Ineffective Assistance and Plea Bargaining

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The Supreme Court decided two cases last week about ineffective assistance of counsel during plea bargaining. The cases, Lafler v. Cooper and Missouri v. Frye, made a big splash in the media. Locally, they were featured on front page of the *News and Observer*. Nationally, they've been the talk of the *New York Times* and have been relentlessly discussed in the blogosphere. They've also caused some alarm among North Carolina prosecutors and judges, some of whom fear that any defendant who turns down a plea offer, goes to trial, and gets a sentence more severe than what was offered will now have a meritorious claim of ineffective assistance.

The facts of *Lafler* are as follows. The defendant "pointed a gun toward [the vicitim's] head and fired." He missed, the victim fled, and the defendant chased after her, wounding her "in her buttock, hip, and abdomen." He was charged with assault with intent to murder and three other offenses. Prior to trial, the prosecutor offered to dismiss two of the charges and to agree to a sentence of 51 to 85 months on the other two if the defendant would plead guilty. "In a communication with the court [the defendant] admitted guilt and expressed a willingness to accept the offer," but he later rejected the offer, apparently because his lawyer advised him that the prosecution could not establish an intent to murder due to the fact that the victim had been shot below the waist. The defendant went to trial, was convicted on all counts, and was sentenced to 185 to 360 months.

The defendant then sought post-conviction relief, arguing that he had received ineffective assistance of counsel when his attorney had advised him to reject the plea offer. He was unsuccessful in Michigan's state courts, but a federal district court ruled in his favor and ordered specific performance of the original plea offer. The Sixth Circuit affirmed, and the Supreme Court granted review.

Justice Kennedy, writing for a five-Justice majority, began by stating that the Sixth Amendment right to the effective assistance of counsel extends to pretrial stages, including plea bargaining. Referring to the two-pronged standard for ineffective assistance claims established by *Strickland v. Washington*, 466 U.S. 668 (1984), the majority noted that the parties agreed that defense counsel had performed deficiently in advising the defendant that he could not be convicted of the assault charge. The issue, then, was how to apply the prejudice prong of *Strickland* to cases in which the alleged harm was proceeding to what, by all accounts, was a fair and impartial trial.

The Court held that a defendant may establish prejudice by showing that but for counsel's deficient performance, (1) the defendant would have accepted a plea offer, (2) the court would have approved it, and (3) it would have resulted in a less severe sentence than that actually imposed after trial. It noted that most of the federal circuits have already adopted this test, and rejected the state's suggestion that so long as the defendant received a fair trial, he had received all that he was entitled to under the Sixth Amendment:

In the end, [the state's] arguments amount to one general contention: A fair trial wipes clean any deficient performance by defense counsel during plea bargaining. That position ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. . . . [T]he 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.

As to the proper remedy, the Court held that it depends on the nature of the offered plea:

- If the plea bargain would have involved a guilty plea to the same crime or crimes of which the defendant was ultimately convicted at trial, so that "the sole advantage [the] defendant would have received under the plea is a lesser sentence," then the defendant may be resentenced, and 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."
- If the plea bargain would have involved a guilty plea to crimes less serious than those of which the defendant was ultimately convicted at trial, resentencing alone may be insufficient. Instead, a court may "require the prosecution to reoffer the plea proposal. Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed."

The Court said very little about what factors a court should weigh when exercising the "discretion" referenced in both remedies, suggesting only that the defendant's previously expressed willingness to accept responsibility, and any facts learned about the crime or crimes after the original plea offer was made, may be considered. As to the suggestion that its holding might unleash a flood of ineffective assistance claims, the Court noted that claims of this type have been recognized in the lower courts for over 30 years, and the predicted tsunami has yet to appear.

Justice Scalia wrote the principal dissent. He argued that when a defendant receives a fair trial, he has received what he is guaranteed by the Constitution. Since a defendant has no right to a plea bargain, he has suffered no cognizable harm when he receives what he is entitled to rather than what might be described as essentially a windfall offer from the prosecution. Justice Scalia, and Justice Alito in a separate dissent, also criticized the remedies established by the majority opinion, describing that portion of the majority opinion as "incoheren[t]" and "opaque."

Frye is a companion case to *Lafler*. It concerns a defendant whose attorney failed to communicate a favorable plea offer to him. The defendant subsequently pled guilty on less favorable terms. He sought, and obtained, post-conviction relief based on ineffective assistance of counsel. The case reached the Supreme Court, which held that defense attorneys have a duty to communicate plea offers to their clients, and that the attorney in this case violated that principle. The Court also concluded that the defendant would likely have accepted the offer, since he later accepted a less advantageous one. However, the Court remanded the case to the Missouri state courts for further consideration on the issue of prejudice. Because the defendant had been rearrested and charged with a new crime after the offer was made, the Court thought that the prosecution might have rescinded the offer if the defendant had tried to accept it, or that the court might have rejected it. In the course of discussing the case, the Court suggested that the state may guard against later ineffective assistance claims by making plea offers formally and in writing; by tracking the processing of and response to such offers; and by noting any plea negotiations on the record before a case reaches disposition.

A few thoughts about these cases:

1. The media frenzy notwithstanding, I don't think that they're earth-shattering. They won't be relevant at all except in cases in which there was a trial, in which the trial resulted in a conviction, in which a plea offer was made before trial, and in which the conviction was accompanied by a sentence more severe than that which would have accompanied the plea offer. Already, we're talking about a small fraction of all cases. Then, the defendant would need to show that counsel performed deficiently. *Lafler* and *Frye* involved very unusual facts in that regard, with counsel either failing to communicate a plea offer at all or providing legally inaccurate advice about a central issue in the case. Of course, a defendant can spuriously claim that counsel performed deficiently, but most defense attorneys already document their files in a way that will make such bogus claims very hard to win. For example, many attorneys convey plea offers to their clients in writing, or at least make written notes concerning any offer and the defendant's response. Attorneys who have not previously done so might be well-advised to begin.
2. Prosecutors and judges can take steps to try to foreclose illegitimate claims. Some of these steps were

suggested by the Court in *Frye.* For example, prosecutors can make offers in writing and can ask for a written response. Or prosecutors can make plea offers in open court at an administrative setting, as is apparently done in at least one North Carolina district. Or they can put the status of plea negotiations on the record, in the presence of the defendant and defense counsel, before the disposition of each case. Judges may choose to engage in a brief colloquy with the defendant verifying the prosecutor's version of events. None of these techniques will completely eliminate the possibility of a fraudulent *Lafler* claim, and some of them raise other issues. (For example, when a judge is informed about plea offers rejected by the defendant, the judge must be very careful at sentencing to avoid any suggestion that the judge is punishing the defendant for going to trial.)

3. The Court's remedy discussion is strange. On this point, I agree with Justices Scalia and Alito. Remember, the remedy issue doesn't arise unless a court has already concluded that a Sixth Amendment violation has taken place, because a defendant was offered a favorable plea that he would have taken but didn't because of counsel's deficient performance, and the defendant suffered a more severe sentence as a result. Under such circumstances, why would a court have the discretion to deny relief? The Court seems to suggest that, in some cases, there is a Sixth Amendment right without a remedy. I suspect that in most cases, judges will and should exercise their discretion to put the defendant in the position he would have been in but for counsel's ineffective assistance. In other words, I suspect that it will be uncommon for judges to find a Sixth Amendment violation but decline to repair it.

Sorry for the long post. As always, I welcome your thoughts on all these issues.