



March 26, 2012

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## ***Supreme Court Establishes Remedies for Sixth Amendment Violations in Plea Bargaining Cases***

On March 21, 2012, the U. S. Supreme Court, in 5-4 votes, decided the companion cases of *Missouri v. Frye*, No. 10-441, 566 U.S.\_\_\_\_ (2012) and *Lafler v. Cooper*, No. 10-209, 566 U.S.\_\_\_\_ (2012). In both cases, the defendants alleged that their respective Sixth Amendment right to counsel was violated during the plea bargaining process. As a preface, the Court noted that ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. The Court pronounced that in today's reality, our criminal justice system is for the most part, a system of pleas, not a system of trials. Thus, 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.

In *Frye*, the prosecution charged him with driving on a revoked license. Since Frye had three priors for the same offense, he was facing a felony conviction and a maximum four years in prison. The prosecution offered to reduce the charge to a misdemeanor and recommend, with a guilty plea, a 90-day sentence. Defense counsel neglected to communicate the plea offer to Frye and the offer expired. A couple of days after the offer expired and before the plea would have been entered, Frye was stopped again and charged with driving on a revoked license. He subsequently entered a non-negotiated plea which resulted in a three-year sentence.

Under *Strickland v. Washington*, 466 U.S. 668 (1984), to prove ineffective assistance of counsel, it must be shown that defense counsel rendered deficient performance and that the deficient performance caused the defendant prejudice. The Court held that a defendant has no constitutional right to be offered a plea bargain. However, defense counsel has a duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Frye's defense counsel rendered deficient performance by not communicating the offer and letting it expire.

In cases where a defendant pleads guilty to less favorable terms and claims ineffective assistance caused him to miss out on a more favorable earlier plea offer, the prejudice prong of the *Strickland* test requires an inquiry into whether the defendant would have accepted the offer to plead pursuant to the terms earlier proposed. Thus, to prove prejudice under *Strickland*, the Court held that a defendant must show 1) a reasonable probability that he would have accepted



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the earlier plea offer; and 2) if the prosecution had discretion to refuse to accept it, a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented.

Here, the Court found, Frye could show he would have accepted the plea offer, but because of the intervening charge of driving on a revoked license, the Court found there was “strong reason to doubt the prosecution and the trial court would have permitted the plea bargain to become final.” The case was remanded back to Missouri for further proceedings.

In *Lafler v. Cooper*, a habeas case, the prosecution charged Lafler with assault with intent to murder and three other related crimes. The prosecution offered to dismiss two of the charges and recommend a sentence range of 51–85 months on the other two in exchange for a guilty plea. Lafler rejected the offer, allegedly because his defense counsel convinced him that the prosecution would be unable to prove intent to murder because the victim was shot below the waist. Lafler went to trial and a jury convicted him of all counts. He received a mandatory minimum 185–360 month sentence.

It was conceded by the State that defense counsel’s performance fell below an objective standard of reasonableness. Thus, the question for the Court was how to apply *Strickland*’s prejudice test where ineffective assistance results in a rejection of a plea offer and the defendant is convicted at the ensuing trial. The Court held a defendant must show that but for the ineffective advice, there was a reasonable probability that the plea offer 1) would have been accepted by the defendant; 2) would not have been withdrawn by the prosecution in light of intervening circumstances; 3) would have been accepted by the trial court under its terms; and 4) the conviction or sentence or both, under the offer’s terms, would have been less severe than under the judgment and sentence that in fact were imposed.

If the defendant satisfies both prongs of the *Strickland* test, the Court found that the remedy must “neutralize the taint” of the constitutional violation, while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution. If the sole advantage is that the defendant would have received a lesser sentence under the plea, the trial court should hold an evidentiary hearing to determine whether the defendant would have accepted the plea. If so, the court may exercise discretion in determining whether the defendant should receive the term offered in the plea, the sentence received at trial, or something in between. However, resentencing based on the conviction at trial may not suffice, e.g., where the offered guilty plea was for less serious counts than the ones for which a defendant was convicted after trial, or where a mandatory sentence confines a judge’s sentencing discretion. In these circumstances, the proper remedy may be to require the prosecution to re-offer the plea. The judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea, or leave the conviction undisturbed.



State Prosecution Support

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In either situation, a trial court must weigh various factors, of which the Court felt two were worthy of mentioning. First, a court may take into account a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions. Second, the Court found that it is not necessary in this case to decide as a constitutional rule that a judge is required to disregard any information concerning the crime discovered after the plea offer was made (e.g. facts that may have come out at trial).

Here, the parties conceded the fact of deficient performance and Lafler proved that but for that deficient advice, there was a reasonable probability that he would have accepted the plea bargain. The habeas court ordered specific performance of the plea bargain. However, the Court held, the correct remedy was to order the prosecution to re-offer the plea agreement. Presuming Lafler accepts the offer, the trial court may then exercise its discretion in determining whether to vacate only some of the convictions and resentence him accordingly, or to leave the convictions and sentence from trial undisturbed.

In both cases, the Court encouraged prosecution and trial courts to adopt measures to ensure against late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted (*Frye*), or after a trial leading to a conviction (*Lafler*). For example, require formal documented plea offers so that what took place in the negotiation process becomes more clear if some later inquiry turns on the conduct of earlier pretrial negotiations, or provide for plea offers to be made part of the record at any subsequent plea proceeding or before trial to ensure that a defendant has been fully advised before those further proceedings commence. States may also elect to formalize rules that all plea offers must be in writing, again to ensure against later misunderstandings or fabricated charges.