

## Ineffective Assistance in Connection With Pleas

*Missouri v. Frye*, 566 U.S. \_\_\_ (Mar. 21, 2012) (<http://www.supremecourt.gov/opinions/11pdf/10-444.pdf>). The Court held that a defense lawyer rendered ineffective assistance by allowing a plea offer by the prosecution to expire without advising the defendant of the offer or allowing him to consider it. The defendant was charged with felony driving with a revoked license, an offense carrying a maximum term of imprisonment of four years. On November 15, the prosecutor sent a letter to defense counsel offering a choice of two plea bargains. First, the prosecutor offered to recommend a 3-year sentence for a guilty plea to the felony charge, without a recommendation regarding probation but with a recommendation for 10 days in jail as so called “shock” time. Second, to reduce the charge to a misdemeanor and, if the defendant pleaded guilty, to recommend a 90-day sentence. The misdemeanor charge would have carried a maximum term of imprisonment of one year. The letter stated both that offers would expire on December 28. The defendant’s attorney did not tell the defendant of the offers and they expired. Before this charge was resolved, the defendant was again arrested for driving with a revoked license. The defendant subsequently plead guilty to the initial charge. There was no plea agreement. The trial court accepted the guilty plea and sentenced the defendant to three years in prison. The defendant challenged his conviction, arguing that counsel’s failure to inform him of the plea offer constituted ineffective assistance of counsel.

The Court began its analysis by concluding that the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected. It stated: “In today’s criminal justice system . . . the negotiation of a plea bargain . . . is almost always the critical point for a defendant.” Having determined that there is a right to effective assistance with respect to plea offers, the Court turned to the question of whether defense counsel has the duty to communicate the terms of a formal offer to accept a plea on terms and conditions that may result in a lesser sentence, a conviction on lesser charges, or both. On this issue it held:

[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Any exceptions to that rule need not be explored here, for the offer was a formal one with a fixed expiration date. When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires.

The Court then turned to the issue of prejudice and laid out the following standards:

To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel’s deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Applying these standards to the case before it, the Court concluded that because defense counsel made no meaningful attempt to inform the defendant of the written plea offer, counsel’s representation fell below an objective standard of reasonableness. As to prejudice, the Court found that the state court applied the wrong standard. Specifically, it did not require the defendant to show that the first plea offer, if accepted, would have been adhered to by the prosecution and accepted by the

trial court, particularly given the defendant's subsequent arrest for the same offense. The Court remanded on this issue.

*Laffler v. Cooper*, 566 U.S. \_\_\_ (Mar. 21, 2012) (<http://www.supremecourt.gov/opinions/11pdf/10-209.pdf>). The Court held that defense counsel rendered ineffective assistance by advising a defendant to reject a plea offer and it specified the appropriate remedy for the constitutional violation. The defendant was charged with assault with intent to murder, possession of a firearm by a felon, possession of a firearm in the commission of a felony, misdemeanor possession of marijuana, and being a habitual offender. The prosecution twice offered to dismiss two of the charges and to recommend a sentence of 51-85 months for the other two, in exchange for a guilty plea. The defendant rejected both offers, allegedly after his attorney convinced him that the prosecution would be unable to establish intent to murder. On the first day of trial the prosecution offered a significantly less favorable plea deal, which the defendant rejected. The defendant was convicted on all counts and received a mandatory minimum sentence of 185-360 months' imprisonment. He then challenged the conviction, arguing that his attorney's advice to reject the plea constituted ineffective assistance.

On appeal the parties agreed that counsel rendered deficient performance when he advised the defendant to reject the plea offer. Thus, the only issue before the Court was how to apply *Strickland's* prejudice prong. The court held that when ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the later trial

a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

The Court then addressed the issue of the appropriate remedy, noting that the injury suffered by defendants who decline a plea offer as a result of ineffectiveness and then receive a greater sentence at a trial can come in at least one of two forms. Sometimes, the Court explained, the sole advantage a defendant would have received under the plea is a lesser sentence. In this situation, the trial court may conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel's errors he or she would have accepted the plea. "If the showing is made," the Court elaborated, "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." In some situations, however, the Court noted "resentencing alone will not be full redress for the constitutional injury," such as when an offer was for a guilty plea to a less serious crime than the one the defendant ends up getting convicted for at trial, or if a mandatory sentence limits a judge's sentencing discretion. In these situations, the Court explained, "the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal. Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." The Court noted that when implementing a remedy in both situations, the trial court must weigh various factors. Although it determined that the "boundaries of proper discretion need not be defined here" the Court noted two relevant considerations:

First, a court may take account of a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions. Second, it is not necessary here to decide as a constitutional rule that a judge is required to prescind (that is to say disregard) any information concerning the crime that was discovered after the plea offer was made. The time continuum makes it difficult to restore the defendant and the

prosecution to the precise positions they occupied prior to the rejection of the plea offer, but that baseline can be consulted in finding a remedy that does not require the prosecution to incur the expense of conducting a new trial.

Applying the relevant test to the case at hand, the Court found that the defendant met *Strickland's* two-part test for ineffective assistance. The fact of deficient performance had been conceded and the defendant showed that but for counsel's deficient performance there is a reasonable probability that both he and the trial court would have accepted the guilty plea. Additionally, as a result of not accepting the plea and being convicted at trial, respondent received a minimum sentence 3½ times greater than he would have received under the plea. The Court found that the correct remedy is to order the State to reoffer the plea agreement. It continued: "Presuming [the defendant] accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed."