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Frye and *Lafler*: No Big Deal

The only surprise about the Supreme Court's recent decisions in *Missouri v. Frye*¹ and *Lafler v. Cooper*² is that there were four dissents. The decisions are straightforward recognitions that the defendants in those cases received unquestionably derelict representation, to their considerable prejudice. The decisions do not represent a novelty in the law, but rather continue the longstanding recognition by the courts that "plea bargaining" is an integral part of our criminal justice system—indeed, I have argued at length that it is our criminal justice system³—and that minimal competence of defense lawyers in dealing with that process is at least as important as competence in investigation or trial. Nor is there reason to believe that the decisions will present administrative problems for federal habeas courts. Most of the Circuits have recognized such claims for years, and the lower courts have experienced no more difficulty assessing plea-bargaining ineffective assistance of counsel claims than similar claims regarding trial performance.

Let's start with the basics. In most cases, in most American jurisdictions, the actual system of justice is not the one we read about in civics books and thrill to in the occasional real or fictional courtroom drama. In our real justice system, the prosecutor is the effective adjudicator of guilt or innocence and the de facto sentencing authority. As Justice Kennedy's opinions for the Court recognize, approximately ninety-five percent of criminal convictions, state and federal, result from guilty pleas, not from trials.⁴ To hold that a defendant's

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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 Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998).
 4. *Frye*, slip op. at 7 (majority opinion); *Lafler*, slip op. at 11 (majority opinion).

right to effective assistance of counsel, guaranteed by the Sixth Amendment, is inapplicable to plea bargaining would be to hold in effect that only five percent of defendants facing the might of the state's criminal justice apparatus are entitled to competent representation. Requiring competent performance by defense counsel in the most important function that counsel performs in the vast majority of criminal cases does not reflect some kind of "sporting-chance theory of criminal law," as Justice Scalia would have it.⁵ Our criminal justice system is most certainly no sport, unless your idea of sport is shooting fish in a barrel. Defendants usually plead because they usually are guilty, the prosecution usually can prove it, and the statutory penalties upon conviction are usually so severe that even a defendant who questions whether the authorities really can prove his guilt beyond a reasonable doubt usually has no realistic choice but to accept the "deal" offered by the prosecutor. Seen in this light, plea "bargaining" is not an aberration, but is our de facto system of criminal justice, and most pleas reflect precious little "bargaining" (in the sense of negotiation or haggling) and are hardly "bargains" (in the sense of cheap dispositions). The resulting sentences are not in any meaningful sense "discounts" from the system's intended outcomes: they *are* the intended outcomes of a system that is designed to produce pleas in large part by threatening defendants who go to trial with extreme sentences.⁶

Indeed, the Supreme Court has already recognized—and regulated—this system. Prosecutorial promises that induce guilty pleas are enforceable,⁷ and incompetent advice that leads a defendant to plead guilty when he would otherwise go to trial violates the Sixth Amendment.⁸ The question decided in *Frye* and *Lafler* is only whether that same Sixth Amendment right is violated when ineffective assistance leads a defendant who would have taken a plea offer to go to trial instead.

From the standpoint of the actual system, this is, or should be, a no-brainer. Since virtually all defendants plead guilty, usually in return for some sentencing concession as compared with the "going rate" after trial, the right recognized in *Frye* and *Lafler* is in fact more important than the converse right recognized in *Hill v. Lockhart*.⁹ While Justice Scalia argues that a defendant cannot be prejudiced by going to trial because, having ultimately been fairly convicted and tried and given a lawful sentence, he got only what he

5. *Lafler*, slip op. at 13 (Scalia, J., dissenting).

6. See Lynch, *supra* note 3, at 2129-36.

7. See Santobello v. New York, 404 U.S. 257 (1971).

8. See Hill v. Lockhart, 474 U.S. 52 (1985).

9. *Id.*

deserved,¹⁰ that objection is premised on the essentially fictive notion that the sentencing outcomes after trial are in fact just. In reality, post-trial sentencing exposures are excessive by design and serve almost exclusively to induce defendants to plead. Lawyerly dereliction that causes a defendant to go to trial rather than accept a favorable plea offer results in the imposition of a de facto sentencing penalty on that defendant, as compared with the normal sentence that would be imposed on the ninety-five percent of his peers whose conviction results from a plea of guilty.

Are there difficulties with the rule of *Frye* and *Lafler*? Sure. Lawyers differ widely in skill and judgment. Just where along that spectrum do we draw the line between the acceptable and the unprofessional? These were easy cases: in *Frye* the lawyer's dereliction in failing to convey a plea offer was clear and fundamental, and in *Lafler* the state conceded that counsel's advice was deficient. But what if the defendant argues that his lawyer was negligent in failing to present mitigating arguments to the prosecutor in order to elicit a favorable plea offer? Or that the lawyer was too tough—or not tough enough—as a negotiator? Such claims are not likely to meet with much success in the courts. Decisions about how to handle plea negotiations—what information should be shared with the prosecutor, which arguments advanced and which withheld for trial use, whether an offer is likely to be withdrawn or improved as trial approaches, and ultimately whether the chances of outright acquittal are sufficiently high to be worth the risk of an enhanced sentence after trial—are questions of tactics and judgment that turn on exquisite factual nuances that are difficult to reconstruct accurately after the fact. Even reasonable lawyers working together on a case and sharing the exact same information will disagree about these issues. After an unsuccessful trial, it is easy to say that the defendant would have been better off taking a plea. These are, however, exactly the same problems we face in evaluating claims of ineffective assistance at trial. They are resolved by taking a fairly hard line against after-the-fact criticism of anything that can be characterized as a matter of tactical decision.¹¹ The same will be true in criticism of lawyers' plea-bargaining judgments. Only in cases similar to *Frye* and *Lafler*, where a defendant can show that his lawyer's failure in negotiation was indefensible, will relief be appropriate.¹²

10. *Lafler*, slip op. at 11 (Scalia, J., dissenting).

11. The Supreme Court has already said as much. See *Premo v. Moore*, 131 S. Ct. 733 (2011).

12. See, e.g., *Mask v. McGinnis*, 233 F.3d 132 (2d Cir. 2000) (holding that the defense lawyer's failure to inform the prosecutor that the defendant was not a persistent violent felon subject to enhanced penalties, where the prosecutor's harsh plea offer was predicated on a mistaken belief that the defendant was, constituted ineffective assistance of counsel).

Similarly, it will be easy for disgruntled convicts to *claim*, falsely, that they were not told of the plea offer. But again, this issue is similar to many claims of *trial* ineffectiveness. Like plea bargaining, much of the work essential to trial success takes place outside the courtroom, off the record. Convicted defendants often claim that trial counsel was ineffective in failing to investigate witnesses of whose possible value the client advised the lawyer. Even more closely analogous, prisoners very commonly claim that their lawyers coerced them not to testify, or did not tell them of their right to take the stand in their own defense. Courts routinely adjudicate these claims, and whatever can be said about such cases, they certainly have not led to widespread defendant victories.

Finally, we know that the heavens will not fall as a result of *Frye* and *Lafler*, because the cases' rule is "new" only to the Supreme Court. The Second Circuit has held, at least since 1996, that defense lawyers must give their clients competent advice about whether to accept a plea.¹³ So, indeed, have virtually all the other Circuits.¹⁴ From the very first 1996 case, the Second Circuit has been prepared to give relief in the form of enforcing the offer, where the defendant can show that his lawyer failed to behave professionally and that he would have taken the offer if it had been given. I have been able to readily locate about a dozen cases in our court in which the issue has been litigated (but not many in which a defendant has succeeded).¹⁵ No doubt there are more that have been dealt with summarily, or decided in the district courts and not appealed. Those numbers are not insubstantial, but they are dwarfed by the number of cases in which, as in *Hill v. Lockhart*, defendants who pled guilty complained of their counsel's ineffective advice and claimed they would have been better advised to go to trial, and even more so by the number of claims of ineffective assistance at trial. The court has been comfortably able to deal with those cases, which have rarely provoked much controversy. The heavens are still up, at least over New York, Connecticut, and Vermont.

13. See *Boria v. Keane*, 99 F.3d 492 (2d Cir. 1996).

14. See, e.g., *Williams v. Jones*, 571 F.3d 1086, 1090 n.3 (10th Cir. 2009) (citing cases in ten circuits with similar holdings).

15. See, e.g., *United States v. Raysor*, 647 F.3d 491 (2d Cir. 2011); *United States v. Brown*, 623 F.3d 104 (2d Cir. 2010); *Puglisi v. United States*, 586 F.3d 209 (2d Cir. 2009); *Davis v. Greiner*, 428 F.3d 81 (2d Cir. 2005); *United States v. Feyrer*, 333 F.3d 110 (2d Cir. 2003); *Pham v. United States*, 317 F.3d 178 (2d Cir. 2003); *Aeid v. Bennett*, 296 F.3d 58 (2d Cir. 2002); *Mask*, 233 F.3d at 132; *United States v. Carmichael*, 216 F.3d 224 (2d Cir. 2000); *Purdy v. United States*, 208 F.3d 41 (2d Cir. 2000); *Cullen v. United States*, 194 F.3d 401 (2d Cir. 1999); *United States v. Gordon*, 156 F.3d 376 (2d Cir. 1998); *Boria*, 99 F.3d at 492.

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Preferred citation: Gerard E. Lynch, *Frye and Lafler: No Big Deal*, 122 YALE L.J. ONLINE 39 (2012), <http://yalelawjournal.org/2012/06/21/lynch.html>.