

# Chicago Daily Law Bulletin

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## A new era in the history of plea bargaining begins

**T**wo major revolutions in criminal procedure have occurred in the United States during the past 50 years. And it now seems we are beginning a third.

From roughly 1960 to 1985, we saw the Constitutional Revolution. The Warren Court used the 14th Amendment's due process clause to extend the criminal provisions of the Bill of Rights to state defendants; the Burger Court proceeded to then limit those rights.

The second revolution from the mid-1980s to the present can be called the Innocence Revolution. During this time, we have used the development of DNA, as well as interdisciplinary work on the dangers of false confessions and faulty eyewitness identifications, to create a legal culture that is much more aware of the perils of convicting the innocent.

But the new revolution can be seen in three events that have occurred in the last few months. Two, new U.S. Supreme Court cases and an amended Illinois Supreme Court rule suggest that we are now entering the Guilty Plea Revolution.

Younger criminal lawyers may be surprised to learn that the U.S. Supreme Court did not even acknowledge the widespread use of the plea bargain until the 1970s. But those same lawyers would not be surprised to learn that guilty pleas now account for fully 97 percent of all federal convictions and 94 percent of state convictions.

Recently the U.S. Supreme Court handed down two 5-4 decisions on the same day that promise to make the constitutional law of guilty pleas a major part of the court's work during the next few decades. *Missouri v. Frye*, No. 10-444, and *Lafler v. Cooper*, No. 10-209, each decided March 21.

In the first case, Galin Frye was charged with a felony for recidivist driving with a revoked license. It carried a maximum four-

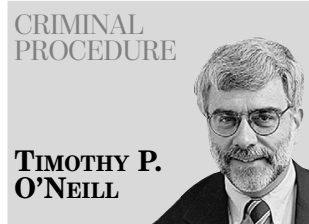
year prison term. The prosecutor sent Frye's lawyer a letter offering his client the right to plead to a misdemeanor with a recommended sentence of 90 days. The offer expired without Frye's lawyer ever telling his client about it. Frye eventually plead guilty without any deal and was sentenced to three years in prison.

Frye claimed his lawyer was constitutionally ineffective for not informing him of the plea offer. Several prior Supreme Court cases had analyzed the performance of defense counsel as to the plea that was actually made. Frye, however, challenged his counsel's performance with respect to potential offers and pleas. Nevertheless, the court held that, as a general rule, defense counsel has the duty to communicate formal, favorable offers from the prosecution. Frye's attorney was constitutionally ineffective by not doing so.

But Frye is entitled to relief only if he can show prejudice. To do this, Frye must show a reasonable probability that he would have accepted the original offer; that the prosecutor would have adhered to the offer; and that the judge would have accepted it. Thus, the court remanded the case to state court.

In *Lafler*, the defendant, Anthony Cooper, was charged with assault with intent to murder. The prosecution offered to allow him to plead in exchange for a 51- to 85-month sentence. The defense attorney advised him to reject the plea. Because the advice was predicated on a misunderstanding of state law, all parties agreed the advice constituted ineffective assistance.

Before the Supreme Court, the prosecution argued that Cooper could not show prejudice because he was subsequently convicted after a fair trial. The defense, however, argued that the prejudice inhered in the 185- to 360-month sentence he received after trial. The Supreme Court agreed with the defense that a fair trial per se does not auto-



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matically obviate any ineffective assistance of counsel during plea bargaining. Here, the court found that but for the ineffective assistance, both Cooper and the trial judge would have accepted the plea offer. And by not accepting the offer, Cooper received a minimum sentence 3.5 times greater than he would have received under the plea. Thus, the Supreme Court found a constitutional violation and remanded the case for the state court to craft a remedy.

In dissent, Justice Antonin Scalia is probably correct when he said that the *Frye* and *Lafler* decisions will open "a whole new field of constitutionalized criminal procedure: plea-bargaining law."

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Indeed, within weeks of these decisions the court agreed to decide whether its prior ruling that failure to properly advise a defendant on the deportation effects of a guilty plea should be applied retroactively. *Chaidez v. U.S.* No. 11-820, cert. granted 4/30/12 (retroactivity of *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010)).

And there is also news on the state level. On July 1, a revised version of Illinois Supreme Court Rule 402 goes into effect.

The old version of Rule 402 made it clear that trial judges could not initiate plea discussions. But it was silent on whether judges could otherwise participate in them. The revised Rule 402 explicitly permits judges to participate at the request of the defendant and with the agreement of the prosecutor.

But before a judge joins the discussions, Rule 402 sets out eight points that the judge must raise with the defendant. These points include: That the judge may learn facts about the case from the prosecutor that he would not otherwise learn unless the case went to trial; that the judge will be informed of the defendant's prior criminal history, driving record, any history of drug or alcohol problems and any other personal factors that may have a bearing on a possible sentence; that the judge would not otherwise learn of the latter facts unless the defendant was actually tried and found guilty; and that if the judge makes a recommendation as to appropriate sentence and the defendant rejects it, the defendant will not be allowed to obtain another judge solely because the judge participated in the conference and is aware of the facts of the case and the defendant's background. The judge must then determine if the defendant understands all this and still wishes the judge to participate.

Without a doubt, we are beginning a very new era in the history of plea bargaining.