

## RECENT DECISION

### CONSTITUTIONAL LAW—THE PLEA-BARGAINING PROCESS—MR. COUNSEL, PLEASE BARGAIN EFFECTIVELY FOR YOUR CLIENT’S SIXTH AMENDMENT RIGHTS, OTHERWISE THE TRIAL COURT WILL BE FORCED TO REOFFER THE PLEA DEAL AND THEN EXERCISE DISCRETION IN RESENTENCING

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#### I. FACTS

On March 25, 2003, Anthony Cooper shot Kali Mundy four times below the waist.<sup>1</sup> Cooper faced trial for five charges under

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<sup>1</sup> *Lafler v. Cooper*, 132 S. Ct. 1376, 1383 (2012) (noting Mundy sustained numerous injuries, but he did survive). Although Cooper’s motive was unclear, the Court noted that the trial record did suggest he may have acted in self-defense or defense of another. *Id.*

Michigan law, including assault with intent to murder.<sup>2</sup> Cooper initially admitted to his crimes,<sup>3</sup> and the prosecution offered him two formal plea bargains that both recommended a sentence of four to seven years.<sup>4</sup> Allegedly acting pursuant to the advice of his attorney, Cooper rejected both plea deals.<sup>5</sup> The trial court found Cooper guilty on all counts and sentenced him to a minimum mandatory sentence of fifteen to thirty years; a sentence three and one-half times longer than either plea offer.<sup>6</sup>

At his posttrial evidentiary hearing, Cooper argued that his attorney's incompetent legal advice violated his Sixth Amendment right to a fair trial.<sup>7</sup> The trial judge and the Michigan Court of Appeals rejected Cooper's claim.<sup>8</sup> Subsequently, the Michigan Supreme Court refused Cooper's application requesting an appeal.<sup>9</sup>

Next, Cooper filed a petition for federal habeas corpus relief pursuant to 28 U.S.C. § 2254.<sup>10</sup> After finding the Michigan Courts had misapplied the relevant law, the district court granted a conditional writ and ordered "specific performance" of Cooper's

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<sup>2</sup> *Id.* (listing his other charges: being a felon in possession of a firearm, possessing a firearm in the commission of a felony, being a habitual offender, and possessing marijuana).

<sup>3</sup> *Id.* (expressing an interest in accepting a plea deal).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* Cooper claimed his lawyer persuaded him that the prosecution could not prove his intent to murder Mundy because he shot Mundy below the waist. *Id.* The Court noted that "an erroneous strategic prediction about the outcome of a trial is not necessarily deficient performance," but in this case all of the parties conceded to the deficient performance. *Id.* at 1391.

<sup>6</sup> *Id.* at 1383, 1391.

<sup>7</sup> *Id.* at 1383.

<sup>8</sup> *People v. Cooper*, No. 250583, 2005 WL 599740 (Mich. Ct. App. Mar. 15, 2005) (per curiam) (finding Cooper chose to go to trial by "knowingly and intelligently" rejecting both plea offers), *appeal denied*, 474 Mich. 905 (2005), *habeas conditionally granted sub nom.* *Cooper v. Lafler*, 06-11068, 2009 WL 817712 (E.D. Mich. 2009), *aff'd*, 376 F. App'x. 563 (6th Cir. 2010), *cert. granted*, 131 S. Ct. 856 (2012), *and vacated*, 132 S. Ct. 1376 (2012).

<sup>9</sup> *People v. Cooper*, 705 N.W.2d 118 (Mich. 2005) (table) (denying Cooper's leave to appeal).

<sup>10</sup> *Cooper v. Lafler*, No. 06-11068, 2009 WL 817712 (E.D. Mich. Mar. 26, 2009).

original plea deal.<sup>11</sup> The Court of Appeals for the Sixth Circuit affirmed.<sup>12</sup>

The United States Supreme Court granted certiorari and vacated the Sixth Circuit's decision.<sup>13</sup> The Court concluded that Cooper was prejudiced by his counsel's defective performance.<sup>14</sup> As the appropriate remedy, the Court held that the State should be ordered to reoffer the plea bargain, and, if the defendant consented, the trial court should use its discretion in deciding whether to annul the convictions and resentence according to the original plea deal, partially annul the convictions and resentence according to the plea deal, or retain the trial court's original judgment.<sup>15</sup>

## II. RELATED LAW

### A. *The Sixth Amendment*

The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . and to have the Assistance of Counsel for his defence."<sup>16</sup> It is well-settled law that the Sixth Amendment's right to counsel includes the plea-bargaining process.<sup>17</sup> Above that, during the plea-bargaining process, defendants are "entitled to the *effective* assistance of competent counsel."<sup>18</sup>

### B. *Strickland v. Washington*

In *Strickland v. Washington*, the Supreme Court discussed the standards for determining when ineffective legal assistance

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<sup>11</sup> *Id.* at \*9 (concluding that the Michigan Court of Appeals unreasonably applied federal precedent to Cooper's plea decision instead of the validity of trial counsel's underlying advice).

<sup>12</sup> *Cooper v. Lafler*, 376 F. App'x 563, 570-71 (6th Cir. 2010) (finding Cooper's attorney's advice was erroneous).

<sup>13</sup> *Lafler v. Cooper*, 132 S. Ct. 1376, 1391 (2012).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> U.S. CONST. amend. VI.

<sup>17</sup> *Lafler*, 132 S. Ct. at 1384; *see also* *Missouri v. Frye*, 132 S. Ct. 1399, 1405 (2012); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010); *Hill v. Lockhart*, 474 U.S. 52, 57 (1985).

<sup>18</sup> *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (emphasis added).

violates a defendant's Sixth Amendment rights.<sup>19</sup> Respondent Washington committed, inter alia, three murders in a ten-day period.<sup>20</sup> Washington pleaded guilty to all of the charges.<sup>21</sup> Contrary to his attorney's advice, Washington waived his right to have an advisory jury at his sentencing hearing.<sup>22</sup> His attorney chose not to seek out further mitigating evidence.<sup>23</sup> The trial judge sentenced Washington to death.<sup>24</sup>

The Court of Appeals for the Fifth Circuit granted Cooper federal habeas relief.<sup>25</sup> The Fifth Circuit outlined the standards for determining whether legal assistance was inadequate and whether such defective performance was serious enough to cause an impartial trial.<sup>26</sup> The Supreme Court granted certiorari and held that where a defendant alleges ineffective legal assistance, the defendant must satisfy both elements of a two-prong test.<sup>27</sup> First, "the defendant must show that counsel's performance was deficient."<sup>28</sup> Second, "the defendant must show that the deficient

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<sup>19</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>20</sup> *Id.* at 671-72 (totaling three stabbing murders, torture, kidnapping, severe assaults, attempted extortion, theft, and attempted murder).

<sup>21</sup> *Id.* at 672. Washington claimed he acted under emotional distress stemming from family problems. *Id.*

<sup>22</sup> *Id.* Hoping for a less severe sentence, Washington was counting on the trial judge's statement that he "respect[ed]" people who took responsibility for their actions. *Id.* (internal quotation marks omitted).

<sup>23</sup> *Id.* at 673. Washington's lawyer, relying solely on his allegations of emotional distress, did not request a psychiatric evaluation, did not seek out character witnesses outside of Washington's immediate family, and did not request a presentencing report. *Id.* The Court noted this decision reflected the attorney's "hopelessness," because Washington pleaded guilty to all charges. *Id.*

<sup>24</sup> *Id.* at 675. The trial judge did not find a single mitigating circumstance, but cited numerous aggravating factors, including the finding that the murders were "heinous, atrocious, and cruel, all involving stabbings," and all the murders were committed during the commission of a separate felony. *Id.* at 674.

<sup>25</sup> *Washington v. Strickland*, 693 F.2d 1243, 1247 (Former 5th Cir. 1982) (per curiam), *cert. granted*, 462 U.S. 1105 (1983), *and vacated*, 466 U.S. 668 (1984). Washington claimed his lawyer's performance was defective because he failed to seek out any mitigating evidence. *Id.* at 1247-48 (including in his motion fourteen affidavits from people stating they would have testified on Washington's behalf).

<sup>26</sup> *Id.* at 1252, 1262 (finding attorneys owe a duty to conduct a "reasonably substantial investigation" and a defendant "must show that ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of his defense.").

<sup>27</sup> *Strickland*, 466 U.S. at 687 (requiring the defendant to meet both prongs of the test to prevail).

<sup>28</sup> *Id.* (explaining that defective performance requires errors significant enough to violate the Sixth Amendment's guarantee to assistance of counsel).

performance prejudiced the defense.”<sup>29</sup> In addition, the Court held that the state court’s findings of fact were not binding on the federal courts, as required by 28 U.S.C. § 2254(d).<sup>30</sup>

While acknowledging that the scope of the Sixth Amendment’s right to counsel had not been fully developed, the Court found that guaranteeing a fair trial should be the goal when determining whether legal assistance was adequate.<sup>31</sup> The Court further elaborated on the two-prong test, first finding that the defendant must prove counsel’s performance fell below “an objective standard of reasonableness.”<sup>32</sup> In addition, the defendant must show the attorney’s errors negatively affected the court’s judgment.<sup>33</sup> The mere possibility, however, of an error affecting the outcome of a trial is not enough, because virtually any error has the possibility of influencing a trial.<sup>34</sup>

Accordingly, the Court held that the proper standard for determining prejudice requires that “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>35</sup> The Court outlined several crucial guidelines to consider when applying the *Strickland* test.<sup>36</sup> Most importantly, the Court found that a “mechanical” application of the test was

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<sup>29</sup> *Id.* (noting that defendants bear the burden to show counsel’s performance violated their right to a fair trial and the court did not reach a fair result).

<sup>30</sup> *Id.* at 698 (finding both parts of the ineffective-legal-assistance analysis contain a combination of law and fact).

<sup>31</sup> *Id.* at 686 (“The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”).

<sup>32</sup> *Id.* at 688. The Court stated a specific definition of “an objective standard of reasonableness” was not practical, and the proper guidelines should be whatever is reasonable “under prevailing professional norms” within the legal community. *Id.*

<sup>33</sup> *Id.* at 691-92. (noting that the Sixth Amendment guarantee of counsel ensures a defendant the assistance necessary to rely on the outcome, thus, the defendant must show prejudice in order to demonstrate a violation of this constitutional protection).

<sup>34</sup> *Id.* at 693. The Court rejected the outcome-determinative standard because effective legal assistance is pivotal in ensuring a fair trial and a high standard requirement would, in essence, be prejudicial towards the defense. *Id.* at 694.

<sup>35</sup> *Id.* (“A reasonable probability is a probability sufficient to undermine confidence in the outcome.”).

<sup>36</sup> *Id.* at 695. The Court should consider the totality of the circumstances and decide each case on its individual merits. *Id.* Further, the Court noted that an overwhelming amount of evidence against the defendant will require the defendant to show a higher degree of prejudice. *Id.* at 696.

the wrong approach.<sup>37</sup> The Court held that Washington's proceedings did not violate his Sixth Amendment right to a fair trial and reversed the Fifth Circuit's decision.<sup>38</sup>

### C. Hill v. Lockhart

In *Hill v. Lockhart*, the Court addressed whether the two-part test established by *Strickland* applied to a defendant's claim that ineffective legal assistance led him to accept a plea deal.<sup>39</sup> Hill pleaded guilty to, *inter alia*, two counts of first degree murder.<sup>40</sup> Later, Hill petitioned for federal habeas relief, arguing that his guilty plea was involuntary because of incompetent legal advice.<sup>41</sup> The United States District Court for the Eastern District of Arkansas refused Hill's request, and the Court of Appeals for the Eighth Circuit affirmed.<sup>42</sup>

The Supreme Court granted certiorari and held challenges to guilty pleas based on inadequate legal advice must satisfy *Strickland's* two-prong test.<sup>43</sup> As a result, the Court held that the district court did not err in denying Hill's request for habeas relief.<sup>44</sup>

Reasoning that the voluntariness of a guilty plea depends on the quality of legal assistance, the Court applied the two-part

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<sup>37</sup> *Id.* at 696 (explaining that courts should instead focus on whether the criminal proceedings were fundamentally fair).

<sup>38</sup> *Id.* at 700-01. Reasonable probability of prejudice was lacking because Washington admitted to all charges and his allegations of emotional distress were suspicious at best. *Id.*

<sup>39</sup> *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

<sup>40</sup> *Id.* at 53. The trial judge sentenced Hill to thirty-five years for the murder and ten years for property theft, his other conviction. *Id.* at 53-54 (requiring Hill to serve one-third of his sentence to be eligible for parole).

<sup>41</sup> *Id.* Allegedly, Hill's attorney told him parole eligibility was possible at one-third of his sentence; however, Hill was a repeat offender, and a state law required him to serve at least one-half of his sentence. *Id.* at 55.

<sup>42</sup> *Hill v. Lockhart*, 731 F.2d 568, 570-73 (1984) (holding "parole eligibility . . . [is a] collateral rather than a direct consequence[] of a [guilty] plea," which is not protected by the Constitution, and there was not a law requiring a defendant to be informed of parole eligibility), *cert. granted*, 470 U.S. 1049 (1985), and *aff'd*, 474 U.S. 52 (1985).

<sup>43</sup> *Hill*, 474 U.S. at 58.

<sup>44</sup> *Id.* at 60. Hill could not show that his attorney's incompetent advice resulted in prejudice as required by *Strickland* because there was no inclination that Hill relied on the terms of parole eligibility in accepting the plea deal. *Id.*

*Strickland* test to Hill's case.<sup>45</sup> More importantly, the Court found that the logic behind *Strickland* justified applying the same test to the plea-bargaining process.<sup>46</sup> The Court reasoned that requiring a showing of prejudice would enforce a policy favoring "finality," a principle that is invaluable to the integrity of the criminal justice system.<sup>47</sup> Finally, the Court discussed the necessity for objectively predicting the outcome of proceedings in determining whether prejudice affected the defense.<sup>48</sup> Accordingly, the Court affirmed the Eight Circuit's judgment.<sup>49</sup>

#### D. Missouri v. Frye

In *Missouri v. Frye*, the companion case to *Lafler v. Cooper*, the Court considered whether the Sixth Amendment right to assistance of counsel should extend to expired and rejected plea bargains.<sup>50</sup> The Court also examined what the defendant must prove to satisfy the prejudice prong required by *Strickland's* test.<sup>51</sup>

The prosecution offered Frye two separate plea deals after he received a felony charge for driving with a revoked license.<sup>52</sup> His attorney, however, never informed Frye of the two plea deals, and

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<sup>45</sup> *Id.* at 56-57 (noting that the voluntariness of a guilty plea is contingent on whether the defendant's legal assistance "was within the range of competence demanded of attorneys in criminal cases" (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)) (internal quotation marks omitted)).

<sup>46</sup> *Id.* at 57-58 ("Attorney errors come in an infinite variety and . . . cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision . . . [T]herefore, the defendant must show that they actually had an adverse effect on the defense." (quoting *Strickland v. Washington*, 466 U.S. 668, 693 (1984)) (internal quotation marks omitted)).

<sup>47</sup> *Id.* at 58 (noting policies hindering guilty pleas compromise the legitimacy of the judicial branch because of the huge role plea bargains play in relieving the burden of courts).

<sup>48</sup> *Id.* at 60. A prediction, however, was not necessary in Hill's case, because the Court determined there was no prejudice. *Id.* In essence, Hill never claimed that he would not have pleaded guilty, nor did he show that he specifically relied on his eligibility for parole in making his decisions. *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Missouri v. Frye*, 132 S. Ct. 1399, 1404 (2012).

<sup>51</sup> *Id.*; see also *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

<sup>52</sup> *Frye*, 132 S. Ct. at 1404. The State had convicted Frye of the same charge on three previous occasions, making the most recent charge a felony. *Id.* Frye was charged with the same charge, for a fifth time, a week before his trial. *Id.*

both eventually expired.<sup>53</sup> Frye subsequently pleaded guilty at trial without any deal, and he was sentenced to three years in prison.<sup>54</sup> The Missouri Court of Appeals found Frye fulfilled both parts of *Strickland's* test and reversed the lower court's decision.<sup>55</sup> The United States Supreme Court granted certiorari.<sup>56</sup>

Ultimately, the Court held that attorneys owe a general duty to inform their clients of favorable plea offers.<sup>57</sup> And if the duty is breached, their performance is defective, thus violating their clients' constitutional right to a fair trial.<sup>58</sup>

The Court found that the Sixth Amendment guarantees a right to effective counsel at all "critical stages" of criminal proceedings.<sup>59</sup> The Court went on to reconcile the holdings of *Hill v. Lockhart*<sup>60</sup> and *Padilla v. Kentucky*<sup>61</sup> with the circumstances of Frye's claim.<sup>62</sup> After acknowledging the compelling argument made by the State,<sup>63</sup> the Court found its argument overlooked the "simple reality" that plea bargains are the predominant way of handling criminal proceedings.<sup>64</sup> Furthermore, plea bargains

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<sup>53</sup> *Id.* The prosecutor first offered to recommend ten days in jail. *Id.* The second offer would have reduced the charge to a misdemeanor, but required ninety days in jail. *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Frye v. State*, 311 S.W.3d 350, 360 (Mo. Ct. App. 2010) (finding incompetent legal advice resulting in a prison sentence three times longer than the plea offer constituted sufficient prejudice because Frye's attorney did not even attempt to inform Frye about either plea deal), *cert. granted*, 131 S. Ct. 856 (2011), *and vacated*, 132 S. Ct. 1399 (2012).

<sup>56</sup> *Frye*, 132 S. Ct. at 1405.

<sup>57</sup> *Id.* at 1408.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1405. Critical stages include entering plea deals, arraignments, and post-indictment interrogations and lineups. *Id.* (citations omitted).

<sup>60</sup> 474 U.S. 52, 58 (1985) (holding the *Strickland* test applies to claims of ineffective legal assistance during the plea-bargaining process).

<sup>61</sup> 130 S. Ct. 1473, 1486 (2010) (holding counsel has a duty to inform his client of the adversarial consequences of accepting a plea offer).

<sup>62</sup> *Frye*, 132 S. Ct. at 1409 (noting this application of *Strickland's* test does not alter or modify the test).

<sup>63</sup> *Id.* at 1407. The State argued that the plea-bargaining process is separate from the trial. *Id.* Furthermore, the State argued that holding it liable for inadequate legal assistance was wrong because the State was limited in controlling how a lawyer can conduct his business. *Id.*

<sup>64</sup> *Id.* The Court found "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Id.*

benefit both parties,<sup>65</sup> but to receive this benefit, defendants must have effective legal assistance in the plea-bargaining process.<sup>66</sup> Upon examining the duty of counsel, the Court found that a failure to inform clients of plea offers constituted defective performance.<sup>67</sup> In addition, the Court noted several measures that courts can adopt to prevent “frivolous . . . or fabricated” claims.<sup>68</sup>

After applying the *Strickland* test, the Court found the Michigan Court of Appeals was correct in determining Frye had received defective legal assistance.<sup>69</sup> Yet, it determined that the Michigan Court of Appeals failed by omitting the second prong of the *Strickland* test.<sup>70</sup> After it examined *Hill*'s reasoning, the Court concluded there were multiple ways to demonstrate prejudice.<sup>71</sup> Accordingly, the Court vacated the decision and remanded the case so the state court could correctly apply the relevant legal standards.<sup>72</sup>

### III. LAFLETER V. COOPER

#### A. Majority Opinion

In *Lafler v. Cooper*, the Supreme Court found that Cooper successfully demonstrated that “but for” his lawyer’s incompetent advice there was a “reasonable probability” that both he and the trial court would have accepted the plea deal.<sup>73</sup> More importantly,

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<sup>65</sup> *Id.* The state saves resources by not having to go to trial and defendants receive less severe punishments by accepting plea deals. *Id.*

<sup>66</sup> *Id.* at 1407-08 (noting plea bargains are possibly the only “critical stage[]” that can help some defendants).

<sup>67</sup> *Id.* at 1408. The Court examined various law-practice guidelines, state-court decisions, and state-bar standards to support its conclusion. *Id.*

<sup>68</sup> *Id.* at 1408-09 (finding formal documentation, putting offers in writing, and keeping a record of all proceedings helps prevent against meritless claims).

<sup>69</sup> *Id.* (finding any reasonable person would have accepted a lesser sentence and a less severe conviction).

<sup>70</sup> *Id.* at 1411; *see also supra* note 26 and accompanying text.

<sup>71</sup> *Id.* at 1409-10. The Court held that *Hill* does not restrict the *Strickland* analysis to accepted plea deals, and if a defendant is prejudiced by never going to trial, the defendant must prove that he would have accepted the plea deal “but for” his attorney’s inadequate performance. *Id.* at 1409.

<sup>72</sup> *Id.* at 1411 (expressing skepticism at Frye’s chances of meeting the second part of the *Strickland* test because Frye was arrested for the same crime again a week before his trial).

<sup>73</sup> *Lafler v. Cooper*, 132 S. Ct. 1376, 1391 (2012).

the Court held that the proper remedy was for the State to reoffer the plea deal and use its discretion in resentencing.<sup>74</sup>

The Court began its analysis by reaffirming the scope of the Sixth Amendment's guarantee of adequate legal assistance extending to the plea-bargaining process.<sup>75</sup> The Court found that because all parties agreed Cooper's legal assistance was inadequate, there was no need to address the first part of *Strickland's* test.<sup>76</sup>

Upon examining the second part of *Strickland's* test, the Court noted that, in *Hill*, the defendant was required to show that he would have rejected the plea deal "but for" the incompetent advice of his counsel; however, the Court went on to distinguish *Hill*.<sup>77</sup> The Court found that because the trial court convicted Cooper, he must show a "reasonable probability" that all parties involved would have accepted the plea deal "but for" the incompetent advice of his counsel.<sup>78</sup>

The State of Michigan argued that the Court had lost sight of the goal of the Sixth Amendment by construing it so broadly<sup>79</sup> and that *Strickland's* test should not be applied to Cooper's case.<sup>80</sup> The majority, however, felt this argument was unconvincing.<sup>81</sup>

More specifically, the State argued that the "sole purpose of the Sixth Amendment is to protect the right to a fair trial."<sup>82</sup> Yet, the majority interpreted the Sixth Amendment as not being so

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<sup>74</sup> *Id.*; see also *supra* note 14 and accompanying text.

<sup>75</sup> *Id.* at 1384 (noting that in *Hill*, the Court applied the two-part *Strickland* test to challenges to guilty pleas stemming from ineffective legal assistance); see *Frye*, 132 S. Ct. at 1405; *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480-81 (2010); *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

<sup>76</sup> *Lafler*, 132 S. Ct. at 1384.

<sup>77</sup> *Id.* at 1384-85. Cooper declined the plea offer, whereas in *Hill* the defendant accepted the plea deal. *Id.* at 1385.

<sup>78</sup> *Id.* The Court stated: "[A] defendant must show . . . a reasonable probability that the plea offer would have been presented to the court[,] . . . that the court would have accepted its terms, and that the conviction or sentence . . . would have been less severe . . ." *Id.* Additionally, the Court noted its application of the *Strickland* test was in line with that of numerous other appellate courts. *Id.*

<sup>79</sup> *Id.* at 1385 (arguing pretrial errors must result in an unfair trial to warrant Sixth Amendment protection).

<sup>80</sup> *Id.* at 1387. The State argued that a fair trial adequately cures pretrial errors. *Id.*

<sup>81</sup> *Id.* at 1385.

<sup>82</sup> *Id.* at 1380.

restricted and found its guarantee extends to stages where defendants rely on their attorneys for advice.<sup>83</sup> The Court found “critical stages” to include pretrial proceedings because any possibility of a longer sentence naturally requires Sixth Amendment protection.<sup>84</sup> Furthermore, the Court rejected the State’s argument that a fair trial cures pretrial errors and found that the focus should be on whether a fair trial cures the particular error at issue.<sup>85</sup> Finally, the Court reasoned that, despite a fair trial, prejudice could still result from plea deals leading to more severe convictions or longer sentences.<sup>86</sup>

Next, the Court rejected the State’s argument that Cooper must show inadequate legal advice caused him to be denied “a substantive or procedural right.”<sup>87</sup> There are situations where the possibility of a different outcome will not warrant relief,<sup>88</sup> yet Cooper sought relief because of incompetent legal advice about a valid legal standard.<sup>89</sup> Additionally, the Court acknowledged that there is no constitutional right to a plea deal.<sup>90</sup>

Finally, the State argued that the fundamental goal of the Sixth Amendment is to ensure that a trial results in a reliable conviction.<sup>91</sup> Yet, the Court found this argument was too narrow and invalidated by precedent.<sup>92</sup> The Court reasoned that the issue

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<sup>83</sup> *Id.* at 1385 (noting that prejudicial proceedings can result without a defendant actually going to trial).

<sup>84</sup> *Id.* at 1385-86 (“The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel’s advice.”). The Court found this was consistent with the guarantee to effective counsel at sentencing hearings and appeals. *Id.*

<sup>85</sup> *Id.* at 1386.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 1387. For example, relief is not warranted when it is based on an incidental result of applying an invalid legal rule or an illegitimate defensive strategy. *Id.*

<sup>89</sup> *Id.* The Court noted that the original plea deal involved a sentence that a person in the same position as Cooper would have likely received. *Id.* The Court compared minimum mandatory sentences to the “sticker price” of cars (i.e., a rational person would never pay the sticker price because its sole purpose is for bargaining). *Id.*

<sup>90</sup> *Id.* (finding if a plea deal were never offered, Cooper would not have a claim).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1387-88. “[T]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* at 1388

was not the fairness of the trial itself but rather the pretrial processes that affected Cooper.<sup>93</sup> The Court, moreover, observed that the Sixth Amendment right to a fair trial applies “to the innocent and the guilty alike.”<sup>94</sup> Conscious of the State’s claim that a fair trial cures any pretrial prejudice, the Court found the State’s arguments ignored the reality of the American criminal justice system.<sup>95</sup> The Court found that the Sixth Amendment’s guarantee to a fair trial could not be adequately upheld without respecting the vital role plea bargains play in the criminal justice system.<sup>96</sup>

Even if Cooper could satisfy both parts of the *Strickland* test, the Court still needed an appropriate remedy.<sup>97</sup> The remedy should adequately rectify the constitutional violation, but it cannot disregard other legitimate interests.<sup>98</sup> Therefore, the remedy must “neutralize the taint of a constitutional violation” while neither wasting state resources nor granting the defendant a “windfall.”<sup>99</sup> The Court noted that rejected plea deals could cause two types of injuries: longer sentences and more severe convictions.<sup>100</sup> Nevertheless, the proper remedy for both injuries is the same—remand the case and grant the trial court full discretion in determining the appropriate cure.<sup>101</sup> Furthermore, two considerations were specified as being of the utmost importance in deciding on a proper remedy: First, the court may

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(quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984)) (internal quotation marks omitted).

<sup>93</sup> *Id.* at 1388.

<sup>94</sup> *Id.* (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 380 (1986)) (internal quotation marks omitted).

<sup>95</sup> *Id.* (noting that “criminal justice today is for the most part a system of pleas, not a system of trials,” and that “[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas”).

<sup>96</sup> *Id.* (citing *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012)). In *Frye*, the Court stated that “it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.” *Frye*, 132 S. Ct. at 1407.

<sup>97</sup> *Lafler*, 132 S. Ct. at 1388.

<sup>98</sup> *Id.* (citing *United States v. Morrison*, 449 U.S. 361, 364 (1981)).

<sup>99</sup> *Id.* at 1388-89 (quoting *Morrison*, 449 U.S. at 365) (internal quotation marks omitted).

<sup>100</sup> *Id.* at 1389.

<sup>101</sup> *Id.* To determine the proper cure, the trial court must weigh various factors including state and federal statutes, decisions of other courts, and various state and federal rules. *Id.*

evaluate the defendant's prior willingness to accept or deny the plea deal, and second, it may consider any new information that arises concerning the crime at issue.<sup>102</sup>

The State contested the proposed remedy, arguing this solution would overwhelm courts with criminals attempting to challenge their guilty verdicts.<sup>103</sup> The State further argued that the remedy would provide a "windfall[]" for criminals to escape sound judgments.<sup>104</sup> The Court, however, found that previous cases invalidated both of the State's counterarguments.<sup>105</sup> In addition, the majority noted that rules are in place to prevent such meritless claims.<sup>106</sup> Accordingly, because the lower court's decision was contrary to well-established federal law,<sup>107</sup> relief to Cooper's claim was not barred.<sup>108</sup>

All parties agreed Cooper's lawyer rendered incompetent legal advice, thereby satisfying *Strickland's* first prong.<sup>109</sup> And because of incompetent advice, Cooper received a sentence three and one-half times longer than he would have under either plea deal.<sup>110</sup> Therefore, the Court held that both prongs of the *Strickland* test had been satisfied.<sup>111</sup> In addition, the Court held that the proper remedy was to order the trial court to reoffer the same plea deal and then "exercise its discretion" in resentencing.<sup>112</sup>

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 1390.

<sup>105</sup> *Id.*; see, e.g., *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010); *Hill v. Lockhart*, 474 U.S. 52 (1985).

<sup>106</sup> *Lafler*, 132 S. Ct. at 1390; see also *Missouri v. Frye*, 132 S. Ct. 1399, 1408-09 (2012).

<sup>107</sup> *Lafler*, 132 S. Ct. at 1390. The state court found Cooper "knowing[ly] and voluntar[ily]" accepted the plea deal instead of applying the *Strickland* test and mislabeled Cooper's claim as a complaint that his lawyer failed to accept the plea deal. *Id.*

<sup>108</sup> *Id.* at 1383-84. Section 2254(d)(1) bars federal courts from granting federal habeas relief unless the lower courts unreasonably applied clearly established federal law. 28 U.S.C. § 2254(d)(1) (2006).

<sup>109</sup> *Lafler*, 132 S. Ct. at 1391.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

*B. Justice Scalia Dissenting*

Justice Scalia, joined by Justice Thomas and Chief Justice Roberts, disagreed with the majority's opinion that Cooper was entitled to relief.<sup>113</sup> More specifically, Justice Scalia stated that there is no constitutional guarantee to plea bargains, that the majority incorrectly granted habeas relief, and that the majority was attempting to contrive a new area of constitutional law.<sup>114</sup>

Justice Scalia agreed that the Sixth Amendment extends to the plea-bargaining process and that entering a plea deal is a "critical stage" in criminal proceedings.<sup>115</sup> He went on, however, to distinguish the majority's interpretation of *Hill* and *Padilla* by reasoning, "There is no constitutional right to [a] plea bargain."<sup>116</sup> First, Justice Scalia restricted the reach of *Padilla* and *Hill*, explaining that the Court has never extended constitutional protection to defendants who reject a plea offer.<sup>117</sup> Next, he concluded that *Strickland* did not guarantee a constitutional right to effective counsel;<sup>118</sup> rather, it used the Sixth Amendment's purpose of ensuring adequate legal assistance to produce a fair trial as a guide in applying its two-part test.<sup>119</sup> Because Cooper was not denied a "substantive or procedural right," Justice Scalia found that the Court's use of *Strickland*'s analysis was nothing more than an application of the previously rejected outcome-determinative test.<sup>120</sup>

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<sup>113</sup> See *id.* at 1392 (Scalia, J., dissenting) (building the argument upon the idea that a fair trial adequately cured pretrial errors).

<sup>114</sup> See *id.* at 1392-98.

<sup>115</sup> *Id.* at 1392.

<sup>116</sup> *Id.* at 1392-93, 1395 (quoting *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977)) (internal quotation marks omitted).

<sup>117</sup> *Id.* at 1393. Justice Scalia argued that extending Sixth Amendment protection to defendants who reject plea deals was a "judicially invented right" and a "vast departure" from precedent. *Id.*

<sup>118</sup> See *id.* at 1393 (stating "bad plea bargaining has nothing to do with ineffective assistance of counsel in the constitutional sense").

<sup>119</sup> *Id.* Justice Scalia cautioned that courts "were not to divert their 'ultimate focus' from 'the fundamental fairness of the proceeding whose result is being challenged.'" *Id.* at 1394 (quoting *Strickland v. Washington*, 466 U.S. 668, 696 (1984)).

<sup>120</sup> *Id.* at 1395 (quoting *Williams v. Taylor*, 529 U.S. 362, 393 (2000)) (internal quotation marks omitted). Justice Scalia argued that because Cooper received a fair trial, his allegation of defective legal advice was merely collateral damage, which is not constitutionally protected. See *id.*

After determining that the Court was attempting to invent a new constitutional right, Justice Scalia argued that the Court was barred from granting habeas relief because, by definition, a “novel” law cannot be “contrary to . . . clearly established Federal law.”<sup>121</sup> Justice Scalia pointed out that the Michigan Court of Appeals quoted the *Strickland* test verbatim, followed by a somewhat ambiguous application of it; therefore, the Michigan Court of Appeals applied the correct law.<sup>122</sup> Finally, Justice Scalia argued that § 2254 requires both parts of *Strickland*’s test to be contrary to federal law and that, because the lower court’s application was unclear, finding both parts contrary to federal law was impossible.<sup>123</sup>

The Court’s remedy troubled Justice Scalia because it was uncertain as to whether Cooper initially intended to accept the plea deal.<sup>124</sup> Justice Scalia argued that the Court’s remedy was “camouflage” for “discretionary’ specification of a remedy for an unconstitutional criminal conviction.”<sup>125</sup> Additionally, Justice Scalia criticized the “factors” the Court outlined as guidelines to use in applying its remedy.<sup>126</sup>

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<sup>121</sup> *Id.* (quoting 28 U.S.C. § 2254(d)(1) (2006)).

<sup>122</sup> *Id.* at 1396. Justice Scalia argued that by finding Cooper “knowingly and intelligently” rejected the plea offer, the Michigan Court of Appeals was saying Cooper was not prejudiced by the ineffective legal advice because obviously he knew he was rejecting it. *Id.* Furthermore, Justice Scalia argued the majority’s interpretation was “inconsistent with the presumption that state courts know and follow the law.” *Id.* (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)) (internal quotation marks omitted).

<sup>123</sup> *Id.* at 1396. Because the state court’s application was “ambiguous,” and it was not clear which part of *Strickland* it was applying, Justice Scalia argued that it was impossible to contradict well established law if the Court had never dealt with a defendant under the same circumstances as Cooper. *Id.*

<sup>124</sup> *See id.*

<sup>125</sup> *Id.* at 1397. Justice Scalia maintained that by arbitrarily requiring the plea deal to be reoffered, the Court was trying to hide its attempt at inventing “plea-bargaining law.” *Id.* at 1397-98. Justice Scalia also found it outrageous that “statutes and rules” and the discretion of a trial judge can be specific cures to violations of the Constitution. *Id.* at 1397. But, apparently the fact that there could be no remedy at all shocked Justice Scalia the most. *Id.*

<sup>126</sup> *Id.* (“I find it extraordinary that ‘statutes and rules’ can specify the remedy for a criminal defendant’s unconstitutional conviction. Or that the remedy . . . should *ever* be subject *at all* to a trial judge’s discretion. Or, finally, that the remedy could *ever* include no remedy at all.”).

Finally, Justice Scalia discussed the negative aspects of a criminal justice system primarily based around plea bargains,<sup>127</sup> but he did concede that plea bargains are unavoidable in American jurisprudence.<sup>128</sup> Justice Scalia, however, accused the majority of attempting to go even further and “open[] a whole new boutique of constitutional jurisprudence,”<sup>129</sup> thereby overturning “an adjudicatory process that worked *exactly* as it is supposed to.”<sup>130</sup>

### C. Justice Alito Dissenting

Justice Alito, in dissent, criticized the majority’s remedy.<sup>131</sup> Justice Alito argued that granting such wide discretion to the state courts would present ample opportunity for abuse of discretion in two situations: “[F]irst, when important new information . . . comes to light after the offer is rejected, and, second, when the rejection of the plea offer results in a substantial expenditure of scarce prosecutorial or judicial resources.”<sup>132</sup> Justice Alito believed that the majority’s interpretation of the Sixth Amendment was not well founded; thus, he dissented.<sup>133</sup>

## IV. DISCUSSION

The Supreme Court’s opinion in *Lafler v. Cooper* further elaborated on its decision in *Missouri v. Frye*, holding that the Constitution guarantees effective legal assistance in the plea-bargaining process, regardless of a fair trial.<sup>134</sup> But more

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<sup>127</sup> See *id.* (noting that many countries do not allow plea bargains for serious crimes). Justice Scalia highlighted two negative aspects of the plea-bargaining system: innocent defendants lowering their risk by admitting to crimes they did not commit and guilty defendants receiving lighter punishments. *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 1398. “The Court today embraces the sporting-chance theory of criminal law . . . giving each player a fair chance to beat the house . . . . And when a player is excluded from the tables, his constitutional rights have been violated.” *Id.* (emphasis omitted).

<sup>130</sup> *Id.* (noting the violent nature of Cooper’s crime and the fact that he was unanimously convicted by an impartial jury).

<sup>131</sup> See *id.* (Alito, J., dissenting) (arguing that the majority’s finding of prejudice was unfounded because Cooper was convicted following a fair trial).

<sup>132</sup> *Id.* at 1399.

<sup>133</sup> *Id.*

<sup>134</sup> See *supra* notes 15, 57-59, 75 and accompanying text.

importantly, the Court established a remedy to cure violations of the Sixth Amendment's guarantee to counsel.<sup>135</sup> Dissenting Justices Scalia and Thomas, and Chief Justice Roberts, however, suggested the Supreme Court might have overstepped its boundaries while providing an ambiguous answer.<sup>136</sup>

More specifically, as indicated by Scalia, the majority's opinion possibly neglected the fundamental goal of the Sixth Amendment: the right to a fair trial.<sup>137</sup> Cooper admitted he was guilty, voluntarily rejected two plea offers, and was found guilty by a unanimous jury.<sup>138</sup> But the majority maintained Cooper was entitled to yet another chance at relief.<sup>139</sup> Bearing in mind the large number of criminals in American prisons, opening a new avenue for relief may have negative consequences for the criminal justice system.<sup>140</sup> Establishing such precedent threatens not only the legitimacy of American jurisprudence, but also the welfare of American citizens.<sup>141</sup>

Perhaps, however, the majority was correct in further ensuring the legitimacy of the American criminal justice system.<sup>142</sup> As noted by the majority, the attorney-client relationship is of utmost importance, and an attorney's judgment significantly influences the final decisions of his dependent clients.<sup>143</sup> Considering the vast majority of convictions are obtained as the result of guilty pleas and, thus, most defendants will never receive a fair trial, justice may demand extending Sixth Amendment protection to pretrial proceedings that require an attorney's assistance.<sup>144</sup> To permit substandard legal advice when a person's life is at stake could ruin Americans' faith in the criminal justice system as well as the legal profession.<sup>145</sup>

The fact that *Lafler v. Cooper* even reached the Supreme Court indicates uncertainty concerning the federal courts'

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<sup>135</sup> See *supra* notes 15, 74 and accompanying text.

<sup>136</sup> See *supra* notes 114-20, 124-26 and accompanying text.

<sup>137</sup> See *supra* notes 116-20 and accompanying text.

<sup>138</sup> See *supra* notes 3-6 and accompanying text.

<sup>139</sup> See *supra* note 15 and accompanying text.

<sup>140</sup> See *supra* notes 127-28, 132-33 and accompanying text.

<sup>141</sup> See *supra* notes 2, 127-28, 132-33 and accompanying text.

<sup>142</sup> See *supra* notes 83-86 and accompanying text.

<sup>143</sup> See *supra* notes 83-86 and accompanying text.

<sup>144</sup> See *supra* notes 95-99 and accompanying text.

<sup>145</sup> See *supra* notes 84, 86 and accompanying text.

confidence in state courts. Justice Scalia, Justice Thomas, and Chief Justice Roberts pointed out it was implausible that the state court's application of *Strickland's* test was erroneous because the state court accurately quoted *Strickland's* analysis and then applied the law to the facts.<sup>146</sup> Also, as noted by the dissent, Cooper was not an innocent man, and the benchmark for prejudicing Cooper's trial was fairly high.<sup>147</sup> On the other hand, for *Strickland's* test to be fulfilled, both prongs must be established.<sup>148</sup> And the opacity of the state court's application cast doubt as to whether the analysis was correctly applied; therefore, the federal court's decision to grant habeas relief was likely justified.<sup>149</sup>

Assuming, arguendo, that the plea-bargaining process is protected by the Constitution, the asserted remedy may not be a sound solution.<sup>150</sup> As the dissenting Justices suggested, the majority's remedy is conceivably not a remedy at all but possibly a façade intended to hedge its own insecurities regarding the solution.<sup>151</sup> Not only does this remedy attempt to incorporate an unnecessary step in a relatively unclear process, it also allows state courts to use subjective preference in curing constitutional violations.<sup>152</sup> Yet, as Scalia mentioned, the most alarming aspect of the majority's remedy is the possibility that there can in fact be no remedy.<sup>153</sup> By granting the state court total discretion in curing infringements on Americans' Sixth Amendment rights, the majority apparently felt that such constitutional violations did not warrant full constitutional protection.

Nevertheless, Scalia ostensibly reinforced the majority's solution by acknowledging it is "unheard-of in American jurisprudence."<sup>154</sup> And to inhibit critical investigation of novel areas of the Constitution is willfully ignorant.<sup>155</sup> Therefore, as no

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<sup>146</sup> See *supra* notes 121-23 and accompanying text.

<sup>147</sup> See *supra* notes 120, 130 and accompanying text.

<sup>148</sup> See *supra* notes 27-29 and accompanying text.

<sup>149</sup> See *supra* notes 107-08 and accompanying text.

<sup>150</sup> See *supra* notes 124-26, 132-33 and accompanying text.

<sup>151</sup> See *supra* note 125 and accompanying text.

<sup>152</sup> See *supra* notes 100-102, 132-33 and accompanying text.

<sup>153</sup> See *supra* notes 15, 126 and accompanying text.

<sup>154</sup> *Lafler v. Cooper*, 132 S. Ct. 1376, 1396 (2012) (Scalia, J., dissenting); see *supra* notes 117, 121, 125 and accompanying text.

<sup>155</sup> See *supra* notes 129-30 and accompanying text.

other remedy was available, perhaps the majority's answer is sufficient. Moreover, criticizing the majority for attempting to answer an unanswered question may prove counterproductive. Thus, because there is no alternative remedy, it would be more beneficial to the American criminal justice system if the dissent offered its own solution, rather than simply attacking the majority's.

#### CONCLUSION

In *Lafler v. Cooper*, the Supreme Court applied a two-part test to decide whether Cooper was entitled to constitutional protection against defective legal advice guiding him to reject a favorable plea offer that ultimately resulted in a guilty verdict. Applying the first prong of the *Strickland* analysis, the Court found that Cooper's attorney was objectively unreasonable in advising Cooper to reject the considerably more favorable plea offer. In addition, the Court found Cooper's claim also satisfied the second prong of the *Strickland* test because he successfully demonstrated that if it were not for the defective performance, all relevant parties would have likely accepted the plea agreement.

Despite a fair trial and lawful conviction, the Court's majority found Cooper's Sixth Amendment rights had been violated, thereby entitling him to relief. While the Court's opinion answered an important constitutional question regarding the scope of the Sixth Amendment, it possibly offered an ambiguous solution to remedying the prejudice. The dissenting Justices not only challenged the proposed remedy as being improper, illogical, and contrary to a federal law, but they also suggested that the majority was attempting to venture into an uncharted area of constitutional law, without providing a clear map for future courts to follow. Nevertheless, injustice consistently serves as a corollary of negative attacks lacking solutions and, thus, the Dissenters would have contributed more to our legal system had they offered an actual solution instead of choosing the easy way out.

*Casey Scott McKay*

