

## Plead Now or Forever Hold Your Peace

BY J. VINCENT APRILE II

At what point does a prosecutor's insistence that the defendant must take an offered plea agreement early in the criminal process or it will be taken off the bargaining table for good unfairly and unconstitutionally skew the fundamental fairness of the criminal justice system? At what point in such a scenario does a prosecutor's refusal to clarify the terms of the offered plea agreement, despite the good faith requests of the defense counsel, undermine the defendant's right to both the effective assistance of counsel and a knowing and voluntary guilty plea?

Posit a situation where, for example, the defense attorney is from out of town and has never had a case in this county so there is no previous history between the prosecutor and the defense lawyer.

The prosecutor offers what appears to be a very reasonable preindictment plea agreement to the defendant's counsel. However, the plea offer is ambiguous in some regards and silent as to a number of matters. For instance, the plea agreement requires the prosecutor to advise the court that the defendant is an excellent candidate for shock probation (probation granted only after the defendant is incarcerated in prison for a number of months) for various stated reasons—no prior record, cooperation with the police during the search of his property, and the defendant's family's cooperation in a separate matter that led to the defendant's crime being discovered. However, the plea agreement is silent on whether the prosecution will actually recommend shock probation.

Defense counsel sends the prosecutor a detailed and lengthy letter to see if matters not mentioned in the plea offer can be negotiated and to clarify ambiguities in the initial offer. The prosecutor returns defense counsel's letter with handwritten comments

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on certain of the points and agreeing to some of the defense requests, but does not send the defense attorney a new plea offer. Certain of the defense inquiries are not addressed. In a cover letter, the prosecutor emphatically states that the defense lawyer is making the prosecutor work too hard.

When the defense attorney writes one additional short letter to clarify the remaining ambiguities in the plea offer, including whether the prosecutor will consider it a breach of the plea agreement for the defense to argue for probation at sentencing, the prosecutor calls the defense attorney and leaves a brief voice mail message. The prosecutor simply says the plea offer is now withdrawn because the defense is making too much work for the prosecutor and the process is taking too long. The prosecutor adds that he does not want counsel to contact him about the deal and he will not talk with counsel about the plea offer any more.

May a prosecutor legally and ethically remove an offer from the table because a defense attorney is trying before agreeing to the plea offer to be sure that counsel knows exactly what to advise the client concerning what the terms of the agreement mean and what the defendant is giving up under those terms?

If the prosecutor withdraws a plea offer because defense counsel is seeking to clarify the proffered plea agreement, is the prosecutor effectively depriving the defendant of his or her Sixth and Fourteenth Amendment right to the effective assistance of counsel and precluding the defense attorney from meeting counsel's ethical obligation to provide competent representation? Under these circumstances, can the prosecutor be compelled by the court to reinstate the offer with clarifications so that the defendant may decide to accept or reject it?

In these types of situations, there is the possibility that the conditions and deadlines imposed by the prosecutor may create a *constructive absence of counsel*, even though defense counsel was present and participating. (*United States v. Cronin*, 466 U.S. 648 (1984).) The defendant must show a deficiency of counsel stemming from the structure of the proceedings. No showing of prejudice is necessary. There is, instead, a presumption of prejudice because under these circumstances it is unlikely that any counsel could render effective assistance.

In some situations the prosecution prior to the preliminary hearing extends an offer to the defendant with the proviso that if the tendered offer is declined at this time, the prosecution will never

agree to an offer equal to or less than this offer at any later stage of the proceedings, regardless of new developments in the case. Faced with such a Hobson's choice so early in the proceedings, is defense counsel able to provide effective representation or is counsel reduced to the role of an administrative conduit merely conveying the prosecutor's offer to the client? Does such a conundrum render defense counsel virtually useless to the client as advisor and advocate?

Defense counsel who elect to challenge prosecutors who engage in these types of plea bargaining tactics are well advised to premise their objections on both *Cronic* and *Strickland* analyses, arguing in the alternative.

Prosecutors are not constitutionally and ethically banned from making "take it or leave it" plea offers. Yet the prosecution's making of such offers does not

modify, or supplement the terms and conditions of the plea agreement, the court should direct the prosecution to respond *in good faith* to defense counsel's inquiries before the defendant is required to accept or reject the prosecution's offer. The court would only direct the prosecutor to respond candidly, completely, and promptly to the defense counsel's concerns and questions, but the court would not attempt to control in any way the substance of the prosecutor's answers.

Defense counsel faced with plea offers of the type and under circumstances described above should not feel helpless or hopeless. Instead, following an unsuccessful attempt to raise and resolve these problems with the prosecutor, defense counsel should advise the client of the alternative of challenging the prosecution's plea bargaining practices and tactics

## **The remedy to ineffective assistance of counsel may require reinstating the original plea offer.**

exempt the impacted defendants from their federal constitutional right to effective assistance of counsel during the plea-bargaining stage of a criminal case. A criminal defendant cannot be penalized for exercising a federal constitutional right, such as the right to the effective assistance of counsel with regard to the acceptance of a plea offer.

Prosecutors should revise their plea bargaining calculus to recognize that the more extreme the time lines and deadlines imposed on the defense for accepting the prosecution's plea offer, the more Draconian the consequences following a defendant's rejection of the offer, and/or the more unjustifiable the refusals of the prosecution to clarify, modify, or supplement a proposed offer, the greater will be the probability that a defendant has been constructively or actually denied the effective assistance of counsel as to the plea negotiations.

What should be the remedy for these prosecutorial tactics when they run afoul of the defendant's federal constitutional rights? There is precedent in some jurisdictions that when a criminal defendant is denied, as a result of ineffective assistance of counsel, an opportunity to accept a tendered plea offer, the potential remedies must include the reinstatement by the prosecutor of the original offer. In situations where the prosecution has refused to clarify,

in the trial court to guarantee the client will be effectively represented during plea negotiations. Once the defendant is on board and negotiations with the prosecutor have proved inadequate or unworkable, defense counsel should identify the problem for the court and seek relief by motion for the prosecutor's fundamentally unfair negotiation tactics calculated to limit defense counsel's ability to represent effectively the defendant.

Day after day new evidence emerges of the failures of the criminal justice system to ensure that those who are tried and convicted as well as those who plead guilty are actually guilty. Today prosecutors, defense counsel, and judges must all be alert to the dangers of the incarceration of the innocent as a result of unfair pressure tactics in plea bargaining by the prosecution coupled with defense attorneys who do not challenge those tactics on the record when off-the-record attempts at clarifying the prosecution's offer are met with silence and/or immediate withdrawal of the offer. In the long run, these types of strong-arm plea negotiations do not ultimately save the prosecution time, effort, and money because guilty pleas entered under such circumstances will always raise the specter of ineffective assistance of counsel and foster the possibility of collateral attacks on the plea and sentence involved. ■