Vera Institute of Justice

Criminal Justice Issues and Prisoners' Rights

https://www.vera.org/blog/supreme-court-recognizing-plea-bargaining-as-the-norm

Public Facing Advocacy Writing

In two companion cases last week, the U.S. Supreme Court held that criminal defendants have a Sixth Amendment right to effective assistance of counsel during plea negotiations. The impact of this finding is far from clear; however, it is likely to create confusion among lower courts and raise questions about how to fund this newly expanded interpretation of effective assistance of counsel.

In*Missouri v. Frye*, the right to effective assistance of counsel was violated because defense counsel had failed to inform his client of the prosecutions two plea offers, resulting in a substantially longer sentence after trial. In*Lafler v. Cooper,*this right was violated because defense counsel advised the defendant to reject the prosecutions plea offer on the basis of counsels erroneous interpretation of the law. This too resulted in a substantially longer sentence after trial.

These decisions mark a watershed moment in the Courts approach toward plea negotiations. They apply a right normally associated with jury trials to a distinctly pre-trial process that until now has been left largely unregulated by the courts. The majority reasoned that, because ours is, for the most part, a system of pleas, not a system of trials, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. AsJustice Anthony Kennedy aptly put it,in todays criminal justice system, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.

Fundamentally, these cases bring an important question to the forefront: what makes a plea just?

If pleas are a complex tradeoff of risks steeped in uncertainty and information deficits, careful choices need to be made to balance both opportunities and risks for both parties. This is particularly so for defendants. As sentencing laws have become more complex, defendants increasingly rely on their lawyers to evaluate bargained-for sentences and help them reach an informed decision whether to accept or reject a plea offer. The Supreme Courts decisions recognize that the key to a fair plea agreement is effective bargaining by defense counsel and competent legal advice throughout the process.

While these decisions were long overdue, they leave at least two facets underlying the cases unresolved. First, it remains an open question as to how lower courts will determine whether plea advice is constitutionally effective. The Supreme Court did not flesh out clear standards that lower courts can use in evaluating plea advice, or provide practical guidelines on how to craft the substance and scope of an appropriate remedy. Second, it is uncertain howif at allthis decision will affect the near-bankrupt state of indigent defense in many jurisdictions. Prior to this decision, there were few safeguards against chronic problems that plagued the overworked and underfunded indigent defense system. Now, both*Frye*and*Lafler*suggest that saddling the poor with lawyers too encumbered to provide real representation will no longer be enough.

Undoubtedly, the full contours of the decisions impact will become clearer as further litigation surrounding plea negotiations reveals how the judgments will play out. These decisions likely will motivate jurisdictions to have serious conversations about how to fund competent defense counsel for those who cannot afford it.

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