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Back to Article

Plea-bargaining cases: Form over substance

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Harlan Protass
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In a pair of recent decisions — *Lafler v. Cooper* and *Missouri v. Frye* — the U.S. Supreme Court held that criminal defendants have the right to effective assistance of counsel during the plea-bargaining process, the means by which 97 percent of federal cases and 94 percent of state cases are resolved. Legal scholars were quick to describe the decisions as "bold" and "huge." See Erica Goode, "Stronger Hand for Judges in the 'Bazaar' of Plea Deals," N.Y. Times, March 22, 2012, at A12. Wesley M. Oliver, a professor at Widener University School of Law, even went so far as to assert that *Lafler* and *Frye* "constitute the single greatest revolution in the criminal justice system since *Gideon v. Wainwright*," the landmark 1963 case in which the Supreme Court held that criminal defendants must be provided an attorney when they can't afford to hire their own. See Adam Liptak, "Justices' Ruling Expands Rights of Accused in Plea Bargains," N.Y. Times, March 21, 2012, at A1.

Lafler and *Frye* no doubt provide an important remedy to criminal defendants who didn't receive effective assistance from their lawyers in plea negotiations and, thus, were subjected to less favorable outcomes. But neither decision provides any real support to attorneys actually looking to effectively help their clients decide whether or not to go to trial. Rather, only changes in the rules governing governmental disclosure obligations will.

Fifty years ago in *Brady v. Maryland* (1963), the Supreme Court recognized the importance of disclosing favorable information to criminal defendants bearing on either their guilt or punishment. It noted that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." It therefore found that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment."

Since then the Supreme Court has held in *U.S. v. Agurs* (1976) that the duty to disclose exculpatory evidence applies even if there has been no request by a defendant or his lawyer and, in *U.S. v. Bagley* (1985), that the information government lawyers must disclose includes impeachment as well as exculpatory evidence. *Bagley* held that evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."

Disclosure of all *Brady* material is obviously important for purposes of trial. But it's also critical to defense counsel seeking to size up a case and advise their clients concerning the key question of whether or not to go to trial. After all, it's difficult to give good legal advice without a full picture of the government's case. Effective assistance of counsel in the context of plea negotiations therefore is difficult to provide without all *Brady* material in hand.

According to the National Association of Criminal Defense Lawyers (NACDL), however, confusion exists as to what evidence the government must disclose. See www.nacdl.org/discoveryreform. Some courts and the U.S. Department of Justice have adopted a rule allowing prosecutors to suppress favorable evidence based on their prediction as to whether that evidence will be "material" — a blatant opportunity for concealment. More significantly, uncertainty continues as to when favorable *Brady* material must be disclosed. According to the NACDL, most courts apply a vague and confusing rule requiring disclosure only "in time for the defense to reasonably use the evidence." Moreover, most federal district courts don't have clear directives specifying the timing of disclosure. And DOJ's own guidelines still provide prosecutors with broad discretion concerning the timing of *Brady* disclosures. See www.justice.gov/dag/dag-memo.pdf, www.justice.gov/dag/dag-to-usas-component-heads.pdf and www.justice.gov/dag/discovery-guidance.html. Indeed, government lawyers often delay releasing

exculpatory evidence contained in witness statements until after direct examination of the witness at trial.

Various proposals have been made to change the timing of *Brady* disclosures, thereby giving defense lawyers a real chance in plea negotiations — in other words, the materials they need to provide the effective assistance of counsel contemplated by *Lafler* and *Frye*.

For example, proposed legislation entitled the "Fairness in Disclosure of Evidence Act of 2012" would require — "without delay after arraignment and before entry of any guilty plea" — prosecutors to turn over all evidence that "may reasonably appear favorable" to a criminal defendant. See www.govtrack.us/congress/bills/112/s2197/text. Similarly, the NACDL has proposed requiring government lawyers to turn over all evidence "favorable" to a criminal defendant "without delay after arraignment, and prior to the entry of any guilty plea pursuant to an agreement with the government." See www.nacdl.org/discoveryreform.

Barry Scheck — the Cardozo School of Law professor and co-founder of the Innocence Project — and Nancy Gertner — formerly a district judge in the District of Massachusetts — proposed a general rule in a *Wall Street Journal* op-ed that would require judges, 30 days (or at least some reasonable time) before trial, to "issue a specific order directing the prosecutors to produce all evidence that 'tends to negate the guilt of the accused or mitigate the offense.'???" See Nancy Gertner and Barry Scheck, "How to Reign in Rogue Prosecutors," Wall St. J., March 16, 2012, at A13.

Lafler and *Frye* surely provide important procedural protections for criminal defendants. They permit relief even after trial for the failure of a defense lawyer to communicate a plea offer or provide competent advice concerning such an offer. Notwithstanding those benefits, discovery reform, rather than post-conviction procedural protections, is the best means for assuring that criminal defendants receive effective assistance of counsel when considering government plea offers. As The *New Yorker*'s Adam Gopnik put it, to do otherwise is to afford criminal defendants "laboriously articulated protections against procedural errors" without any safeguards against violations of basic principles of fairness and justice. Adam Gopnik, "The Caging of America," New Yorker, Jan. 30, 2012, at 72.

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