***Missouri* v. *Frye* and *Lafler* v. *Cooper*: Supreme Court Expands Sixth Amendment Right to Effective Counsel at Plea Bargain Stage**

On March 21, 2012, the Supreme Court issued a pair of decisions in *Missouri* v. *Frye* and *Lafler* v. *Cooper*[1] that greatly expand the Sixth Amendment right to the effective assistance of counsel at the plea bargain stage. The Court held that the right to effective assistance of counsel extends not only to those situations in which a criminal defendant accepts a plea bargain and thus gives up his right to trial, as previously held in *Hill* v. *Lockhart* and *Padilla* v. *Kentucky*,[2] but also to situations in which plea offers are rejected or allowed to lapse. Finding that plea bargaining is a "critical stage" of the criminal process regardless of whether a plea offer is accepted or rejected, the Court applied the test from *Strickland* v. *Washington*,[3] governing ineffective assistance claims at the plea stage, to two cases in which plea offers had either been rejected or allowed to lapse, leading to later convictions and harsher penalties for both defendants.

I. Background and Procedural History[4]

***Missouri* v. *Frye*.** Respondent Galin Frye came before the Court having been charged with a felony under Missouri law for driving with a revoked license. Frye faced a maximum four-year prison term under the law, but the prosecutor sent a letter to his counsel offering two separate plea bargains, one of which would have reduced the charge to a misdemeanor (carrying a one-year maximum term of imprisonment) with a recommended 90-day jail sentence. Frye's counsel, however, failed to communicate the offers to him, and the offers lapsed. Subsequently, but before trial, Frye was again arrested for driving with a revoked license. He eventually pled guilty to a felony without a plea agreement and was sentenced to three years in prison.

Following his guilty plea, Frye filed for post-conviction relief in Missouri state court on the basis that his counsel's failure to inform him of the plea offers had denied him the effective assistance of counsel. His motion was denied by the state trial court, but the Missouri Court of Appeals reversed, finding that Frye met both of the *Strickland* requirements for showing a Sixth Amendment violation because: (1) his counsel's performance had been deficient and (2) he had been prejudiced thereby.

***Lafler* v. *Cooper*.** Respondent Anthony Cooper came before the Court charged with multiple gun-related felonies under Michigan law, including assault with intent to murder and possession of a firearm by a felon. On two occasions, the prosecution offered to dismiss some of the charges and recommend a sentence of 51 to 85 months for the others in exchange for a guilty plea. Cooper rejected both offers based on erroneous advice from his counsel that the prosecution could not prove intent to murder because the victim had been shot only below the waist. Following trial, Cooper was convicted on all counts and received a mandatory minimum sentence of 185 to 360 months' imprisonment.

Cooper sought relief in Michigan state court on the basis that his attorney's erroneous advice when considering the plea offer constituted ineffective assistance of counsel. The trial court rejected the claim, and the Michigan Court of Appeals affirmed, finding that Cooper had knowingly and intelligently

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[1] *Missouri* v. *Frye*, No. 10-444, slip op. (Mar. 21, 2012) ("Frye"); *Lafler* v. *Cooper*, No. 10-209, slip op. (Mar. 21, 2012) ("Lafler"). Citations to the Court's decisions in these cases are to the slip opinions.

[2] *Hill* v. *Lockhart*, 474 U.S. 52 (1985); *Padilla* v. *Kentucky*, 559 U.S. __ (2010).

[3] 466 U.S. 668 (1984).

[4] The factual background and procedural history are drawn from the Court's opinions in *Frye* and *Lafler*.

rejected the two plea offers and chose to go to trial. The Michigan Supreme Court denied Cooper's application for leave to file an appeal.

Cooper then filed a petition for federal habeas relief under 28 U.S.C. § 2254, renewing his ineffective assistance of counsel claim. The federal district court found that the Michigan Court of Appeals had unreasonably applied the constitutional standards for effective assistance of counsel claims, and the U.S. Court of Appeals for the Sixth Circuit affirmed. The Sixth Circuit found that Cooper's attorney had provided deficient counsel by informing him of "an incorrect legal rule," and that Cooper was prejudiced because he "lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him."

II. The Supreme Court's Decisions

In a pair of 5-to-4 decisions, the Court[5] held that the Sixth Amendment right to the effective assistance of counsel applies at the plea bargain stage not only in cases where a plea offer has been accepted, *see, e.g.*, *Hill* and *Padilla*, but also in situations where a plea offer is rejected or allowed to lapse. The Court emphasized the "critical" role of plea bargaining in the criminal justice process, acknowledging that "the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant."[6] Indeed, the Court explained, "plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages."[7]

Having found that the Sixth Amendment right to effective counsel applied, the Court in *Frye* next turned to the two-part *Strickland* test to determine (1) whether Frye had been denied the effective assistance of counsel when his attorney failed to communicate the plea offers to him, and (2) whether he had suffered prejudice as a result. The Court had little trouble holding that Frye had received deficient counsel, finding, "as a general rule, defense 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."[8] Because Frye's attorney "did not make a meaningful attempt to inform the defendant of a written plea offer before the offer expired," the Court found that his counsel's representation fell below "an objective standard of reasonableness."[9]

The Court then turned to whether Frye had been prejudiced by his counsel's breach of duty. The Court adapted the *Strickland* test to the context of unaccepted plea offers, requiring defendants to demonstrate (1) "a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel," and (2) "a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it."[10] As to Frye, the Court held that there was a reasonable probability he would have accepted the prosecutor's original plea offer had it been communicated to him.[11] It was unclear, however, given Frye's subsequent arrest for the same offense, whether the prosecutor would have withdrawn that

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[5] Justice Kennedy wrote for the Court in both cases, joined by Justices Ginsburg, Breyer, Sotomayor and Kagan.

[6] *Frye*, Slip Opinion at 8.

[7] *Id.* at 7.

[8] *Id.* at 9.

[9] *Id.* at 13.

[10] *Id.* at 11.

[11] *Id.* at 14.

offer or whether the court would have approved the deal.[12] The Court remanded to the Missouri Court of Appeals for further consideration of the issue.[13]

In *Lafler*, both sides conceded that counsel's performance had been deficient, and thus the main inquiry was how to apply *Strickland*'s prejudice test where defendant had rejected a plea offer based on ineffective assistance of counsel but had nonetheless been convicted after a full and fair trial.[14] The Court again applied its "reasonable probability" test, requiring a showing that that the plea would have been accepted and entered as final and that the outcome of the plea process would have been different with competent legal advice.[15]

In so doing, the Court rejected the government's more narrow interpretation of the Sixth Amendment right to counsel, under which a full and fair trial would negate *Strickland* prejudice. As the Court explained, "[f]ar from curing the error, the trial caused the injury from the error."[16] Indeed, "[e]ven if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence."[17]

The Court also rejected the government's argument that *Strickland* requires a defendant to show that the ineffective assistance of counsel led to his being denied a substantive or procedural right (which, the government argued, was certainly not the case following a full and fair trial). While acknowledging that defendants have "no right to be offered a plea . . . nor a federal right that the judge accept it," the Court nonetheless found that, "[w]hen a state opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the constitution."[18]

Finally, the Court rejected the government's argument that the conviction should be preserved because the purpose of the Sixth Amendment is to ensure the *reliability* of a conviction following trial. Again, the Court disagreed with the narrowness of the government's proposed scope of the right to counsel, noting that the proper inquiry "is not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance."[19] The Court continued: "The fact that respondent is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney's deficient performance during plea bargaining."[20]

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[12] *Id.* at 15.

[13] *Id.*

[14] *Lafler*, Slip Opinion at 4.

[15] *Id.* at 4–5.

[16] *Id.* at 7.

[17] *Id.*

[18] *Id.* at 9.

[19] *Id.* at 10.

[20] *Id.* at 11.

III. The Scalia Dissents[21]

Justice Scalia authored vigorous dissents in both cases criticizing what he viewed to be the majority's overly broad interpretation of the Sixth Amendment right to the effective assistance of counsel. While agreeing that the right to counsel applies in situations where a defendant *accepts* a plea agreement and thus "abandon[s] his right to a fair trial," he criticized the majority's willingness to extend that right to the plea process generally, describing the decision as a "vast departure" from prior cases and "protecting not just the constitutionally prescribed right to a fair adjudication of guilt and punishment, but a judicially invented right to effective plea bargaining."[22] In Scalia's view, the purpose of the right to counsel is to ensure a fair trial, and thus the "benchmark inquiry" is whether counsel's performance "so undermined the proper functioning of the adversarial process" that it failed to produce a reliably just result.[23] In cases such as *Frye* and *Lafler*, where a plea offer was rejected or allowed to lapse but the criminal justice process nonetheless continued unimpeded and fairly, Scalia argued that no constitutional violation exists because no substantive or procedural right has been denied.

IV. Significance of the Decision

The Supreme Court's decision strongly affirms the "critical" nature of the role played by plea bargaining in the criminal justice system and establishes that the scope of the Sixth Amendment right to the effective assistance of counsel includes not only consummated plea deals but also the negotiation and consideration of plea offers that are rejected or otherwise allowed to lapse, even in circumstances where a full and fair trial ensues.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Brian Barrett at 212.701.3246 or bbarrett@cahill.com.

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21 Justice Scalia's dissent in *Frye* was joined by Chief Justice Roberts and Justices Thomas and Alito. *Frye*, No. 10-444, slip op. (Mar. 21, 2012) (Scalia, J., dissenting). Scalia's *Lafler* dissent was joined in full by Justice Thomas and in part by Chief Justice Roberts. *Lafler*, No. 10-209, slip op. (Mar. 21, 2012) (Scalia, J., dissenting) ("Scalia *Lafler* Dissent"). Justice Alito authored a separate dissent in *Lafler* focused primarily on the issue of remedies. *Lafler*, No. 10-209, slip op. (Mar. 21, 2012) (Alito, J., dissenting).

22 Scalia *Lafler* Dissent, at 4.

23 *Id.*

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