the sentence is
12 going to be, so, you know, I'm not giving up anything because
13 I'm just going along with it. And I also have a policy that I
14 try and accept 11(c)(1)(C) agreements even if it's not the
15 sentence that I would ultimately give to try and encourage
16 lawyers to negotiate plea agreements. So I've accepted many
17 11(c)(1)(C) agreements that differed fairly substantially from
18 the actual sentence that I would impose. But almost always
19 they're in drug cases where a defendant is maybe looking at a
20 mandatory life sentence because of the application of a Title 18
21 section 851 enhancement. Do you even know what that is? Do you
22 know what an 851 enhancement is?

23 MR. GEVEROLA: I don't handle drug cases, Judge, so
24 I'm not familiar with that.

25 THE COURT: Okay. That's a prior drug offense that

1 doubles their mandatory minimum. So if you have two priors, you
2 can go all the way up to a mandatory life sentence, and I see a
3 significant number of those. And sometimes when somebody's
4 looking at mandatory life, I have no discretion to give anything
5 other than mandatory life, the parties enter into an 11(c)(1)(C)
6 agreement. Sometimes it's 360 months, sometimes 240 months.

7 I had one two weeks ago that was 84 months, and I went
8 along with it because I looked at the 3553(a) factors, and, you
9 know, I wouldn't have gone that low, but it wasn't totally out
10 of reason, and the defendant was getting a huge break, and I
11 think the guidelines are too harsh, and I'm opposed to mandatory
12 minimums, so there are all kinds of reasons why I would want to
13 accept an 11(c)(1)(C) agreement in that context.

14 I don't know of a single reason why I'd want to accept
15 an 11(c)(1)(C) agreement in a white-collar price-fixing case. I
16 just can't think of a single reason why I'd want to do it.

17 MR. GEVEROLA: I understand, Judge, but for what it's
18 worth, there were substantial negotiations between the parties
19 here and Mr. Goodwin who's counsel for Mr. VandeBrake. There
20 were several months worth of back and forth to reach the plea
21 agreement that we presented to you.

22 THE COURT: Well, let me ask you this because at least
23 tentatively I don't even agree with your guideline calculations.
24 So why would you agree to a 3B1.1(b) role enhancement rather
25 than a 3B1.1(a) role enhancement?

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1 MR. GEVEROLA: You mean manager or supervisor before
2 leader or organizer, Judge?

3 THE COURT: Yes. You don't think the offense conduct
4 statement supports the four-level enhancement?

5 MR. GEVEROLA: I certainly think it could be argued
6 either as a three-level or as a four-level. The reason we
7 agreed to the three-level is because the defendant, you know,
8 although he was involved in three was essentially in agreement
9 at arm's length with other high-level corporate executives
10 including presidents of their own companies. So we believed it
11 more appropriate that he was a manager or supervisor rather than
12 the leader only because --

13 THE COURT: He was the instigator based on your
14 offense conduct statement that I read. None of this would have
15 happened without him.

16 MR. GEVEROLA: That statement I certainly would agree
17 with, Judge, is that --

18 THE COURT: Without his conduct, you wouldn't be here
19 today. You'd be in Cleveland or Akron or somewhere else. I'd
20 be here, but you wouldn't be here. Mr. Goodwin wouldn't be
21 here.

22 MR. GEVEROLA: The relevant thing to point out I
23 think, Judge, is that these were two company conspiracies that
24 essentially -- while he was involved in three, each conspiracy
25 itself is kind of --

1 THE COURT: A separate.

2 MR. GEVEROLA: -- a separate, one on one, almost --

3 THE COURT: But he instigated each one.

4 MR. GEVEROLA: -- equal-level conspiracies.

5 THE COURT: But he instigated each one according to
6 your offense conduct statement.

7 So here's the thing. It may even be fairly debatable
8 whether it's three or four points. You probably have some
9 really good arguments. And if we wind up having a contested
10 sentencing, I may find that it's three or two or four. But
11 based on your offense conduct statement which I think would
12 support a four-level increase, I'm not sure you properly scored
13 the guidelines. I'm open to the possibility that they're
14 properly scored, and usually the difference between a -- in the
15 role whether it's an aggravating role or mitigating role, those
16 are very tough judgment calls. You can't say somebody's wrong
17 because they give three levels off rather than four levels off.
18 It's just a -- you know, it's cutting a hair so fine that
19 they're seldom to me right or wrong. There are good arguments
20 on both sides. But I think I could make a pretty powerful case
21 that this is a four-level increase. But I realize that's all
22 part of your negotiations.

23 MR. GEVEROLA: That's correct, Judge.

24 THE COURT: Mr. Goodwin?

25 MR. GOODWIN: Thank you, Judge. First of all, I want

1 to say I have nothing but respect for this Court, and I profess
2 I don't have the --

3 THE COURT: Yeah, whenever you start with that, you
4 can cut it out because you're just starting to -- why don't you
5 just tell me why you disagree.

6 MR. GOODWIN: I disagree, Judge, because number one,
7 my job is to do the best job I can for my client, and I felt
8 that from the onset if I could work out an understanding with
9 the government that something that the two of us could agree
10 upon, it would be in the best interests of my client.

11 And one of the problems we had in this case is my
12 client has -- and this is all -- this all goes to the 3553(a)
13 situations. But my client has three children, and one of the
14 problems was that we wanted to try to let the kids know what
15 their father would be looking at because they knew about what
16 was going on because he told them about it. And we wanted the
17 kids to know that there might be light at the end of the tunnel,
18 and that's one reason why we entered into this agreement.

19 I also told my client at the time we entered into this
20 agreement that this is totally discretionary with the Court and
21 that the Court could look at this and say, "I'm not going to
22 agree to it." And so he understands that this is totally within
23 your discretion. But I felt through the negotiations that we
24 did, it was fair to both sides because we gave up some things,
25 the government gave up some things, and we could put some

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1 finality on it and he could get his sentencing done, do his time
2 and get back to his kids and his wife. And that's probably the
3 biggest reason why I did this.

4 I also felt --

5 THE COURT: Well, that's really -- you know, all due
6 respect, that's not a major concern of mine. My role is to not
7 get him back to his kids as fast as possible.

8 MR. GOODWIN: I understand that.

9 THE COURT: That is a factor that I can consider under
10 the history and characteristics of the defendant. But I'll tell
11 you right now it does not tug at my heartstrings. If he wanted
12 to be with his kids, he wouldn't have engaged in three
13 conspiracies to fix prices.

14 MR. GOODWIN: That's true.

15 THE COURT: So, you know, while I certainly can give
16 that some weight -- and I realize that that was your goal. But
17 your goal is very different than my goal. My goal is to give
18 just punishment. Your goal is to minimize the punishment as
19 much as you can. So we have totally opposite goals. I respect
20 your goal. That's what good defense lawyers do and you're as --
21 you're an excellent defense lawyer, but that's not a goal of
22 mine. So I'm not going to accept a plea agreement because
23 you've been able to negotiate the best deal you can for your
24 client. That's not my goal. My goal is to give a just
25 sentence.

1 MR. GOODWIN: And I realize that's your goal. But I
2 guess in doing this, I don't know what more I can say than what
3 Mr. Geverola says. This was an ongoing eight-month
4 negotiations. I feel that by my client pleading early it made
5 it much easier on the government on the other cases that have
6 entered into pleas because if the Court would look, the other
7 cases have come after my client's case because he's the one that
8 took the initiative to enter a plea of guilty in this case. And
9 I think that's -- there's some weight. The government has to
10 say there's some weight in that.

11 THE COURT: Absolutely. I totally agree with you,
12 Mr. Goodwin. That's something that I would give substantial
13 weight to.

14 MR. GOODWIN: And I have to say to this Court also I
15 felt that by -- I explained to my client that I don't know what
16 the judge's sentence would be in this case, and maybe the
17 judge's sentence would be substantially more than what we were
18 able to work out in this case. But I also told him there could
19 be an issue that the sentence could be less. Now, maybe it
20 wouldn't be, but there is an issue it could be less.

21 THE COURT: Absolutely.

22 MR. GOODWIN: And I said to him do you want to -- by
23 entering into this negotiation, assuming the judge is willing to
24 accept it, you are also understanding that you're giving up any
25 opportunity to ask this Court for a lesser sentence than what

1 you're getting, and my client said, "I'm willing to do that.
2 I'm okay with that."

3 So that is how this all came about. And we knew that
4 there would be this day where we'd be coming before you and that
5 you could very easily reject this plea. But that's what this
6 was all about. And based upon what I see -- what I'm reading
7 and seeing that's happening, I feel that my client is willing to
8 take the sentence he's got and it's up to the Court to see if
9 he'll agree to it. But I do feel that under the circumstances
10 what we did was -- I believe it was in the best interests of my
11 client, and that's why I did it.

12 THE COURT: No, I don't disagree with that.

13 MR. GOODWIN: So I --

14 THE COURT: If the test were should I accept the
15 11(c)(1)(C) agreement because it's in your client's best
16 interest --

17 MR. GOODWIN: No.

18 THE COURT: -- I'd accept it in a heartbeat, but
19 that's not the test.

20 MR. GOODWIN: I know that.

21 THE COURT: Yeah.

22 MR. GOODWIN: I know that.

23 THE COURT: And I'm not criticizing you in any way.
24 You negotiated an excellent agreement. That's your job, and you
25 did it extremely well as you always do when you appear in this

1 court. But that's not the test either.

2 And here's basically the bottom line. I see it as a
3 separation of powers issue, and I'm unwilling in this case to
4 cede my discretion to the executive branch of government. I'm
5 unwilling to do it. And I'm even more unwilling to do it than I
6 was when I walked in here because I haven't heard anything -- I
7 mean, you had an uphill struggle. And, Mr. Geverola, you're an
8 excellent lawyer, so I'm not criticizing you at all. I'm just
9 saying I haven't heard anything, nada, zilch, nothing, that
10 would cause me to want to accept the 11(c)(1)(C) agreement.

11 And, you know, I've rejected 11(c)(1)(C) agreements
12 and sentenced lower, and I've rejected them and sentenced
13 higher. I think my record is that 90 percent of the time I go
14 lower than what the government recommends in sentencings. But
15 10 percent of the time I go higher, sometimes substantially
16 higher, and many, many times substantially lower.

17 But, you know, we got discretion when the Supreme
18 Court decided United States versus Booker and United States
19 versus Gall, and I was more willing prior to those cases to
20 accept 11(c)(1)(C) agreements. But as a matter of kind of
21 judicial philosophy, what the Supreme Court gave us I'm not
22 willing to let the executive branch take away. It's pretty much
23 that simple. I'm just not willing to give up my discretion.

24 Parties don't like my sentence, appeal it to the Court
25 of Appeals. That's fine. I never have a problem. I don't even

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1 check. I've never once looked to see if somebody's appealed one
2 of my rulings. And every Monday morning between 9 and 10 a.m. I
3 get an e-mail from the circuit listing all my cases on appeal
4 and the status. First time I got it, I opened it up to see what
5 it was. Ever since then for almost a decade now I hit the
6 delete key. I never even look because I don't care. It's not
7 in my control. You don't like the sentence, appeal it.

8 So here's the deal. You know, in my order I indicated
9 we'd have a hearing so that I could comply with 11(c)(5).
10 Anybody have any problem if we use the hearing today to do that?
11 It would seem silly to have another hearing in my view, but you
12 want to have another hearing for me to formally reject it, we
13 can. But there are certain requirements in 11(c)(5) that I want
14 to fulfill. You have any problem with proceeding today with
15 that?

16 MR. GEVEROLA: We have no objection with that, Your
17 Honor.

18 MR. GOODWIN: No objection, Your Honor.

19 THE COURT: Okay.

20 MR. GEVEROLA: Before we proceed, Your Honor --

21 THE COURT: Yes.

22 MR. GEVEROLA: -- may I confer with Mr. Goodwin for a
23 moment?

24 THE COURT: Sure. You know, there's one other --
25 there's actually a couple ways we can do this. And then I'll

1 give you all the time you need to confer. I've actually got
2 another 11(1)(c) agreement where I did it that I just entered an
3 order I think yesterday or maybe Monday because I'm kind of
4 experimenting with -- and let me talk to you about that -- with
5 different ways to do it.

6 There are some advantages, it seems to me, when you
7 have an 11(c)(1)(C) agreement, although I've never actually done
8 it this way or maybe I have but not very often, about actually
9 going through the entire sentencing including the allocution,
10 the recommendations from the lawyers, I mean go right up to
11 where you're going to pronounce sentence and then decide whether
12 or not I'm going to accept the plea because I have a lot more
13 information at that point -- I really have all the information I
14 would ever have -- and then at that point say, look, I'm going
15 to accept the plea and I'll sentence you to the 19 months and
16 hundred thousand dollar fine or, you know, I've heard all the
17 evidence; I'm just unwilling to accept the plea.

18 The advantage is I have a much more informed judgment
19 about whether to accept the plea or not because I've heard
20 everything I could possibly hear. The disadvantage is it's a
21 huge waste of time if the defendant then exercises their right
22 to withdraw the plea and we have a trial. I don't mind doing it
23 that way. I don't know which way is better really or just kind
24 of rejecting it early on.

25 So one option is that we could go through the

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1 sentencing and I'd make up my mind after I've heard all of the
2 evidence. And I would normally suggest that. But I'll just be
3 candid with you. It's fairly unlikely that I'm going to
4 accept -- that I'm going to give this sentence. It's -- I have
5 had the advantage of reading the offense conduct statement.
6 I've had the advantage of a lengthy discussion with probation
7 about the parties' guideline calculations, a lengthy discussion
8 with probation about my own view of this particular guideline,
9 particularly as it relates analytically to the fraud guidelines.
10 And given all that, it's -- you know, it's fairly unlikely I
11 would adopt the parties' position. It's possible but . . .

12 MR. GEVEROLA: We appreciate that.

13 THE COURT: But I'd say it's -- you know, it's
14 probably not a good idea to give odds, but there's probably less
15 than a 10 percent chance that I would accept the plea, although,
16 on the other hand, you know, I really do work hard to accept
17 agreements that I wouldn't personally follow. So I have to have
18 a very, very strong belief that the sentence should be
19 substantially different than what the parties propose.
20 Otherwise, you know, I'm not going to say, oh, yeah, I want to
21 give a \$125,000 fine, so I'm going to reject the plea agreement
22 or a \$200,000 fine. You know, 100,000 is certainly within a
23 range. So it would have to be something that I really had a
24 substantial disagreement with in terms of my own sentencing
25 philosophy.

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1 And, Mr. Geverola, you don't understand that, you
2 know, I worked exceedingly hard for a decade fighting for
3 judicial discretion, and now that I have it, you know, I'd
4 probably give up anything else except my firstborn, but I'm
5 just -- I'm just very reluctant to abdicate my res -- I see it
6 as my responsibility and my responsibility alone with the input
7 from the parties which I take very seriously. So that's kind of
8 where I'm at.

9 So you want to take some time to confer?

10 MR. GEVEROLA: Yes, Judge.

11 THE COURT: Would you like a recess? Do you want me
12 to leave the bench and then come back in 10 or 15 minutes, or
13 you want to just have a quick conference? Or how would you like
14 to proceed?

15 MR. GEVEROLA: I think a recess would be preferable,
16 but before we even break --

17 THE COURT: Sure.

18 MR. GEVEROLA: -- Your Honor mentioned there were kind
19 of two ways to move forward. One was to go all the way through
20 sentencing. Could Your Honor elaborate a little bit as to the
21 other option?

22 THE COURT: Right. I would take about 20 seconds
23 today to go through the requirements of 11(c)(5) and formally
24 reject the plea.

25 MR. GEVEROLA: Thanks, Your Honor.

1 THE COURT: Thank you. Why don't you just let my law
2 clerk Nick know when you're ready, and he'll come get me.

3 MR. GEVEROLA: Yes, Your Honor.

4 THE COURT: Okay? Thank you.

5 (Recess at 8:48 a.m.)

6 THE COURT: Thank you. Please be seated.

7 What'd you all decide?

8 MR. GOODWIN: May it please the Court.

9 THE COURT: Yes.

10 MR. GOODWIN: Your Honor, what we've decided to do is
11 that we would like to stay with the same plea agreement, but we
12 would like to have that plea agreement be pursuant to
13 11(c)(1)(B), and if the Court would approve that, we would file
14 that plea agreement with the Court today.

15 THE COURT: So does that mean that these would then be
16 recommendations?

17 MR. GEVEROLA: That's correct.

18 THE COURT: Nonbinding recommendations of the parties?

19 MR. GEVEROLA: That's correct, Judge. And pursuant to
20 that agreement, Judge, the defendant would then not withdraw his
21 guilty plea at this proceeding.

22 THE COURT: Well, let me ask you this before we go any
23 farther. Must have been another plea agreement I was looking
24 at. There's no appeal waiver in this plea agreement, is there?
25 Or is there?

1 MR. GEVEROLA: There is, Judge, as with the previous
2 plea agreement. There is an appeal waiver with this one.

3 THE COURT: Where is that in the plea agreement?

4 MR. GEVEROLA: Paragraph 2.

5 THE COURT: Oh, it's right up front.

6 MR. GEVEROLA: Yeah, first sentence.

7 THE COURT: Oh, there it is. Usually in our district
8 they're at the very end, and that's where I was looking so . . .

9 Let me ask you this. Well, I can't get involved in
10 plea negotiations, so I want to be very careful about even
11 asking the parties to do anything. But, you know, I don't have
12 a problem with an appeal waiver in an 11(c)(1)(C) agreement, but
13 I think it's -- and I'm not saying it's intended to be heavy
14 handed, but my own view is -- for whatever it's worth, is that
15 all parties ought to have a right to appeal every single
16 judgment I make. And I feel much more comfortable when the
17 defendant has a right to appeal a sentence.

18 And I'm just wondering if -- because it makes total
19 sense in an 11(c)(1)(C) agreement, I'm wondering if the parties
20 want an opportunity to renegotiate that issue because it's no
21 longer an 11(c)(1)(C) agreement.

22 And I'm not suggesting that you should have an appeal
23 waiver or not have an appeal waiver. But I'm suggesting that
24 maybe you haven't thought about that in light of the change of
25 circumstances today, and I just want to make sure I give the

1 parties an opportunity to discuss and negotiate that before I
2 were to accept the plea agreement. So would you like another
3 recess?

4 MR. GOODWIN: Your Honor, I don't think -- I think we
5 can say this on the record. As I read this 11(B), it's my
6 understanding that as long as the Court's sentence is consistent
7 with what was recommended he would not have a right to appeal.
8 Maybe -- I understand that the Court's -- that the sentence can
9 be different. So it would be my thoughts -- I think we
10 should -- I think Mr. Geverola and I should discuss that, but I
11 hate to keep taking up the Court's time.

12 THE COURT: No, this is too important. Don't worry
13 about that.

14 MR. GEVEROLA: Judge, if we may just take a moment
15 without taking a recess.

16 THE COURT: I haven't read this that carefully. Does
17 it actually say, Mr. Goodwin, that there's only a plea waiver if
18 I sentence pursuant to the parties' recommendation, that it's
19 only waived if I sentence pursuant to your agreement?

20 MR. GOODWIN: It's only waived if you -- that's how I
21 read it, so if I'm not reading that -- if that's not how I'm to
22 read that, then I'd like to renegotiate that. I'd like to at
23 least talk to the U.S. -- the Justice Department about that,
24 Your Honor.

25 MR. GEVEROLA: Judge, I think the appellate waiver may

1 be broader than that. I don't think it's qualified in terms of
2 direct appeal. But I think Mr. Goodwin is correct in terms of
3 collateral attacks, that under the plea agreement he waives the
4 right to collateral attack if the sentence is consistent with
5 the recommended sentence.

6 THE COURT: Well, let me ask you this. Would you have
7 any objection to taking another recess and discussing this so at
8 least the parties are clear?

9 MR. GEVEROLA: Not at all, Judge.

10 THE COURT: Okay. Why don't you just let me know when
11 you're ready.

12 MR. GEVEROLA: Thank you.

13 THE COURT: Okay? Thank you.

14 (Recess at 9:09 a.m.)

15 THE COURT: Thank you, Nick. Please be seated.

16 Okay. Where are we?

17 MR. GEVEROLA: Thanks for your patience, Judge. We
18 have before us and before you a new plea agreement which is
19 pursuant to Rule 11(c)(1)(B), and the only differences between
20 this plea agreement and the prior one are, of course, of the
21 changing Rule 11(c)(1)(C) to Rule 11(c)(1)(B).

22 In addition, a change was made to paragraph 2 in the
23 first sentence where the waiver of rights only ranges from 1(b)
24 to 1(g) so that the right to appeal the imposition of sentence
25 is not waived.

1 The only additional difference between this and the
2 prior plea agreement is in paragraph 10 which makes clear that
3 the Court has the discretion to accept or reject the recommended
4 sentence and the defendant has no right to withdraw his plea of
5 guilty after the Court decides the sentence.

6 THE COURT: And I notice you do not have new
7 signatures or new dates on it. So don't you think it'd be a
8 good idea to put today's date on it and have everybody just
9 re-sign it, or do you think it's sufficient that we just make a
10 record that those are the changes in the plea agreement and as
11 long as everybody orally agrees to those changes on the record
12 there's no need to have today's date and the additional
13 signatures? I don't take a position one way or the other.

14 MR. GEVEROLA: Well, I certainly feel that making a
15 record on that is sufficient, Judge. I don't believe there's
16 any harm in us initialing the change to paragraph 2 with today's
17 date, and I can do that to the version that we file with the
18 Court after this hearing.

19 THE COURT: Okay. Mr. Goodwin, have you had an
20 opportunity to discuss with Mr. VandeBrake the changes in the
21 plea agreement and the significance of those changes?

22 MR. GOODWIN: I have, Judge.

23 THE COURT: And do you agree with the changes as
24 outlined by the prosecutor?

25 MR. GOODWIN: We do agree with the changes that are

1 outlined.

2 THE COURT: Okay. And I need then -- let's see. This
3 is an 11(c)(1)(B) agreement. So under (3)(b), yeah, the only
4 thing I need to do, Mr. VandeBrake, is to advise you that if I
5 do not follow the recommendations in this plea agreement at the
6 time of your sentencing, that does not give you the right to
7 withdraw your guilty plea. Do you understand that?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: Okay. Is there anything else we need to
10 take up?

11 MR. GEVEROLA: I don't believe so, Judge, unless you
12 think we need to formally go through the 11 -- I don't recall
13 the exact subpart but put on the record the defendant is not
14 withdrawing his plea of guilty pursuant to the new plea
15 agreement and whether you want to formally reject on the record
16 the prior one.

17 THE COURT: Oh, yeah. That's probably -- we probably
18 should make a record on that. Thank you. That's an excellent
19 point.

20 I just want to make sure that everybody understands
21 that pursuant to Federal Rule of Criminal Procedure 11 -- I'm
22 going to get these subsections wrong -- 11(c)(5) I have rejected
23 the 11(c)(1)(C) agreement. I've informed the parties that I've
24 rejected their plea agreement.

25 And, Mr. VandeBrake, because I rejected the

1 11(c)(1)(C) agreement, you would have the right to totally
2 withdraw your plea, and you would return to a plea of not
3 guilty, and then we would set a trial date. And then one of two
4 things could happen. You could either negotiate a new plea
5 agreement, or we'd have a trial to determine whether the
6 government could prove you guilty beyond a reasonable doubt. Do
7 you understand that?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: And you've apparently decided that you
10 want to enter into this new plea agreement under 11(c)(1)(B)
11 that essentially takes the old plea agreement which, had I
12 agreed to it, would have been binding, and now it's simply
13 recommendations by both sides to me, but I'm not bound by those
14 recommendations. Do you understand that?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: And so that's how you've decided you
17 wanted to proceed, by going ahead and pleading guilty but
18 turning the sentencing recommendations -- instead of being
19 binding, they're now just recommendations. Do you understand
20 that?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: And do you understand once again -- I'm
23 repeating myself, but I just want to make sure -- that if I
24 don't follow those recommendations then you don't have any right
25 to withdraw your plea? Do you understand that?

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1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: I think you do have a right -- as I
3 quickly read the new plea agreement, you would have a right --
4 if I don't follow the sentencing recommendations, you'd have a
5 right to appeal the sentence I've imposed. Is that -- is my
6 understanding correct?

7 MR. GEVEROLA: That's correct, Judge. He -- we have
8 removed the general waiver of the appealing the sentence. I
9 just want to make sure we're clear on that point with regard to
10 the second sentence of paragraph 2 that the waiver of any right
11 to appeal continues to apply in the event the Court decides a
12 sentence consistent with the recommended sentence by the
13 parties. So in other words, the defendant only has the right to
14 appeal the sentence if it is not consistent with the recommended
15 sentence in the plea agreement.

16 THE COURT: So if I gave the defendant 19 months but
17 imposed a fine of \$100,000.01, would he have the right to appeal
18 or not appeal? Is that consistent with the recommended sentence
19 or inconsistent with it?

20 MR. GEVEROLA: It's certainly not exactly consistent
21 with it, Your Honor. Whether the change is material, I'm not so
22 sure, but I don't even know if materiality is something to be
23 considered with that.

24 THE COURT: Well, what I'll try and do is craft a
25 sentence that either completely adopts the parties'

1 recommendation or is so sufficiently different that we won't
2 face the issue of whether one cent would be material and whether
3 materiality as you point out would be a factor. How's that?

4 MR. GEVEROLA: Thanks, Your Honor.

5 THE COURT: Okay. Is there anything else we need to
6 do this morning?

7 MR. GOODWIN: No, Your Honor.

8 THE COURT: Okay. Could I ask you when you schedule
9 the sentencing with my secretary Jennifer, I do want to try and
10 do all the sentencings that are related in the same week so I'll
11 be able to see all of the presentence reports, you know, the
12 week before, have an op -- I always read each presentence report
13 at least twice, but I want to read them all, and I'll probably
14 make a flow chart looking at what the recommended sentences are
15 going to be and -- because, you know, I really do take seriously
16 my obligation to avoid unwarranted sentencing disparity.
17 Sometimes sentencing disparity is wanted. That's why I kind of
18 picked on you when you used the phrase unwanted because
19 sometimes you want sentencing disparity because it's not
20 unwarranted.

21 MR. GEVEROLA: Sure, Judge. One --

22 THE COURT: At least in my view so . . .

23 MR. GEVEROLA: One quick question, Judge.

24 THE COURT: Yes.

25 MR. GEVEROLA: In terms of attempting to schedule

1 these close together, how would you like us to treat parties
2 with cooperation agreements in which case sentencing's typically
3 deferred until closer to the end of the investigation versus
4 parties who do not have cooperation agreements in which case
5 there's really no reason to defer the sentencing?

6 THE COURT: Let me ask you this. If we use that
7 characterization, how long do you think people who are
8 cooperating -- how long will it be before they're ready to
9 sentence just in general terms? I don't want to get into --
10 invade the province of your investigation, but would you think
11 it'd be a substantial difference in timing for those folks
12 versus somebody like Steven VandeBrake?

13 MR. GEVEROLA: As Your Honor recognized, it's
14 difficult to predict, and here's the primary reason why. In the
15 event that parties do not go to trial, we likely will be able to
16 sentence significantly sooner. If there are parties who intend
17 to go to trial, that would certainly delay the proceedings by --
18 I'm not familiar with the Court's docket, but given other cases,
19 at least a year if not more. So it hinges on that decision, and
20 because I play no role in that decision, it's tough for me to
21 guess.

22 THE COURT: Well, after reading the offense conduct
23 statement, I doubt if anybody's going to trial would be my
24 guess, but you never know. It's the most precious right we
25 have, so God bless them if they do exercise their Sixth

1 Amendment right, but I kind of doubt it in this case.

2 Well, when do you think you'll be in a position to
3 know who's pleading, who's going to trial?

4 MR. GEVEROLA: My best estimate, Your Honor, is by
5 this fall we'll probably know whether parties will be going to
6 trial.

7 MR. GOODWIN: May it please the Court?

8 THE COURT: Yes.

9 MR. GOODWIN: I think truthfully that it would -- I
10 don't have a problem with the Court sentencing -- looking at all
11 the sentencing recommendations at the same time, and I
12 appreciate the Court's willingness to do that. I also realize
13 that we don't -- Mr. VandeBrake does not necessarily want to
14 wait a year to be sentenced.

15 THE COURT: Right, because it's hard to have this
16 hanging over his head.

17 MR. GOODWIN: So I guess if the Court -- if it would
18 be agreeable to the Court, couldn't the Justice Department give
19 you a status report like within maybe a month from now? Maybe
20 that -- then if that -- just so --

21 THE COURT: Mr. Goodwin, that's a good idea. Why
22 don't you just -- you can even just call my secretary and just
23 kind of update her on where we're at, so we won't -- we'll start
24 the presentence report -- I think they've already -- Shane Moore
25 is here. You've already started it. But, you know, ultimately

1 we may group them into cooperators and noncooperators and do the
2 sentencing. But if there's any possibility that we could do it
3 all in the same week, I would kind of prefer that. And it's
4 probably to your advantage or disadvantage depending upon
5 whether you like to try cases or not, but there will probably be
6 more trials if I go ahead and sentence him. So you might want
7 to wait.

8 MR. GEVEROLA: That's fine, Judge. I don't mind the
9 added experience.

10 THE COURT: Okay. Anything else?

11 MR. GEVEROLA: No, Judge. So just so I'm clear, in
12 about 30 days or so, we should update the Court with regard to
13 the status of other parties?

14 THE COURT: Yes, and you can just do that kind of
15 informally by calling my secretary Jennifer, and then she'll
16 fill me in. Of course, let Mr. Goodwin know.

17 MR. GEVEROLA: Yes, sir.

18 THE COURT: Okay?

19 MR. GEVEROLA: Thank you.

20 THE COURT: Great. Well, it's been an interesting
21 morning. Thank you so much for coming, and I look forward to
22 these cases. I kind of hope some of them go to trial. I think
23 it'd be interesting, but we will see.

24 Anything else, Mr. Goodwin?

25 MR. GOODWIN: No, Your Honor.

1 THE COURT: Okay. Thank you. We'll be in recess.

2 MR. GEVEROLA: Thank you, Judge.

3 (The foregoing hearing was

4 concluded at 9:48 a.m.)

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CERTIFICATE

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S/Shelly Semmler
Shelly Semmler, RMR, CRR

5-28-10
Date

**Contact Shelly Semmler at 712-233-3846 or shelly_semmler@iand.uscourts.gov
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