

JED S. RAKOFF

## *Frye* and *Lafler*: Bearers of Mixed Messages

In two five-to-four decisions rendered on March 21, 2012—*Missouri v. Frye*<sup>1</sup> and *Lafler v. Cooper*<sup>2</sup>—the Supreme Court extended the Sixth Amendment right to effective assistance of counsel to the plea-bargaining process. Viewed in a broader perspective, *Frye* and *Lafler* are but the latest reactions to the ever-more-punitive criminal penalties imposed by state and federal legislatures over the past half century. Beginning in the 1960s, and escalating thereafter, Congress and most state legislatures, largely in response to public pressure, decreed that those convicted of crimes would serve ever-longer prison sentences. In the federal system, for example, this trend took the form of mandatory minimum sentences, sentencing guidelines, and the abolition of parole.<sup>3</sup> Faced with the knowledge that their clients, if convicted after trial, would be sentenced to very long periods of incarceration, prudent defense counsel increasingly sought to negotiate plea bargains that would allow their clients to obtain lower sentences by pleading guilty to lesser counts or narrower charges, or in exchange for other sentencing concessions. The direct result was to increase greatly the percentage of criminal cases resolved by guilty pleas; such pleas now account for ninety-seven percent of all federal criminal convictions and ninety-four percent of all state criminal convictions.<sup>4</sup> The indirect results were to move primary responsibility for sentencing from the courts to the prosecutors and, concomitantly, to move the locus of the resolution of most criminal cases from the public forum of the courtroom to

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1. No. 10-444 (U.S. Mar. 21, 2012), <http://www.supremecourt.gov/opinions/11pdf/10-444.pdf> (to be reported at 132 S. Ct. 1399).
  2. No. 10-209 (U.S. Mar. 21, 2012), <http://www.supremecourt.gov/opinions/11pdf/10-209.pdf> (to be reported at 132 S. Ct. 1376).
  3. See generally KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 29-66 (1998) (discussing the history of sentencing reform).
  4. See *Frye*, slip op. at 7 (majority opinion).

the private venue of the prosecutor's office.<sup>5</sup> This shift to a criminal justice system operating largely behind closed doors is both inconsistent with the traditions of a free society and an invitation for abuse.

But although *Frye* and *Lafler* recognize that shift, they will, in my view, do little to rectify its shortcomings. In *Frye*, the Court held that the failure of defense counsel to communicate to his client a prosecutor's written plea offer before it expired constituted ineffective assistance of counsel.<sup>6</sup> In *Lafler*, the Court held that defense counsel's advice to his client to reject a plea bargain based on counsel's misperception of the law was likewise ineffective assistance of counsel.<sup>7</sup> Both cases therefore posit a certain amount of judicial scrutiny of defense counsel's performance in plea bargaining; and in both of these rather easy cases, the majority and dissent agreed that the deficiency of counsel's performance was patent, although the Justices disagreed over whether there was prejudice.<sup>8</sup> In reality, however, most of the unfairness that occurs during the plea-bargaining process is, in my experience, not the result of defense counsel's ineffectiveness. Instead, it is the result of overconfidence on the part of prosecutors, whose evidence and sources, having never been put to the test of a trial, appear much stronger to the prosecutors than is objectively warranted. For example, a prosecutor, intent on ensnaring as many defendants as possible, is often more prone to credit a cooperator's testimony than a jury that has heard the cooperator cross-examined by effective defense counsel would be.

*Frye* and *Lafler* do nothing to address this kind of problem. On the contrary, they may make it worse. *Frye* and *Lafler* could push defense attorneys toward urging their clients to take the first plea offered, even if counsel felt there was a realistic chance that a better deal might later be obtained; for otherwise, the defense attorney would risk facing a charge of ineffectiveness of counsel if the later plea bargain—or sentence after trial—proved more onerous than the initial offer. But the corollary of this result is that both the prosecutor and the defense counsel will be negotiating their deal at a time when neither fully understands the strengths or weaknesses of the case: a recipe for injustice.

I am also skeptical of the majority's claim that *Frye* and *Lafler* will not invite a substantial increase in the number of collateral claims of ineffective assistance

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5. See, e.g., Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2123 (1998).

6. *Frye*, slip op. at 13-14 (majority opinion).

7. *Lafler*, slip op. at 15-16 (majority opinion).

8. See *Frye*, slip op. at 3 (Scalia, J., dissenting). In *Lafler*, the deficiency of performance was conceded by the parties. See *Lafler*, slip op. at 15 (majority opinion).

of counsel filed with the courts.<sup>9</sup> Indeed, although the majority states that “there is no indication that the system is overwhelmed” by the claims of ineffective assistance of counsel already recognized under prior law,<sup>10</sup> in fact such claims have become extremely common.<sup>11</sup> Although the vast majority of these claims are meritless and wind up being dismissed, they serve not just to burden the courts, but, more insidiously, to deter able defense counsel from undertaking a robust and creative defense of their clients, for fear of being labeled “ineffective” if the defense fails. In my experience, the truly effective defense lawyers, rather than taking the first plea bargain offered, take the time to develop the factual and legal defenses that will, in many instances, lead to better results (either in the form of a better plea bargain or an acquittal at trial) – even if, in rarer cases, the delay will lead to a less favorable deal. Before *Frye* and *Lafler*, the failure to take the time to develop such defenses was putatively a sign of ineffective assistance of counsel.<sup>12</sup> But now, after *Frye* and *Lafler*, the failure to take the first plea offered may likewise be alleged to be ineffective assistance of counsel. Why would a less-than-scrupulous defendant not want to bring a claim of ineffectiveness of counsel when, after *Frye* and *Lafler*, he can in effect have it both ways? And, conversely, who will want to be a defense lawyer if, no matter what you do or how hard you try to achieve a good result for your client, your efforts will be the subject, years later, of an accusation of ineffectiveness?

Thus, in the end – however much one may applaud the Supreme Court’s recognition that the Constitution should extend to the plea-bargaining process, and however obvious the defense attorneys’ deficiencies in *Frye* and *Lafler* may have been – the long-term influence of these cases in subtly discouraging defense counsel from taking aggressive positions on behalf of their clients, or just from taking the time necessary to develop a full defense, may be to harm the defendants themselves.

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9. See *Lafler*, slip op. at 13-14 (majority opinion).

10. *Id.* at 13.

11. A search of Westlaw’s New York State and Federal Cases database for the year 1990 yields eighty-one cases that include the terms “Strickland v. Washington,” “ineffective,” “assistance,” and “counsel”; a similar search for 2010 yields 521 such cases – a 540% increase. In contrast, to account for overall increases in caseloads and improved reporting, the number of reported state and federal cases in New York containing the word “constitution” has increased only 136% over that time period (from 944 cases to 2231 cases).

12. See *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (discussing defense counsel’s duty to investigate during plea negotiations); *Strickland v. Washington*, 466 U.S. 668, 691 (1984) (“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”).

*Jed S. Rakoff is a United States District Judge for the Southern District of New York. Before entering judicial service in 1996, he spent seven years as a federal prosecutor and eighteen years as a criminal defense lawyer. The opinions expressed in this Essay are the author's personal views only.*

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