Finally, the US Supreme Court has acknowledged the dirty little secret known to all of us: plea bargaining is the centerpiece of the federal criminal justice system without which the administration of justice would grind to a halt. “Ninety-seven percent of federal convictions ... are the result of guilty pleas.” Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012).

As such, "[T]he right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences." Lafler v. Cooper, 132 S.Ct. 1376, 1388 (2012). See Note, Deal or No Deal? Remediating Ineffective Assistance of Counsel During Plea Bargaining, 120 YALE L.J. 1532 (2011).

The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours "is for the most part a system of pleas, not a system of trials," Lafler, post, at 1388, 132 S.Ct. 1376, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.

Lafler at 1407. The Court merely announced a "general rule, that 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." Id. at 1408.

This "general rule" is woefully inadequate to establish minimum standards of professional performance and conduct to demand that counsel present their clients with all dispositional options. See Todd A. Berger, After Frye and Lafler: The Constitutional Right to Defense Counsel Who Plea Bargains, 38 AM. J. TRIAL ADVOC. 121 (2014)(urging that counsel's "failure to participate in the plea bargaining process violates the Sixth Amendments guarantee of effective assistance of counsel ... ") Id.

Consequently, the Court's failure to examine the parameters for a test as to what constitutes ineffective assistance of counsel in the plea bargaining process has engendered a new wave of post-conviction litigation challenging defense counsel's failure to participate in or initiate plea bargaining at all. And sadly, numerous scholars have described a type of cost/benefit analysis that defendants and their counsel must consider when deciding whether to plead guilty or stand trial under a system in which the client's actual criminal responsibility is not the decisive factor. See e.g., Robert E. Scott & William J. Stuntz, Plea Bargaining as a Contract, 101 YALE L.J. 1909, 1935-49 (1992) (illustrating how plea bargaining may lead innocent defendants to plead guilty).
WHAT IS FEDERAL POST-CONVICTION LAWYERING?

By Benson Weintraub, Esq.

Federal post-conviction lawyering involves the representation of convicted defendants, starting at sentencing, through direct appeal, and the variants of habeas corpus in capital and non-capital cases, including one or more Motions to Vacate Conviction and Sentence pursuant to 28 USC §§2254-2255. As one of many proceedings of last resort for federal prisoners, 28 USC §2241 affords a remedy in a limited category of cases. See e.g., Bryant v. Walden, FCC Coleman, 738 F.3d 1253 (11th Cir. 2014).

Recognition of sentencing as a "critical stage" of the criminal process implicates the right of convicted defendants to receive the effective assistance of counsel under Glover v. United States, 531 US 198, 203 (2001). For your client, "To the convicted defendant, the sentencing phase is certainly as critical as the guilt-innocence phase." United States v. DiFrancesco, 449 US 117, 150 (Justice Brennan, with whom Justices White, Marshall, and Stevens join, dissenting).

Since 97% of defendants plead guilty in US District Courts, "post-conviction lawyering," including Guidelines sentencing, is often a misnomer because in the vast majority of cases, the sentence is largely predetermined by the attorneys' plea agreement and stipulations. On the other hand, the negotiation of a plea agreement often sets boundaries, limitations, and waivers upon post-conviction review.

For that reason, I typically do not enter plea agreements with the Government because their standard provisions bestow few actual benefits and have demanded intolerable waivers and limitations.

The nation's leading authority on sentencing, Professor Douglas A Berman, demands that:

From the very outset of representation, a defense attorney needs to assess the range of possible trial and sentencing outcomes for his client in order to properly craft an effective defense strategy and evaluate the prospects for striking a beneficial plea bargain. In the federal system, this not only entails basic investigation concerning the defendants guilt, but also requires counsel to make an initial assessment of the defendants possible sentence under the Federal Sentencing Guidelines (and the possible application of any mandatory minimum sentencing statutes). Such an assessment—requiring a defense attorney to calculate the defendant's potential offense level and criminal history score, which together determine a convicted offender's place on the Guidelines' Sentencing Table and hence the applicable sentencing range—is anything but simple, especially at the outset of a federal criminal case.


There are also attorneys that largely limit their practices to the representation of and advocacy on behalf of inmates within the jurisdiction of the US Bureau of Prisons.
The Firm provides advice, counsel, and representation in all aspects of federal criminal litigation, including trials, plea agreements correlated with application of the Guidelines, appeals and post-conviction remedies, including: 28 USC §2255, 28 USC §2241, Administrative Procedure Act, and FOIA/PA. The Firm also provides representation to Florida inmates in post-conviction proceedings under Rule 3.850.
criminal, appellate law; and otherwise. But at its core, federal post-conviction lawyering accentuates the recognition that you, postconviction counsel, are your clients last best hope and “Liberty’s Last Champion.”

ABOUT BENSON WEINTRAUB. Esq.


Benson was a pioneer in developing federal sentencing and post-conviction relief as a freestanding legal discipline. His practice is still largely limited to the representation of federal defendants at sentencing (correlated at times with pleas associated with favorable Guidelines application), direct appeals, and of course, postconviction remedies, e.g., 28 USC §§2241, 2255, Bivens, etc. He is proficient in authoritative Guidelines litigation.

Mr. Weintraub was admitted to the Florida Bar in 1985. He served as Chair of NACDL Committee on Sentencing & Post-Conviction Remedies, ABA Sentencing Committee, and was a founding member of the US Sentencing Commission Practitioner’s Advisory Committee.

Mr. Weintraub is the lead author of a Treatise for attorneys entitled WHITE COLLAR CRIME: HEALTH CARE FRAUD (West Pub., 2010-2013 eds.). A former Visiting Associate Professor of Law at Hofstra Law School, Mr. Weintraub has been widely published and cited in law reviews and legal journals, including Harvard L Rev., Yale L.J., and Federal Probation Quarterly.

Mr. Weintraub’s practice is largely limited to federal criminal defense litigation and aggressive, scholarly sentencing advocacy. He litigates prisoners' rights cases. Benson employs innovative jurisdictional predicates and novel legal theories to obtain optimal sentences and meaningful relief from adverse conditions of confinement for inmates. Association as co-counsel or writing for counsel is welcomed.