Lafler v. Cooper and *Missouri v. Frye;* Effective Assistance of Counsel Expanded to Plea Bargaining

By W. Kelly Johnson

The United States Supreme Court issued a pair of decisions on March 21, 2012 which confirmed what criminal practitioners have known for many years: plea bargaining is not adjunct to the criminal justice system, "it is the criminal justice system."[1] In the *Cooper* and *Frye* decisions, the Supreme Court expanded the Sixth Amendment right to effective assistance of counsel to plea bargaining. It found that plea bargaining is a "critical stage" in a criminal proceeding.

I. *Lafler v. Cooper*

In March, 2003, Anthony Cooper pointed a gun at Kali Mundy and shot her in the buttock, hip and abdomen. Mundy survived the assault. Cooper was charged under Michigan law with assault with intent to murder, possession of a firearm and possession of a firearm in the commission of a felony. On two occasions, the prosecution offered to dismiss two of the three charges and to recommend a sentence of 51 to 85 months, all in exchange for a guilty plea to the remaining charge. Cooper told the judge that he admitted guilt and expressed a willingness to accept a plea offer. However, he later rejected the plea offer after his attorney convinced him that the prosecution would be unable to establish his intent to murder Mundy because he had shot her below the waist. The advice provided by counsel was clearly erroneous in light of current Michigan law. Cooper was convicted at trial on all counts and received a mandatory minimum sentence of 185 to 360 months.

Cooper appealed his conviction and sentence to the Michigan Court of Appeals. That court rejected his claim of ineffective assistance of counsel on the grounds that Cooper knowingly rejected two plea offers and chose to go to trial. Cooper filed a petition for habeas relief in U.S. district court under 28 U.S.C. §2254 and renewed his ineffective assistance of counsel claim. The district court found that the Michigan courts had unreasonably applied the constitutional standards for ineffective assistance of counsel laid out in *Strickland v. Washington* and *Hill v. Lockhart* and granted a conditional writ. The district court ordered the "specific performance of (Cooper's) original plea offer for a minimum sentence in the range of 51 to 85 months."[2] The Sixth Circuit Court of Appeals affirmed the district court's finding of deficient performance by Cooper's counsel when he informed Cooper of an incorrect legal rule. The Sixth Circuit further found that Cooper had suffered prejudice when he had "lost out on an opportunity to plead guilty and receive a lower sentence that was offered to him."[3]

II. *Missouri v. Frye*

In August, 2007, Galin Frye was charged with driving with a revoked license, a felony under Missouri law, which carried a maximum term of imprisonment of four years. On November 15, 2007, the prosecutor sent a letter to Frye's counsel offering a choice of two plea bargains. The prosecutor's first offer was a plea to a felony charge with a three-year sentence and with a recommendation from the prosecutor that Frye be released after serving 10 days in jail of "shock" time.[4] The second offer was to reduce the charge to a misdemeanor with a recommendation from the prosecutor of a 90-day sentence. A misdemeanor charge of driving with a revoked license carried a maximum term of imprisonment of one year. The letter stated that both offers would expire on December 28.

Frye's lawyer did not advise him that the offers had been made and both offers expired. Two days after the expiration of the offers, Frye was again charged with driving with a revoked license. Frye eventually pled guilty to the felony charge with no underlying plea agreement. The prosecutor recommended a three-year sentence, and made no recommendation regarding probation but requested "shock" time. The trial judge sentenced Frye to three years in prison.

Frye filed for post-conviction relief in state court and, at an evidentiary hearing, testified that he would have entered a plea to a misdemeanor charge if he had known of the offer. The state court denied his post-conviction motion, but the Missouri Court of Appeals reversed and found that the performance of Frye's counsel was deficient because there was no indication in the record that any effort had been made by trial counsel to communicate the offers to Frye prior to their expiration.

III. Analysis of the Supreme Court

Justice Kennedy authored both opinions. In a 5 to 4 decision, the majority concluded that the Sixth Amendment

right to counsel extends to the plea bargaining process when a defendant rejects a plea offer because of counsel's erroneous advice about the law or is unaware of a plea offer.[5] In *Lafler,* the Court found that the Sixth Amendment right to effective assistance of counsel is not designed simply to protect trial rights. The Court found that the constitutional guarantee applies to all pretrial critical stages that are part of the "whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice." [6] It was conceded by the State of Michigan that Lafler went to trial, rather than accept a plea deal, as a result of ineffective assistance during the plea negotiation process. The Court focused on the practical result that Lafler received a sentence three times more severe than he would have received by pleading guilty to the plea offer.

In *Lafler,* the Court also recognized the statistics that 97 percent of federal convictions, and 94 percent of state convictions, are the result of a plea bargain.[7] The Court accepted "the reality that criminal justice today is for the most part a system of pleas, not a system of trials."[8] "The right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences."[9] The Court rejected the State of Michigan's position that implementing a remedy for these violations would open a floodgate of litigation by defendants seeking to unsettle their convictions.

In reviewing the failure of counsel to notify Frye of the plea offers, the court in *Frye* held that, as a general rule, defense counsel has a duty to communicate formal plea offers from the prosecution on terms and conditions that may be favorable to the defendant. When defense counsel allows a plea offer to expire without communicating it to a defendant or allowing him to consider it, defense counsel does not render the effective assistance the Constitution requires.

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Because defense counsel failed to notify Frye of the misdemeanor offer, Frye was denied effective assistance of counsel.

Frye also discusses a second element of the *Strickland* case. A criminal defendant is required to show prejudice from the ineffective assistance of counsel to establish a constitutional violation. To establish prejudice in this instance, it was necessary for Frye to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. "In cases where a defendant complains »

that ineffective assistance led him to accept a plea offer as opposed to proceeding to trial, the defendant will have to show a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'"[10] In order to establish prejudice, a defendant must also show that, if the prosecution had the discretion to cancel the offer or if the trial court had the discretion to refuse to accept it, there is a reasonable probability that neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented. The court in *Frye* found that there was a reasonable probability that Frye would have accepted the prosecutor's offer of a plea bargain to a lesser charge had it been communicated to him, because he ultimately pled guilty to a more serious charge. The court remanded the case to the Missouri Court of Appeals for a factual determination on whether the prosecutor would have cancelled the plea agreement and whether the trial court would have refused to accept the plea offer.

IV. Scalia Dissent

Justice Scalia, on behalf of the Chief Justice and Justices Thomas and Alito, rejected the expansion of Sixth Amendment protections to plea negotiations. The dissent opined that the decision "opens a whole new field of constitutionalized criminal procedure: plea bargaining law."[11] While conceding that negotiation of plea bargains is a critical phase in litigation for Sixth Amendment purposes, the right to the effective assistance of counsel, the hallmark of which is the assurance of a fair trial, is not infringed unless "counsel's mistakes call into question the basic justice of a defendant's conviction or sentence."[12] Scalia rejected the majority decision because failure to notify a defendant of a plea offer, or giving incorrect legal advice in plea negotiations, did not deny effective assistance of counsel when the case proceeded to trial and the trial rights of the defendant were not adversely affected. Justice Scalia distinguished between "unfortunate attorney error and error of constitutional significance."[13] Only the latter, he stated, impaired a fair trial and constituted ineffective assistance of counsel.

V. Practical Effects of Decision

Finding that ineffective assistance of counsel occurs when a plea offer is rejected because defense counsel provides erroneous legal advice or because counsel fails to disclose the offer to the defendant, the Supreme Court has opened for discussion a variety of issues concerning the practicalities of plea offers:

1. Whether a plea offer should be formalized in writing and made part of the discovery process.
2. Whether terms of a plea offer, and a rejection of the offer, should be memorialized in a filing or acknowledged on the record prior to trial.
3. Whether an opportunity should be provided, in the form of a proffer with the court reporter on the record, to document the plea offer and rejection of the plea offer.

Each of these options presents pitfalls for the criminal practitioner. Obviously, a formalized plea offer made in writing prior to trial is the "gold standard" for the communication of plea offers and is common practice in federal prosecutions. This luxury does not extend to practice in most state felony and misdemeanor courts. In many cases, whether the prosecutor will insist on going forward with a trial and refuse to offer a plea bargain depends heavily on whether a key witness or witnesses appear for that trial. Therefore, it is not unusual for plea offers to be made and plea bargains to be struck on the morning of trial.

Detailing a plea offer in a separate pleading or in a "fill-in the-blank" plea form would be an option in felony courts, most of which require a written record of a plea agreement. In many misdemeanor cases, the terms of a plea agreement are stated verbally on the record and no document details the plea offer made or plea bargain struck. Detailing rejected plea offers, prior to trial, would require judges to devote additional time in many cases in already over-crowded dockets.

A "one size-fits all" approach to documenting rejected pleas offers is not an option. Protecting the record concerning plea offers is likely to be a process that will be worked out between prosecutors and defense attorneys on a court by court basis. Defense counsel should be vigilant to insure that criminal defendants are aware of plea offers made to them by prosecutors and be sure to explain to defendants the risks and benefits of going to trial versus accepting a plea offer.

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1 *Lafler v. Cooper* (10-209), 556 U.S. ___(March 21, 2012) and *Missouri v.* Fry (10-444), 556 U.S. ___ (March 21, 2012).

2 *Lafler v. Cooper* at 3.

3 *Id.*

4*Missouri v. Frye* at 2.

5 *Padilla v. Kentucky*, 559 U.S. _____, 131 S.Ct. 1437, 176 L.Ed 2d 284 (2010). The court found that during plea negotiations, defendants are entitled to the effective of assistance of competent counsel.

6 *Lafler* at 6.

7 *Lafler* at 11, *citing*, *Frye* at 7.

8 *Lafler* at 11.

9 *Id.*

10 *Frye* at 11, *citing*, *Hill v. Lockhart, 474 U.S.* at 59.

11 *Lafler* at 1.

12 *Lafler* at 4.

13 *Lafler* at 4.