FEDERAL SENTENCING & POST-CONVICTION REVIEW ©

An Educational Journal for Attorneys and Their Clients Published By
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THE AFTERMATH OF *PADILLA, FRYE* & *LAFLER* IN UNITED STATES DISTRICT COURTS

By

Benson Weintraub, Esq.

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? Remedying 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).

In This Issue:

As the *Paddila*, *Frye*, and *Lafler* trilogy continues to unfold, the courts must make the import of these cases more than aspirational in order to permit meaningful remedies for aggrieved defendants and inmates for their attorneys' unprofessional conduct inconsistent with the principles recently underscored by the US Supreme Court.

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.

Douglas A. Berman, *From Lawlessness to Too Much Law? Exploring the Risk of Disparity From Differences in Defense Counsel Under Guidelines Sentencing*, 87 IOWA L. REV. 435, 445 (2002), *citing* Benson B. Weintraub, *The Role of Defense Counsel at Sentencing*, FED. PROBATION, Mar. 1987, at 25-29 at Note 12.

A central element of post-conviction lawyering involves the focus upon civil remedies to ameliorate conditions of confinement. *See generally Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 US 388 (1971); 28 USC §2241, *et. seq.* This relatively narrow class of practice necessarily implicates nontraditional remedies in federal criminal practice, including the Writ of Mandamus, 28 USC §§1361, 1651, Motions for Injunctive and Declaratory Relief, 28 USC §§2001, *et. seq*., Rule 65, Fed. R. Civ. P., 28 USC §1331, and, the Administrative Procedure Act (APA), 5 USC §702. *See generally Simmat v. US Bureau of Prisons*, 413 F.3d 1225 (10th Cir. 2005).

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.

Practice before the BOP requires informed advocacy by exhausting administrative remedies for inmates preparatory to conditions of confinement litigation; designation and transfer; and, informally ameliorating adverse conditions of custody. The tenacious use of FOIA/PA by prisoner's rights' lawyers is frequently important to substantiate legally cognizable claims in advance of potential discovery and finding "new evidence" to hopefully support further post-conviction review of your client's underlying criminal case.

With the unprecedented proliferation of Barak Obama's Presidential Commutations of Sentence, Executive Clemency must be deemed an element of post-conviction lawyering particularly since it, too, sometimes engenders disparity in differences of representation by counsel or counsel substitute ranging from volunteer law students or paralegals, *pro se* inmates, general practice lawyers, and exceptionally experienced counsel.

However, one systemic problem continues to plague federal inmates seeking post-conviction remedies. For many years, clients and inmates have been lured into "representation" by a myriad of gnarly figures, the most egregious of which was Howard 0. Kieffer. He held himself out as a Member of the Bar to unwitting clients, lawyers, and even Federal Courts.

Notwithstanding *Kieffer*, unscrupulous non-lawyers without any legal training, disbarred lawyers, self-proclaimed "paralegals," and plain thieves often prey upon vulnerable inmate victims by making unfulfillable promises regarding the outcome of a case and engage in serial unauthorized practice of law (UPL). More often than not, the State Bars have been ineffective in deterring such specifically targeted UPL or enforcing civil injunctions. There is, however, an exceedingly well-qualified group of paralegals, often the product of jailhouse lawyering, assisting post-conviction attorneys.

There are many exceptionally competent non-lawyers who work under counsel's direction and supervision mostly in connection with federal sentencing. Many previously served as US Probation Officers and are often more proficient in Guidelines application than some attorneys. Often called Sentencing Specialists, they, too, can run afoul of UPL rules unless working with an attorney under the Delegation Doctrine.

Our over-incarcerated and under-funded criminal justice system requires more attorneys proficient in federal post-conviction representation to· seek relief on behalf of that inestimable number of inmates unnecessarily maintained by and in the *Prison Industrial Complex*, a term coined by an article of the same title by Eric Schlosser in *The Atlantic* (Dec. 1998).

And "private prisons" administered by Wall Street giants represent a self-perpetuating exploitive industry that often results in totalitarian corporate prison fiefdoms engendering systemic corruption, lack of oversight, self-dealing, and compromised correctional standards. Commendably the Federal Prison System recently announced their abandonment of sub-contracting to private prisons. But weeks later, the agency reversed it’s position.

Critically, Congress has failed to act upon numerous progressive initiatives that would decrease excessive and mandatory minimum sentences and reduce prison populations. However, this formidable undertaking is politically stalled. As a Nation, we must immediately address the futility and lack of social/cost benefit brought upon by systemic over-prosecution and mass incarceration.

Sadly, the Trump Administration will set back such sentencing reforms, including the Sentencing Commission’s amendments to ameliorate mandatory minimum sentences. Congress will assuredly step up enactment of increased “statutory” Guidelines too.

In conclusion, the consummate federal postconviction lawyer must be a proficient, authoritative, ethical federal litigator well-versed in a wide range of legal disciplines: administrative, civil,

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."

gates 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.**

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ABOUT BENSON WEINTRAUB. Esq.

BensonWeintraub.com

Benson Weintraub's law practice began in Washington, DC in 1981. Benson immediately concentrated on prisoners' rights and post-conviction remedies for federal inmates.

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 liti-

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