Plea Bargaining and Effective Assistance of Counsel After *Lafler* and *Frye*

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Introduction

This Supreme Court term had a number of important criminal justice decisions. Examples include decisions that: refused to apply due process standards to the admissibility of eye witness identification testimony;[2] applied retroactively the law reducing the crack/cocaine sentencing disparity to persons committing crack offenses before the law's effective date but sentenced after that date;[3] held that the Confrontation Clause did not bar an expert's testimony referring to laboratory analyses she relied upon without testimony by the analysts that prepared them;[4] and held that the Eighth Amendment barred mandatory life-without-parole sentences to juveniles convicted of murder.[5] But *Lafler v. Cooper*[6] and *Missouri v. Frye,*[7] which clarify the scope of the Sixth Amendment right to effective assistance of counsel during plea bargaining, may be the term's decisions with the greatest, everyday impact on the criminal justice system.

The right to effective assistance of counsel at the plea bargaining stage was already well established before these two companion decisions. See *Padilla v. Kentucky*,[8] and *Hill v. Lockhart.*[9] But those decisions involved the issue of whether

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[2] *Perry v. New Hampshire*, 132 S.Ct. 716 (2012)

[3] *Dorsey v. United States,* 132 S.Ct. 2321 (2012

[4] *Williams v. Illinois*, 132 S.Ct. 2221 (2012)

[5] *Miller v. Alabama*, 2012 WL 236859 (U.S. Sup.Ct. June 25, 2012)

[6] 132 S. Ct. 1376 (2012)

[7] 132 S. Ct. 1399 (2012)

[8] 130 S. Ct. 1473 (2010)

[9] 474 U.S. 52 (1985)

ineffective assistance of counsel caused the defendants to *accept* the offer of a guilty plea, thereby waiving their right to a trial.

Lower court decisions, including decisions of the Second Circuit and many other circuits,[10] have long held that a defendant's Sixth Amendment rights also may be violated where counsel's deficient performance causes a defendant to *reject* a favorable plea bargain, but until now the Supreme Court had not addressed that circumstance. In *Lafler* and *Frye* the Court finally confirmed that it is equally a violation of defendants' rights to effective assistance of counsel if counsel's deficient advice results in the rejection or lapse of a plea bargain that would have resulted in a more favorable sentence than the outcome of a subsequent jury trial or guilty plea. In doing so, the Court put the right to effective assistance of counsel in the plea bargaining process on firm footing, in recognition of the central role that plea bargaining plays in the criminal justice system.

The impact of the decision on plea bargaining is open to some debate. Justice Scalia, dissenting in *Lafler* and *Frye*, complains that the decisions "open a whole new field of constitutionalized criminal procedure: plea bargaining law,"[11] departing from what he views as the purpose of the right of effective assistance of counsel to protect the right to a fair trial and a just basis for conviction and sentence. Second Circuit Judge Gerald Lynch, on the other hand, welcomes the decisions as a recognition of the reality that plea bargaining, which accounts for the vast majority of federal and state

[10] See *Borea v. Keane,* 99 F.3d 492 (2nd cir. 1996); *Williams v. Jones,* 571 F. 3d 1086, 1090, n. 3 (10th Cir. 2009) collecting cases; Gerard F. Lynch, *Frye and Lafler, No Big Deal* 122 Yale L.J. Online 39 (2012), http://yalelawjournalonline.org/2012/06/21/lynch.html (hereafter "Lynch")
[11] 132 S. Ct. at 1391

convictions, "is our criminal justice system." [12] But federal district Judge Jed Rakoff warns that *Lafler* and *Frye* may have perverse effects. He worries that they may weaken defense counsel's incentive to bargain hard and induce counsel to accept the first plea deal offered by the prosecutor, for fear that on hindsight she or he later will be labeled "ineffective" if it turns out that an opportunity for a more favorable sentence was lost.[13]

Even Justice Kennedy's majority opinions in the two cases candidly acknowledge the many difficulties that will arise in determining professional standards for defense counsel, evaluating the merits of claims of ineffective assistance, and fashioning appropriate remedies, and the need to establish procedures that will prevent late, frivolous, or fabricated claims of ineffective assistance.

I will discuss some of the details of these two cases, the guidance they might give to defense counsel, prosecutors and courts, and then say a few words about how these two decisions may be consistent with some positive themes suggested by other criminal justice decisions decided this term.

Let's begin with the facts of these two companion cases, the issues they raised, and the Court's decisions.

Factual and Procedural Background

Lafler v. *Cooper* involved a federal habeas challenge to a Michigan state court conviction and sentence entered after trial. Defendant Anthony Cooper was

[12] Lynch, note 10 supra, 122 Yale. L.J. Online at 39; see also Stephanos Bibas, *Taming Negotiated Justice,* 122 Yale L.J. Online 35 (2012), http://yalelawjournalonline.org/2012/06/20/bibas.html (hereafter "Bibas")

[13] Jed S. Rakoff, Frye *and* Lafler: *Bearers of Mixed Messages,* 122 Yale L.J. Online 25 (2012), http://yalelawjournalonline.org/2012/06/18/rakoff.html (hereafter "Rakoff").

accused of shooting a woman several times in the thigh and buttocks as she was fleeing from him after he pointed a gun at her head. He was charged with several crimes, the most serious being assault with intent to murder, for which he faced a potential life sentence. Prior to trial, the prosecution offered Cooper a plea deal: he could plead guilty to assault with intent to murder and face a below-sentencing-guidelines minimum sentence of 51 to 85 months (approximately 4 to 7 years) of imprisonment.

Cooper's court-appointed counsel advised him to reject this plea offer, informing Cooper that because the victim was wounded below the waist, the prosecution could not establish the requisite element of intent to kill. Based on this advice, Cooper rejected the plea offer, rejected a second, harsher plea offer made after the first day of trial and was convicted by a jury on all charges. He was then sentenced to 185 to 360 months (15 to 30 years) imprisonment—approximately four times longer than the prosecution's initial plea offer.

Cooper asked the trial court to overturn his sentence on the ground that his counsel's advice to reject the initial plea offer amounted to ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendment, thereby depriving him of the advantageous initial plea offer that he claimed he would he would have accepted but for his counsel's deficient advice. The trial court rejected the argument, as did the Michigan appellate courts. Cooper then sought federal habeas relief. The federal district court granted habeas, holding that Cooper met the two- part standard set forth in *Strickland* v. *Washington*,[14] by establishing that in violation of his Sixth Amendment right to effective assistance of counsel his counsel wrongly advised him that the

[14] 466 U.S. 668 (1984)

circumstances failed to satisfy the elements of assault with intent to commit murder and that he was prejudiced by that violation because it caused him to reject the more favorable plea offer. The district court concluded that the remedy for this ineffective assistance should be "specific performance" of the original plea deal that the defendant would have accepted but for his lawyer's erroneous advice.

The Sixth Circuit affirmed. In its decision, the court of appeals, among other things, rejected the argument that Cooper suffered no cognizable prejudice from his counsel's deficient performance because he was convicted at a fair and error-free trial and sentenced accordingly. In the Sixth Circuit's view, Cooper had established prejudice by showing that he would have accepted the plea offer but for counsel's recommendation, and that he ultimately received a sentence "greater than that promised by the plea deal." Thus, the court concluded that Cooper's Sixth Amendment rights were violated when, due to counsel's constitutionally deficient advice, he "lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him."

In *Missouri* v. *Frye*, defendant Galen Frye was charged in Missouri state court with driving with a revoked license, a felony because of his three prior convictions for the same offense. Before Frye's preliminary hearing, the prosecutor mailed a written plea offer to the public defender assigned to represent Frye, offering two alternative deals: (i) Frye could plead guilty to the felony charge and the prosecutor would recommend a three-year prison sentence while deferring to the court on whether Frye should instead receive probation (but the prosecutor would request that, in any event, Frye serve ten days in jail as "shock" incarceration); or (ii) Frye could plead guilty to an amended information charging only a misdemeanor, in which case the prosecutor would

recommend a sentence of ninety days in jail. The offer would expire, the prosecutor stated, a week before the preliminary hearing. Frye's counsel never informed him of this plea offer and it expired by its terms.

In the meantime, a week before trial Frye was again arrested for driving with a revoked license. Prior to trial, Frye entered a guilty plea to the felony charge without the benefit of a plea agreement and was sentenced to three years imprisonment. After he was convicted and sentenced, Frye learned of the prosecution's original plea offer. On his motion for post-conviction relief, Frye stated that had he been informed of the opportunity to plead guilty to the misdemeanor charge (and resulting 90-day sentence), he would have done so. He therefore alleged that his counsel's failure to communicate the State's plea offer to him violated his Sixth Amendment right to the effective assistance of counsel and resulted in the more unfavorable sentence entered on his guilty plea.

The Missouri Court of Appeals agreed with Frye. It applied the two-part *Strickland* standard and determined that counsel's deficient performance in failing to inform him of a plea offer was prejudicial to Frye. Therefore, the court determined, Frye was denied his constitutional right to effective assistance of counsel. Unlike *Lafler*, however, the Missouri court did not order "specific performance" of the original plea offer. Instead, the court "deem[ed] the guilty plea withdrawn" and remanded to the trial court to allow Frye to decide whether to "insist on trial" or to "plead guilty to the charged [felony] offense or to such other amended charge as the State may deem it appropriate to offer."

The Supreme Court Opinions

The Supreme Court granted review in both cases. In 5-4 decisions, and opinions by Justice Kennedy, in both cases, the Court held that the two-part *Strickland* test to determine ineffective assistance of counsel properly applied to the rejection of the plea offer in *Lafler* and the lapse of the plea offer in *Frye*. In so doing, the Court rejected the arguments of the state prosecutors (and the United States as amicus) that the *Strickland* test applied only where a deficient performance of counsel resulted in the *acceptance* of a plea bargain resulting in the waiver of the right to a trial or some other procedural or substantive right and could not apply in a case where following the rejection of the plea or its lapse, the defendant was sentenced after a fair trial or knowingly and intelligently accepted a subsequent (but harsher) plea offer.

Justice Kennedy acknowledged that special difficulties arose where application of the *Strickland* test was sought in cases where counsel's deficient performance is alleged to have resulted in the rejection or lapse of a plea, that were not present in cases where the claim related to advice to accept a plea. In the latter cases, Justice Kennedy noted that the plea is taken in open court and the judge and counsel can establish on the record that the plea is based on an informed and intelligent decision by the defendant. As Justice Kennedy noted, "[t]his affords the States substantial protection against claims that the plea was the result of inadequate advice."[15] Where a plea offer has lapsed or been rejected, however, "the prosecution has little or no notice that something may be amiss and perhaps no capacity to intervene in any event." [16] Moreover,

[15] *Frye,* 132 S.Ct. at 1406.
[16] Id. at 1407

unlike the case of defective advice to accept a plea where the remedy was simply to vacate the sentence and order a trial, the remedy for defective advice resulting in the rejection or lapse of a plea would likely entail greater difficulties in putting the defendant, the prosecutor and the court in the same position as they would have been had the initial plea offer been accepted.[17]

Justice Kennedy nevertheless reasoned that the State's objections, premised on the general contention that a "fair trial wipes clean any deficient performance by counsel during plea bargaining"[18] or the special administrative or evidentiary difficulties presented in the case of a lapsed or rejected offer, were insufficient "to overcome a simple reality."[19] Citing statistics showing that 97 percent of federal convictions and 94 percent of state convictions are the result of guilty pleas, Justice Kennedy concluded that: "the reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities … that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because " 'ours is for the most part a system of pleas, not trials,' … it is insufficient simply to point to fair trials as a backstop that inoculates any errors in the pretrial process. "[20]

Noting that the plea bargaining process typically determines who goes to jail and for how long, Justice Kennedy concluded: "In today's criminal justice

[17] *Lafler,* 132 S. Ct. at 1389.
[18] Id at 1388.
[19] *Frye,* 132 S.Ct. at 1407.
[20] *Frye*, 132 S.Ct. at 1407, see also *Lafler,* 132 S.Ct. at1388.

system…the negotiation of a plea bargain rather than the unfolding of a trial, is almost always the critical point for a defendant."[21]

Applying the *Strickland* standard, Justice Kennedy found the first prong – ineffective assistance—was met in both *Lafler* and *Frye*: In *Lafler, that* point was conceded and in *Frye*, Justice Kennedy held that the failure to communicate the original plea offer to the defendant violated professional standards.[22]

As for the second *Strickland* prong—prejudice resulting from the deficient advice—the Court explained that to show prejudice from ineffective assistance of counsel where a plea offer is rejected or lapses, a defendant must demonstrate a reasonable probability that (1) it would have accepted the favorable plea offer had it received effective assistance of counsel, and (2) that the plea would have been entered without the prosecution cancelling the offer or the trial court refusing to accept it, if state law permitted the prosecutor to withdraw the offer once accepted and the court to exercise discretion to reject it.[23]

Justice Kennedy found that in *Lafler*, Cooper satisfied the prejudice requirement, i.e., that there was a reasonable probability that, but for the deficient advice, Cooper would have accepted the original plea offer and that the court would have accepted the plea which would have resulted in a shorter sentence than he received after the trial. But in *Frye*, Justice Kennedy found that while there was a reasonable probability that but for counsel's ineffective performance Frye would have accepted the

[21] *Frye*,132 S.Ct. at 1408.
[22] *Lafler*, 132 S.Ct. at1390; *Frye,* 132 S.Ct. at 1408-09.
[23] *Lafler,* 132 S.Ct. at 139; *Frye*, 132 S.Ct. at 1410-11.

initial offer, it was doubtful whether the prosecutor would have adhered to the initial plea offer—recall that Frye was apprehended driving with a revoked license for a fourth time before the trial was to begin—or that the court would have accepted that plea.[24]

Justice Kennedy then turned to the issue of remedy in each case.

In *Lafler*, despite the finding that Cooper had satisfied both prongs of the *Strickland* standard, he did *not* order specific performance of the original plea offer. He ordered the state to reoffer the plea but he reasoned that in all such cases, the trial judge had discretion to choose between the original plea offer, the sentence imposed on conviction, or something in between. He held that "[t]oday's decision leaves open to the trial court how best to exercise that discretion in all the circumstances of the case."[25] The case was therefore remanded to the trial court for further proceedings consistent with the opinion.

In *Frye*, despite his strong doubts that either the prosecutor or the court would accept the original plea offer, Justice Kennedy remanded to determine the state-law question of whether the prosecutor would have had discretion to cancel the plea offer once accepted and whether the court had discretion to reject the plea. The judgment of the Missouri Court of Appeals was therefore vacated and the case remanded for further proceedings not inconsistent with the Supreme Court's opinion.[26]

Justice Scalia dissented in both cases.

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[24] *Lafler*, 132 S.Ct. at 1391-92; *Frye*, 132 S.Ct. at 1411.
[25] *Lafler*, 132 S.Ct. at 1391.
[26] *Frye*, 132 S.Ct. at 1411.

Justice Scalia maintained that the purpose of the Sixth Amendment right to effective assistance of counsel was to safeguard the right to a fair trial, prevent the loss of other procedural and substantive rights, and assure that a conviction and sentence were just. Inasmuch as Cooper's sentence indisputably resulted from a fair trial and Frye's later guilty plea was not claimed to be based on defective advice of counsel, Justice Scalia maintained that there was no prejudice resulting from counsel's deficient performance in either case. In his view each got the sentence permitted under state law and therefore the result could not be unjust. Justice Scalia also criticized the majority decision as unjustifiably creating a new constitutional plea bargaining law, without standards for defense counsel, with possible implications for the obligations of prosecutors, and with broad remedial discretion for trial courts, unconstrained by any standards, that, he maintained, anomalously allows them to deny any remedy for violations of the constitutional right created by the majority.[27]

Plea Bargaining After *Lafler* and *Frye*

What then do *Lafler* and *Frye* teach us?

First, how do these decisions affect the professional standards for defense counsel's negotiation of a plea? The determination of the first *Strickland* prong—

[27] *Lafler,* 132 S.Ct. at 1391-95, 1396-97. Justice Scalia also argued that the Court should have dismissed *Lafler* as barred by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which permits federal habeas only if the state court's decision is inconsistent with or an unreasonable application of "clearly established law." Id at 1395-96 Although the Michigan Court of Appeals opinion was vague and confusing, Justice Scalia read it as having applied *Strickland* but finding that the prejudice prong was not satisfied. Because at the time, no prior Supreme Court decision had established that prejudice occurred in the circumstances involved here, the Michigan court, on Justice Scalia's reading of its decision, did not fail to apply, nor did it unreasonably apply, "clearly established law."

ineffective assistance of counsel—seems easy in these cases.[28] But as Justice Kennedy acknowledges, "how to define the duty and responsibilities of defense counsel in the plea bargaining process…is a difficult question." As he notes, "bargaining is, by its nature, defined to a substantial degree by personal style" and negotiating tactics "are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process."[29]

As noted, Judge Rakoff worries that defense counsel, fearful of later being labeled "ineffective" counsel should rejection of an offer prove with hindsight to have been disadvantageous, will be inclined to accept the prosecutor's first offer, rather than develop a robust defense and bargain hard for the defendant.[30] Judge Lynch, on the other hand, argues that claims that defense counsel were negligent in failing to present mitigating proof in plea bargaining or that defense counsel was too tough or not tough enough are not likely to be successful. He believes courts recognize that tactical judgments in plea bargaining turn on "exquisite factual nuances" and will take a fairly hard line against claims that are directed against "anything that can be characterized as a matter of tactical decision."[31] Indeed, *Strickland* cautions that "scrutiny of counsel's performance must be highly deferential" and that "every effort must be made to eliminate

[28] But as Justice Kennedy acknowledges, in *Lafler* that is only because the parties there conceded that counsel's advice to Cooper was deficient. As he notes there may be questions as to whether in fact his performance amounted to ineffective assistance. (*Lafler,* 132 S. Ct. at 1390-91).
[29] *Frye*, 132 S. Ct. at 1408.
[30] Rakoff, note 13 supra.
[31] Lynch, note 10 supra, 122 Yale L.J. Online at 40.

the distorting effects of hindsight … and to evaluate the conduct from counsel's perspective at the time."[32]

Second, the burden on a defendant claiming ineffective assistance of counsel in plea bargaining is substantial. The defendant has the burden of proving a reasonable probability that the defendant would have accepted the plea offer but for counsel's deficient advice and a reasonable probability that the prosecutor would not have withdrawn the plea and that the trial court would have entered it. Resolution of these issues is necessarily fact intensive. Moreover, courts are likely to be influenced by what transpired after the initial plea offer, including facts disclosed concerning the guilt of the defendant following the initial plea offer before or during trial.

Finally, Justice Kennedy's opinions leave it to the discretion of trial judges to decide how, and even whether, to remedy failures of defense counsel to provide effective assistance in the plea bargaining process, without any clear standards. Justice Kennedy suggests some considerations that should be taken into account in fashioning a remedy. These include the defendant's earlier willingness or unwillingness to accept responsibility for his or her actions, avoiding, if possible, the additional expense of a new trial, and assuring that the remedy does not confer a windfall on the defendant. Ultimately, however, Justice Kennedy concludes that "the trial court must weigh various factors; and the boundaries of proper discretion need not be defined here. Principles elaborated over time in decisions of state and federal courts, and in statutes and rules, will

[32] 466 U.S. at 689; see generally, id at 687-91.

serve to give more complete guidance as to factors that should bear upon the exercise of the judge's discretion."[33]

Justice Scalia criticizes this vague advice, but others express confidence in a common law development for devising workable standards and applaud the Court's wisdom in allowing "lower courts to experiment with crafting workable remedies."[34]

In the meantime, courts, prosecutors, defense counsel and legislatures may want to address the potential for late, frivolous or fabricated claims of ineffective assistance of counsel after a later, less advantageous plea offer has been accepted or after a trial results in a conviction with a harsher sentence than a rejected or lapsed plea bargain would have offered. Justice Kennedy suggests, for example, that plea offers might be required to be in writing; plea negotiations be documented; and before trial begins, judges should inquire in open court about plea negotiations.[35]

In the end, notwithstanding the many difficulties and uncertainties it entails, the Supreme Court's confirmation of the scope of the Sixth Amendment right in the plea bargaining process seems a wise recognition of the role of plea bargaining in the criminal justice system as it actually exists. Justice Scalia's dissenting view is premised on the belief that the loss of an opportunity for a favorable plea due to ineffective assistance of counsel bargain cannot be prejudicial or unjust because any harsher sentence resulting from a fair trial or an error-free later plea is the one that the legislature has already determined to be just. But as Judge Lynch observes, Justice Scalia's view is

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[33] *Lafler,* 132 S.Ct. at 1389.
[34] Bibas, note 12 supra, 122 Yale L.J. Online at 38.
[35] *Frye*, 132 S.Ct. at 1408-09.

premised "on the essentially fictive notion that the sentencing outcomes after trial are in fact just. In reality post-trial sentencing exposures are excessive by design and serve almost exclusively to induce defendants to plead."[36]

Indeed, Justice Scalia acknowledges that injustices occur in the plea bargaining processes.[37] Among them are cases where defendants who are innocent or are faced with prosecutorial overcharging plead guilty and accept sentences they do not deserve to avoid risking unduly harsh minimum mandatory sentences enacted by legislatures. Perhaps *Lafler* and *Frye* through the scrutiny they will bring to the plea bargaining process may draw attention to injustices caused by these legislative policies or prosecutorial practices that exploit them. Without addressing these problems, as well as our underfunded and overburdened criminal justice system, however, Lafler and *Frye* are not a panacea for the injustices faced by many indigent defendants.

Realism and Justice in Supreme Court Criminal Justice Jurisprudence

But let me close on a more positive theme—one that connects these decisions with some of this term's other decisions. And that theme is the triumph of realism and justice over narrow legalism and formalism. I have already noted how the reality of plea bargaining's dominant role in the criminal justice system ultimately controlled the outcome in *Lafler* and *Frye*. Realism is also reflected in the Court's decision in *Dorsey v. United States*,[38] applying the Fair Sentencing Act's reduction of the crack/cocaine powder disparity to the sentencing of persons committing drug offenses

[36] Lynch, 122 Yale L.J. Online at 40.
[37] *Lafler*, 132 S.Ct. at 1397 . This portion of Justice Scalia's dissent, joined only by Justice Thomas, includes a broad critique of the plea bargaining system as a necessary evil.
[38] Note 3 supra.

before the Act's effective date but sentenced after that date—a recognition of Congress's goal to reduce an unjust sentencing disparity. It is reflected in the decision in *Miller v. Alabama*,[39] holding that the Eighth Amendment barred mandatory life-without-parole sentences for juvenile homicide offenders--in recognition of the differences between children and adults that bear on culpability and the capacity for rehabilitation. And it is reflected in the common sense decision in *Maples v. Thomas,*[40] refusing to allow a missed appellate deadline, due entirely to defense counsels' abdication of their professional obligations, to deprive a death row inmate of his opportunity to challenge constitutional errors he claimed infected his trial and sentence—a recognition that justice and fairness play a role in interpreting jurisdictional and procedural rules. Let us hope we can see more of this realism and a sense of justice in the terms to come.

[39] Note 5 supra.
[40] 132 S.Ct. 912 (2012)