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The Propriety Of Prosecutorial Bluffing

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This year, the Innocence Project celebrated its 25th anniversary. With this milestone, Time magazine observed the increasing trend of exonerations of the falsely accused: "For the third year in a row the number of exonerations in the United States has hit a record high. A total of 166 wrongly convicted people whose convictions date as far back as 1964 were declared innocent in 2016. On average, there are now over three exonerations per week — more than double the rate in 2011." With this staggering number of false convictions, one must ask: Why are there so many falsely accused in the first place?

One problem in this regard is that prosecutors bluff to induce guilty pleas. Imagine your client finds himself in a meeting with a criminal prosecutor. The prosecutor says that she is prepared to charge your client with a crime and, if convicted, he will most likely get seven years in custody. But if he pleads guilty today, she explains, the most he will get is one year. Do you recommend your client take the deal? Considering the time and expense of trial and the fact that people remember the fact that someone was charged as much as the trial outcome, most would be seriously tempted to take the deal even if they "didn't do it."

But what if the prosecutor were bluffing? What if the prosecutor didn't really intend to charge your client because she has a mere circumstantial case against him? What if the prosecutor had already charged the main target of her investigation and your client were just on the periphery — she wasn't really interested in spending the time to build a case against your client but was just looking to "clean up" loose ends. If your client pleads, great, she gets another notch on her belt, but if your client doesn't, no sweat, because the conduct doesn't really warrant the government spending the resources going after your client. Or consider a different scenario: What if the key witness the prosecutor says she has ready to testify against your client has actually died? Or similarly, what if the key recording the prosecutor says she has of your client conspiring to commit the crime doesn't actually exist?

Is a Guilty Plea Induced by Prosecutorial Bluffing Voidable?

Let's say your client takes the prosecutor's offer. If you find out after your client has pled guilty or after sentencing that your client's plea was induced by a bluff (because, for example, you learn the key

witness really did die before your meeting and the prosecutor knew it), can you successfully move to set aside the guilty plea? Failure to disclose certain exculpatory evidence arguably is a violation of the defendant's rights to receive exculpatory evidence under Brady.[1]

But in most instances, the bluff may not relate to the withholding of Brady material but rather to the prosecutor's intent to charge or the nonexistence of inculpatory evidence, like a recording. One could argue that a guilty plea made based on a prosecutor's false representation is not an intelligent plea, therefore not a valid waiver of rights, and thus a violation of the "Due Process" clause.[2]

However, the U.S. Supreme Court has held that, in the context of plea negotiations, the Constitution does not require a defendant to know all of the relevant circumstances and that the court may accept a plea deal "despite various forms of misapprehension under which a defendant might labor."[3] While the prosecution must, during plea negotiations, provide any information establishing the factual innocence of the defendant, it need not, for example, provide impeachment evidence relating to informants and other witnesses or evidence supporting affirmative defenses that the defendant may ultimately raise at trial.[4] In reaching this conclusion, the Supreme Court focused on the distinction that impeachment evidence and evidence concerning a defendant's affirmative defense relate to a trial's fairness, not the voluntariness of a plea deal.

Courts have also recognized that prosecutors have a duty to not impede the truth. For example, where a prosecutor misrepresented to the jury during rebuttal argument that it could not have called a critical prosecution witness to testify when it had a cooperation agreement with that witness all along under which it indeed could have compelled the witness to testify, the Ninth Circuit found prosecutorial misconduct: "Prosecutors are subject to constraints and responsibilities that don't apply to other lawyers. ... While lawyers representing private parties may — indeed, must — do everything ethically permissible to advance their clients' interests, lawyers representing the government in criminal cases serve truth and justice first."[5] The court focused on the fact that the prosecutor's misconduct denied the defendant his right to a fair trial. But this high-spirited language which is grounded in the right to a fair trial has not been extended to the plea context.[6]

Will the Prosecutor Face Ethical Sanction?

Will the prosecutor who engages in this sort of behavior have a legal ethics issue? Once again, the answer is not as clear as one would like. In California, an attorney's duty of candor only explicitly applies to representations made in court, and therefore may not apply to plea negotiations.[7] By contrast, in New York, the duty of candor is not limited to statements made before a tribunal but extends to statements made to any party,[8] which should include plea negotiations.

The American Bar Association recognizes a "heightened duty of candor" for prosecutors. Standard 3-1.4(b) of the Criminal Justice Standards for the Prosecution Function[9] provides that the prosecutor "should not make a statement of fact or law, or offer evidence, that the prosecutor does not reasonably believe to be true, to a court, lawyer, witness, or third party, except for lawfully authorized investigative purposes." With respect to plea negotiation, Standard 3-5.6 expressly states that a prosecutor should not "knowingly make false statements of fact or law" or "agree to a guilty plea if the prosecutor reasonably believes that sufficient admissible evidence to support conviction beyond reasonable doubt would be lacking if the matter went to trial." The National District Attorneys Association's National Prosecution Standards similarly provide that, with respect to plea negotiations, "[t]he prosecutor should not knowingly make any false or misleading statements of law or fact to the defense during plea negotiations."[10]

Calling the Prosecutor's Bluff

Since it is unclear that any court would invalidate a plea agreement because the prosecutor misled the defendant, and even if there were a legal remedy, it may be a long, tortured road, it's worth considering how then to navigate those uncertain waters. Experienced defense counsel can identify some tells.

First, if it sounds too good to be true, maybe it is. If the deal that the prosecutor is offering is so generous that it is almost "too good to be true," it's worth considering why the prosecutor is willing to be that charitable. Why is the prosecutor willing to take a case that she genuinely believes is worth seven years and let your client plead to something that will give your client one year? Perhaps that is a sign that the prosecutor has no intent to charge or has a "proof" problem.

Second, is the prosecutor willing to show you her evidence or engage in a so-called "reverse proffer"? If she has an incriminating witness statement, why not provide it to you? If she has an incriminating tape recording, why not play it for you? The very fact that the prosecutor is unwilling to show you her evidence may suggest an evidentiary weakness, even though the rules of discovery don't technically require her to provide that evidence until later in the discovery process.

Third, what independent investigation of the case have you done? If the prosecutor has no obligation to tell you her witness is dead, perhaps you should be independently verifying this fact along with other components of your case. In addition to investigating the strengths or weaknesses of the government's case, what does your case look like?

Fourth, if the prosecutor says the offer is only good for a limited time, ask why. Is the prosecutor trying to induce a plea before you have a chance to receive and review discovery or do your own investigation?

Ultimately, just as in real poker, calling the prosecutor's bluff is fraught with peril. The downside of being wrong — losing at trial and being sentenced to seven years when there was an offer to plead guilty and do one — is not for the faint of heart. Best to have an experienced criminal defense lawyer by your side to help you navigate these murky waters.

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[1] See U.S. v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998) ("The government's obligation to make [Brady] disclosures is pertinent not only to an accused's preparation for trial but also to his determination to plead guilty.").

[2] See, e.g., Matthew v. Johnson, 201 F.3d 353, 364 fn.15 (5th Cir. 2000) (there may be situations in which the prosecution's failure to disclosure evidence makes it impossible for a defendant to enter a knowing and intelligent plea); Ferrara v. U.S., 456 F.3d 278, 293 (1st Cir 2006) ("[T]he government's

nondisclosure was so outrageous that it constituted impermissible prosecutorial misconduct sufficient to ground the petitioner's claim that his guilty plea was involuntary.").

[3] U.S. v. Ruiz, 536 U.S. 622, 630 (2002) (citing Brady v. U.S., 397 U.S. 742, 757 (1970)).

[4] Ruiz, 536 U.S. at 633.

[5] U.S. v. Kojayan, 8 F.3d 1315, 1323 (9th Cir. 1993).

[6] See, e.g., U.S. v. Krasn, 614 F.2d 1229, 1234 (9th Cir. 1980) (failure to disclose existence of separate government investigation during plea negotiations did not amount to denial of due process).

[7] California, Rule of Professional Conduct 5-200 provides that, "In presenting a matter to a tribunal, a member . . . (B) [s]hall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law . . .
." http://www.calbar.ca.gov/Portals/0/documents/ethics/2D_RRC/2017_CaliforniaRulesProfessionalConduct050717.pdf.

[8] Rule 4.1 of the New York Rules of Professional Conduct states, "In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person." http://www.nycourts.gov/rules/jointappellate/ny-rules-prof-conduct-1200.pdf

[9] https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html. While the ABA's Criminal Justice Standards are admittedly "aspirational" or "best practices," they are modeled after, and intended to be consistent with, the ABA's Model Rules of Professional Conduct.

[10] Rule 5-3.3. http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf. The Prosecution Standards are aspirational rules of professional conduct, intended to "supplement" the existing rules of ethical conduct