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## The Present and Future Regulation of Plea Bargaining: A Look at *Missouri v. Frye* and *Lafler v. Cooper*

Wesley M. Oliver\*

This past term, the Supreme Court recognized in *Missouri v. Frye* and *Lafler v. Cooper* that criminal defendants are entitled to the effective assistance of their lawyers in the plea negotiation process, just as they are entitled to effective assistance of counsel at trial.<sup>1</sup> Justice Antonin Scalia dissented from the Court's opinion in the two plea-bargaining cases but made some interesting observations about criminal negotiations and the Court's new role in overseeing them. Plea bargaining, Scalia explained, "presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense; and for guilty defendants it often—perhaps usually—results in a sentence well below what the law prescribes for the actual crime."<sup>2</sup> As he describes, the Court's recent opinions create a "whole new field of constitutionalized criminal procedure: plea-bargaining law."<sup>3</sup> Even though this term's decisions involve only issues of effective assistance of counsel, Scalia concluded that "it would be foolish to think that 'constitutional' rules governing *counsel's* behavior will not be followed by rules governing the *prosecution's* behavior in the plea-bargaining process."<sup>4</sup>

It is hard to quarrel with much of Justice Scalia's analysis, except for his bottom line that the Court should impose no regulation on the plea-bargaining process. It is hard to see how a system that

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<sup>1</sup> *Missouri v. Frye*, 132 S. Ct. 1399 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

<sup>2</sup> *Cooper*, 132 S. Ct. at 1397 (Scalia, J., dissenting).

<sup>3</sup> *Id.* at 1391.

<sup>4</sup> *Id.* at 1392 (emphasis in original).

imposes the sort of risks Scalia describes—and creates an alternative criminal justice system where defendants are punished quite differently—should exist without judicial oversight. These latest opinions recognize the central role that plea bargaining plays in the criminal justice system and begin to extend the constitutional protections afforded criminal defendants to this critical stage. Given the growing role plea bargaining has played in the criminal justice system, the Court was in many ways simply catching up to an unregulated modern practice.

### **The Rise of an Unregulated System of Plea Bargaining**

Well over 90 percent of all criminal convictions result from a defendant's plea of guilty.<sup>5</sup> Most often a defendant agrees to enter a guilty plea because the prosecution has agreed to drop some of the charges against him or has agreed to at least recommend a lesser sentence to the judge. It is quite rare for a defendant to enter a guilty plea merely hoping the judge will be lenient in the sentence as a result of his acceptance of responsibility—most of the time his plea has been exchanged for some type of sentencing consideration. For most defendants, the prosecutor is the only judge they will encounter.

It is little wonder that so many cases are resolved in this manner. Prosecutors have enormous power. They have the power to charge a variety of crimes—carrying widely varying sentences—for almost any crime imaginable. Long-existing crimes like felony murder and conspiracy make defendants liable for very serious conduct even if their culpability is relatively low. New crimes like RICO (Racketeer Influenced and Corrupt Organizations) and continuing criminal enterprise provide prosecutors a way to transform low- to mid-level misconduct into a crime that is punished quite seriously. Perhaps most significantly, though, sentencing guidelines and mandatory minimums have shifted the power of determining how defendants are sentenced to prosecutors. In a presentencing-guideline world, judges were able to determine whether a particular defendant's conduct called for the sentence typically given for an offense. A prosecutor's decision to charge a more serious offense—say felony murder rather than involuntary manslaughter—was not dispositive

<sup>5</sup> See *infra* note 22 and accompanying text.

of a defendant's sentence prior to mandatory minimums and sentencing guidelines. The judge could recognize that the defendant's low level of involvement did not justify a sentence typically associated with felony murder. Since the sentencing guidelines revolution of the 1980s, if the elements of both the greater and lesser charges are supported by the evidence, the prosecutor can ensure that the defendant will receive the greater sentence unless he agrees to some sort of a deal.

Plea bargaining *is* the modern criminal justice system. While criminal defendants may not realize it, it is far more important that the attorneys they select be good at negotiating than at trying cases. (These are, however, obviously related skills. An attorney's skill at trying cases will improve his negotiating position.) Statistically, the odds of obtaining a favorable disposition are greater in a negotiation with the prosecutor than they are in a jury trial, filled with its plethora of constitutional protections.

One reading the opinions of the U.S. Supreme Court prior to this past term would not, however, have had any sense of the central role plea bargaining plays in the modern criminal justice system. Prior to 1970, the Court had not even recognized that a guilty plea could be offered in exchange for a favorable sentencing consideration. In fact, plea bargaining seemed at odds with a centuries-old notion that a guilty plea may not be motivated by any promise or threat of any kind. The Court would find the process of plea bargaining to be legitimate, however, decades before it recognized that it was subject to any sort of meaningful judicial oversight.

In a series of opinions in the 1970s, the Court held that guilty pleas were valid even if motivated by the prosecutor's promise not to pursue greater punishment (or, alternatively, the prosecutor's threat to pursue greater punishment if the plea was not accepted). In the first decision, *Brady v. United States* (1970), the Court held that a defendant's plea in exchange for a 50-year sentence was voluntary even though it was motivated by the defendant's (understandable) desire to avoid the death penalty.<sup>6</sup> Later that same year, in *North Carolina v. Alford* (1970), the Court held that another defendant attempting to avoid the death penalty had entered a voluntary plea,

<sup>6</sup> 397 U.S. 742, 750 (1970).

even though he claimed that he had not committed the crime.<sup>7</sup> The Court held that so long as there was a factual foundation to support the prosecution's theory, then the plea was valid. The Court emphasized in each case that the defendant was represented by counsel who was capable of advising the appropriate course of action.

Certainly Robert Brady could have been a risk-averse defendant who would be willing to lie about his involvement in a crime in order to take the death penalty off the table, but a court (or a public) worried about an erroneous conviction could satisfy itself that he had admitted his guilt. Henry Alford insisted on his innocence. One did not have to ask about hidden motivations in order to determine why he was willing to enter his plea. The threat of execution alone motivated his decision. The Court in *Alford* limited the judicial role to inquiring into whether there was a "factual basis" for the prosecution to make the threat that alone induced a plea.<sup>8</sup> So long as the "factual basis" was satisfied, the Court would leave the matter to the prosecutor and defense lawyer to work out whatever deal they could each *live* with. For these risk-averse defendants, this meant any deal that let them live. As Justice Scalia recognized last term, this dynamic could create a real threat of innocent persons pleading guilty.<sup>9</sup>

In 1975, the Court placed its imprimatur on a virtually complete transfer of power from judges and juries to prosecutors to decide how defendants ought to be punished. The little-known case of *Bordenkircher v. Hayes* presented an easy question for the Court that led to a problematic conclusion.<sup>10</sup> Paul Hayes was charged with stealing a blank check, filling it out for \$88.30 and passing it. In Kentucky at the time, the felony offense of uttering a forged check carried a sentence of two to ten years at hard labor. The prosecutor charged the felony and offered Hayes a plea offer of five years at hard labor. The prosecutor's offer was hardly generous when only this one offense is considered. There would have been no reason for Hayes to have accepted it, except for the fact that Kentucky had a very rigid three-strikes-and-you're-out law. Paul Hayes had two

<sup>7</sup> 400 U.S. 25, 37 (1970).

<sup>8</sup> *Id.* at 38.

<sup>9</sup> Cooper, 132 S. Ct. at 1397 (Scalia, J., dissenting).

<sup>10</sup> 434 U.S. 357 (1978).

fairly substantial prior felonies—detaining a female (a lesser included offense to rape) and armed robbery. Even though his latest crime arguably should not have been charged as a felony at all, the property-crime offense under which Hayes was charged gave the prosecutor, because it was Hayes's third felony, the discretion to seek a life sentence. The prosecutor informed Hayes that if he did not accept the 5 year sentence, he would seek an indictment under Kentucky's habitual criminal act for which a conviction carried a mandatory life sentence. Hayes refused the offer, went to trial, was convicted, and received a life sentence for uttering a forged check for \$88.30.

In the Supreme Court, Hayes argued that he had been the victim of prosecutorial vindictiveness. The prosecutor, Hayes argued, had sought the life sentence only because Hayes refused to accept a plea and insisted on his right to a jury trial. Hayes did not argue that a life sentence for this offense was unconstitutional. He was thus left with a difficult argument. If a life sentence did not offend the Constitution, then the prosecutor would not have done anything wrong if he had sought a life sentence in the first place. Hayes argued that threatening a life sentence after he brought an initial charge without the third-strike provision amounted to vindictiveness. The prosecutor's initial charge, absent the third strike, does suggest something about the penalty the prosecutor deemed appropriate for the offense. Of course, had the Court held that the prosecutor had engaged in vindictiveness because of the timing of the threat, the case would have provided a remedy for Paul Hayes and no guidance for any subsequent case. Prosecutors attempting to engage in such vindictiveness in the future would simply seek the life sentence initially and then offer the five-year plea deal.

The Court rejected Hayes's claim that the prosecutor's threat to seek a life sentence unless Hayes pled imposed an unconstitutional burden of his right to a trial. Unless the Court forbade plea bargaining—or imposed some substantial regulations on it that were not argued in the case—it was required to find the prosecutor's decision to seek a life sentence constitutionally permissible. Yet *Bordenkircher* involved an extraordinary power grab by a prosecutor. Consider the reasons a prosecutor may decide to seek something less than the maximum penalty permitted by law. A prosecutor may believe that there are weaknesses in the case and accept a plea to avoid the

risk of an acquittal. He may be willing to offer the defendant some reduction in the sentence to conserve the resources of his office, or for the sake of the time and anxiety of witnesses. He may be willing to offer sentencing consideration for cooperation against other defendants, or with a wider investigation. Finally, he may recognize that the maximum allowable sentence is excessive given the circumstances of the offense.

The facts of *Bordenkircher* suggest that the prosecutor did not believe that anything close to a life sentence was appropriate. The extraordinary difference between a five-year term and a life sentence can hardly be explained by the prosecutor's concern about the use of his office's resources to try this case. This would have been a short trial. Nor can the five-year offer be explained by the concerns that witnesses will suffer from having to testify. There were no other defendants for Hayes to testify against and no larger criminal network about which Hayes could offer information. Finally, the prosecution's case appeared to have been very solid—the fear of acquittal certainly did not seem to be a motivating factor. The prosecution was thus permitted to threaten a life sentence, which was completely disproportionate to Hayes's offense, simply to ensure that he accepted a plea deal that the prosecution deemed fair.

*Bordenkircher* was thus the end of a line of cases that legitimized a transfer of power from judges to prosecutors. With this decision, it was now clear that prosecutors could bring any charges supported by probable cause, even if the prosecution believed the defendant should be punished considerably more leniently.

The American criminal justice system is often favorably compared to the European continental system by those who observe that America has an adversarial system while most European countries have an inquisitorial system. The primary—and most criticized—characteristic of an inquisitorial system is the role of judge as prosecutor. The American adversarial system, it is boasted, has an independent evaluator of fact and determiner of sentence, whether judge or jury. *Bordenkircher* illustrates the practical reality: American prosecutors are judges.

Given the extraordinary range of criminal codes for any given criminal act, prosecutors are able to charge offenses that carry penalties far more substantial than any prosecutor would deem reasonable. There is thus a gap between the law on the books and the law,



not on the street, but actually in the courtroom. Obviously, the larger the gap, the more likely the defendant will accept the plea.

This gap poses two types of problems. First, consider defendants likely to be convicted of crimes. If the prosecution can realistically threaten much more than would be an appropriate sentence in the minds of most prosecutors, then the defendant has little choice but to accept whatever the prosecutor has offered, whether reasonable or simply less than he would receive after a trial. With sentencing guidelines and mandatory minimums, the prosecutor's ability to extract a plea through this means increases. Under modern sentencing law, judges have much less discretion to conclude that the facts of the case do not call for a sentence within the range typically given, or required, in the case of mandatory minimums.

Power has thus largely shifted to the prosecutor to determine the appropriate sentence—a role proponents of the adversarial system tout as resting with a neutral and independent judge. Prosecutors decide the punishment they deem to fit the crime. Defense lawyers then appeal to the prosecutor's sense of equity in arguing for a milder sentence. The prosecutor's role becomes that of a sentencing judge, but a judge who is not required to listen to the evidence a defendant offers. The prosecutor is further not required to consider how other prosecutors in his jurisdiction or elsewhere have handled such cases. Indeed, such comparisons are all but impossible, as no record is kept of how prosecutors go about resolving these cases. As the bases for these decisions are off-the-record, unlike judicial decisions, there is no public accountability and no opportunity for appeal.

The second sort of problem is often regarded as more substantial. Consider what happens when the prosecution has a relatively weak case. The risk of acquittal will frequently prompt the prosecutor to offer a plea to something substantially less serious than the initial charge. Risk-averse defendants will accept such pleas. Those who lament the decline of trials observe that pleas in such cases deny the public an opportunity to see the presentation of evidence. Conspiracy theorists were able to offer alternative narratives about the assassination of Martin Luther King Jr. in part because there was no public presentation of the evidence. James Earl Ray pled guilty to avoid death in Tennessee's electric chair. (Public presentation of evidence certainly does not always stop the conspiracy theorists—



alternative theories about President John F. Kennedy's assassination abound notwithstanding the Warren Commission's investigation and report.)

There is more at stake, however, than a public-confidence issue. When defendants plead guilty in weak cases in order to avoid the threat of more serious consequences, it is the prosecutor who has decided what to do about the weaknesses in the case. Accused spy Wen Ho Lee, for instance, was released on a sentence of time served when the prosecution's case fell apart, and he was offered a deal that would dismiss 58 counts against him in exchange for a plea to a minor charge.<sup>11</sup> The defense, in arguing that the prosecution should either dismiss the case (a pipe dream in most cases) or charge a lesser punishment given the weakness of the case, makes the same sort of arguments he would make to the jury in closing arguments. For risk-averse defendants, the prosecutor becomes the finder-of-fact. Just as for defendants with strong cases, no procedures govern the consideration that must be given to defense arguments. Durham County District Attorney Mike Nifong, for example, ignored compelling evidence of innocence in what has come to be called the Duke Lacrosse rape case.<sup>12</sup> In weak cases—those that involve the possibility of innocence—there is a type of appellate procedure for the defendant. Defendants can always go to trial and take their chances if the deal offered is not sufficiently generous. Defendants facing serious charges are, however, frequently quite risk-averse.

### **Judicial Oversight of Defense Effectiveness in Criminal Negotiations**

Until the very recent Supreme Court decisions, there has been another aspect of the plea-bargaining process that has remained unregulated. Defendants have not been entitled to the effective assistance of counsel during the process that leads to the resolution of the overwhelming majority of criminal cases. The Bill of Rights recognized the right of a defendant to be represented by counsel at trial, even though the right to have counsel present at trial was

<sup>11</sup> See Mike Dorning, *Lee Pleads Guilty, Walks*, Chicago Tribune, Sept. 14, 2000, at 1.

<sup>12</sup> See, e.g., *Lawyers for Indicted Duke Player Seek Rape Accuser's Cell-Phone Records*, FoxNews.com, May 16, 2002, <http://www.foxnews.com/story/0,2933,195659,00.html>.

relatively new in 1791. In the 20th century, the Supreme Court recognized that this right meant that a defendant was entitled to have a lawyer even if he could not afford one.<sup>13</sup> The Court also concluded that defendants are entitled to a lawyer who effectively represents them—both at trial and on appeal.<sup>14</sup> Until recently, however, the Supreme Court's jurisprudence provided that if a defendant did not go to trial, then a defendant could only bring an ineffective assistance of counsel claim if his lawyer had improperly advised taking a plea rather than going to trial. Under this interpretation of the right to counsel, a defendant is entitled to an effective trial and appellate lawyer, but not an effective pretrial negotiator.

The Supreme Court's jurisprudence on the right to counsel during negotiations, prior to the recent decisions, was laid out in a case called *Hill v. Lockhart*.<sup>15</sup> In *Hill*, the defendant was facing a possible 5-to-50 year sentence (or life) for first-degree murder. Both the defense lawyer and the prosecutor assumed that William Hill would be eligible for parole after he served one-third of whatever sentence he received. On the advice of counsel, the defendant entered a plea of guilty in exchange for a sentence of 35 years, which everyone assumed included release eligibility after roughly 12 years. As the defendant had a prior felony conviction that neither the prosecution nor defense had discovered, the defendant was not eligible for parole until he had served half of the sentence he was given.

Hill brought a claim for ineffective assistance of counsel. Hill had been informed by his lawyer that he was pleading guilty to an offense for which he would remain in jail for possibly no more than 12 years when he was actually receiving a sentence that required him to serve at least 5.5 more years. Even if defense counsel was ineffective in failing to inform him of the particulars of his sentence, had he been prejudiced? The Supreme Court concluded that he had not. The Court concluded that Hill had not alleged that he would have rejected the plea and taken the case to trial had he known of the actual number of years he would be required to serve. For the

<sup>13</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963) (providing right to counsel at trial); *Douglas v. California*, 372 U.S. 353 (1963) (providing right to counsel on appeal).

<sup>14</sup> *Strickland v. Washington*, 466 U.S. 668 (1984) (recognizing constitutional right to effective assistance of trial counsel); *Evitts v. Lucey*, 469 U.S. 387 (1985) (recognizing constitutional right to effective assistance of appellate counsel).

<sup>15</sup> 474 U.S. 52 (1985).

Court, a defendant who entered a plea was prejudiced only if there was a reasonable probability that he would have gone to trial and been acquitted.<sup>16</sup>

The Court in *Hill* further noted that the defendant received the percentage discount he willingly accepted. His baseline sentence went from 50 to 35 years. Due to the miscalculation of the parties in this case, everyone assumed that under both the maximum and bargained sentence, the defendant could be released after he served one third of the time. The reality was that he faced a stiffer maximum than his lawyer (or the prosecutor) realized. Defense counsel's plea negotiations reduced the minimum amount of time his client could serve by the same percentage that it would have been reduced by under the deal the defendant thought he received. His release eligibility for the negotiated sentence or for any sentence he received after a trial would have been altered from the baseline assumptions of the prosecutor and defense lawyer because of Hill's prior conviction.

The Court's reasoning in *Hill* recognized no duty on the part of counsel to plea-bargain effectively. *Any* deal was acceptable, according to the Court, unless the defendant would have gone to trial and presumably had a realistic chance of prevailing. Otherwise, whatever concession the defendant obtained from the prosecution, regardless of his counsel's failure to acquire information that would have aided in the negotiation, was beyond the court's consideration. Justice Byron White's concurrence concluded that Hill must not have informed his attorney about his prior conviction or else the attorney would not have signed a plea form indicating the defendant had no priors.<sup>17</sup> Had Hill's attorney been aware of the prior felony and misinformed his client about his release eligibility, Justice White would have concluded that Hill stated a cognizable claim.<sup>18</sup> For the majority, though, even if Hill's counsel was aware of his prior conviction, it would not have made a difference.

The Court's analysis rested on an unstated (and hopefully false) premise—prosecutors are seeking to maximize the amount of time that every defendant serves. It is possible that Hill's lawyer could

<sup>16</sup> *Id.* at 59.

<sup>17</sup> *Id.* at 61 (White, J., concurring).

<sup>18</sup> *Id.* at 62–63.

have used the prior felony to his advantage in the negotiation. Even though the defendant received the same percentage discount he expected, the actual minimum sentence was quite different. The prosecution was satisfied with a judgment that would allow the parole board to consider the defendant's release after roughly 12 years. Under the deal actually struck, the parole board could not consider the defendant's release for an additional five-and-a-half years. It is certainly possible that, had the prosecution been aware of the felony, it would have been unwilling to offer a deal any more generous than the one it offered. In fact, it may not have been as generous. But if the prosecution was satisfied with the defendant's eligibility for parole in 12 years, perhaps it would have agreed to a sentence of 24 years. Hill's lawyer's decision to ignore the prior felony was not a strategic one. If, however, Hill's lawyer did know about the prior, depending on the reasons for the prosecutor's agreement for the 35-year sentence, a different deal may have been struck. A 24-year sentence would have left Hill in jail for a minimum of 12 years, which satisfied the prosecution before it knew of the prior. The Court's opinion thus implicitly assumed that such an argument for a shorter sentence in light of the prior would have gone nowhere. The Court thus assumed that prosecutors are attempting to maximize the penalties that defendants face.

Defense counsel after *Hill v. Lockhart* had no Sixth Amendment obligation in the plea-bargaining process until *Padilla v. Kentucky* (2010).<sup>19</sup> In *Padilla*, the defendant pled guilty to a felony drug crime. Before he pled, however, he asked his attorney if he could be deported if he entered the plea. Defense counsel told him that if immigration authorities had left him in the country this long, that he had nothing to worry about. The advice was incorrect. A drug conviction makes even a lawful noncitizen resident deportable, something defense counsel apparently did not know. The Court concluded that counsel failed to adequately discharge his Sixth Amendment obligations when he misinformed his client about the deportation consequences of his plea. Significantly, Justice John Paul Stevens's majority opinion observed that if the defense was aware that deportation was a consequence of the conviction, he could have potentially structured a deal with the prosecution for a misdemeanor

<sup>19</sup> 130 S. Ct. 1473 (2010).

conviction, or several misdemeanor convictions. *Padilla* thus not only imposed a new constitutional burden on defense counsel—to learn information that might be helpful in plea negotiation—it also painted a very different picture of prosecutors.<sup>20</sup> Implicit in *Padilla* is the premise that prosecutors may not always be seeking the maximum possible punishment in a plea negotiation.

*Padilla* further began the Court's new understanding of plea bargaining as an essential part of the criminal justice process during which a defendant is entitled to effective assistance of counsel. To some extent, *Padilla* could be expected. Courts are much more favorably disposed to find a lawyer ineffective when he fails to understand the law, or fails to discover important facts, than they are when counsel makes a strategic decision, such as deciding to present evidence he has discovered. In order to make a strategic decision, counsel must be aware of the law and facts. In José Padilla's case, his lawyer was unaware of the law, but Hill's lawyers were apparently unfamiliar with relevant facts years earlier and the Supreme Court was unconcerned. In *Hill*, the Court concluded that release eligibility was a collateral issue. In *Padilla*, the Court was not willing to regard the threat of deportation as an issue collateral to the plea. The *Padilla* Court concluded if counsel's errors related to deportation, he could show that his lawyer's actions had prejudiced him.

*Padilla* alone, however, did not itself create a right to a lawyer who satisfies a minimal level of effectiveness in the bargaining process for

<sup>20</sup> It was the immigration consequences of the conviction that could have been helpful to Padilla's counsel at plea bargaining. As the Court described:

By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.

*Padilla*, 130 S. Ct. at 1486.

three reasons. First, *Padilla* dealt with a case that was not taken to trial. If his lawyer had made him aware of the immigration consequences of a guilty plea, Padilla may have preferred to take his chances with a jury. *Padilla* could have been limited to cases in which defense counsel improperly pled rather than go to trial. Such a ruling would have been a modest extension of *Hill v. Lockhart*—and, given the facts of *Padilla*, perhaps not much of an extension at all. Second, Padilla’s lawyer had provided him patently false information that Padilla requested before entering the plea. Defense counsel had incorrectly answered a question his client posed to him. Subsequent cases could have easily cabined the holding to the specific type of error Padilla’s lawyer made—a mistake regarding the terms of the plea itself on a topic about which the defendant specifically inquired. Third, *Padilla* involved a miscommunication of the legal significance of the plea deal itself, not the adequacy of Padilla’s lawyer in obtaining the deal. This term’s plea-bargaining cases considered the role of counsel during the negotiation and determined that counsel is required to satisfy a minimum standard of competence at that phase.

### ***Frye* and *Cooper* Require Effective Assistance of Counsel in Criminal Negotiations**

The new opinions issued by the Supreme Court on plea bargaining this term, taken together, rejected any narrow construction that could have been placed on *Padilla*. Though they were decided on the same day, the less remarkable case was issued first. In *Missouri v. Frye*, defense counsel failed to convey an offer the prosecutor made to the defendant on a fourth-offense driving-without-a-license charge. The prosecution’s offer provided two alternatives. The first possibility involved a plea to the felony charge: the prosecution would recommend a three-year sentence with a recommendation that the defendant Galin Frye, serve 10 days, referred to as “shock” time, but with no prosecution recommendation on whether the remainder of the time could be served on probation. The second alternative would reduce the charge to a misdemeanor that carried a maximum penalty of one year’s incarceration and the prosecution would recommend that the defendant serve 90 days. The letter containing these offers stated that they would expire on December 28, 2007, unless accepted. Frye’s lawyer did not tell him about the offer and it expired. Less than a week before the defendant’s preliminary



hearing, he was arrested again for driving on a revoked license. When he was arraigned, he entered a plea of guilty to the original charge of fourth-offense driving on a revoked license. There was no plea agreement; Frye simply entered a plea of guilty. Interestingly enough, at sentencing the prosecution made the same recommendation that it would have under the first alternative communicated to Frye: a three-year sentence with 10 days of “shock” time and no recommendation on how much of the rest of the sentence could be served on probation. The judge sentenced the defendant to three years in prison.<sup>21</sup>

Frye’s case was different from *Padilla* or *Hill* in that Frye made no claim that he had not understood the consequences of his plea. Frye was expecting nothing in exchange for his plea—no deals were made on sentencing or even on recommendations that the prosecution would make to the judge. Frye’s complaint on appeal was that his lawyer had failed him during the negotiation process.

The state argued that while it may have been reasonable to provide a remedy when defense counsel had failed to explain an aspect of the plea bargain itself, it was inappropriate to provide a remedy when defense counsel erred in counseling a defendant to accept or reject a plea. The terms and legal implications of the plea offer are easily knowable. The state argued in *Frye* that courts and prosecutors are not in a position to know what prompts clients to accept or reject pleas. Discussions between lawyers and clients are privileged. Prosecutors may not be aware that clients are getting bad advice from their lawyers and would be virtually powerless to do anything if they were aware of this fact.

Justice Anthony Kennedy’s opinion for the majority had a very practical response to the state’s arguments. “The State’s contentions are neither illogical nor without some persuasive force, yet they do not suffice to overcome a simple reality: Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”<sup>22</sup> The fact that plea bargaining has taken on such a substantial role in criminal adjudication drove a majority

<sup>21</sup> For more background on the case, see *Missouri v. Frye*, 132 S. Ct. 1399, 1404–05 (2012).

<sup>22</sup> *Id.* at 1407.



of the Court to extend the protections afforded criminal defendants to their lawyer's performance in the negotiation.

The reality is that 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. Because ours is for the most part a system of pleas, not a system of trials, it is insufficient to point to the guarantee of a fair trial as a back-stop that inoculates any errors in the pretrial process.<sup>23</sup>

The Court's opinion quoted the late Professor William Stuntz and former Dean Robert Scott for the proposition that plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system."<sup>24</sup> Undeniably, Scott and Stuntz are correct. The process used to arrive at a criminal conviction in the overwhelming majority of cases in this country resembles the continental European inquisitorial system that is frequently the source of scorn by American commentators—but our inquisitorial system operates behind closed doors, in prosecutors' offices, in courthouse stairwells, even occasionally in taverns where prosecutors and defense lawyers finalize agreements.

As the majority observed, "To note the prevalence of plea bargaining is not to criticize it. The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties."<sup>25</sup> The arguments of staunch defenders of the American adversarial system of criminal justice notwithstanding, there is nothing inherently wrong with a system where the prosecutor also serves as fact-finder and sentencing authority. The measure of the quality of such a system must, however, turn on the extent to which it includes mechanisms not only to protect the innocent but also to ensure reasonable sentences. The only issue before the Court in *Cooper* and *Frye* was the quality of counsel's representation

<sup>23</sup> *Id.* (citation omitted).

<sup>24</sup> *Id.* (quoting Scott & Stuntz, Plea Bargaining as Contract, 101 Yale L. J. 1909, 1012 (1992)) (emphasis in original).

<sup>25</sup> *Id.*

at the virtually all-important negotiation stage. And given the significance of this phase, the Court concluded that the constitutional guarantee of effective representation extended to plea bargaining.

The Court recognized the difficulty of assessing effective assistance of counsel at plea bargaining. “The art of negotiation is at least as nuanced as the art of trial advocacy and it presents questions farther removed from immediate judicial supervision.”<sup>26</sup> In evaluating counsel’s performance at trial, however, the Court has found a way to require a minimum threshold of performance. Tactical choices generally do not provide a basis for concluding that defense counsel was ineffective. Courts are, however, much more willing to find ineffective assistance when defense counsel does not know the relevant law or fails to adequately investigate the facts of the case.

In *Frye*, defense counsel’s failure could not be identified as tactical under the type of reasoning the Court had previously applied to questions of trial performance. In *Frye*, the Court recognized that counsel’s failure violated a basic and easily satisfied ethical requirement of criminal and civil representation. Defense counsel failed to communicate a plea offer to his client. The American Bar Association Standards for Criminal Justice, adopted by nearly every state, require lawyers to communicate offers to clients. A lawyer’s communication of an offer is, of course, a ministerial task. A lawyer could not gain a tactical advantage by not informing his client of a offer in his case.

As in all ineffective-assistance-of-counsel claims, the Court was concerned about issues of proof. In such cases, courts are often concerned about the difficulty of resolving credibility issues between clients and lawyers. The Court reasoned, however, that allowing a claim that defense counsel failed to communicate an offer does not raise this issue. A formal offer can be easily reduced to writing or even made a part of the record. In one state, New Jersey, the prosecution and defense are required to report the status of settlement conferences to the judge in open court with the defendant present. The Court therefore reasoned that it would not be difficult to make a record of the fact of an offer and to ensure that the client was made aware of it—or, alternatively, to determine whether the offer had been communicated to him.

<sup>26</sup> *Id.* at 1408 (quoting *Premo v. Moore*, 131 S. Ct. 733, 741 (2011)).

The Court then faced the difficult question of how to determine whether prejudice resulted from counsel's errors during the negotiation. First, the Court held that to show prejudice, there must be a reasonable probability that the earlier plea offer would have been accepted and that, if the prosecution had the discretion to withdraw the offer, or the judge had the discretion to reject the plea, that there was a reasonable probability that neither would have done so. Applied to the facts of this case, the Court held that "there appears to be a reasonable probability" that Frye would have accepted the plea to the misdemeanor charge if it had been communicated to him, as he ultimately pled to "a more serious charge with no promise of a sentencing recommendation."<sup>27</sup> This conclusion seems at least debatable. Frye actually received one of the two deals he was offered—it is not at all clear that he would have chosen the misdemeanor with its 90-day recommendation over the felony charge, with no sentencing recommendation beyond the 10 days of "shock" time. And if he would have chosen the felony charge, he actually received the deal he would have elected.

The Court in *Frye* did not have to address the question of what remedy to grant the defendant. If, but for counsel's errors, he would have accepted the misdemeanor offer, then he must be resentenced with a maximum penalty of one year.

Justice Scalia's dissent, in which he was joined by three other members of the Court, contends that a defendant only has the right to a fair trial. Scalia also contends that the Court has now assumed responsibility for evaluating the adequacy of a process that does not lend itself to ready standards. Scalia pointed out that in many cases, it will be difficult to evaluate whether "counsel's plea-bargaining skills, which now must meet a constitutional minimum, are adequate."<sup>28</sup> Even if *Frye* presented an easy case for concluding that counsel's performance was insufficient, by concluding that defendants are entitled to effective assistance of counsel at the negotiation phase, subsequent cases will not be so easily resolved.

Justice Scalia further found that even the standard the Court had to develop for this case was problematic. Even if it was easy to determine whether *this* defendant would have accepted the plea,

<sup>27</sup> *Id.* at 1411.

<sup>28</sup> *Id.* at 1412 (Scalia, J., dissenting).

how could a court go about determining whether a prosecutor would have withdrawn the plea prior to its entry? How could a court determine whether the trial judge would have accepted the plea?

Justice Scalia observed that “[t]he plea-bargaining process is a subject worthy of regulation, since it is the means by which most criminal convictions are obtained.”<sup>29</sup> He contended, however, that the Sixth Amendment did not provide the basis for that regulation, as that amendment “is concerned not with the fairness of bargaining but with the fairness of conviction.”<sup>30</sup> Scalia suggested that the legislature was in a better position to regulate plea bargaining, as legislatures could punish attorneys for failing to inform clients of offers, while the Court was left only with the remedy of “penalizing (almost) everyone else by reversing valid convictions or sentences.”<sup>31</sup>

*Lafler v. Cooper*, the companion case to *Missouri v. Frye*, had much farther-reaching implications. In *Cooper*, defense counsel recommended that his client reject a plea offer and go to trial, where he was convicted and sentenced to a considerably longer term than he would have received under the terms of the plea offer. Certainly, one of the most important functions defense counsel performs is advising clients about the wisdom of taking a settlement offer. A defendant who is poorly advised to go to trial has not received good legal advice. But quite often, a defendant who chooses to go to trial will receive greater punishment than he would have received if he had not.<sup>32</sup> The implications of considering the legal advice that led a defendant to go to trial could well be enormous. What prevents every recommendation to go to trial from being the act of an ineffective lawyer when his client is convicted?

The facts of *Cooper* illustrate the potential reach of this decision.<sup>33</sup> Anthony Cooper was charged with assault with the intent to murder

<sup>29</sup> *Id.* at 1413–14.

<sup>30</sup> *Id.* at 1414.

<sup>31</sup> *Id.*

<sup>32</sup> At least this is the conventional wisdom. David Abrams has challenged this assumption in an article that compared sentences that flowed from guilty pleas and trials in Chicago. Abrams concluded that, statistically, a defendant is likely to receive a less harsh sentence after trial than after a negotiated plea. David S. Abrams, *Is Pleading Really a Bargain?*, 8 J. Empirical Legal Stud. 200 (2011).

<sup>33</sup> For more background on the case, see *Lafler v. Cooper*, 132 S. Ct. 1376, 1383–84 (2012).

and three lesser offenses in Michigan. The prosecution offered to dismiss two of the three lesser offenses and recommend a sentence of 51 to 85 months if he would plead to the remaining two charges. On the advice of counsel, Cooper rejected this plea offer. A rare on-the-record proceeding regarding the plea revealed that Cooper's attorney informed him that the prosecution would be unable to prove assault with intent to murder, as Cooper shot his victim below the waist. The trial court apparently passed on an opportunity to correct the misinformation given to the defendant and the case proceeded to trial, where Cooper was convicted and received a mandatory minimum sentence of 185 to 360 months.

The State of Michigan conceded that defense counsel's performance was insufficient in advising his client that the trajectory of the bullet precluded a finding of guilt on the most serious charge. The question in *Cooper* was whether prejudice resulted from this error. Cooper had received a trial, with all the protections required by the constitutions of Michigan and the United States. Michigan argued that the Sixth Amendment guarantee of counsel was for the sole purpose of ensuring the right to a fair trial. Unless errors of counsel prior to trial affected the fairness of the trial itself, Michigan argued that the Sixth Amendment provided no remedy.

The Court disagreed, holding that defendants are entitled to effective assistance of counsel at sentencing and on appeal. The right to the effective assistance of counsel on appeal is particularly analogous to the right to counsel during the plea. The Constitution does not require the prosecution to offer the defendant a plea, just as it does not require a state to provide a mechanism for appeal.<sup>34</sup> Once a mechanism is provided for appeal, however, a criminal defendant is entitled to the effective assistance of counsel on appeal.

Further, the Court noted that not all pretrial errors are cured by a trial. An indictment that is defective because it is handed down by a grand jury from which all African-Americans have been systematically excluded is not cured by a trial.

In Cooper's case, the Court held, the trial did not cure the injury: it was the cause of it. The sentence Cooper received as a result of going to trial was three-and-a-half times longer than it would have

<sup>34</sup> *Abney v. United States*, 431 U.S. 651, 656 (1977).

been if he had accepted the plea. Of course, the sentence the defendant received after trial was one that the legislature prescribed for this offense. The Court, however, concluded that the state's criminal code was not the appropriate baseline from which to assess whether counsel's errors prejudiced the defendant. Bargained-for sentences, the Court concluded, provide the appropriate point of comparison for determining whether a defendant has suffered an injury from his lawyer's errors in the negotiation phase. "The favorable sentence that eluded the defendant in the criminal proceeding appears to be the sentence he and others in his position would have received in the ordinary course, absent the failings of counsel."<sup>35</sup> Quoting Professor Stephanos Bibas, the Court concluded that the penalty the legislature designates for a crime "is like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less a bargain."<sup>36</sup>

The Court concluded that Michigan's position, that "a fair trial wipes clean any deficient performance by defense counsel during plea bargaining," was untenable.<sup>37</sup> "[That position] ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials."<sup>38</sup>

Having found a violation of the right to counsel in *Cooper*, the Court turned to the question of remedy. The Court recognized that the remedy must "neutralize the taint" of his counsel's poor performance without granting the defendant a windfall.<sup>39</sup> Lower courts before *Cooper* dealt with the question of remedy in three ways: providing no remedy, ordering the prosecution to reinstate the plea offer, or ordering a new trial.<sup>40</sup> Each of these positions presented substantial problems. Obviously, the Court's opinion rejected the position that provided no remedy. Ordering the plea offer reinstated interfered with separation of powers—a court ordering this remedy was essentially taking over the prosecutorial role. Ordering a new

<sup>35</sup> *Cooper*, 132 S. Ct. at 1387.

<sup>36</sup> *Id.* (quoting Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Cal. L. Rev. 1117, 1138 (2011)).

<sup>37</sup> *Id.* at 1388.

<sup>38</sup> *Id.* at 1381.

<sup>39</sup> *Id.* at 1388 (quoting *United States v. Morrison*, 449 U.S. 361, 365 (1981)).

<sup>40</sup> See David A. Perez, *Deal or No Deal?: Remedying Ineffective Assistance of Counsel During Plea Bargaining*, 120 Yale L. J. 1532 (2011).



trial, a remedy more consistent with the judicial function, may provide a defendant a windfall. At a minimum, the memories of witnesses will have faded; at worst, some witnesses will be unavailable or deceased. Further, ordering a new trial does not mean that a new trial will occur. Ordering a new trial simply restarts the clock on a criminal prosecution. Plea discussions will begin anew, but now on a cold case, perhaps one with missing witnesses. The defendant's trial position, and therefore his plea-bargaining position, may well be substantially better than it was when the original plea was rejected. The remedy that intrudes less on the formal powers of the prosecutor therefore may be more detrimental to the interests of the prosecution and grant the defendant a considerable windfall.

The Supreme Court's opinion in *Cooper* did not resolve the issue of remedy, but importantly, the Court did not lock lower courts into any of the aforementioned categories of remedies. The Court concluded that judges have discretion to determine how to remedy the constitutional error that prejudiced the defendant. The Court observed that there are essentially two types of plea bargains, one that provides a reduction in the severity of the sentence and one that reduces the amount or type of charges the defendant faces. The Court expressly observed that if the rejected plea reduced the number of years to be served, "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."<sup>41</sup> If the rejected plea involved a reduction of the number or types of charges, the Court observed that a proper remedy "may be to require the prosecution to reoffer the plea proposal" but that "the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed."<sup>42</sup>

What the Court lacked in clarity, it certainly made up for in flexibility. "In implementing a remedy in both of these situations, the trial court must weigh various factors; and the boundaries of proper discretion need not be defined here. Principles elaborated over time in decisions of state and federal courts, and in statutes and rules,

<sup>41</sup> *Cooper*, 132 S. Ct. at 1389.

<sup>42</sup> *Id.*



will serve to give more complete guidance as to the factors that should bear upon the exercise of the judge's discretion."<sup>43</sup>

### A Preview of Coming Attractions

The Supreme Court opinions in *Frye* and *Cooper* in many ways left more questions open than they answered. For the defendants involved in cases like these, their main concern is, of course, when they will be released. The Supreme Court did not answer that question and gave the lower courts no guidance on how to consider modifying their convictions or sentences.

The two opinions did, however, conclude that recommending the rejection of a plea on the basis of an incorrect assessment of the law or failing to communicate a plea offer to one's client amounts to ineffective assistance of counsel. Beyond these specific holdings, lower courts—as well as criminal lawyers in general—were alerted that the Sixth Amendment requires effective assistance of counsel at the plea-bargaining phase, just as it does at trial.

The remedies that lower courts develop for ineffective assistance of counsel at the plea stage could have profound effects beyond defining the role of defense counsel. Courts prior to *Frye* and *Cooper* had opted for one of two remedies—reinstate the plea or order a new trial. As discussed earlier, each of these approaches is problematic. The Supreme Court's recent opinions, however, are very clear that courts have the discretion to tailor remedies for ineffective assistance of counsel in plea negotiations beyond these two options.

As courts begin to consider remedies for ineffective assistance in this phase, it seems worthwhile to consider why prosecutors agree to plea bargains at all. There are essentially four reasons: (1) guarding against a risk of acquittal on some or all of the charges, (2) preserving the resources of the office and sparing victims the emotional and economic costs of testifying, (3) providing an incentive for cooperation, and (4) equitable considerations, such as those that appear to have prompted the prosecutor in *Bordenkircher v. Hayes* to agree to a five-year sentence rather than life.

<sup>43</sup> *Id.*

Ineffective-assistance-of-counsel claims are to be granted—and a remedy provided—only when the result that flowed from the lawyer's failure produced an unfair result.<sup>44</sup> In fashioning remedies, it seems that courts ought to look to the motives of prosecutors in making the plea offers that were rejected or not communicated to clients. The equitable considerations that factor into the prosecutor's decision to offer a plea seem to relate to the fairness of an outcome in a criminal case. Considerations of cost saving, risk aversion, and cooperation seem to be bargained-for exchanges that can no longer be traded once there has been a conviction. The prosecutor, once there has been a conviction, has no risk of an acquittal; witnesses have testified and any possibility of cooperation is considerably less meaningful, if it exists at all.

Though parsing the amounts of punishment attributable to equitable considerations in mixed-motive offers will, of course, be difficult, this portion of the plea deal represents the portion of the sentence reduction that can be attributed to a motive of fairness. Beyond achieving a remedy consistent with the Supreme Court's requirements for remedies in ineffective-assistance-of-counsel cases, there will be substantial benefits to relief that provides defendants the equity they lost through counsel's errors. As the Court recognized in *Frye* and *Cooper*, it may be good practice to put plea offers in writing, and perhaps even in the record, to stave off ineffective-assistance-of-counsel claims. If remedies for ineffective assistance of counsel are limited to that portion of the deal attributable to equitable considerations, then prosecutors will have an incentive to explain how they arrived at the deal.

Prosecutorial decisionmaking has long been regarded as a black box. The decisions of prosecutors to bring charges, to forego some charges, and to reduce charges have considerably more impact on the lives of actual defendants than do most court decisions. Presumably prosecutors use some criteria in making these very difficult decisions, yet these criteria are rarely known. At a minimum, these

<sup>44</sup> See, e.g., *Lockhart v. Fretwell*, 506 U.S. 364, 366 (1993) (no relief where counsel in capital case failed to raise objection to aggravating factor that would have been successful under Eighth Circuit law at the time the objection would have been made, but objection would not have been successful at time of ineffective-assistance-of-counsel claim because Eighth Circuit had reversed itself in light of Supreme Court decision).

opinions suggest that more about the prosecutorial decisionmaking process will be public—more prosecutors will reveal their deal so that it is clear that the defendant knew about the offer. Some prosecutors and judges will follow the New Jersey model of inquiring into the reasons the plea was rejected to avoid cases like *Cooper*’s from going to trial.

If, however, remedies turn on the reasons a plea was offered, some portion of prosecutors may find it to their advantage to explain the reasons for the deal offered. This explanation would provide a record of the quasi-judicial decisions of prosecutors who render decisions every day for reasons other than those enumerated in statutes, case law, or sentencing guidelines. These opinions, in other words, hold the potential of beginning the development of a common law of plea bargaining.