

## “THE FEDERAL CORNER”

### The Perils of Representing the Client Who Does Not Want to Even Talk About Pleading Guilty

Buck Files

Robert M. Parker was a great federal judge. Before he served on the United States Court of Appeals for the Fifth Circuit, he sat in Tyler as the Chief Judge of the United States District Court for the Eastern District of Texas. He could make any appearance before him interesting, challenging – and even fun. One year, he spoke on the topic of “Departures” at the Advanced Criminal Law Course of the State Bar of Texas. His thesis was simple: Defense lawyers win few jury trials. Winning is more often achieved by negotiating a plea agreement that contains a § 5K1.1 departure paragraph.

Few cases will reflect the truth of that statement better than *United States v. Arredondo-Meza*, \_\_\_F.Supp.3d\_\_\_, 2016 WL 5660328 (Sept. 29, 2016). In this case, Chief Judge B. Lynn Winmill of the United States District Court for the District of Idaho held that Arredondo-Meza’s lawyer had been ineffective in communicating plea offers to him; granted his claim of ineffective assistance of counsel; and, ordered that the Government re-offer the plea agreement previously offered twice before to him.

Arredondo-Meza was convicted of conspiring to distribute 500 grams or more of methamphetamine and participating in a continuing criminal enterprise. Eleven of his co-defendants had cooperated with the Government, entered pleas of guilty, and received sentences ranging from 18 to 151 months imprisonment. In contrast, Arredondo-Meza tried his case to a jury, was convicted and received a sentence of 480 months imprisonment. After being unsuccessful on his direct appeal, Arredondo-Meza filed a § 2255 motion seeking habeas relief alleging, among other things, that his counsel provided ineffective assistance during the plea bargaining stage of his case.

So, how did Arredondo-Meza succeed in receiving a sentence significantly harsher than those of his eleven co-defendants? He was first represented by an assistant federal defender who advised him that he should consider cooperating with the Government and pleading guilty. Like so many before him, Arredondo-Meza did not like what he heard and had his relatives find a lawyer who would try his case. They settled on Larry Legal-Eagle (not his real name). In fairness to this lawyer, it should be noted that his client was not cooperative.

The Government presented Mr. Legal-Eagle with a plea offer that called for the dismissal of the continuing criminal enterprise charge in return for a plea of guilty to the conspiracy charge. After the defendant rejected this proposed resolution of his case, a jury was selected. Even after having a jury in the box, the Government re-offered the same plea agreement and the defendant again rejected it.

After conducting a contested hearing on Arredondo-Meza’s motion, Judge Winmill filed his opinion which reads, in part, as follows (with Arredondo-Meza referred to as “Movant”):

[The Movant Had Little Education]

Movant never attended school and does not read or write in Spanish or in English. Therefore, part of the Court's inquiry is whether he received adequate interpretation of the evidence against him and of the terms and benefits of the plea offers. Although he can apparently understand and speak English on a limited basis, there is no indication that Movant would be able to comprehend the evidence and a plea offer without adequate interpretation. Movant testified on cross examination that he was able to speak some English but not enough to be in court or to understand legal matters and that he had told [Mr. Legal-Eagle] that he needed someone to translate for him.

[How Mr. Legal-Eagle Communicated With His Client]

[Mr. Legal-Eagle] testified from memory. He had discarded his file along with other inactive files after he moved from his prior office a year ago. [Mr. Legal-Eagle] testified that he utilized the interpretive services of two individuals when visiting Movant in jail. One was his secretary/paralegal who was very fluent in Spanish having spent eighteen months in Ecuador. The other was bilingual having grown up in a Mexican-American home and whose sister was a court interpreter who was unavailable to accompany him on visits to Movant in jail. The Court questions whether they were sufficiently versed in legal terminology to adequately explain the evidence, the plea offer, and the benefits of pleading guilty.

[Mr. Legal-Eagle] did not recall reading any materials to Movant word for word. Rather, he summarized the documents and his discussions with AUSA Fica, and those summaries were interpreted. [Mr. Legal-Eagle] gave the documents to Movant, but he recognizes that Movant would not have known exactly what they said absent translation.

Movant does not dispute that interpreters were present during the jail visits. However, he contends that none was present in the holding cell when the second plea offer was allegedly communicated.

\* \* \*

[There Were No Discussions About a §5K1.1 Departure]

Counsel stipulated at the evidentiary hearing that once [Mr. Legal-Eagle] became involved in the case, there was no discussion with the Government of consideration for cooperation under § 5K1.1. However, such consideration was not precluded. AUSA Fica confirmed that he generally includes cooperation language in a plea agreement in case a defendant who initially declines to cooperate subsequently decides to do so.

Regardless of whether there was a cooperation provision, it is apparent from his testimony on cross examination that [Mr. Legal-Eagle] did not discuss with Movant the potential of cooperating with the Government. Nor does it appear that Movant was interested in cooperation.

[The Lack of Advice Given to the Client]

[Mr. Legal-Eagle] did not testify specifically about what advice he gave. Rather, he appears to have presented the offer twice and accepted Movant's stated desire to go to trial without any thorough discussion of issues like acceptance of responsibility or a § 5K1.1 departure. Furthermore, the adequacy of interpretation of the first plea offer and whether there was any interpretation of the second plea offer is questionable on the evidence presented.

[The Issue in This Case]

[Mr. Legal-Eagle] communicated the two plea offers. Movant rejected them. But the inquiry does not end there. *The issue is whether [Mr. Legal-Eagle] communicated the offers effectively—i.e., did he provide adequate interpretation of the plea offers, did he advise Movant about the comparative advantages of pleading guilty with or without cooperation, and did he properly counsel him about the likelihood of being convicted if he chose to go to trial.* (emphasis added)

[A Defendant's Right to the Assistance of Counsel]

Once a plea offer has been made, a defendant has the right to counsel's assistance in making an informed decision about whether to accept it. [\*Nunes v. Mueller\*, 350 F.3d 1045, 1052 \(9th Cir. 2003\)](#) (failure to accurately communicate plea offer constitutes ineffective assistance of counsel); [\*United States v. Leonti\*, 326 F.3d 1111, 1117](#) (defendant is entitled to effective assistance of counsel in deciding whether and when to plead guilty); [\*United States v. Rivera-Sanchez\*, 222 F.3d 1057, 1060–61 \(9th Cir. 2000\)](#) (counsel is required to ensure that the defendant understands the plea offer's terms and significance); [\*Turner v. Calderon\*, 281 F.3d 851, 880 \(9th Cir. 2002\)](#) ('[A] defendant has the right to make a reasonably informed decision whether to accept a plea offer.') (quoting [\*United States v. Day\*, 969 F.2d 39, 43 \(3d Cir. 1992\)](#)). Inadequate interpretation when rendering advice to or communicating with a defendant can constitute ineffective assistance of counsel. See [\*Gallo-Vasquez v. United States\*, 402 F.3d 793, 799 \(7th Cir. 2005\)](#).

[The Most Critical Period of the Proceedings]

The period from the arraignment extending to the beginning of trial is 'perhaps the most critical period of the proceedings.' [\*Nunes\*, 350 F.3d at 1052](#) (citing [\*Powell v. Alabama\*, 287 U.S. 45, 57, 53 S.Ct. 55, 77 L.Ed. 158 \(1932\)](#)). It is during this time that a defendant may have his best opportunity for avoiding or

mitigating a harsh sentence by cooperating with the government. [Leonti, 326 F.3d at 1116–17.](#)

[The Duties of a Competent Attorney]

A competent attorney’s duties, in addition to advising whether and when to cooperate, include ‘facilitating communication between the defendant and the government, attending proffer sessions, ascertaining the government’s expectations and whether the defendant is satisfying them, communicating the client’s limitations to the government, and establishing a record of attempts to cooperate.’[Id. at 1118–19.](#) In addition to failure to facilitate cooperation, an ineffective assistance of counsel claim can arise from failure to advise a defendant to enter a plea bargain when it is clearly in his interests. [Id. at 1117.](#)

[A Defendant’s Right to Competent Advice]

Here, there is no indication that Movant wanted to or would have cooperated, but he was still entitled to competent advice. Indeed, even where counsel is aware, as here, that the evidence against a defendant is ‘overwhelming’ and the defendant has advised him that he will not cooperate, counsel’s performance is deficient if he does not advise defendant of the option to plead without cooperating. [United States v. Booth, 432 F.3d 542, 549–50 \(3rd Cir. 2005\).](#) ‘[A] defendant has the right to make a reasonably informed decision whether to accept a plea offer’ because ‘[k]nowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty.’[Id.](#) (quoting [United States v. Day, 969 F.2d 39, 44 \(3d Cir. 1992\)](#)). The possibility of a lesser sentence pleading without a plea agreement is important knowledge on which to base a decision on whether to plead guilty. [Id.](#)

[The Evidence Against the Movant was Overwhelming]

The stakes were high for Movant in this case. All co-defendants had pleaded guilty with cooperation and substantial assistance provisions in their plea agreements prior to the trial, some of them as much as three months before trial although others were shortly before trial. At the very least, at the time of the second plea offer, it was obvious that the evidence against Movant was overwhelming. General statements that the Government would have a hard time proving its case without witnesses, or merely telling Movant about the evidence or witnesses without including meaningful discussions of the likelihood of conviction and the benefit of pleading without a cooperation did not constitute adequate representation.

[Mr. Legal-Eagle Did Not Participate in  
Meaningful Discussions With His Client]

The evidentiary hearing revealed no indication that [Mr. Legal-Eagle] engaged in substantive discussions with Movant and provided him with proper interpretation regarding his options, the risk of trial, and the benefit of pleading guilty even without cooperation. It is true that Movant's testimony was often conflicting and inconsistent and accordingly less than credible on some points. He may very well have initially wanted to go to trial and sought [Mr. Legal-Eagle]'s representation because of Mr. Kumm's advice to plead guilty with some attempts at cooperation. He may very well have adamantly refused the plea offers. He may very well have refused to believe that anyone would testify against him and failed to provide a list of witnesses to testify on his behalf. However, this does not excuse counsel from taking pains to educate Movant given the obvious risks of going to trial. Rather, the record suggests that counsel did not attempt to negotiate a plea agreement but only agreed to communicate any offer the Government would make, which he did, but without reopening negotiations as he became aware of the strength of the evidence against Movant. Although [Mr. Legal-Eagle] testified that he advised Movant of the grand jury testimony, the witnesses, and the other testimony the Government planned to introduce, he only tangentially mentioned advising Movant of the ramifications of going to trial.

[The Interpreters Were Inadequate or Not Present]

The Court feels that the adequacy of the background of the interpreters used at the jail visits is questionable and the issue of whether an interpreter was even present in the holding cell adds credence to Movant's claims that he did not understand the offers.

[The Proper Remedy]

Upon a showing of deficient performance and prejudice, '[t]he correct remedy ... is to order the [Government] to reoffer the plea agreement.' If the defendant accepts the offer, the trial court can then '(1) vacate the convictions and resentence the defendant pursuant to the plea agreement, (2) vacate only some of the convictions and resentence accordingly, or (3) leave the convictions and sentence from trial undisturbed.' [\*Lafler\*, 132 S.Ct. at 1392.](#)

\* \* \*

**IT IS ORDERED** that...The Government shall reoffer the Plea Agreement to Movant for his consideration within ten (10) days from the date of this Order, or the parties may stipulate that Movant will accept the plea offer within ten (10) days from the date of this Order.

[My Thoughts]

- Ineffective assistance of counsel cases are not the most exciting to write about; however, they do give us a road map of how to avoid such a claim being raised against us.

- We have all had the client who didn't want to talk about anything but pleading not guilty and having a trial. It should not be surprising, though, that many of these clients have a change of heart (and mind) after listening to a well-reasoned presentation of what the law is and what the evidence against them is – but it does take patience to have this conversation.
- There is nothing to indicate that Mr. Legal-Eagle contacted either the federal defender appointed to represent his client or the AUSA whose job it was to prosecute his client. Such a conversation might well have alerted Mr. Legal-Eagle to the difficulties of representing his client -- and the embarrassment of having his name mentioned unfavorably in a reported case.