

# **PLEAS**

**JOHN BRADLEY**  
District Attorney  
Williamson County

State Bar of Texas  
**30<sup>TH</sup> ANNUAL ADVANCED CRIMINAL LAW COURSE**  
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**CHAPTER 9**



# JOHN M. BRADLEY

Williamson County District Attorney  
405 S. Martin Luther King, Box 1  
Georgetown, Texas 78626  
(512) 943-1234  
FAX: (512) 943-1255

## EDUCATION

### Graduate

UNIVERSITY OF HOUSTON LAW CENTER

Houston, Texas

J.D., May 1985

Licensed in State of Texas: 11/8/85 (No. 02826500)

Licensed in U.S. Supreme Court: 5/01

Certified Specialist in Criminal Law

Texas Board of Legal Specialization

1991- present

### Undergraduate

UNIVERSITY OF ST. THOMAS

Houston, Texas

B.A., English, *magna cum laude*, May 1981

## EMPLOYMENT

12/01-present

### District Attorney

Williamson County

Georgetown, Texas

1/96-12/01

### First Assistant District Attorney

Williamson County District Attorney's Office

Georgetown, Texas

11/89-12/96

### Assistant District Attorney

Williamson County District Attorney's Office

Georgetown, Texas

1/97-12/98

### Legislative Assistant

Senate Criminal Justice Committee

75th Legislature

Austin, Texas

9/95-8/31/96

### Consultant

Senate Criminal Justice Committee

Interim

Austin, Texas

9/93-5/95

### General Counsel

Senate Criminal Justice Committee

74th Legislature

Austin, Texas

12/91-8/93 Prosecution & Law Enforcement Consultant  
Texas Punishment Standards Commission  
Austin, Texas

5/87-11/89 Assistant District Attorney  
Harris County District Attorney's Office  
Houston, Texas

9/85- 4/87 Research & Briefing Attorney  
Judge Charles F. Campbell  
Texas Court of Criminal Appeals  
Austin, Texas

**PROFESSIONAL  
ACTIVITIES**

Texas District and County Attorneys Association  
Chairman, TDCAA Publications Committee  
Member, Texas State Bar Journal Editorial Board  
Williamson County Bar Association  
Williamson County Bail Bond Board, former secretary  
State Bar of Texas Committee on Crime Victims & Witnesses, former member

Frequent speaker at seminars for various organizations, including State Bar, Texas Center for the Judiciary, Texas District and County Attorneys Association, Texas District and County Clerk's Association, Texas Community Supervision and Corrections Departments, Texas Criminal Defense Attorneys Association, Texas Independent Lawyers Association, Texas Justice Training Center, National Advocacy Center, and National College of District Attorneys.

**PUBLICATIONS**

Bradley, J., *The Perfect Plea* (TDCAA 2002), available at <tdcaa.com>.

Anderson, K., and Bradley, J., *Texas Sentencing* (Lexis Law Publishing 4<sup>th</sup> Ed. 2002, annual supplement), available at <lexis.com>.

Bradley, J., and Anderson, K., *Predicate Questions Manual*, (4th Ed. 2002, TDCAA), available at <tdcaa.com>.

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## PLEAS

### I. LEGAL DUTIES OF A GUILTY PLEA AND BARGAINING

#### A. Prosecutor

1. There is no federal or state constitutional or statutory law that requires a prosecutor to engage in plea bargaining. *Lynch v. Overholser*, 369 U.S. 705, 82 S.Ct. 1063, 8 L.Ed.2d 211 (1962); *Morano v. State*, 572 S.W.2d 550, 551 (Tex. Crim. App. 1978). Nor can a judge order mediation. See Tex. Code Crim. Pro. art. 26.13(h).
2. Plea bargaining is done by the state to minimize the risks associated with trial, reduce the cost to the county and achieve a quick, final disposition of the case.
3. The state's primary duty during plea negotiations is to see that justice is done. Tex. Code Crim. Pro. art. 2.01. This means the prosecutor must evaluate the case on behalf of the entire community—as well as the victim—and recommend a disposition that is just. Tex. Code Crim. Pro. art. 56.02(d).
4. Although a victim may not prevent a prosecutor from disposing of a criminal case through a plea agreement, the prosecutor should inform the victim of any plea negotiations, any plea agreement reached, and all substantive court proceedings. Tex. Code Crim. Pro. art. 56.02(a)(3-5); see also Tex. Code Crim. Pro. art. 42.12 § 5 (requiring judge to find that deferred adjudication for sex offense is in best interest of victim).
5. Ordinarily, a prosecutor must disclose all exculpatory evidence in connection with a criminal case set for trial. Tex. Code Crim. Pro. art. 2.01; *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963). However, a prosecutor may be relieved of that duty, absent an affirmative claim of innocence, if the defendant decides to plead guilty. Tex. Code Crim. Pro. art. 1.14(a); *United States v. Ruiz*, 536 U.S. 622, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002) (waiver of right to defensive information before pleading guilty did not violate 5<sup>th</sup> Amendment right to fair trial); see also *Matthew v. Johnson*, 201 F.3d 353 (5<sup>th</sup> Cir. 2000), cert. denied, 531 U.S. 830, 121 S.Ct. 291, 148 L.Ed.2d 44 (2000). Note that *Ruiz* did not decide whether such a waiver could extend to evidence of actual innocence. Cf. *Orman v. Cain*, 228 F.3d 616 (5<sup>th</sup> Cir. 2000)

- (claim of amnesia as to offense did not equate to a claim of innocence requiring disclosure of exculpatory evidence before guilty plea).
6. In many misdemeanor cases, a defendant seeks to plead guilty without the benefit of representation. To avoid any claim of overreaching, a prosecutor should not negotiate with a misdemeanor defendant until after the judge has approved the defendant's waiver of the right to counsel. Given the serious consequences of a felony prosecution, a prosecutor should avoid negotiating a plea bargain with an unrepresented felony defendant.
  7. **Withdrawal.** The state may interrupt a plea proceeding at any time before a judge approves a plea bargain. Generally, the state interrupts a plea proceeding upon discovering some fact not known at the time a punishment recommendation was offered that causes the state to become dissatisfied with the recommendation. The state also may interrupt a plea proceeding if the defendant fails to perform some act required by the bargain (e.g., to plead guilty, judicially confess, or waive appeal). If the state interrupts the plea proceeding after the judge has approved the plea bargain, the judge must nonetheless order specific performance of the plea agreement, if possible. *Castleberry v. State*, 704 S.W.2d 21 (Tex. Crim. App. 1984). Otherwise, the defendant must be permitted to withdraw his plea. *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).

#### B. Defense Attorney

1. A criminal defense attorney has a duty to provide effective assistance to the defendant during the plea bargaining process. *Ex parte Battle*, 817 S.W.2d 81 (Tex. Crim. App. 1991). See also *Hernandez v. State*, 988 S.W.2d 770 (Tex. Crim. App. 1999) (applying Strickland ineffective assistance standard to punishment stage of noncapital trial). In general, this means the defense attorney must educate the defendant as to the charge, the punishment range, and the evidence that is available to prove the defendant's guilt. He then must determine whether the defendant wants to consider pleading guilty and negotiate a fair resolution of the case.
2. For a defendant who has decided to plead guilty, the defense attorney's primary duty is to determine whether the defendant is voluntarily entering the plea of guilty. *Butler v. State*, 499 S.W.2d 136, 139 (Tex. Crim.

- App. 1973); *Fontnette v. State*, 24 S.W.3d 647 (Tex. App. — Beaumont 2000, pet. ref'd).
3. Rather than relying solely on the facts as represented by the prosecutor, a defense attorney has a duty to make an independent investigation of the facts of the case. *Melton v. State*, 987 S.W.2d 72 (Tex. App. — Dallas 1998, no pet.). Although the defense attorney must become familiar with the facts surrounding the offense charged, the defense attorney does not have an obligation to conduct as extensive an investigation of the facts as is required before proceeding to trial. *Toupal v. State*, 926 S.W.2d 606 (Tex. App. — Texarkana 1996, no pet.); see also *Eddie v. State*, 100 S.W.3d 437 (Tex. App. — Texarkana 2003, pet. ref'd) (applying same lessened duty to investigate to plea of true to motion to adjudicate or revoke).
  4. Offers and Replies
    - a) A defense attorney must convey any offer made by the prosecutor to the defendant. *Ex parte Lemke*, 13 S.W.3d 791 (Tex. Crim. App. 2000); *Ex parte Wilson*, 724 S.W.2d 72 (Tex. Crim. App. 1987); *Atkins v. State*, 26 S.W.3d 580 (Tex. App. — Beaumont 2000, pet. ref'd). But see *Harvey v. State*, 97 S.W.3d 162 (Tex. App. — Houston [14<sup>th</sup> Dist.] 2002, pet. ref'd) (no tentative agreement reached); *Hernandez v. State*, 28 S.W.3d 660 (Tex. App. — Corpus Christi 2000, pet. ref'd) (no duty to convey passing offer by prosecutor that was not firm).
    - b) And convey the defendant's subsequent acceptance or rejection of that offer back to the prosecutor. *Randle v. State*, 847 S.W.2d 576 (Tex. Crim. App. 1993); *Guidry v. State*, No. 01-03-00171-CR (Tex. App. — Houston [1<sup>st</sup> Dist.] March 18, 2004) (requiring hearing on motion for new trial as to whether defense attorney communicated acceptance of offer to prosecutor).
    - c) The defense attorney also must explain the offer to the defendant. *State v. Williams*, 83 S.W.3d 371 (Tex. App. — Corpus Christi 2002, no pet.).
    - d) And inform the defendant of any deadline the prosecutor imposed for accepting the offer. *Turner v. State*, 49 S.W.3d 461 (Tex. App. — Fort Worth 2001), pet. dismissed, improvidently granted, 118 S.W.3d 772 (Tex. Crim. App. 2003).
    - e) However, a defense attorney does not have a duty to advise the defendant to accept or reject a plea offer. *Jordan v. State*, 852 S.W.2d 689 (Tex. App. — Houston [14<sup>th</sup> Dist.] 1993), affirmed, 883 S.W.2d 664 (Tex. Crim. App. 1994). The defendant ultimately must make any decision for himself. See *United States v. Cothran*, 302 F.3d 279 (5<sup>th</sup> Cir. 2002) (stern warning from defense counsel about likely consequences of trial does not render plea involuntary).
  5. In negotiating a plea agreement, a defense attorney should be cautious about revealing privileged information to the prosecutor. Tex. R. Evid. 503 (establishing lawyer-client privilege). A defense attorney should obtain the defendant's waiver of the lawyer-client privilege before discussing the defendant's version of the offense with the prosecutor. Tex. R. Evid. 511 (waiver of privilege); *Carmona v. State*, 941 S.W.2d 949 (Tex. Crim. App. 1997) (defense attorney disclosed polygraph results to prosecutor to avoid indictment).
  6. The most common allegation made against a defense attorney who participates in a guilty plea is that the attorney did something to force or trick the defendant into pleading guilty. To prove ineffective assistance following a guilty plea, a defendant must show that: (1) the attorney's representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for the attorney's errors, the defendant would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).
  7. A defendant who pleads guilty to a crime may not later sue the defense attorney for malpractice unless the defendant is subsequently exonerated for the crime. *Peeler v. Hughes & Luce*, 909 S.W.2d 494 (Tex. 1995). As a matter of public policy, the guilty plea serves as the sole legal cause for disposition of the defendant's case, regardless of the quality of the attorney's representation. A more likely consequence than reversal is that the defense attorney's negligence would result in a grievance filed with the State Bar.
  8. Backing out. For a guilty plea before a judge, the defendant's ability to withdraw a plea depends on the timing of the request. Before

the judge has pronounced judgment on guilt or taken the case under advisement, a defendant has an unqualified right to withdraw his plea without assigning any reason to the request. *Jackson v. State*, 590 S.W.2d 514, 515 (Tex. Crim. App. 1979). After a judge has pronounced judgment on guilt or taken a case under advisement (which includes resetting for PSI), the withdrawal of a guilty plea is within the trial court's discretion. The defendant should pursue the request to withdraw a guilty plea by filing a motion and requesting a hearing. *Donovan v. State*, 17 S.W.3d 407 (Tex. App. — Houston [1st Dist.] 2000), *aff'd*, 68 S.W.3d 633 (Tex. Crim. App. 2002).

### C. Judges

1. Throughout the plea negotiation process, a judge's primary obligation is to remain impartial. Tex. Gov. Code T.2, Subt.G, App.B, Canon 3 (Code of Judicial Conduct).
2. For that reason, a judge should not engage in actual plea negotiations. *Ex parte Shufflin*, 528 S.W.2d 610 (Tex. Crim. App. 1975). Relying on ABA Standards and the Code of Judicial Conduct, the Court of Criminal Appeals has repeatedly warned judges to avoid participating in a guilty plea *before* an agreement is reached between the prosecutor and defendant. *Perkins v. Third Court of Appeals*, 738 S.W.2d 276 (Tex. Crim. App. 1987); *Ex parte Williams*, 704 S.W.2d 773 (Tex. Crim. App. 1986); *Ex parte Shufflin*, 528 S.W.2d 610 (Tex. Crim. App. 1975); see also *Holland v. State*, 112 S.W.3d 251, 256 n. 3 (Tex. App. — Austin 2003, no pet. h.) (declining to sanction plea bargaining between defendant and trial court). Unfortunately, in many jurisdictions, judges communicate with defendants or their attorneys in an attempt to resolve criminal cases, abandoning their duty to impartiality. While these communications may seem to "move a case," in the long run, they undermine the public's respect for the judiciary and threaten the constitutional authority and duty of the prosecutor.
3. All plea discussions should take place between the state and the defendant, who is usually represented by counsel. This means a judge should not plea bargain directly with a defendant or even participate in discussions between the defendant and the state regarding the disposition of the criminal case. *Ex parte Spicuzza*, 903 S.W.2d 381 (Tex. App. — Houston [1st

Dist.] 1995, *pet. ref'd*). Federal law expressly prohibits a federal judge from participating in plea bargaining. Fed. R. Crim. Pro. 11(e). For a discussion of the difference between judicial bargaining and mere rejection of a recommendation, see *United States v. Jeter*, 315 F.3d 445 (5<sup>th</sup> Cir. 2002). *Cf. State v. Bowie*, No. 12-02-00182-CR (Tex. App. — Tyler 2003) (noting questionable procedure in which judge prohibits plea bargaining by prosecutor but permits defendant to withdraw guilty plea if not satisfied with sentence), *rev'd*, Nos. 639-03, 773-03, 774-03, 2004 Tex. Crim. App. (Tex. Crim. App. May 19, 2004). If a defendant should plead guilty pursuant to an agreement with a judge that later proves to be unenforceable, the plea may be challenged as involuntary. *Ex parte Spicuzza*, 903 S.W.2d 381 (Tex. App. — Houston [1st Dist.] 1995, *pet. ref'd*). Or, if a judge takes a firm position on punishment before hearing the evidence, he may be subject to recusal. See *Teixeira v. State*, 89 S.W.3d 190 (Tex. App. — Texarkana 2002, *pet. ref'd*).

4. Acceptance or Rejection. A judge accepts a plea bargain by pronouncing his decision to accept the agreed punishment recommendation. The decision whether to accept a plea bargain may be delayed until after the judge hears and accepts the guilty plea, hears evidence supporting the plea, and receives and considers a PSI or any other punishment evidence. *Ortiz v. State*, 933 S.W.2d 102 (Tex. Crim. App. 1996). A judge should avoid formally accepting a plea bargain until hearing all of the evidence and reading a PSI, if any. *Zapata v. State*, 121 S.W.3d 66 (Tex. App. — San Antonio 2003, *pet. ref'd*).

## II. MINIMUM DISCOVERY

- Complaints/search & arrest warrants
- D's statements (written, recorded, oral)
- Scientific reports (drugs, DNA, etc.)
- Photographs, videotapes
- Diagrams
- Conversation with prosecutor

## III. WHO STARTS?

- Prosecutor should make timely offer
- Don't wait for prosecutor to make an offer

- Defense could start with an admission of guilt and a request for an offer
- Defense is protected by Rule of Evidence 401

#### IV. WHAT MATTERS TO THE PROSECUTOR

- Acceptance of responsibility (admit guilt, make statement to investigator)
- Cooperation in investigation (physical evidence or oral statements that lead to physical evidence)
- Identification of evidentiary weakness (e.g., credibility)
- Identification of legal issues (provide case law)
- Assistance in prosecution of others
- Restitution
- Verifiable mitigation (provide medical, work, military, psychological, education records)

#### V. TO COUNTER-OFFER OR NOT?

- Prosecutor should not bargain with self
- Have a commitment from D before making counter-offer
- Don't play games
- Take a fair offer
- Politely decline an unfair offer
- Don't make a habit of changing your mind

#### VI. WHAT SHOULDN'T MATTER

- Begging from priest, mother, lawyer
- Money other than restitution
- D's family/children/status in community
- D's job (with exceptions)
- The lawyers (hired or appointed)
- Collateral consequences (including immigration)

#### VII. WHAT CAN YOU BARGAIN?

- The Plea Itself
- Evidence
- The Offense(s)
- Defendants
- Enhancements
- Deadly Weapon

- Family Violence
- Sentence
- Early Release
- Community Supervision
- Conditions
- Collateral Consequences
- Expunction
- Appeal

#### VIII. PRESERVING APPEAL

- Open plea waives appeal if conviction obtained independent of any error - Young v. State, 8 SW3d 656
- Negotiated plea waives appeal unless pretrial motion ruled upon or permission from trial court - Rule 25.2; Cooper v. State, 45 SW3d 77
- Judge must certify appeal beginning January 1, 2003

#### IX. PROTECT YOURSELF

- Ask for an offer in writing; reply in writing
- Cover all the details
- Include a warning: that which isn't covered by the offer is open to the judge
- Make notes of your conversations
- Do the plea before a court reporter

#### X. RESOURCE

- The Perfect Plea (the law of a guilty plea, including forms and a script). Go to <tdcaa.com>. Or call 512-474-2436.