No. 99-127

# In the Supreme Court of the United States

LARRY D. BACH, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the *Ex Post Facto* Clause, U.S. Const. Article I, Section 9, Clause 3, bars the application of the provisions of the Mandatory Victims Restitution Act of 1996, 18 U.S.C. 3663A and 3664 (Supp. III 1997), to offenses committed before the effective date of the Act.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 172 F.3d 520. The order of the district court (Pet. App. 8a-23a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on April 16, 1999. The petition for a writ of certiorari was filed on July 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a guilty plea, petitioner was convicted in the United States District Court for the Central District of Illinois of one count of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to 30 months' imprisonment and ordered to pay restitution to his victims

in the amount of $674,325.84. The court of appeals affirmed. Pet. App. 1a-7a.

1. From July 1988 to December 1992, petitioner operated a Ponzi scheme in which he solicited investors to purchase oil and gas interests through his company, Bach Energy Corporation (BEC), in exchange for a guaranteed monthly payment for their investment. Contrary to petitioner's representations to investors, the various ventures were not producing the returns promised, but rather the investments made by new investors were used to pay the guaranteed returns for previous investors. Meanwhile, petitioner was drawing funds from BEC to pay his large salary and as loans. By the end of 1989, petitioner owed BEC nearly $1 million. Pet. App. 2a; Gov't C.A. Br. 5-8.

On November 3, 1997, petitioner entered into a plea agreement in which he pleaded guilty to one count of mail fraud, in violation of 18 U.S.C. 1341. In paragraph 10 of the plea agreement, petitioner stipulated that "restitution is appropriate in this case." App., *infra*, 5a. Petitioner further agreed "to make restitution * * * imposed by the Court in the time and manner to be determined by the United States Probation Office and the United States Attorney's Office for the Central District of Illinois." *Ibid.*

2. The district court adopted the recommendation of the Presentence Report (PSR) that petitioner make restitution and ordered petitioner to make restitution in the amount of $674,325.84. Pet. App. 8a-23a. The court rejected petitioner's contention that he lacked the ability to pay restitution "for two reasons." *Id.* at 18a. First, the court concluded, "contrary to [petitioner's] assertions, [he] has the ability to make restitution." *Ibid.* The court explained that petitioner "has the capacity, especially given his current and past entre-

preneurial enterprises, to make restitution. [Petitioner] has little debt and is currently engaged in an apparently lucrative business venture. Finally, [petitioner] has only one dependent, his wife, and her salary is greater than his." *Id.* at 19a. "Thus," the court found, "restitution is appropriate." *Ibid.*

"Second," the court ruled, petitioner's "ability to pay restitution is irrelevant" under the Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. 3663A and 3664 (Supp. III 1997). Pet. App. 19a. The MVRA provides that, when sentencing a defendant convicted of certain offenses, including fraud, 18 U.S.C. 3663A(c)(1)(A)(ii) (Supp. III 1997), "the court shall order, in addition to * * * any other penalty authorized by law, that the defendant make restitution to the victim of the offense." 18 U.S.C. 3663A(a)(1) (Supp. III 1997). The MVRA further provides that "the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant." 18 U.S.C. 3664(f)(1)(A) (Supp. III 1997). Congress directed that the MVRA "shall, to the extent constitutionally permissible, be effective for sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment of this Act [April 24, 1996]." 18 U.S.C. 2248 (Supp. III 1997) (statutory notes).

Petitioner had argued that "restitution is appropriate in accordance" with the Victim and Witness Protection Act of 1982 (VWPA), which the MVRA amended in 1996. See Pet. C.A. Supp. App. 34 (June 5, 1998 letter attaching Defendant's Additional Objections To PSR). Under the VWPA, an award of restitution was discretionary, 18 U.S.C. 3663(a) (1988), and "in determining whether to order restitution * * * and the amount of

such restitution," the court considered "the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate." 18 U.S.C. 3664(a) (1988).

In rejecting petitioner's contentions, the district court found that the MVRA "is applicable in the case at bar because [petitioner] pleaded guilty after the Act became effective." Pet. App. 19a. As support for that conclusion, the court cited the Seventh Circuit's decision in *United States* v. *Newman*, 144 F.3d 531, 537-542 (1998), which held that an award of restitution under the MVRA is not criminal punishment, and therefore the *Ex Post Facto* Clause does not bar the Act's application to an offense committed before its enactment.

3. The court of appeals affirmed. Pet. App. 1a-7a. The court declined to overrule its decision in *Newman*. *Id.* at 5a. The court explained that, under the MVRA, "definite persons are to be compensated for definite losses just as if the persons were successful tort plaintiffs," and "[f]unctionally, the [MVRA] is a tort statute, though one that casts back to a much earlier era of Anglo-American law, when criminal and tort proceedings were not clearly distinguished." *Id.* at 5a-6a. The court further reasoned that "[i]t is a detail from a defrauder's standpoint whether he is ordered to make good his victims' losses in a tort suit or in the sentencing phase of a criminal prosecution." *Id.* at 6a. The court recognized that "[i]t would be different if the order of restitution required the defendant to pay the victims' losses not to the victims but to the government for its own use and benefit; then it would be a fine,

which is, of course, traditionally a criminal remedy." *Ibid.* (citations omitted).[1]

**ARGUMENT**

1. Petitioner argues (Pet. 17-22) that, because the MVRA is a penal statute, the *Ex Post Facto* Clause bars the retroactive imposition of a mandatory restitution order without regard to a defendant's ability to pay.[2] As petitioner explains (Pet. 9-16), the courts of appeals are divided on that question. The majority view is that restitution under the MVRA is criminal punishment subject to the *Ex Post Facto* Clause. See *United States* v. *Edwards*, 162 F.3d 87, 89-92 (3d Cir. 1998); *United States* v. *Siegel*, 153 F.3d 1256, 1258-1260 (11th Cir. 1998); *United States* v. *Bapack*, 129 F.3d 1320, 1327 n.13 (D.C. Cir. 1997); *United States* v. *Williams*, 128 F.3d 1239, 1241 (8th Cir. 1997); *United States* v. *Baggett*, 125 F.3d 1319, 1322 (9th Cir. 1997); *United States* v. *Thompson*, 113 F.3d 13, 15 n.1 (2d Cir.

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[1] The court of appeals also held that petitioner's mailings were in furtherance of the scheme to defraud, Pet. App. 2a-5a, and that the district court did not err in refusing to allow petitioner to present certain exhibits at the sentencing hearing, *id.* at 6a-7a. Petitioner does not challenge those rulings in this Court.

[2] Petitioner also argues (Pet. 22-24) that a mandatory imposition of restitution for criminal offenses committed before April 24, 1996 conflicts with USSG § 5E1.1(g). That provision states that the mandatory restitution provision of USSG § 5E1.1(a)(1) applies only to those offenses committed on or after November 1, 1997. We note, however, that Application Note 1 to USSG § 5E1.1 states that, "[t]o the extent [18 U.S.C. 3663A] conflicts with the provisions of this guideline, the applicable statutory provision shall control," and Congress intended Section 3663A to be effective, to the extent constitutionally permissible, in all sentencing proceedings in which the defendant is convicted after April 24, 1996. 18 U.S.C. 2248 (Supp. III 1997) (statutory notes).

1997). Along with the Seventh Circuit, the Tenth Circuit has concluded that restitution is not criminal punishment subject to the constraints of the *Ex Post Facto* Clause. *United States* v. *Nichols*, 169 F.3d 1255, 1279-1280 (10th Cir.), petition for cert. pending on other issues, No. 99-5063 (filed June 30, 1999).

This case, however, does not squarely present the question whether the MVRA, consistent with the *Ex Post Facto* Clause, may be applied to criminal offenses occurring before the Act's effective date, because petitioner was not disadvantaged by the application of the MVRA. The district court explicitly found that petitioner "has the ability to make restitution" in the amount awarded by the court. Pet. App. 18a.

Indeed, consistent with the VWPA, 18 U.S.C. 3664(a) (1988), the district court considered "the amount of loss sustained by the victims," "the financial resources of the defendant," "the financial needs of the defendant and his or her dependents," and "the financial earning ability of the defendant and his or her dependents." Pet. App. 18a (quoting *United States* v. *Boyle*, 10 F.3d 485, 490 (7th Cir. 1993)). The district court found that those "factors weigh in favoring of ordering restitution." *Id.* at 19a. As the district court explained:

> The victims lost large amounts of money as a result of [petitioner's] scheme, some of which had been saved for retirement funds. [Petitioner] has the capacity, especially given his current and past entrepreneurial enterprises, to make restitution. [Petitioner] has little debt and is currently engaged in an apparently lucrative business venture. Finally, [petitioner] has only one dependent, his wife, and her salary is greater than his. Thus, an order of restitution is appropriate.

*Ibid.* Petitioner thus received the benefit of the more favorable standards for imposing restitution under the VWPA.

Citing this Court's decision in *Lindsey* v. *Washington*, 301 U.S. 397 (1937), petitioner suggests (Pet. 17 n.7) that "whether Petitioner would receive a different restitution sentence" under the VWPA is irrelevant to whether this Court should consider his *ex post facto* challenge. Petitioner's reliance on *Lindsey* is misplaced.

In *Lindsey*, 301 U.S. at 401-402, the Court held that a State could not retroactively apply a statute that provided for a court to impose a mandatory 15-year maximum term of imprisonment (subject to the later possibility of parole), when prior law permitted a judge to impose a maximum term of 15 years or less. The Court reasoned that the law disadvantaged the defendant because he was deprived of the opportunity to avoid a mandatory maximum sentence of 15 years. *Id.* at 400-401. The Court also stated that, although "petitioners might have been sentenced to fifteen years under the old statute, * * * the *ex post facto* clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed." *Id.* at 401.

Unlike the situation in *Lindsey*, it was not just theoretically possible that petitioner would be ordered to pay restitution. The standards of the prior law were in fact applied to petitioner; the district court expressly considered and rejected petitioner's contention that he lacked the financial ability to pay restitution. Pet. App. 18a. Petitioner therefore was not deprived of "the right to avoid a mandatory imposition of restitution and to have evidence of his ability to pay taken into con-

sideration by a sentencing court in deciding to impose an order of restitution as part of a sentence." Pet. 18.

Petitioner, moreover, waived the right to raise the issue in his plea agreement. In that agreement, petitioner stipulated that "restitution is appropriate in this case," and he "agreed to make restitution" in the amount determined by the court. App., *infra*, 5a. See also 18 U.S.C. 3663(a)(3) (1988 Supp. IV 1992) (authorizing court to "order restitution in any criminal case to the extent agreed to by the parties in a plea agreement."); *United States* v. *Andersen*, 928 F.2d 243, 245 (8th Cir. 1991) (district court could properly order restitution based on plea agreement despite defendant's financial inability to pay). This case accordingly is not a suitable vehicle for considering the general question whether the district court was required to consider petitioner's ability to pay the amount of restitution ordered by the district court.

2. Apart from the lack of significance to the restitution order in this case, the question whether the MVRA may be applied to criminal offenses committed before the date of its enactment is of diminishing significance in criminal cases generally. That question has relevance only to those offenders who committed their underlying offenses before April 24, 1996, when Section 3663A and the new Section 3664 became effective. The number of offenders potentially affected by the question presented here is therefore limited, and the number of cases in which the MVRA might make a difference to the outcome fewer still. Accordingly, this Court's review is not warranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
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RICHARD A. FRIEDMAN
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SEPTEMBER 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

CRIMINAL NO. 96-30025

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

LARRY D. BACH, DEFENDANT

[Filed: Nov. 3, 1997]

***PLEA AGREEMENT***

Pursuant to Rule 11, subsections (a)(2) and (e)(1)(A) and (B) of the Federal Rules of Criminal Procedure, the United States of America, by its attorneys, Frances C. Hulin, United States Attorney for the Central District of Illinois, and Assistant United States Attorney Esteban F. Sanchez, and the defendant, Larry D. Bach, personally and by his attorneys, Howard W. Feldman and Stanley N. Wasser, have agreed upon the following:

***Charges and Potential Statutory Maximum Penalties***

1. The defendant, Larry D. Bach, will voluntarily plead guilty to Count 1 of the indictment which charges the offense of Mail Fraud in violation of 18 U.S.C. §1341. Said plea of guilty is hereby explicitly conditioned on the defendant's reservation of his right to appeal from the judgement of this court, this court's ruling of May 6, 1997 denying defendant's pretrial Motion to Dismiss Indictment which alleged that the

indictment in this cause did not alleged an offense committed within the statute of limitations and in the alternative alleging prosecutorial delay in bringing the indictment. Rule 11 (a)(2). F.R.Cr. P.

2. The maximum potential statutory penalties for said offense pursuant to 18 U.S.C. §1341 are as follows:

- a maximum term of imprisonment of 5 years;
- a fine of up to $250,000.00 or both;
- a period of supervised release of 3 years; and
- a $50 mandatory special assessment.

***Element of Offense***

3. To sustain the charge of Mail Fraud, the government must prove the following propositions beyond a reasonable doubt:

- First, that the defendant knowingly devised the scheme to defraud as described in the indictment;
- Second, that for the purpose of carrying out the scheme or attempting to do so, the defendant used the United States mail or caused the United States mails to be used in the manner charged ~~in the manner charged~~ in Count 1 of the indictment; and
- Third, that the defendant did so knowingly and with the intent to defraud.

***Terms and Conditions***

4. ***Government's Calculation of Amount of Loss***: The government believes that the amount of loss associated with the scheme to defraud described in the indictment is between $800,000.00 and $1,500,000.00. At the time of sentencing the parties reserve the right to present evidence in support of or in opposition to the

amount of loss determined by the probation office, including evidence as to (a) whether an investor was a person defrauded by the scheme and (b) the actual dollar amount of an investor's loss, if any.

5. ***Parties Agreement Regarding Applicable Enhancements***: The parties agree that the following enhancements are applicable to the defendant in calculating his offense level pursuant to the United States Sentencing Guidelines:

a) *Minimal Planning*: Pursuant to USSG §2F1.1 the parties agree that the offense involved more than minimal planning and the offense base offense level should be increased by 2 levels.

b) *Victim Related Adjustment*: The parties agree that the victims related adjustments of USSG § 3A1.1 (Hate Crime Motivation or Vulnerable Victim) are not applicable as there is no evidence to support the proposition that the defendant committed the crime in question motivated by race or that the victims were vulnerable as defined by that section.

c) *Aggravating Role In The Offense*: Pursuant to USSG § 3B1.1(c) the parties agree that the defendant offense level should be increased by 2 levels because he was an organizer, leader, manager or supervisor in the criminal scheme described in the indictment.

d) *Abuse of Position Of Trust Or Use Of Special Skill*: The parties agree that the enhancements USSG §3B1.3 are not applicable because the defendant used skills (knowledge of the oil and gas industry) in the special commission of this offense. Since the parties have agreed to an aggravating role enhancement pur-

suant to USSG § 3B1.1(c), this enhancement is inapplicalbe as stated in USSG §3B1.3.

6. ***Sentencing Recommendations***: The government agrees that at the time of sentencing it will recommend a sentence between the middle to low end of the applicable sentencing guideline range. The defendant agrees and understands that at the time of sentencing both the defendant and the government (subject to the limitation stated above) will be free to recommend whatever sentence they deem appropriate. The court will not be bound by said recommendations.

The government further agrees not to oppose a request by the defendant to the Court for a recommendation by the Court to the Bureau of Prison that the defendant be imprisoned in a facility which is as close to his home is practicable. The defendant understand that neither the United States Attorney's Office nor the Court may direct the Bureau of Prisons to house the defendant in a particular correctional facility and that the ultimate decision in this regard rest exclusively with the Bureau of Prisons.

7. ***Dismissal of Remaining Count***: At the time of sentencing the government agrees to dismiss the remaining count of the indictment, Count 2.

8. ***Acceptance of Responsibility***: The government agrees, based upon the facts currently known by the government, that the defendant has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for his criminal conduct in accordance with §3E1.1 of the United States Sentencing Guidelines and, therefore, a two-level reduction in the offense level is appropriate. This agreement does not

preclude the government from changing its position if new evidence to the contrary is discovered or if the defendant later demonstrates a lack of acceptance of personal responsibility.

9. ***Early Notification of Intent to Plead Guilty***: The government also agrees that the defendant qualifies for an additional one-level reduction in his offense level pursuant to §3E1.1(b)(2) of the Sentencing Guidelines because he timely notified the United States Attorney's Office of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently.

10. ***Restitution***: The parties stipulate that restitution is appropriate in this case. The defendant acknowledges that the court will make an independent determination of the amount of restitution. The defendant agrees to make restitution and pay any fine imposed by the Court in the time and manner to be determined by the United States Probation Office and the United States Attorney's Office for the Central District of Illinois.

11. ***Mandatory Special Assessment***: The defendant agrees to pay the mandatory special assessment in the amount of $50.00 at the time of sentencing by delivering cash, money order or cashier's check made payable to the United States District Court or to the Clerk of the United States District Court or as otherwise directed by the Court, and he further understands that he will be required to do so as a condition of this plea agreement. Failure to comply with this requirement, however, will not constitute grounds for the defendant to withdraw his plea of guilty.

12. ***Cost of Imprisonment and Supervision***: The defendant understands that the court may also order the defendant to pay the cost of imprisonment and supervision.

***STIPULATION OF FACTS***
***(FACTUAL BASIS)***

13. The defendant will plead guilty because he is in fact guilty. In pleading guilty, the defendant stipulates and agrees to the following:

From approximately July, 1988, or before, and continuing through December, 1992, in the Central District of Illinois and elsewhere, the defendant knowingly devised and executed a scheme to defraud others and obtain their money by means of false and fraudulent pretenses, representations and promises. As part of such scheme the defendant approached individuals in the Central District of Illinois and elsewhere and encourage them to invest money in various oil and gas well programs the defendant had an interest. In order to induce such individuals to invest money in his oil and gas wells programs, the defendant made the following false and misleading pretenses, representations and promises to such individuals knowing that pretenses, representations and promises were false and fraudulent when made:

a. The defendant represented to investors that they would receive monthly payout for 22 months of $869 or $934 (depending on the program) for every $25,000.00 invested in his programs, and that upon the completion of the 22 month payout period, investors would share on a pro rata basis based on their amount of investment the oil or gas revenue generated by the projects. The defendant told investors that the revenues generated

from the oil reserves in these programs would be sufficient to guarantee long term monthly payout far in excess of their investment.

b. The defendant failed to in form the investors that he could not guarantee that sufficient oil and gas revenues would be generated to pay investors the guarantee monthly payment or any subsequent payment beyond the 22 guaranteed monthly payments.

c. Bach represented his company Bach Energy Corporation (BEC) and his programs to be in good financial condition when in fact BEC was in substantial arrears regarding the payment of guaranteed monthly payout to investors in other BEC oil and gas projects.

d. Bach represented to investors that the BEC programs were approved for a tax credit by the Internal Revenue Service and that investors would receive substantial tax benefits from their investment. In fact, the BEC programs were never approved by the Internal Revenue Service for a tax credit.

e. Bach falsely misrepresented to investors his education and experience in the oil and gas industry.

f. On or about June 25, 1991 in the Central District of Illinois, the defendant for purposes of executing and attempting to execute the scheme described above did knowingly cause to be delivered by the United States Postal Service, according to directions thereon, an envelope containing a check in the amount of $934 falsely represented as revenue from the oil from the BEC 88-6 program, addressed to Gary Hepburn, 927 Rickard Court, Springfield, Illinois 62704.

As a result of said scheme Bach diverted investor funds and production revenues to his own use or to pay the guaranteed monthly payments to other investors contrary to his representations to the investors.

***ACKNOWLEDGMENTS AND WAIVERS OF RIGHTS***

14. ***Acknowledgment of Understanding of Charge***: The defendant hereby acknowledges that he has read the charge against him. The charge has been fully explained to him by his attorneys and he fully understands the nature of the charge against him and the potential penalties described above.

15. ***Application of United States Sentencing Guidelines***: The defendant understands and agrees that the United States Sentencing Guidelines apply to the defendant's offense and that the applicable provision of the Guidelines in Section 2F1.1.

16. ***Acknowledgment of Understanding of Guidelines Application***: The defendant further acknowledges that he has reviewed the applicable Sentencing Guidelines with his attorneys, including but not limited to Section 1B1.3 (Relevant Conduct), 2F1.1 (Offenses Involving Fraud and Deceit) and 4A1.1 (Criminal History Calculation). The defendant acknowledges that the application of the United States Sentencing Guidelines have been fully explained to him by his attorneys and he understands said.

17. ***Presentence Investigation and Report***: The defendant acknowledges and understands that prior to sentencing the court will order the United States Probation Office to conduct a presentence investigation and prepare a report, pursuant to Rule 32 of the Federal

Rules of Criminal Procedure. The defendant further acknowledges and understands that the court will resolve, prior to sentencing, any factual or legal disputes the parties may have with the presentence report. The court will use the information contained in the presentence report and any evidence the parties may present in sentencing the defendant.

18. ***Independent Findings by the Court***: The defendant understands and agrees that at the time of sentencing the court may receive evidence presented by the parties and make legal and factual findings regarding the offense level, including but not limited to the amount of loss associated with he scheme to defraud for which the defendant will be held accountable for at sentencing, role in the offense adjustments, acceptance of responsibility adjustments and criminal history of the defendant. The court will calculate and determine the applicable sentencing guideline range based on those findings. The defendant specifically agrees that the court will be free to make its own independent findings as to the amount of loss associated with the scheme to defraud for which the defendant will be held liable at sentencing. An objection to the court's rulings pertaining to the application of the sentencing guidelines will not give the defendant any right to withdraw his plea of guilty.

19. ***Exclusive and Independent Sentencing Authority of Court***: The defendant further agrees that at the time of sentencing the court will not be bound by any recommendation made by any party, and that the court will be free to impose whatever sentence it deems appropriate subject to the limitations of the United States Sentencing Guidelines. The defendant under-

stands and agrees that he will not be allowed to withdraw his guilty plea because of an objection to the calculation of the sentencing guidelines or to the court's sentencing findings or rulings.

20. ***Trial***: Defendant understands that by pleading gl that those rights and the consequences of his waiver have been explained to him by his attorneys:

(a) The right to plead not guilty or persist in the plea of not guilty if already made. If the defendant persisted in a plea of not guilty to the charge against him, he would have the right to a public speedy trial.

(b) The right to a trial by jury. The trial could be either a jury or a trial by the judge sitting without a jury. The defendant has an absolute right by jury. If the trial is a jury trial, the jury would be composed of twelve persons selected at random. The jury would have to agree unanimously before it could return a verdict of either guilty or not guilty. The jury would be instructed that the defendant is presumed innocent, and that it could not convict him unless, after hearing all the evidence, it was persuaded that the government had met its burden of proving the defendant's guilt beyond a reasonable doubt.

(c) The right to the assistance of counsel. The defendant has the right to be represented by an attorney at every stage of the proceedings and, if the court finds the defendant is unable to afford an attorney, one will be appointed to represent the defendant at no cost to the defendant.

(d) The right to confront and cross-examine adverse witnesses. At a trial, the government would be required to present its witnesses and other evidence against the defendant. The defendant would be able to see and hear those government witnesses and his attorney would be able to cross-examine them. In turn, defendant's counsels could present witnesses and other evidence in defendant's behalf. If the witnesses for defendant would not appear voluntarily, their attendance could be required through the subpoena power of the court.

(e) The right against compelled self-incrimination. At a trial, defendant would have a privilege against self-incrimination so that he could decline to testify, and no inference of guilty could be drawn from his refusal to testify. If defendant desires to do so, he could testify in his own behalf.

***AGREED*:**

**Defendant:**

21. I have read this entire plea agreement carefully and have discussed it fully with my attorneys. I fully understand this agreement, and I agree to it voluntarily and of my own free will. I am pleading guilty because I am in fact guilty, and I agree that the facts stated in this agreement about my criminal conduct are true. No threats, promises, or commitments have been made to me or to anyone else, and no agreements have been reached, express or implied, to influence me to plead guilty other than those stated in this written plea agreement. I am satisfied with the legal services provided by my attorneys. I understand that by signing below I am stating I agree with everything stated in

this paragraph, and I am accepting and entering into this plea agreement.

Date: 11/3/1997 /s/ LARRY D. BACH
LARRY D. BACH
Defendant

**Defendant's Attorney:**

22. We have discussed this plea agreement fully with our client, and we are satisfied that our client fully understands its contents and terms. No threats, promises, or representations have been made, nor agreements reached, express or implied, to induce our client to plead guilty other than those stated in this written plea agreement. We have reviewed with our clients Sections 1B1.3 and 1B1.4 of the Sentencing Guidelines.

Date: November 3, 1997
/s/ HOWARD W. FELDMAN
HOWARD W. FELDMAN
Defendant's Attorney

Date: November 3, 1997
/s/ STANLEY N. WASSER
STANLEY N. WASSER
Defendant's Attorney

**United States**

23. On behalf of the United States of America, I accept and agree to this plea agreement.

Date: November 3, 1997

/s/ ESTEBAN F. SANCHEZ
ESTEBAN F. SANCHEZ
Assistant United States
Attorney