IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
) Cr. No. [redacted]
vs.)
)
[redacted])
)
)
)
Defendants.)

MOTION PURSUANT TO *LAFLER v. COOPER* and *MISSOURI v. FRYE*

Comes now the United States, by and through undersigned counsel, and moves this Court to compel counsel for any defendants proceeding to trial to make a specific record of plea negotiation activity prior to the empaneling of the jury. The United States believes such a record should include the content of any plea-related discussions with the United States and attorneys' advice to their clients arising from these discussions, as well as a voir dire of each defendant to ensure that they were fully advised of any plea offers. Such an inquiry is necessary to preserve the record in light of *Lafler v. Cooper*, 566 U.S. ___, No. 10-209 (March 21, 2012) and *Missouri v. Frye*, 566 U.S. ___, No. 10-444 (March 21, JS2012).

I. The New Case Law

"During plea negotiations defendants are entitled to the effective assistance of counsel." *Lafler*, slip op. at 3-4. In the two March 21, 2012 cases dealing with this right, the Court provided some indication of how that right applies in practice where defendants proceed to trial after plea negotiations have failed.

A. Communication of Offers

In *Frye*, the Court addressed a defendant whose attorney failed to communicate a plea offer from the prosecution. The defendant in *Frye* was charged with a felony carrying a maximum term of imprisonment of four years. *Frye*, slip op. at 2. The prosecutor sent Frye's attorney an offer for either a felony plea with 10 days in prison or a misdemeanor plea with 90 days in prison. *Id.* The offers were set to expire a week before Frye's preliminary hearing. *Id.* Frye's attorney never communicated to Frye that the offers had been made. *Id.* Frye changed his plea to guilty at the preliminary hearing and received a sentence of three years in prison. *Id.*

The Court held "that, as 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." *Frye*, slip op. at 9. Frye's attorney was therefore constitutionally deficient when he failed to communicate the offer. *Id.* at 11. The Court therefore remanded the case to determine if this failure had prejudiced Frye sufficiently to satisfy the second prong of *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* at 15.

The Court never defines what constitutes a formal offer, however, and the reasoning underlying its holding does not appear limited by any sort of formal rule. The Court acknowledges that "the plea-bargaining process is often in flux, with no clear standards or timelines and with no judicial supervision of the discussions between prosecution and defense." *Frye*, slip op. at 6. "The alternative courses and tactics in negotiation are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process." While in the future a procedural rule may ensure that every case involves a formal plea negotiation at a set time, *see id.* at 10-11, the current federal plea negotiation process defies reduction to distinct steps separated by bright lines.

The *Frye* Court recognizes the potential for a deluge of post-conviction litigation and identifies "some measures to help ensure against late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted or after a trial leading to conviction with resulting harsh consequences." *Frye*, slip op. at 10. One such measure is that "formal offers can be made part of the record at any subsequent plea proceeding or before a trial on the merits, all to ensure that a defendant has been fully advised before those further proceedings commence." *Id.* Other measures rely more on formalizing the plea negotiation process to make it easier to contain in the record. *Id.*

B. Sound Advice

In *Frye*'s companion case, *Lafler*, the Court looked at a defendant who took his attorney's advice and rejected a series of plea offers. *Lafler*, slip op. at 2. While Lafler's attorney fulfilled his duty to communicate the offers, he failed to provide effective assistance when he based his recommendation to reject the offers on a faulty evaluation of the underlying facts and law. *Id.* at 2, 15. Having rejected offers of a sentencing range of 51 to 85 months, Lafler was ultimately convicted and sentenced to 185 to 360 months imprisonment. *Id.* Because Lafler's attorney provided ineffective advice, the Court remanded the case to determine an appropriate remedy. *Id.* at 16.

All parties conceded that the attorney's advice failed to satisfy any minimal requirement of competence. *Lafler*, slip op. at 4, 15. The Court therefore declined to elaborate on the nature of effective assistance at this stage and instead plunged into the *Strickland* prejudice analysis. *Id.* At the very least, however, *Lafler* makes clear that a conviction secured at trial may be in jeopardy if a defendant declines a plea offer based on lousy advice from his attorney.

II. The Proactive Response: A No-Plea Colloquy and Ex Parte Oversight

Both the District Court and the United States have an interest in seeing "judgments remain intact on appeal." *Wheat v. United States*, 486 U.S. 153, 161 (1988). As the Court recognized in

Frye, one solution to preserve a conviction is to hold a colloquy to ensure that a defendant's pretrial right to effective assistance of counsel has been vindicated and to make a record to constrain abusive post-conviction filings.

Frye and *Lafler* jointly stand for the proposition that effective pretrial counsel entails both communicating plea offers to the defendant and advising the defendant competently on how to respond to those offers. A properly responsive solution must therefore ensure that both the defendant's awareness of a plea offer and his attorney's advice arising from it are part of the record.

The United States recognizes potential wrinkles with such a colloquy. To avoid a *Lafler* situation, an attorney's advice to reject a deal needs to be articulated so the Court can ensure it meets minimal constitutional standards; the alternative to this easy procedure is lengthy post-conviction litigation. Announcing the attorney's advice in open court may divulge privileged conversations, however, and could additionally reveal trial strategy to the prosecution's advantage. The United States should therefore not be privy to such information. A sealed ex parte document signed by both the defendant and his counsel could properly preserve the record without tipping the defendant's hand to the prosecution.

No such complication exists with respect to the plea offers themselves, to which the government is a necessary party. A colloquy in open court in which defense counsel describes the offers received from the prosecution and the defendant confirms for the Court that the offers were communicated to him would protect any subsequent convictions from a *Frye* challenge with minimal inconvenience. The presence of the United States would serve as a check to ensure that the record is accurate. In the future, such a colloquy could potentially be obviated by formal plea offers filed as part of the case docket. But in the meantime, a brief conversation in open court is an easy short-term solution.

III. Conclusion

For the foregoing reasons, the United States respectfully requests that this Court conduct a colloquy to ensure that any defendants going to trial have been informed of the United States' plea offers, and further requests that this Court obtain ex parte information from defense counsel to preserve the record against a *Lafler* claim.

Respectfully submitted,

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