Supreme Court expands 6th Amendment rights in plea bargaining

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In a boon for criminal defendants, the U.S. Supreme Court decided a pair of cases last month that expand rights to effective assistance of counsel in plea bargaining situations.

The first case, *Missouri v. Frye*, addresses an attorney's failure to inform a defendant of a plea offer with terms more lenient than those of a guilty plea entered later.

The second case, *Lafler v. Cooper*, concerns an attorney's advice that a defendant reject a plea offer where the defendant received a harsher penalty after trial.

The court split 5-4 in each case, with Justice Anthony M. Kennedy writing the majority opinion in both.

In each case, the court applied the familiar two-part *Strickland v. Washington* test, looking at whether counsel's performance was deficient and whether the defendant was unduly prejudiced.

In *Lafler*, the court also addressed the question of what remedy the defendant should receive.

'Missouri v. Frye'

In *Frye*, the defendant was charged with driving with a revoked license, fourth offense, a felony that carried a maximum prison term of four years.

The prosecution offered defense counsel two plea deals, one reducing the charge to a misdemeanor and a 90-day sentence (the misdemeanor carried a maximum sentence of incarceration for one year).

Although counsel was told the offers would expire on a certain date, he never informed his client of the offers, and they expired. The defendant later pleaded guilty without a plea agreement and was sentenced to three years in prison.

Early in its analysis, the court recognized the fundamental reality that almost all criminal convictions result from guilty pleas: 94 percent in state cases, and 97 percent in federal matters.

"Plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process … to render the adequate assistance of counsel that the Sixth Amendment requires," the court stated.

The court stopped short, however, of defining in detail a lawyer's duties at the plea negotiation stage, recognizing that plea bargaining involves issues of "personal style," "tactics" and "alternative courses."

Concentrating on the facts of *Frye*, the court held that, "as a general rule," counsel "has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."

Because the offer in *Frye* was formal and the expiration date fixed, the court declined to explore any exceptions to the general rule. The court concluded that, under the first prong of *Strickland*, counsel's performance was deficient.

The court noted that prosecutors and courts "may adopt some measures to help ensure against late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted or after a

trial leading to conviction with resulting harsh consequences."

For instance, plea offers could be required to be made formal and put in writing, or made part of the record at any subsequent plea proceeding or before trial.

As for the prejudice prong of *Strickland*, in which a defendant claims ineffectiveness based on a lapsed or rejected plea offer, the defendant must show "a reasonable probability that":

• "they would have accepted the earlier plea offer had they been afforded effective assistance of counsel";

• "the plea would have been entered without the prosecution cancelling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law"; and

• "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."

The court added that "[i]t may be that in some cases defendants must show more than just a guilty plea to a charge or sentence harsher than the original offer. For example, revelations between plea offers about the strength of the prosecution's case may make a late decision to plead guilty insufficient to demonstrate, without further evidence, that the defendant would have pleaded guilty to an earlier, more generous plea offer if his counsel had reported it to him."

In the *Frye* case, the court remanded the matter for the state court to sort out the prejudice prong of *Strickland*, i.e., whether, as a matter of state law, the prosecution and the trial court were required to follow the first plea offer.

'Lafler v. Cooper'

In connection with a shooting in Michigan, the defendant in *Lafler* was charged with assault with intent to murder and three other charges.

The prosecution offered a plea deal involving dismissal of two of the charges and a recommendation of a sentence of 51 to 85 months on the other charges.

The defendant rejected the offer on advice of counsel that the prosecution could not prove intent to murder because the victim had been shot below the waist.

After trial, the defendant was convicted on all charges and received a mandatory minimum sentence of incarceration for 185 to 360 months.

Because the parties agreed that defense counsel's performance was deficient under the first prong of *Strickland*, the court proceeded directly to the prejudice prong and to the proper remedy for the defendant.

In discussing the elements necessary to prove prejudice when a defendant rejects a plea offer, the court used language similar to that used in *Frye*. It held that a defendant "must show that but for the ineffective advice of counsel, there is a reasonable probability that":

• "the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances)";

• "the court would have accepted its terms"; and

• "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."

The court rejected the notion that a fair trial wipes clean ineffectiveness concerning a plea offer, noting that "criminal justice today is for the most part a system of pleas, not a system of trials."

As for the appropriate remedy, the court discussed two possibilities:

(1) resentencing, if the defendant would have pleaded guilty to the same charges for which he was convicted after trial, or

(2) requiring the prosecution to reoffer the plea proposal, if the offer involved lesser offenses than those for which the defendant was convicted, or if a mandatory sentence confines a judge's discretion after trial.

In the first situation, "the court may conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel's errors he would have accepted the plea. If the showing is made, the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between."

In the second situation, the judge can "exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed."

The court said that, in implementing a remedy, the judge "must weigh various factors," but it specified only two:

(1) a defendant's "willingness or unwillingness to accept responsibility for his or her actions," and

(2) "any information concerning the crime that was discovered after the plea offer was made."

In addition, the "baseline" of the parties' positions at the time the plea offer was made "can be consulted in finding a remedy that does not require the prosecution to incur the expense of conducting a new trial."

In sum, the court ruled that Lafler was prejudiced by receiving a sentence, after trial, that was three and a half times greater than he would have received under the plea.

The court also concluded that the proper remedy was to order the prosecution to reoffer the plea agreement, and, presuming the defendant accepts it, for the trial court to exercise its discretion in implementing the remedy.

The trial court would have to decide whether to vacate the convictions and resentence the defendant pursuant to the plea agreement, vacate only some of the convictions and resentence the defendant accordingly, or leave the convictions and sentence undisturbed.

As with other fundamental shifts in the law, such as the sea change in confrontation clause jurisprudence brought about by *Crawford v. Washington*, the *Frye* and *Lafler* decisions present a host of difficult and unanswered questions sure to keep prosecutors and defense attorneys busy for some time.

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