Ineffective Assistance in Plea Bargaining?

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On Halloween, I was dressed up as a sheep, trick or treating with my daughter, Little Bo Peep. Fortunately, serious legal business was being conducted elsewhere: the Supreme Court heard oral argument in *Lafler v. Cooper*, a fascinating ineffective assistance of counsel case. Here's a summary of the case, courtesy of SCOTUSblog:

Cooper shot a woman, striking her several times below the waist. He was arrested and charged with assault with intent to murder, possession of a firearm by a felon, and other charges. The state offered a plea bargain under which Cooper could plead guilty to the assault with intent to murder charge and face a minimum sentence of fifty-one to eighty-five months in prison. Although Cooper was inclined to take the plea, his counsel advised him that, because the victim was injured below the waist, the state could not establish an element of its case, i.e., intent to murder. Based on this erroneous advice, Cooper rejected the deal. Cooper was later convicted at trial and received a sentence of between 185 and 360 months in prison.

The defendant eventually sought, and obtained, federal habeas relief based on ineffective assistance of counsel. Applying the well-settled two-pronged *Strickland* test for ineffective assistance of counsel, he argued (1) that his attorney performed deficiently by giving him legally inaccurate advice, which (2) resulted in prejudice when he rejected the plea offer, and ultimately received a sentence three times as long as he would have received under the deal. At least by the time the case reached the Supreme Court, the state conceded that defense counsel's advice was wrong and that the lawyer performed deficiently, but argued that the defendant had suffered no prejudice, because he had received a fair trial and had relinquished no rights based on the faulty advice.

Over at Crime and Consequences, a prosecution-oriented blog, the thinking is this: a fair trial is the benchmark way of adjudicating criminal cases. A defendant who receives such a trial can't complain about the result. Perhaps he didn't get a windfall -- a reduced sentence obtained through plea bargaining -- but there is no right to such a windfall. (For more detail, look at the posts here and here.) This point of view can be summed up in a question asked by Justice Kennedy during oral argument: "You are saying it was unfair to have a fair trial?"

The defense counters that most cases are resolved by plea bargaining, making plea bargaining a critical stage of any criminal case, a point recently acknowledged by the court in *Padilla v. Kentucky*. On this view, prejudice is measured not just by whether the defendant relinquished rights based on counsel's deficient performance, but by whether the defendant received a longer sentence than he otherwise would have received. The defense contends that "the approach advocated by the state [in *Lafler*] has been rejected by twelve federal courts of appeals and twenty-five of the twenty-seven states in which the issue has arisen." (I couldn't quickly find a case directly on point in North Carolina, but in *State v. Simmons*, 65 N.C.App. 294 (1983), the court of appeals awarded a new trial to a defendant whose lawyer failed to communicate a plea offer to him, perhaps implicitly rejecting the idea that a defendant who receives a fair trial can never show that he was harmed by poor lawyering during plea negotiations. If you know of a case more closely on point, please let me know.)

Lafler is an interesting case. Even if the defendant prevails, there's a question about the proper remedy. Is the defendant entitled to specific performance of the plea bargain? Is he entitled to choose whether to accept the plea offer, and to turn it down in favor of a new trial if, for example, key witnesses have died or moved? Or should his

conviction simply be set aside, with the parties free to negotiate anew or to proceed to trial as they please?

The *New York Times* covers the case here. The oral argument transcript is available here. I should add that the case was heard along with a companion case, *Missouri v. Frye*, raising similar issues on what appear to be less compelling facts.