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Plea Bargaining After *Frye* and *Lafler*, A Real Problem in Search of a Reasonable and Practical Solution (Meeting the Challenges of *Frye* and *Lafler*) [Keynote Address]

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Plea Bargaining After *Frye* and *Lafler*, A Real Problem in Search of a Reasonable and Practical Solution (Meeting the Challenges of *Frye* and *Lafler*)

*The Honorable W. Louis Sands**

Good afternoon. I must say that I am not only honored to be your keynote speaker, but I am humbled to have been included with such a distinguished assembly of members of the academy. I am well aware that I am not a member or even adjunct. It does, however, give me the opportunity to share my views with those who have given careful and reflective consideration to the subject of this conference. It is also an indication that the sponsors of the conference not only value the importance of plea bargaining as an academic matter, but also recognize its practical implications.

Given that there are many opinions, views and criticisms of plea bargaining, as indicated in Kyle's introduction,¹ I must confess that I have negotiated pleas as a federal and state prosecutor, similarly as defense counsel and considered and imposed pleas and recommended sentences as a judge in both courts and accepted and rejected binding plea agreements in federal court.

As a judge, over the years I have addressed motions to withdraw pleas and allegations of violations of plea agreements. You could say that I have been around the block a few times. Based on those experiences and the invitation to speak, I suppose it is a fair assumption that the purpose of the invitation was to invite me to make some comments from my perspective and experience in response to *Frye* and *Lafler*.² I will endeavor to do that. In turn, I hope to learn a great deal from the in depth analysis and discussion of relevant constitutional principles and case precedent by distinguished legal scholars who have also been invited. In other

* United States District Court, Middle District of Georgia. This is the Keynote Address that Judge Sands delivered at the Duquesne University School of Law Plea Bargaining After *Lafler* and *Frye* Symposium on February 28, 2013.

1. Kyle R. Bahr worked as a clerk for Judge Sands from 2009 to 2011. Attorney Bahr is an associate at the law firm of Reed Smith in the Pittsburgh office and introduced Judge Sands at the start of the symposium.

2. *Missouri v. Frye*, 132 S. Ct. 1399 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

words, I look forward to this being a mutually beneficial conference.

As background, we all know that the Supreme Court recognized and declared through numerous opinions issued over the decades the right to and the extent of the right to effective assistance of counsel. Chief among those were cases such as *Powell v. Alabama*³ and *Glasser v. United States*.⁴ Effective assistance requires counsel assistance at a time early enough and under circumstances such that it provides effective aid in the preparation as well as at the trial itself. The Court declared that judicial denial of a defendant's right to effective assistance of counsel was a violation of the Sixth Amendment. The right of counsel was expanded to include an equal protection right of effective assistance of appellate counsel. In effect, historically, the Court has recognized a constitutional right to effective counsel coextensively with all proceedings and circumstances where the court found that counsel could not underperform to the detriment of his or her client whether counsel was private or appointed.

Where there is a right to effective counsel based on the Constitution, that is, based on fairness grounded in the Sixth Amendment or based on due process or equal protection—where neither appointed nor retained counsel is permitted to undercut the right by providing ineffective assistance of counsel—the defendant's right is protected and may not be violated. To the contrary, where proceedings or activities are not connected to a constitutional ground, or right, there is no constitutional right to effective assistance of counsel. However, some cases do suggest that where due process is required but counsel is not, yet counsel is nevertheless present, a claim for violation of due process based on counsel's ineffectiveness may be possible even though relief is not available through a direct claim on ineffective assistance grounds. That is, there are circumstances where, arguably, the lawyer's ineffectiveness can be the basis of a due process violation where there was no right to counsel. Admittedly, these are outliers.

Frye and *Lafler* changed the theretofore traditional review that had been previously closely linked to the trial. The Sixth Amendment now reaches and includes plea bargaining, at least with respect to defense counsel's performance.

3. 287 U.S. 45 (1932).

4. 315 U.S. 60 (1942).

We have been under a constitutional form of government for well over 200 years. With that in mind, we also note that there are differing schools of thought regarding just how to appropriately interpret and apply constitutional principles. These approaches underpin the differing views expressed by the majority and the dissent, not only in *Frye* and *Lafler*, but in many areas of the Court's decision making. There are, of course, variations and hybrids of these approaches but they can usually be condensed into two basic approaches: one seeks to apply an original view and the other views the Constitution as living or adaptable. Although both schools concede that much has changed in our society since 1791, they differ sharply as to whether and how the Constitution should be interpreted to apply, or respond to, those changes.

The Constitution grants not only the right to a trial, but also the right to a "fair trial." For more than 200 years through statutes and the interpretations of the Constitution by the Supreme Court, what is or is not a fair trial has been defined. The Court has done so largely through direct application of the Sixth Amendment and less directly through application of due process via the Fifth Amendment and by extension to the states through Fourteenth Amendment due process and equal protection. Therefore, questions about fairness in the criminal justice system have been addressed essentially with respect to how directly they relate to the trial stage or to those proceedings that are considered to be closely associated with the trial or the first appeal.

Similarly, the Court's Sixth Amendment-based recognition and development of the right to counsel have resulted also in the Court's review of effective assistance of counsel as one defined and closely associated with the actual trial and first appeal. Therefore, the quality of activities such as plea bargaining, until *Lafler* and *Frye*, have been largely considered without effect where they were followed by a trial and the trial itself was determined to have been fair and thus having met the requirements of the Sixth Amendment. Thus, even if counsel may have been ineffective in some aspect of the overall proceeding, a defendant convicted at trial was without a remedy for counsel's ineffectiveness if it could be said that counsel's ineffectiveness did not cause the unfavorable result. That is, if the defendant otherwise received a fair trial under the then current view of Sixth Amendment fairness, due process, or equal protection, there was no constitutional violation.

The Court set out in *Strickland*⁵ the test for determining whether counsel has provided effective assistance. Although often criticized, *Strickland* is consistent with the Sixth Amendment trial review approach. Did counsel's performance fall below or outside the professional norm, and, even if it did, did it place the outcome in doubt? In other words, would the result have been different, but for counsel's ineffective performance? If the results would have been the same, the trial was fair and the defendant must accept the result insofar as the question of ineffective assistance of counsel. With this as background, it is no wonder that the Supreme Court's decisions in *Frye* and *Lafler* were hailed as significant, although there is some disagreement on the question of how significant.

It is doubtful that many would deny that the plea-bargaining, which is so much a part of today's criminal justice system, both state and federal, is very different from practices familiar to or even contemplated by the founders. That, again, is why I believe the differing views regarding appropriate constitutional interpretation bore so heavily on the bright line revealed in the opinions as expressed by the majority and minority in these two cases. However, whether it was 9 to 0 or 5 to 4, the majority controls.

Simply put, I believe the majority, recognized that we are now, and have been for some time, in an era of criminal case disposition by plea-bargain rather than disposition by trial. Can a criminal justice system remain effective, be fair, have legitimacy or be adequately assessed where judicial review is limited to the application of a constitutional right that is recognized and given effect only when it is tightly and strictly tied to the trial stage where only five percent or less of cases result in a trial? Disposition by trial may be our historical tradition, but plea bargaining is our modern reality. Based on this reality, we could reasonably have anticipated a *Lafler* or *Frye* at some point.

Before further discussing my views on these cases and the possible responses to them, I would like to take a few minutes and share with you some of my observations of what is actually involved in today's plea bargaining. What is the nature and reality of present-day plea bargaining? The activity can range from that of highly sophisticated negotiations, reduced to written "mortgage-length" agreements between tough, experienced prosecutors and capable, well-healed, well-informed and experienced defense at-

5. *Strickland v. Washington*, 466 U.S. 668 (1984).

torneys who are often former highly successful and effective prosecutors, to informal discussions between a prosecutor and an unsophisticated, uneducated and even naive *pro se* defendant that take place just before a case is called for trial. These informal oral agreements are loosely formed and often are absent any real discussion of possible consequences. Possible consequences are left to the judge to address later in the plea colloquy. The latter cases are likely to involve fines, expected probation or time-served sentences. As a part of these informal negotiations, the defendants may also, in effect, waive their right to counsel during the negotiations and waive counsel before the court.

Although most defendants are accorded legal representation, particularly in connection with felonies, the abilities, talent, and experience of their attorneys may vary vastly. The lawyers' familiarity with and understanding of the criminal process itself, and sometimes more importantly, the practices, personalities, traditions and policies of the particular jurisdiction or court, may also vary widely or be virtually nonexistent. The attitudes of the trial judges and their attention to the overall process also cover a broad spectrum. The length of sentence may depend a great deal on which judge entertains the plea, when the plea occurs, and what specific charge or charges to which the defendant pleads.

State or federal sentencing policies may have an impact or even be controlling. The needs or goals of the prosecutor may have an impact on the offer. Potential evidentiary, witness, trial or appellate issues may have an impact. In sum, there are innumerable factors, variables and considerations that may possibly impact, in varying degrees, whether an offer is made, the quality and quantity of the offer, and the resulting actual sentence. There may even be the possibility of negotiating a total dismissal of charges.

Practitioners are familiar with many slogans. Often in the old days, the advice given to counsel for defendants in multiple-defendant cases was that "the hog that reaches the trough first, gets the longest drink." The point was that a defendant did not want to be last to seek a plea deal. There may be nothing left to "drink" in the way of a favorable offer from the prosecutor. To the contrary, on occasion it is the defendant who holds out who gets the best deal. Add to this competition among defendants, attorney blustering, legal threats and counterthreats, tactics, bluffs and lawyer jousting, you can easily see that each case, as to each defendant, has many possible favorable and unfavorable outcomes short of trial.

There are also practical considerations. For instance, some defendants have no concern about the charge or its possible future impact so long as they are able to initially avoid jail, go home or go away for what they consider to be a relatively short period of time. Others are so repulsed by or fearful of being labeled a criminal or going to jail that they become immobilized, unwilling or unable to even contemplate pleading guilty even where there is a favorable offer on the table given the defendant's actual circumstances. Still others approach the choice of whether to plead guilty or go to trial as a lottery, either risking all and going to trial as a long shot at acquittal or taking a deal as a safe bet in favor of a known outcome when the actual possibility of acquittal might be significant.

Add the weight of the judge's discretion to the mix of lawyers of varying abilities, experiences and effectiveness, prosecutorial interests and policies, and the defendant's own preference. There are judges known for leniency in sentencing and judges known for maximum sentences, judges who sentence in between and judges who unpredictably bounce to the extremes. Not surprisingly then, plea-bargaining, unofficially of course, sometimes involves, for lack of a better term, judge shopping. The shopping is sometimes cooperative between defense counsel and the prosecutor, and sometimes not.

Even the lawyers' egos and ambitions may have an impact on the availability of plea offers. They may guard their hard-fought-for successful images and reputations as great defense lawyers or tough prosecutors. When these factors loom too large, a defendant's opportunity to receive a favorable plea offer might become a casualty. Some observers assert that the election interests of elected prosecutors and judges can sometimes affect the nature and quality of a plea offer. Closely associated with this possible political impact is that of public outcry and demands in response to the occasional high-profile crime.

Congress and state legislatures sometime enact legislation to curtail what they deem to be plea bargaining or procedural outcomes not in the public interest or inconsistent with a particular sentencing policy or principle they support. In other words, "a pox on all your houses"—the defense, the prosecution and the judiciary. It is, of course, in the first instance, the duty of legislators and the executive to establish the statutory framework for their respective criminal justice system.

Lastly, there is the occasional highly publicized case of a "miscarriage of justice" that is seen as so egregious, the criminal jus-

tice system itself is brought into question and criticized. The questions are asked: How could that have happened? How could an innocent man have been allowed to plead guilty or be convicted at trial? How could that case have been dismissed or that defendant released? The system's defensive response to such questions and criticisms might affect future plea-bargains temporarily or for the foreseeable future.

Those are the stakeholders and that is the arena into which the Supreme Court stepped in *Frye* and *Lafler*, the Court noting that virtually all criminal cases in federal and state courts result, not in trials, but instead in guilty pleas. The majority thus concluded that our criminal justice system is essentially a plea bargaining system. As a result, the Court, with regard to defense counsel's performance, extended the reach of the Sixth Amendment to create the right to effective assistance of counsel in plea bargaining. Having declared the right, the Court, with the identified stakeholders and the arena I described as background, stopped short of fixing a remedy. Thus, the right of effective assistance of counsel in plea-bargaining is the Court's response to a real problem in our current criminal justice system, but one still in search of a reasonable and practical solution or remedy.

Two hundred years of applying the principles of the Sixth Amendment and due process to trials in the determination of fairness have come face to face with the reality of disposition by plea-bargain. This meeting of prior Supreme Court interpretation, history, tradition and modern reality in the decisions reached in *Frye* and *Lafler* has resulted in much uncertainty and countless unresolved legal issues, evidenced by the Court's reluctance and difficulty in deciding what the remedy for a violation of this newly recognized right to effective assistance of counsel in plea bargaining should be. The Court even avowed that, perhaps, a remedy might not even be necessary. This is the dilemma for the Court, and hence, for the rest of us.

I believe that it can be substantially argued that the majority of our highest court is beginning to wrestle with the question of what constitutes fairness in the constitutional sense and in the context of an acknowledged criminal justice reality—the vast majority of criminal cases, for all kinds of reasons, are disposed of by plea, not by trial. Plea bargaining, then, as Justice Kennedy observed, “is the criminal justice system.”

The Court did not, as some would have preferred, criticize disposition by plea-bargaining as an inappropriate means of dispos-

ing of criminal cases. The Court observed that plea-bargaining is good for both sides. Justice Scalia in his dissent went further concluding in his view that plea-bargaining allows defendants to get sentences they do not deserve. However, the Court's approval of plea-bargaining itself did not mean that the court had no view or requirement as to what should be considered fair plea-bargaining. At a minimum, *Frye* and *Lafler* teach that fairness in plea-bargaining for Sixth Amendment purposes now includes effective assistance of counsel in plea-bargaining. How limited is this new right? Is this just the beginning or is this where the Court's concern stops?

There is much to discuss at this conference. Is the right to be applied narrowly—that is, to only the most egregious failings of counsel, such as in *Frye* and *Lafler*—or will, or should for that matter, the right be more broadly interpreted and applied? Is the whole of plea bargaining under review?

All stakeholders have an interest in sound analysis and well-thought-out responses to the Court's newly expressed interest in plea-bargaining, at least as to the role of defense counsel. By implication, especially in connection with any likely remedy, the roles of the prosecutor and that of the judge are also involved. The right might even more broadly involve an expanded role for the defendant and because of statute or policy, even that of the victim in certain cases. And, of course, the elephant always in the room is the Congress and/or state legislatures.

We must also keep in mind the fundamental requirements of federalism. The country's courts include procedures that involve both clear separation and some intermingling of federal law and policy and state law and policy. The responses need not be identical; they need not involve the same approaches or adopt the same solutions. All courts are limited in resources, both in personnel and finance, especially in the universally tight budgetary climate in which we find ourselves.

Since the federal government for criminal justice purposes is organized under a single department of justice and its supervised United States attorneys, the federal response is less daunting. Federal criminal courts face comparatively fewer cases, the great majority of which are initiated at the sole discretion of federal prosecutors. On the other hand, the states are usually made up non-unified, independent prosecutorial officers acting in judicial districts that follow different practices and sometime differ even within the same court. State courts typically have much larger

criminal dockets and prosecutors have less discretion and often fewer resources.

In some state courts, both prosecutors and organizational defenders, if they exist at all, are likely to have hundreds of cases each. Their extra-trial activities, including plea bargaining, are often informal, on the fly, or at the last moment. In many jurisdictions, formal arraignment takes place very close to the trial date. In that circumstance, there is little time left for formality and documentation. Therefore, any approach or suggested solution in response to *Frye* and *Lafler* must be practical in order to be meaningful, useful and effective. I believe recognition of these differences and challenges impacted the Court's willingness to simply provide its own solution. As a result, stakeholders are provided the opportunity to devise workable solutions, which the Court in the future will approve, disapprove or modify upon further review.

The uncertainty resulting from *Frye* and *Lafler* reminds me of the period beginning in the mid-seventies and extending into the eighties. This was the period of modern development in Fourth Amendment law. Years were required for the court to clarify through its opinions what constituted a reasonable search within the Fourth Amendment and what were the appropriate exceptions. The Court established guidelines and rules through its ongoing review, and thus gave guidance to the lower courts for their evaluation of claims of violations. Today, judges, lawyers and even law enforcement officers have a pretty good understanding of what the Fourth Amendment requires. However, it did take some time to get police officers to understand that moving furniture and digging into drawers and thereafter observing contraband was not what the Supreme Court meant by "plain view."

Similarly, it will take some time to determine the Sixth Amendment parameters of effective plea bargaining and to identify the exceptions and what is excluded. However, there is one big distinction. The stakeholders or the true players with respect to effective plea-bargaining are not laymen, police officers and the like, but are trained, experienced lawyers and judges dedicated to fairness. For reason of this distinction, should we expect a faster resolution of the issues and a more rapid adoption of appropriate procedures? Only time will tell, but our profession has a great opportunity to demonstrate the important and valuable role lawyers play and can play in improving our actual criminal justice system.

The current, open-ended opportunity to devise appropriate solutions also reminds me of Army Officers Basic School. During training, we were divided into small teams. Each team would be given an assignment, which the initial team leader had to plan and lead in its execution. Predictably, at some stage during the execution, fate or adversity would befall or deal a blow to our initial fearless leader. Then, the instructor/observer would immediately select one of the remaining members of the team to be the new leader and charged to carry on with the plan. The frightful question was unfailingly asked of the new leader: "What now, Lieutenant?" Now that the Supreme Court has spoken, a similar question arises for defense counsel, prosecutors and judges: "What now?"

The right to effective plea-bargaining is a right still in the making, a work in progress. As a result, we must, to some extent, devise solutions since the Court has provided so little detail or instruction. As I have earlier suggested, the Court was limited practically as to what it could reasonably suggest or instruct given the murky reality of plea bargaining, the lack of uniformity or standard practices, the different treatment of plea bargaining in the various trial courts and, not the least of all, the expected difficulties arising from the very expansion and application of traditional Sixth Amendment trial principles to the plea bargaining phase of criminal proceedings. In fact, arguably the application of traditional Sixth Amendment law to plea-bargaining flies in the face of the long and well-established parameters that heretofore definitively and intentionally excluded plea bargaining. As the dissenters point out, *Frye* and *Lafler* now make the defendants' "fair" trials irrelevant, where before, fairness of the trial was the only question that needed to be addressed. Thus, critics of the decisions point out that not only do the holdings create a new right, possibly without any remedy, but that they dethrone the fair trial as the unquestionable and ultimate measure of fairness in the American criminal justice system.

In considering and reflecting on this new right, I thought of a lot of questions and issues beyond the basic one of whether the right is to be interpreted and applied narrowly or broadly. And, I am sure that many of you have also. My actual list is very long, and growing, so I will just mention a few:

- (1) Beyond the question of effective communication of plea offers, does effective plea-bargaining implicitly involve whether counsel ever sought or obtained a good, better, best or bad

bargain? If so, how is that to be determined and what is its effect on the validity of the case outcome?

(2) Does effective plea-bargaining include an affirmative duty for counsel to advance or present offers originating with defendant?

(3) Must the content and result of the bargain be placed in the record? If so, what is the consequence of failing to do so?

(4) Does the judge's acknowledged independence effectively nullify any reasonable expectation of the defendant for a favorable bargain?

(5) Is effective plea-bargaining effectively limited to binding plea agreements that the judge can accept or reject (especially in federal court)?

(6) Are defendant's decisions in accepting or rejecting a plea offer to be reviewed subjectively or objectively and considered with or without regard to counsel's actual plea bargaining skills?

(7) What is the acceptable limit of the impact of ineffective assistance of counsel review on finality in sentencing?

(8) How will *Frye* and *Lafler* impact plea offers accepted by the defendant? In other words, will plea offers clearly accepted by defendants be subject to review of counsel's plea bargaining skills or effectiveness?

(9) What steps will federal trial judges have to take upon remands to avoid running afoul of the rule against judicial involvement in plea bargaining?

(10) Will prosecutors alter their approach to plea-bargaining in order to avoid limiting their options in the event of a remand?

With regard to remedy, there are some practical solutions that quickly come to mind. For example, creating forms for documenting the communication of plea offers, acknowledgment of the receipt of offers and their acceptance or rejection and additional questions to be propounded by the judge during the plea colloquy, etc. However, even these rather readily available solutions can be problematic. For example, adding information about offered and

rejected plea bargains, adding some questions for the judge to ask during the plea colloquy, can probably be added in federal courts without a great deal of added work or burden. Extensive, detailed written plea agreements are the rule rather than the exception and plea colloquies are already relatively formal and extensive. Adding a few more questions will not likely matter all that much. The number of defendants and proceedings are relatively small for most federal courts.

Change venue and move to the state courts, however, and you will find vastly increased numbers on all fronts. Therefore, the addition of significant documentation, its preparation, review, and additional inquiry or findings by the judge would not only be significant in individual cases but would likely have a large cumulative effect on court proceedings and resources. Also, merely adding documents and asking additional questions will not necessarily significantly reduce claims of ineffective plea bargaining. There will always be the question, sometimes legitimate, did the defendant really understand? Did he reject or accept the bargain knowingly and voluntarily? Was his rejection substantially affected by counsel's ineffective plea bargaining? Notwithstanding the many questions that may not be conclusively answered by a review of the record, some record is better than no record.

An additional interesting question: Does the rejection of what could be considered objectively a good bargain result in a presumption that defendant's decision was unknowing and involuntary? Can a defendant make, for the lack of a better term, a knowing and voluntary stupid decision? Will the defendant, in effect, be allowed to argue that "obviously my attorney did not do a good job explaining things to me because I clearly would have accepted the offer, if he had"?

Nevertheless, the Supreme Court has left it to the trials courts, along with those directly involved, to work out the details, the procedures and the relief, if any. I think the majority acknowledges that this new right will be applied on uneven legal terrain and that there are many possible, acceptable and adequate approaches and outcomes. Therefore, I expect many trial courts to take a position first on just how broadly they should apply the Court's holdings and, based on that determination, will take the steps they believe at least minimally meet the requirements of this new right as they see it.

Defense attorneys will probably take additional steps to document their communication of offers and their clients' acknowl-

edgment and decision. And if for no reason other than to protect their criminal judgments, so will prosecutors. There is likely to be an increase in written offers and agreements and trial judges are more likely to make plea bargain inquiries on the record and possibly make additional findings.

The greatest challenges, as I believe most of us can agree, will be determination of the necessity of a remedy upon remand and if so, fashioning an appropriate remedy. What steps will be taken to provide an adequate procedure or record where relief is denied? Thus more attention will necessarily be given to the record.

Of course the appellate courts will perform their review obligation and make their assessment. From a review of this dynamic process, the Supreme Court will more clearly delineate what it means by effective plea-bargaining and its adequacy for Sixth Amendment purposes as it more realistically evaluates the real criminal justice system, plea bargaining.

In conclusion, the Court in *Frye* and *Lafler* has identified ineffective assistance of counsel in plea bargaining as a real problem in the current reality of our criminal justice system. It is a significant right, whose creation is intended to address this real problem, but a right nonetheless yet in search of a reasonable and practical solution. In seeking that solution, we have been given the opportunity to carefully assess our commitment to fairness in this system we all acknowledge. Ideally, just as we have figured out largely what it means to have a fair trial, we will have to figure out what it means to have a criminal case disposed of through effective plea-bargaining, that is, fair plea-bargaining. A key component of fair plea bargaining is unquestionably competent and effective counsel. But we all, defense lawyers, prosecutors, judges and scholars have a part to play in finding our way.

Will we require further prodding by the Supreme Court or will we take affirmative steps to guarantee fairness, effectiveness, in plea bargaining? Based on the commitment, resources and energy given to the planning and presentation of this conference, I believe there is a very good possibility that we will. I certainly hope so.

Those are some of my thoughts, some of my views. WHAT NOW, PROFESSORS?

Thank you.

