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# Justices' Ruling Expands Rights of Accused in Plea Bargains (abridged)

Editorial published in *The New York Times* on March 21, 2012

Criminal defendants have a constitutional right to effective lawyers during plea negotiations the Supreme Court ruled on Wednesday.

The cases decided Wednesday answered the question: What is to be done in cases in which a lawyer's incompetence caused the client to reject a favorable plea bargain?

Some 97 percent of convictions in federal courts were the result of guilty pleas. In 2006, the last year for which data was available, the corresponding percentage in state courts was 94.

"In today's criminal justice system," the Court wrote, "the negotiation of a plea bargain, is almost always the critical point for a defendant. The Court wrote that plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system."

One of the cases, Missouri v. Frye, No. 10-444, involved a defendant who was charged with driving without a license in 2007. A prosecutor offered to let him plead guilty in exchange for a 90-day sentence.

But defendant's lawyer at the time failed to tell his client of the offer. After it expired, defendant pleaded guilty without a plea bargain, and a judge sentenced him to three years.

The Court said that the defendant should have been allowed to try to prove that he would have accepted the original offer. But that was only the beginning of what defendant would have to show to get relief. He would also have to demonstrate that prosecutors would not have later withdrawn the offer had he accepted it, as they were allowed to do under state law. Finally, the defendant would have to show that the court would have accepted the agreement.

The second case, Lafler v. Cooper, No. 10-209, concerned a defendant who shot a woman in Detroit in 2003 and then received bad legal advice. Because all four of his bullets had struck the victim below her waist, his lawyer incorrectly said, defendant could not be convicted of assault with intent to murder.

Based on that advice, defendant rejected a plea bargain that called for a sentence of four to seven years. He was convicted, and is serving 15 to 30 years. The Supreme Court rejected the argument by the prosecutor that a fair trial was all defendant was entitled to.

A federal district judge in that case tried to require officials to provide him with the initial deal or release him. The Supreme Court said the correct remedy was to require the plea deal to be re-offered and then to allow the trial court to resentence defendant as it sees fit if he accepts it. The Justices who disagreed with the opinion said this was "a remedy unheard of in American jurisprudence."

A law professor said the decisions were a great step forward. But he acknowledged that it may give rise to gamesmanship. "It is going to be tricky," he said, "and there are going to be a lot of defendants who say after they're convicted that they really would have taken the plea."

The Court suggested several "measures to help ensure against late, frivolous or fabricated claims." Among them were requiring that plea offers be in writing or made in open court.

My take: While I applaud the decision, I do not think it is going to have an overwhelming impact. First of all, 94 percent of defendants plead guilty. So for them this is a non-issue. Second, most lawyers are hesitant to go to trial in the first place and so will advise their clients of a plea offer. A federal district judge who has since retired once said that in his experience defense lawyers don't want to defend, prosecutors don't want to prosecute, and judges don't want to judge, an opinion I do not necessarily share but it is food for thought.

***Bottom Line**: Most defendants will continue to challenge the plea agreement they took rather than the agreement they did not take. As the poet, Angela Maya once said: "things are generally not as good as you think or as bad" which may be of some comfort to the dissenters in this case. - David Zapp, Esq.*

# Federal Judges Offer Addicts a Free Path

*By Mosi Secret*

Published in *The New York Times* on March 1, 2013

*[The following is an article that was published in the New York Times on March 1, 2013 written by Mosi Secret. It describes a new program set up by Federal Judges and by Pretrial Services. In New York, the program is called "Pretrial Opportunity Program" or "POP." Those eligible are defendants who are addicts. According to Pretrial Officer and Program Coordinator Laura Fahmy, the Court must believe that "...but for the addiction" the defendant would not have committed the crime he or she is charged with. Furthermore, that defendant must be deemed "bail worthy." This means that if the defendant is not in the United States legally, it is difficult to be accepted into the program.] - Johanna S. Zapp, Esq.*

**FEDERAL JUDGES AROUND** the country are teaming up with prosecutors to create special treatment programs for drug-addicted defendants who would otherwise face significant prison time, an effort intended to side-step drug laws widely seen as inflexible and overly punitive.

The Justice Department has tentatively embraced the new approach, allowing United States attorneys to reduce or even dismiss charges in some drug cases.

So far, federal judges have instituted programs in California, Connecticut, Illinois, New Hampshire, New York, South Carolina, Virginia and Washington. About 400 defendants have been involved nationwide.

In Federal District Court in Brooklyn on Thursday, Judge John Gleeson issued an opinion praising the new approach as a way to address swelling prison costs and disproportionate sentences for drug trafficking.

"Presentence programs like ours

and those in other districts mean that a growing number of courts are no longer reflexively sentencing federal defendants who do not belong in prison to the costly prison terms recommended by the sentencing guidelines," Judge Gleeson wrote.

The opinion came a year after Judge Gleeson, with the federal agency known as Pretrial Services, started a program that made achieving sobriety an incentive for drug-addicted defendants to avoid prison.

For nearly 30 years, the United States Sentencing Commission has established guidelines for sentencing, a role it was given in 1984 after studies found that federal judges were giving defendants widely varying sentences for similar crimes. The Commission's recommendations were approved by Congress, causing judges to bristle at what they consider interference with their judicial independence.

"When you impose a sentence that you believe is unjust, it is a very difficult thing to do," Stefan R. Underhill, a federal judge in Connecticut, said in an interview. "It feels wrong."

The development of drug courts may meet resistance from some Republicans in Congress.

Under the model being used in state and federal courts, defendants must accept responsibility for their crimes and agree to receive drug treatment and other social services and attend regular meetings with judges who monitor their progress. In return for successful participation, they receive a reduced sentence or no jail time at all. If they fail, they are sent to prison.

The drug court option is not available to those facing more serious charges, like people accused of being high-level dealers or traffickers, or accused of a violent crime. (These programs differ from re-entry drug courts, which federal judges have long used to help offenders integrate into society after prison.)

## Timid Use of the Pardon Power

Editorial published in *The New York Times* on March 4, 2013

Last week, President Obama pardoned 17 people who had been convicted of felonies. An Na Peng, a Chinese citizen living in Hawaii, is the first person convicted of an immigration crime to be pardoned in many years. With the pardon, she can now become an American citizen. Lynn Marie Stanek, convicted in a minor drug deal, told her Oregon newspaper that the pardon would allow her to "move beyond my past in a tangible, legal and personally meaningful way."

These women represent the reason the Constitution gives the president the power to grant "pardons for offenses against the United States" — to provide a check on the criminal justice system and the negative consequences of having a criminal record. A pardon does not erase the record, but restores rights lost from the conviction and affirms a person's good character. On the federal books alone, there are 465 laws and 699 regulations that make life harder for people with criminal records.

While pardons for people with minor and old offenses — Ms. Peng's conviction occurred in 1996 and Ms. Stanek's in 1986 — are important, they are also small beans. The Obama administration's criteria for favorable treatment seem narrow and unlikely to cause much political trouble for the president. Of the 17 pardoned, only five spent any time in prison, with the rest sentenced to probation, fines or a few months of home confinement.

The pardon power also allows a president to commute or shorten unjust sentences on a case-by-case basis. Many federal inmates are serving egregiously long prison terms under federal mandatory minimum sentencing schemes. Regrettably, Mr. Obama refused to grant petitions from federal prisoners to commute their sentences.

The president's clemency actions seem to reflect a process still controlled by a Justice Department that is largely anti-pardon. For a president whose approval rate for pardons and commutations is woefully low compared with presidents going back to 1900, these pardons represent a step in the right direction — but a fainthearted, disappointing step.

## America's Retreat From the Death Penalty

Editorial published in *The New York Times* on January 1, 2013

When the Supreme Court reinstated the death penalty in 1976, it said there were two social purposes for imposing capital punishment for the most egregious crimes: deterrence and retribution. In recent months, these justifications for a cruel and uncivilized punishment have been seriously undermined by a growing group of judges, prosecutors, scholars and others involved in criminal justice, conservatives and liberals alike.

A distinguished committee of scholars convened by the National Research Council found that there is no useful evidence to determine if the death penalty deters serious crimes. Many first-rate scholars have tried to prove the theory of deterrence, but that research "is not informative about whether capital punishment increases, decreases, or has no effect on homicide rates," the committee said.

A host of other respected experts have also concluded that life imprisonment is a far more practical form of retribution, because the death penalty process is too expensive, too time-consuming and unfairly applied.

The punishment is supposed to be reserved for the very worst criminals, but dozens of studies in state after state have shown that the process for deciding who should be sent to death row is arbitrary and discriminatory.

Thanks to the Innocence Project and the overturning of 18 wrongful convictions of death-row inmates with DNA evidence and the exonerations of 16 others charged with capital crimes, the American public is increasingly aware that the system makes terrible mistakes. Since 1973, a total of 142 people have been freed from death row after being exonerated with DNA or other kinds of evidence.

All of these factors have led the states to retreat from the death penalty in recent years — in both law and in practice.

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