Turning the Sixth Amendment Upon Itself: The Supreme Court in *Lafler v. Cooper* Diminished the Right to Jury Trial with the Right to Counsel

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I. INTRODUCTION.

Among the several rights protected by the Sixth Amendment are two of the most essential: the right to jury trial and the right to the assistance of counsel.[1] According to the recent Supreme Court decision, *Lafler v. Cooper*, these two fundamental rights can potentially conflict during plea bargaining.[2] In *Lafler*, a defendant missed the chance to accept a favorable plea offer due to his attorney's ineffective assistance. The case proceeded to jury trial, which resulted in his receiving a harsher sentence than that which he would have received from the plea presented in the original offer.[3] The *Lafler* Court characterized the prejudice suffered by the defendant to be "[h]aving to stand trial" rather than "choosing to waive it."[4] Denying that a fair trial could cure counsel's failures during plea bargaining,[5] *Lafler* held that the jury trial and the subsequent sentence, which was "3 & half; times greater" than that offered in the original plea bargain, amounted to prejudice of the defendant's Sixth Amendment rights.[6]

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[1] The Sixth Amendment to the Constitution provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the assistance of counsel for his defense." U.S. CONST. amend. VI.

[2] Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012).

[3] *Id*. at 1383.

[4] *Id*. at 1385.

[5] Specifically, the Court rejected the contention that a "fair trial wipes clean any deficient performance by defense counsel during plea bargaining." *Id*. at 1388.

[6] *Id*. at 1391.

Lafler's dim view of the consequences of jury trial is not the norm. The jury trial has been deemed "the pinnacle of constitutional 'process,'"[7] "fundamental to the American scheme of justice,"[8] and a "great bulwark . . . of civil and political liberties."[9] The Court has traced the jury trial's origins to Blackstone, who described the right as requiring that "the truth of every accusation [should be] confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors."[10] Jury trial was "no mere procedural formality, but a fundamental reservation of power in our constitutional structure"[11] to guard against tyranny.[12] The Framers "included the criminal jury in the constitutional design as part of an elaborate system of checks and balances."[13] John Adams believed "'[T]he common people, should have as complete a control . . . in every judgment of a court of judicature' as in the legislature."[14] Thus, "[j]ust as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."[15] The jury even provided the criminal justice system with its "moral authority."[16] Thus, "only the jury can strip a man of his liberty or his life."[17]

Historically, courts and commentators have worried less about the prejudice a jury trial can cause the right to effective counsel than about the corrosive impact plea bargaining can have on jury trial and associated rights. In *Padilla v. Kentucky*, the Court determined that "[p]leas account

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[7] Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 3 (2006) (quoting Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 391 (2001)) ("[A] wide variety of due process limitations add considerably to the constitutional regulation of the [criminal] trial.") .

[8] The Court has previously noted: "The Sixth Amendment in terms guarantees 'trial, by an impartial jury . . .' in federal criminal prosecutions. Because 'trial by jury in criminal cases is fundamental to the American scheme of justice,' the Due Process Clause of the Fourteenth Amendment guarantees the same right in state criminal prosecutions." Neb. Press Ass'n. v. Stuart, 427 U.S. 539, 551 (1976) (quoting Duncan v. Louisiana, 391 U.S. 145, 149, 153 (1968)).

[9] United States v. Gaudin, 515 U.S. 506, 511 (1995) (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540 (Thomas M. Cooley ed., 4th ed. 1873)).

[10] *Id*. at 510 (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (4th ed. 1769)); Blakely v. Washington, 542 U.S. 296, 301 (2004) (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (4th ed. 1769)).

[11] *Blakely*, 542 U.S. at 306.

[12] *Gaudin*, 515 U.S. at 510–11(quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540 (Thomas M. Cooley ed., 4th ed. 1873)).

[13] Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. MICH. J.L. REFORM 345, 347 (2005).

[14] *Blakely*, 542 U.S. at 306 (citations omitted).

[15] Gardina, *supra* note 13, at 347 (quoting *Blakely*, 542 U.S. at 306). The right to jury trial has been described as guaranteeing that "the jury would still stand between the individual and the power of the government." Douglas A Berman, *Conceptualizing* Booker, 38 ARIZ. ST. L.J. 387, 408–09 (2006) (quoting United States v. Booker, 543 U.S. 220, 237 (2004)).

[16] Judge Stanley Marcus, "*Wither the Jury Trial*," 21 ST. THOMAS L. REV. 27, 29–30 (2008) (quoting Honorable William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 69 (2006)).

[17] *Neb. Press Ass'n*., 427 U.S. at 551 (quoting Irvin v. Dowd, 366 U.S. 717, 722 (1961)).

for nearly 95% of all criminal convictions."[18] In *Missouri v. Frye*, the Court was even more precise, noting that "Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."[19] Plea bargaining has become not just a part of the system but "today it *is* the system,"[20] while trials "take place in the shadow of guilty pleas."[21] One commentator has lamented, "Every two seconds during a typical workday, a criminal case is disposed of in an American courtroom by way of a guilty or nolo contendere plea."[22]

The proliferation of pleas constitutes an alarming trend. Indeed, Justice Rehnquist once wryly observed, "[t]he process of plea bargaining is not one which any student of the subject regards as an ornament to our system of justice."[23] Plea bargaining has been blamed for "injustice" and "loss of the right to trial."[24] The very manner of striking the deal is suspect, for it is "moved from the light of day to behind closed doors, where the professionals provide virtually all of the answers."[25] Plea bargaining possesses "coercive elements . . . such as pretrial confinement, overcharging, and differential in sentencing between pleas and trial."[26] Such pressures might force a defendant to forego his or her constitutional right to trial or potentially even cause innocent person to plead guilty.[27] Case backlogs create an incentive to process the cases as quickly as possible, promoting "conflicting interests and motivations" for prosecutors, judges, and particularly, defense counsel.[28] Commentators have worried that "the very nature of plea bargaining invites inadequate representation."[29] Plea bargaining has been blamed for circumventing the standard of proof,[30] trivializing justice as "modern day shopping,"[31] and

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[18] Padilla v. Kentucky, 130 S. Ct. 1473, 1485 (2010).

[19] Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012).

[20] Judge Rudolph J. Gerber, *On Dispensing Injustice*, 43 ARIZ. L. REV. 135, 145 (2001) (emphasis in original).

[21] Tina Wan, *The Unnecessary Evil of Plea Bargaining: An Unconstitutional Conditions Problem and a Not-So-Least Restrictive Alternative*, 17 S. CAL. REV. L. & SOC. JUST. 33, 34 (2007) (quoting Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains,* 55 STAN. L. REV. 1409, 1415 (2003)).

[22] Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 696 (2001).

[23] Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 931(1983) (citations omitted).

[24] Gerber, *supra* note 20, at 145.

[25] Marcus, *supra* note 16, at 30.

[26] Jeff Palmer, Note, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, 26 AM. J. CRIM. L. 505, 519 (1999) (citations omitted).

[27] F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 189 (2002).

[28] Palmer, *supra* note 6, at 520.

[29] Hessick III & Saujani, *supra* note 7, at 189.

[30] Palmer, *supra* note 6, at 523.

[31] *Id*. at 526.

eroding the adversarial system.[32]

Lafler therefore stands out as a curious incongruity from the concerns of case law and commentary. This Article considers the consequences of *Lafler's* novel perspective by first, in Part II, reviewing the legal context of ineffective counsel precedent in the arena of plea negotiations. Part III examines *Lafler*—its facts and the Court's opinion. In Part IV, this Article assesses the implications of *Lafler's* creation of a right to overturn a full and fair jury trial conviction on the basis of ineffective counsel during plea negotiations. The Court's reasoning could cause the jury trial, an ideal of the criminal justice system's ideal, to become a wrong that prejudices an individual's right to counsel. Further, *Lafler's* irregularities seem to be brought into relief by the Court's curious and conflicting discussion of remedy in this case. Finally, the ruling in *Lafler* not only appeared to be an unnecessary violation of traditional Court restraint, but a decision inconsistent with the European approach to right to counsel.[33]

II. THE CONTEXT OF THE *LAFLER* COURT'S DECISION.

The Court determined, in *McMann v. Richardson*,[34] that "the right to counsel is the right to the effective assistance of counsel."[35] In *McMann*, Richardson challenged the validity of his guilty plea to murder as induced by a coerced confession and ineffective counsel, who, in a 10-minute conversation, told the defendant to take the plea to avoid the electric chair.[36] Although the *McMann* Court determined that "defendants facing felony charges are entitled to the effective assistance of competent counsel," it ruled against the defendant, holding that "a defendant who alleges that he pleaded guilty because of a prior coerced confession is not, without more, entitled to a hearing on his petition for habeas corpus."[37]

Fourteen years after *McMann*, the Court handed down its seminal decision, *Strickland v. Washington*, which created the two-part test for assessing ineffectiveness of counsel claims under the Sixth Amendment.[38] In *Strickland*, the defendant embarked on a ten day crime spree involving such acts as stabbing murder, torture, and kidnapping.[39] The State appointed an experienced criminal lawyer who initially actively pursued

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[32] *Id*. at 527. Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 2009 (1992).

[33] *See infra* Part IV.D.

[34] McMann v. Richardson, 397 U.S. 759, 771 (1970).

[35] United States v. Gonzalez-Lopez, 548 U.S. 140, 147 (2006) (quoting *McMann*, 397 U.S. at 771, n.14). The Court determined this early holding was based on "the Due Process Clause rather than on the Sixth Amendment." *Gonzalez-Lopez*, 548 U.S. at 147.

[36] *McMann*, 397 U.S. at 762–63.

[37] *Id*. at 771.

[38] Strickland v. Washington, 466 U.S. 668, 687 (1984).

[39] *Id*. at 672.

the defense until learning that Strickland had, against his advice, confessed to two murders, waived his right to jury trial, pled guilty to all charges, and falsely represented his criminal record to the judge who would be imposing the sentence.[40] When he was sentenced to death, Strickland claimed ineffectiveness of counsel.[41]

At the outset, *Strickland* anchored the right to counsel to its underlying purpose, noting that "this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial."[42] The Sixth Amendment's provisions, "including the Counsel Clause," largely defined "the basic elements of a fair trial."[43] *Strickland* explained that the right to counsel "plays a crucial role in the adversarial system," because a skilled lawyer was needed in order to provide a defendant the chance to meet the prosecution's case.[44] The Court concluded:

> The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. "An accused is entitled to be assisted by an attorney…who plays the role necessary to ensure that the trial is fair.[45]

The fairness of the trial was so central to the Sixth Amendment's right to counsel that it served as the measure of effectiveness of counsel with the Court determining that "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."[46]

Counsel's purpose in maintaining the integrity of the process to ensure a fair result influenced the substance of *Strickland's* two-part rule.[47] First, *Strickland* mandated that "the defendant must show that counsel's performance was deficient."[48] Such a showing required counsel to have "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[49] Second, "the

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[40] *Id*.
[41] *Id*. at 675.
[42] *Id*. at 684.
[43] *Id*. at 685.
[44] *Strickland*, 466 U.S. at 685.
[45] *Id*.
[46] *Id*. at 686.
[47] *Id*. at 686–687.
[48] *Id*. at 687.
[49] *Id*.

defendant must show that the deficient performance prejudiced the defense," which necessitated a "showing that counsel's errors were so serious as to deprive the defendant of a fair trial."[50] Thus, the Sixth Amendment's fundamental purpose of having defense counsel ensure the fairness of the trial was built into the very language of the *Strickland* test.[51]

Strickland further advised that the application of its test should not be performed mechanically, but instead should ultimately focus on "the fundamental fairness of the proceeding."[52] The Court admonished, "[i]n every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results."[53] Protection of the system's reliability infused both *Strickland's* performance and prejudice prongs. For performance, "the court should keep in mind that counsel's function…is to make the adversarial testing process work in the particular case."[54] Likewise, prejudice was to be measured by whether one could "justify reliance on the outcome of the proceeding."[55] Thus, the Court in *Strickland* clearly and repeatedly fastened the right to effective counsel to the proper functioning of the adversarial system.[56]

The Court held that *Strickland* applied to a guilty plea in *Hill v. Lockhart*.[57] More than two years after pleading guilty to first-degree murder and theft, Hill claimed his lawyer failed to advise him that, as a two time offender, he would have to serve a greater portion of his sentence before becoming eligible for parole.[58] The *Hill* Court held, "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel."[59] To prove *Strickland's* performance prong, "the defendant must show that counsel's representation fell below an objective standard of reasonableness."[60] For *Strickland's* prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[61] *Hill's* formation of the prejudice test exemplified the emerging standard for ineffective counsel claims for plea-bargaining; since counsel's advice steered Hill away from pursuing trial, the loss, and its

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[50] Strickland v. Washington, 466 U.S. 668, 687 (1984).
[51] *Id*.
[52] *Id*. at 696.
[53] *Id*.
[54] *Id*. at 690.
[55] *Id*. at 692.
[56] *Strickland*, 466 U.S. at 692.
[57] Hill v. Lockhart, 474 U.S. 52, 57–58 (1985).
[58] *Id*. at 53.
[59] *Id*. at 58.
[60] *Id*. at 57.
[61] *Id*. at 59.

remedy, would be a trial on the merits.[62]

The Court considered an ineffective counsel claim in *Padilla v. Kentucky*, where a defendant faced deportation after pleading guilty to a drug offense after his lawyer assured him that he "did not have to worry" about being deported.[63] The Supreme Court of Kentucky denied relief on the theory that deportation was "merely a 'collateral consequence' of his conviction," and thus fell outside the scope of the Sixth Amendment.[64] The Court in *Padilla* was not impressed with this argument, declaring, "We…have never applied a distinction between direct and collateral consequences to define the scope of constitutionally."[65] *Padilla*, deeming plea negotiation to be "a critical phase of litigation" under the Sixth Amendment, held that "counsel must inform her client whether his plea carries a risk of deportation."[66]

The Court considered an ineffective counsel issue in *Missouri v. Frye*, a companion case to *Lafler*.[67] In *Frye*, the defendant faced a charge of driving on a revoked license, which, since he had committed the same crime three times previously, exposed him to a maximum sentence of four years in prison.[68] The prosecution had sent a letter to Frye's defense counsel formally offering a choice between two plea bargains: first, a three year sentence (in which Frye served ten days in jail for "shock time") for a guilty plea on a felony charge, or, second, a ninety day sentence to a guilty plea on a misdemeanor charge.[69] The prosecutor's letter specified that the two offers would expire on a particular date, December 28, 2007.[70] The offers expired without Frye's counsel ever alerting him to the proposed pleas.[71] Frye later pleaded guilty to the felony without any deal, resulting in a 3-year prison sentence.[72] Frye then alleged that counsel's failure to inform him of the earlier and more favorable offer constituted ineffective counsel, preventing him from accepting the misdemeanor offer.[73]

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[62] Since Hill failed to prove prejudice under *Strickland*, the Court never offered him the remedy of a trial. *Id*. at 60.

[63] Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010).

[64] *Id*. at 1478.

[65] *Id*. at 1481.

[66] *Id*. at 1486. *Padilla* considered deportation to be "a particularly severe 'penalty'" and "'the equivalent of banishment or exile.'" *Id*. at 1481, 1486 (quoting Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) and Delgadillo v. Carmichael, 332 U.S. 338, 391 (1947)).

[67], The Court noted in Missouri v. Frye, "Other questions relating to ineffective assistance with respect to plea offers, including the question of proper remedies, are considered in a second case decided today." 132 S. Ct. 1399 (2012) at 1404. Moreover, Justice Scalia simply stated, "This is a companion case to *Lafler v. Cooper*." *Id*. at 1412 (Scalia, J., dissenting).

[68] *Id*. at 1404.

[69] *Id*.

[70] *Id*.

[71] *Id*.

[72] *Id* at 1404–05.

[73] *Frye*, 132 S. Ct. at 1405.

The Court in *Frye* identified two issues presented by the case.[74] The first question involved the scope of Sixth Amendment application, with the Court inquiring "whether the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected."[75] The second issue focused on proof, questioning "what a defendant must demonstrate in order to show that prejudice resulted from counsel's deficient performance."[76] For the application issue, *Frye* noted that a defendant has a right to counsel "at all 'critical' stages of the criminal proceedings."[77] *Hill* and *Padilla* established that a guilty plea was within Sixth Amendment protection and *Padilla* specified that "the negotiation of a plea bargain is a critical phase of litigation" for Sixth Amendment purposes.[78] The Court recognized a valid distinction between the situation of *Hill* and *Padilla*, where ineffective assistance led to the acceptance of a plea offer, ("a process involving a formal court appearance with the defendant and all counsel present,") and that of *Frye*, where a plea offer lapsed or was rejected, thus failing to trigger any formal court proceedings.[79] In the latter setting, the prosecution, lacking both notice and the opportunity to intervene, was helpless to prevent defense counsel's failings, and thus should not suffer any penalty for what was beyond its control.[80]

However logical or persuasive the arguments were, they could not change the "simple reality" that "plea bargains have become so central to the administration of the criminal justice system" that they have *become* the system.[81] *Frye* candidly acknowledged, "In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant."[82]

The difficulty of defining defense counsel's Sixth Amendment duties in the plea bargaining process, which "is often in flux, with no clear standards or timelines and with no judicial supervision,"[83] was made all the more complicated by the fact that the "art of negotiation is at least as nuanced as the art of trial advocacy."[84] Fortunately for the Court, it faced

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[74] *Id*. at 1404.
[75] *Id*.
[76] *Id*.
[77] *Id*. at 1405 (quoting Montejo v. Louisiana, 556 U.S. 778, 786 (2009)).
[78] *Id*. at 1406.
[79] *Frye*, 132 S. Ct. at 1406–07.
[80] *Id*. at 1407.
[81] *Frye* noted that plea bargaining was "not some adjunct to the criminal justice system; it *is* the criminal justice system." *Id*. (quoting Robert E. Scott & Willian J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)) (emphasis in original).
[82] *Frye*, 132 S. Ct. at 1407.
[83] *Id*.
[84] *Id*. at 1408 (citing Premo v. Moore, 131 S.Ct. 733, 741 (2011)). *Frye* recognized, "Bargaining is, by its nature, defined to a substantial degree by personal style. The alternative courses and tactics in

no such problems in the instant case; here the defense counsel's failure to communicate the terms of a formal offer, was hardly a close call.[85] *Frye* thus 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."[86] Frye's lawyer, in failing to alert him to the offer, "did not render the effective assistance the Constitution requires."[87]

When it moved to *Strickland's* prejudice prong, *Frye* reformulated the standard for the particular context in which, "a plea offer has lapsed or been rejected because of counsel's deficient performance."[88] *Frye* mandated that defendants make two showings: 1) "[D]efendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel," and 2) "Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it."[89] Thus, when ineffective counsel denies the opportunity for a more beneficial deal, the defendant must convince a reviewing court that all actors would have accepted the original offer's terms.[90]

In over four decades of case law, the Court established that guilty pleas in court, as well as the negotiations leading up to such formal proceedings, are critical phases that fall within the Sixth Amendment's application, thus deserving of effective assistance of counsel.[91] Each case contributing to this line of precedent involved a challenge to a plea entered due to counsel's ineffective assistance.[92] The separate issue of whether a defendant, alleging ineffective counsel during plea bargaining, could challenge a conviction after a "full and fair trial," remained an open question until *Lafler v. Cooper*.[93]

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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." *Id*.

[85] *Frye,* 132 S. Ct. at 1408.

[86] *Id*.

[87] *Id*. The *Frye* Court, recognizing that its reasoning could make prosecutors and trial judges vulnerable, suggested that the "prosecution and trial courts may adopt 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." *Id*. at 1408–09. The main thrust of the Court's advice was the admonition to reduce such negotiations to writing. *Id*. at 1409.

[88] *Id* at 1409.

[89] *Id*.

[90] *Id*. at 1409–10.

[91] Missouri v. Frye, 132 S. Ct. 1399, 1405–06 (2012).

[92] *Id*. at 1405.

[93] Lafler v. Cooper, 132 S. Ct. 1376, 1383 (2012); *Id*. at 1392 (Scalia, J., dissenting).

III. LAFLER V. COOPER.

A. *Facts:*

On the evening of March 25, 2003, in an apartment complex in Detroit, Michigan, Kali Mundy was "anxiously awaiting the arrival of a friend," and walked toward a vehicle as it arrived.[94] Anthony Cooper exited the vehicle and moved towards her.[95] When the two were about six feet apart from one another, Cooper pulled out a handgun, pointed it at Mundy's head, and fired, missing Mundy.[96] Cooper fired at Mundy four more times, "hitting her twice in the right buttock, once in the hip, and once to the right side of her abdomen."[97] Mundy collapsed near the door of a house.[98] Detroit Police Officer Randell Coleman, who happened to be nearby, witnessed the shooting, radioed in a description of the shooter, and saw two other officers apprehend Cooper.[99] One of Cooper's bullets had perforated Mundy's intestines, causing a life-threatening injury.[100] Mundy underwent surgery, enduring a nearly three-week hospital stay and "daily pain."[101]

Cooper faced charges in state court for assault with intent to murder, possession of a firearm by a felon, possession of a firearm at the time of commission of a felony (felony firearm), and possession of marijuana.[102] Before trial, Cooper wrote a letter to the court, expressing his desire to plead guilty.[103] After the preliminary hearing, the prosecutor offered Cooper's lawyer, Brian McClain, a guilty plea to the assault with intent to murder charge for a term of imprisonment below the sentencing guidelines' minimum.[104] Cooper was willing to accept the offer because he

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[94] *Id*. at 1383; Petition for Writ of Certiorari at 5, Lafler v. Cooper, 132 S. Ct. 1376 (2012), No. 10-209 [hereinafter Petition for Writ]; Brief of Respondent Anthony Cooper at 2, Lafler v. Cooper, 132 S. Ct. 1376 (2012), No. 10-209 [hereinafter Brief of Respondent].

[95] Petition for Writ, *supra* note 94, at 5.

[96] *Id*. Mundy and Cooper were "acquaintance[s]." Brief for Criminal Justice Legal Foundation and the National District Attorneys Association as Amicus Curiae Supporting Petitioners at 3, Lafler v. Cooper, 132 S. Ct. 1376 (2012), Nos. 10-209 and 10-444 [hereinafter CJLF Amicus Brief]. The *Lafler* Court noted the reason behind the shooting was "unclear," yet, "at trial, it was suggested that (Cooper) might have acted either in self-defense or in defense of another person." *Lafler*, 132 S. Ct. at 1383.

[97] Brief for the Petitioner at 5, Lafler v. Cooper (2012), 132 S. Ct. 1376, No. 10-209 [hereinafter Brief for the Petitioner].

[98] Petition for Writ, *supra* note 94, at 5.

[99] *Id*.

[100] *Id*.

[101] Brief for the Petitioner, *supra* note 98, at 5; Brief for the United States as Amicus Curiae Supporting Petitioner at 2, Lafler v. Cooper (2012), 132 S. Ct. 1376, No. 10-209 [hereinafter Amicus Brief for the United States].

[102] Amicus Brief for the United States, *supra* note 101, at 1–2.

[103] *Id*. at 2–3.

[104] *Id*. at 1–2. "The State offered a minimum sentence range of 51 to 85 months, even though the guidelines called for a minimum sentence range of 81 to 135 months." Brief of Respondent, *supra* note 94, at 3.

"was guilty."[105] McClain talked him out of it by telling him that, "because the victim was injured below the waist, the State could not establish the element of intent."[106] The prosecution withdrew the offer, warning that there would "be no offer on trial date because that's policy."[107] The defense counsel, convinced that Cooper "was innocent…as a matter of law," expected a better offer before trial.[108]

No better offer ever came. Instead, a different prosecutor on the day of trial made the less favorable offer of imprisonment from 126 to 210 months, which Cooper rejected.[109] At trial, the defense presented evidence about a prior dispute between Mundy and a companion of Cooper's, arguing that Mundy had been lying in wait to confront Cooper.[110] The defense also urged that the location of Mundy's injuries indicated a lack of intent to kill.[111] The jury was unconvinced, convicting Cooper on all charges.[112] The trial court then sentenced Cooper to 185 to 360 months imprisonment.[113]

At a post-conviction hearing, Cooper testified, "My lawyer told me that they couldn't find me guilty of the charge because the woman was shot below the waist."[114] He complained that "We never really got a chance to discuss a strategy" and that "[I] never knew I was going to trial until the trial started."[115] Unimpressed, the trial court ruled against Cooper, noting, "Mr. Cooper made his own choices," despite finding that Cooper's counsel had told him that an intent to murder conviction "'could not'' occur given the medical evidence."[116]

B. The Court's Opinion.

The *Lafler* Court in an opinion written by Justice Kennedy, framed the issue as "how to apply *Strickland's* prejudice test where ineffective

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[105] Amicus Brief for the United States, *supra* note 94, at 2.

[106] *Id*. Counsel believed the prosecution could not prove assault with intent to murder because:

> [A]fter the medical report, Your Honor, I believe that the Prosecution does not have the evidence to try to [sic] this case . . . [the prosecutor at the pretrial conference] is not trying the case, I would like to discuss this matter with the attorney who has will (sic) make the case for the Prosecution. I think he would be a little more reasonable about making a more reasonable offer so that we won't have a trial.

Brief of Respondent, *supra* note 95, at 3.

[107] Brief of Respondent, *supra* note 95, at 4.

[108] Brief in Opposition at 3, Lafler v. Cooper (2012), 132 S. Ct. 1376, No. 10-209 [hereinafter Brief in Opposition].

[109] Amicus Brief of United States, *supra* note 101, at 3.

[110] *Id*.

[111] *Id*.

[112] *Id*.

[113] *Id*.

[114] Brief of Respondent, *supra* note 94, at 5.

[115] *Id*.

[116] *Id*. at 6.

assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial."[117] To answer this question, *Lafler* began with *Strickland's* requirement that the defendant "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[118] Justice Kennedy noted that *Hill*, in the specific context of pleas, required the defendant to show a "reasonable probability that, but for counsel's errors," the defendant "would not have pleaded guilty and would have insisted on going to trial."[119] *Hill's* version of the prejudice test exposed the fact that in *Lafler*, "[h]aving to stand trial," rather than being the remedy sought, was "the prejudice" being alleged.[120]

The Court required that the defendant, when contending prejudice after a jury verdict, make three showings: 1) "that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court,"[121] 2) "that the court would have accepted its terms,"[122] and 3) "that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed."[123] Applying its new rule, *Lafler* found the defendant had fulfilled the three-part test.[124]

Justice Kennedy then addressed the government's contention that, "there can be no finding of *Strickland* prejudice arising from plea bargaining if the defendant is later convicted at a fair trial."[125] *Lafler* characterized the government position as asserting, "that the sole purpose of the Sixth Amendment is to protect the right to a fair trial."[126] The prosecution would thus deem any errors before trial as essentially irrelevant "unless they affect the fairness of the trial itself."[127] The Court admonished that "The Sixth Amendment, however, is not so narrow in its

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[117] *Lafler*, 132 S. Ct. at 1384. The Court could immediately focus on the question of prejudice because "all parties" agreed that the defense counsel's performance was deficient when he advised Cooper to reject the offer on the theory that he could not be convicted at jury trial. *Id*.

[118] *Id*. (quoting *Strickland*, 466 U.S. at 694).

[119] *Id*. at 1384–85 (quoting *Hill*, 474 U.S. at 59).

[120] *Id*. at 1385.

[121] *Id*. The Court alternately stated this first showing as demonstrating, "that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances." *Id*.

[122] *Lafler*, 132 S. Ct. at 1385.

[123] *Id*. at 1385.

[124] The Court concluded:

As to prejudice, [defendant] has shown that but for counsel's deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea . . . . In addition, as a result of not accepting the plea and being convicted at trial, [defendant] received a minimum sentence 3 & half; times greater than he would have received under the plea. The standard for ineffective assistance under *Strickland* has thus been satisfied. *Id*. at 1391.

[125] *Id*. at 1385.

[126] *Id*.

[127] *Id*.

reach."[128] The Sixth Amendment extends beyond the trial to cover "pretrial critical stages that are part of the whole course of a criminal proceeding."[129] The right to counsel also applied to sentencing and appeal, post-trial stages clearly not meant to affect the integrity of the trial itself.[130] *Lafler* emphasized the bigger picture because, in the criminal justice system, "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."[131] *Lafler* therefore found it "insufficient" to "point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process."[132]

Since the Court found that Cooper had suffered prejudice, it sought a remedy that would neutralize the taint of the violation without squandering State resources or granting the defendant an undeserved windfall.[133] *Lafler* gave the trial court "discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between."[134] Even though the Court called on trial judges to "weigh various factors," it refrained from specifying what such factors exactly were.[135] *Lafler* did, however, offer what it called "two considerations."[136] First, the trial court could properly consider whether the defendant had earlier expressed a willingness to accept responsibility for his or her actions.[137] Second, the Court left open the possibility that the trial judge would consider "any information concerning the crime that was discovered after the plea offer was made."[138] The Court maintained this possibility because it was

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[128] *Lafler*, 132 S. Ct. at 1385. *Lafler* condemned the argument that the Sixth Amendment's only purpose was to ensure "'the reliability of [a] conviction following trial'" as too restrictive a view of the right of counsel. *Id*. at 1387.

[129] *Id*. Justice Kennedy reiterated that the focus was not merely "the fairness or reliability of the trial," but the "fairness and regularity of the processes that preceded it." *Id*. at 1388.

[130] *Id*. at 1385–86. *Lafler* also found troubling the government's assertion that *Lockhart v. Fretwell* had created "an additional requirement that the defendant show that ineffective assistance of counsel led to his being denied a substantive or procedural right." *Lafler*, 132 S. Ct. at 1386; *see* Lockhart v. Fretwell, 506 U.S. 364 (1993). *Lafler* flatly rejected the contention that *Strickland* had suffered any such modification, noting that the defendant in *Fretwell* claimed ineffective counsel because his lawyer failed to make what would have been a meritless objection. *Lafler*, 132 S. Ct at 1386. The *Fretwell* defendant therefore simply "could not demonstrate an error entitling him to relief." *Id*. at 1386. In contrast, the defendant in *Lafler*, incorrectly told that it was legally impossible for him to be convicted, was genuinely injured by "counsel's failure to meet a valid legal standard." *Id*.at 1387. When a plea is offered, the defendant has a right to effective assistance of counsel in considering it; "if denied this right, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence." *Id*.

[131] *Id*.at 1388.

[132] *Id*.

[133] *Lafler*, 132 S. Ct., at 1388–89. (internal quotation omitted).

[134] *Id*. at 1389

[135] *Id*.

[136] *Id*.

[137] *Id*.

[138] *Id*.

difficult to restore the parties to the positions they held "prior to the rejection of the plea offer."[139] In applying its new remedy to the case, *Lafler* did not simply order "specific performance of the original plea agreement."[140] The "correct remedy" was far more complicated, for the court should:

> [O]rder the State to reoffer the plea agreement. Presuming [defendant] accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence [defendant] pursuant to the plea agreement, to vacate only some of the convictions and resentence [defendant] accordingly, or to leave the convictions and sentence from trial undisturbed.[141]

Justice Kennedy concluded that the Court's decision left "open to the trial court how best to exercise that discretion in all the circumstances of the case."[142] The *Lafler* Court's remedy, after its vehement discussion of preserving the integrity of the entire system, constituted more of a whimper than a bang, raising more questions than it answered.

I V. THE IMPLICATIONS OF *LAFLER'S* CREATION OF A DEFENSE RIGHT TO SEEK REINSTATEMENT OF A REJECTED PLEA OFFER AFTER A JURY TRIAL CONVICTION.

A. *Lafler, in Separating the Sixth Amendment Right to Counsel from its Purpose, Ultimately Turned the Criminal Justice System's Ideal of a Fair Trial Into a Violation of Constitutional Right:*

The *Lafler* Court, however good its intentions, detached the Sixth Amendment right to counsel from its fundamental purpose. *Gideon v. Wainwright*, the seminal case establishing the Sixth Amendment right to assistance of counsel in state court, determined that the right to counsel was "fundamental and essential to a fair trial."[143] *Strickland*, which established the standard for ineffective counsel that *Lafler* meant to apply, admonished that to give meaning to the requirement for effective counsel, one must "take its purpose—to ensure a fair trial—as the guide."[144] *Strickland* thus deemed the existence of the right to counsel as premised

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[139] *Lafler*, 132 S. Ct. at 1389..
[140] *Id*. at 1391.
[141] *Id*.
[142] *Id*.
[143] Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (internal citation omitted).
[144] *Strickland*, 466 U.S. at 686.

upon protecting a fundamental right to fair trial.[145] In *United States v. Cronic*, the Court explicitly began its Sixth Amendment analysis by declaring, "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial."[146] The right to counsel was not meant to promote a norm of solid advocacy throughout the nation, but to maintain "the reliability of the trial process."[147] The goal of preserving the fairness of trial even informed the Court's interpretation of the scope of right to counsel; *United States v. Wade* extended the Sixth Amendment to cover pretrial processes such as line-up identifications because occurrences at such critical periods might "affect the whole trial."[148] Although *Wade* emphasized that a defendant deserved a right to counsel "at any stage of the prosecution, formal or informal, in court or out,"[149] the Court noted repeatedly that the guarantee of the right to counsel was to be measured by how its violation detracted from a person's right to a fair trial.[150]

Lafler altered *Strickland's* prejudice standard. *Lafler* quoted *Strickland's* simple and powerful language that prejudice is established when the defendant shows "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[151] *Lafler's* later mathematical calculation made prejudice seem self-evident, for the defendant "received a minimum sentence 3 & half; times greater than he would have received under the plea."[152] *Lafler's* mathematics oversimplified the prejudice issue, for *Strickland's* difference in outcome was a function, not of amount of time imposed by the sentence, but of the "fairness" and "confidence" of the outcome.[153] The "'benchmark' of an ineffective-assistance [of counsel] claim is the fairness of the adversary proceeding."[154] Once again, the Court's precedent tied the right to counsel to its impact on the fairness and reliability of the trial's verdict. Applying *Strickland* with its focus on the fairness and reliability

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[145] *Id*. at 684.

[146] United States v. Cronic, 466 U.S. 648, 658 (1984).

[147] *Id*.

[148] Wade v. United States, 388 U.S. 218, 225 (1967) (citing Hamilton v. Alabama, 368 U.S. 52, 54 (1961)).

[149] *Id*. at 226.

[150] In *Wade*, the Court explained, "the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution . . . where counsel's absence might derogate from the accused's right to a fair trial." *Id*. *Wade* further noted, "the principle of *Powell v. Alabama* and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial." *Id*. at 227 (emphasis in original).

[151] *Lafler*, 132 S. Ct. at 1384.

[152] *Id*. at 1391.

[153] In *Nix v. Whiteside*, the Court specified, "[a]ccording to *Strickland*, '[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Nix v. Whiteside, 475 U.S. 157, 175 (1986).

[154] *Id*.

of the outcome would have caused the *Lafler* Court to reach a conclusion precisely opposite to the one in its opinion, because, as the Court itself declared, Cooper received a "full and fair trial before a jury."[155] Since the entire purpose of the right to counsel is to ensure that the defense lawyer does not "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result,"[156] with the *Lafler* Court conceding that there was a perfectly proper trial, there is simply no prejudice to address in this case.[157]

The essential purpose of a jury trial is "to discover the truth."[158] Juries, employing the common sense of community values, avoid the corrupting influences that threaten jaded judges or overzealous prosecutors,[159] and are therefore "meant to protect against unjust punishment perpetrated by government."[160] Blackstone considered the jury second to none in determining the truth, declaring the jury trial "the best criterion, for investigating the truth of facts, that was ever established in any country."[161] In short, jury trials were created "'for the benefit' and protection of the accused."[162] The jury in Cooper's "full and fair trial"[163] did its job in convicting him; during plea negotiations, the defendant himself readily volunteered he was guilty.[164] The criminal justice system is not designed to prevent harsh consequences, but only unjust convictions. The result the defendant challenged was not due to a failure of the system but to its success; the sentence Cooper received after jury trial was due simply to the exposure of the truth by the trial. Justice Kennedy admitted as much when

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[155] *Lafler*, 132 S. Ct. at 1383.

[156] *Strickland*, 466 U.S. at 686.

[157] Justice Scalia described *Strickland's* "result of the proceeding would have been different" language as a "rule of thumb" which should not distract the Court from the "ultimate focus" on the fairness of a proceeding. *Lafler*, 132 S. Ct. at 1394 (Scalia, J., dissenting).

[158] Michelle Pan, *Strategy or Stratagem: The Use of Improper Psychological Tactics by Trial Attorneys to Persuade Jurors*, 74 U. CIN. L. REV. 259, 259–60 (2005). Pan cited Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95, 97–100 (1996) as follows, "[n]one of the trial's functions are more central to its legitimacy than the search for truth . . . . Arguably, the most compelling claim supporting the adversary system of trial court dispute resolution is that it is the best judicial system for truth-finding."*Id*. at n.2. *See also* Tehan v. United States, 382 U.S. 406, 416 (1965), in which the Court noted, "The basic purpose of a trial is the determination of truth." *Id*.

[159] Ballew v. Georgia, 435 U.S. 223, 240 (1978); Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 724, 745–46 (1993).

[160] Kristen K. Sauer, *Informed Conviction: Instructing the Jury about Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232, 1261 (1995).

[161] Charles A. Rees, *Preserved or Pickled?: The Right to Trial by Jury After the Merger of Law and Equity in Maryland*, 26 U. BALT. L. REV. 301, 321 (1997). Blackstone also asserted, "in settling and adjusting a question of fact . . . a competent number of sensible and upright jurymen . . . will be found the best investigators of truth and the surest guardians of public justice." Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 4 (1989).

[162] Landon Wade Magnusson, *Failure to Yield: How Wecht Might Ruin the Right to a Fair Trial*, 2010 B.Y.U. L. REV. 995, 1013 (2010).

[163] *Lafler*, 132 S. Ct. at 1383.

[164] Amicus Brief of United States, *supra* note 102, at 2.

he allowed that a sentencing judge did not need to disregard "information concerning the crime that was discovered after the plea offer was made."[165] *Lafler*, therefore, found a violation of the Sixth Amendment despite the fact that the purpose of the right to counsel was fulfilled in this case.

B. Lafler's Own Remedy Highlights the Faultiness of its Reasoning.

The remedies *Lafler* offered exposed glaring inconsistencies in the Court's reasoning. *Lafler* noted that the "specific injury" suffered by a defendant who received a full and fair trial after mistakenly rejecting a plea could be: 1) a greater sentence than presented in the original plea offer, or 2) a greater sentence due to conviction at trial on more serious counts than those presented in the plea offer.[166] For the first injury involving only a greater sentence, *Lafler* suggested that the trial court "may conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for the counsel's errors he would have accepted the plea."[167] Having the trial court, at the remedy stage, hold a hearing to see if the defendant would have accepted the plea is redundant. Such a finding had to be made to fulfill *Strickland's* prejudice prong in order for the defendant to be eligible for the remedy in the first place.[168] Justice Kennedy, however, soldiered on, declaring that "if the showing is made, the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between."[169] Such a statement bordered on the bizarre; in offering this range of options, *Lafler* indicated that a trial court could *both* determine that a person's Sixth Amendment right to effective counsel was violated by receiving a sentence after a trial caused by an ill-advised rejection of a plea offer *and* impose as a remedy the very same sentence that constituted a violation of his rights.[170] To further complicate matters, the trial court could impose "something in between" the original offer and the sentence received at trial.[171] To impose this "something in between," or any other sentence, *Lafler* held that "the trial court must weigh various factors."[172] As to precisely what factors a trial court should consider, the *Lafler* Court did not specify.[173] *Lafler* effectively invited more litigation to flesh out such factors, encouraging more claims of error, thus undermining finality of

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[165] *Lafler*, 132 S. Ct. at 1389.
[166] *Id*.
[167] *Id*.
[168] *Strickland*, 466 U.S. at 686.
[169] *Lafler*, 132 S. Ct. at 1389.
[170] *Id*.
[171] *Id*.
[172] *Id*.
[173] *Lafler* asserted, "the boundaries of proper discretion need not be defined here." *Id*.

judgment.[174] The more prudent course would seem to have been to avoid confusion in the future by offering a list of factors, as the Court has readily done in other Sixth Amendment litigation.[175] *Lafler's* failure to do so, when considered with its confusing reasoning on available remedies, could be due to the fact that the Court itself does not have a sense of what such factors should be.

The Court did deign to offer "two considerations that are of relevance:" 1) a trial court may take into account the defendant's "earlier expressed willingness" to accept responsibility for his or her actions, and 2) "it is not necessary here to decide as a constitutional rule that a judge is required to prescind (that is to say disregard) any information concerning the crime that was discovered after the plea offer was made."[176] As a reason for the Court's second consideration, *Lafler* offered the significant understatement that "The time continuum makes it difficult to restore the defendant and the prosecution to the precise positions they occupied prior to the rejection of the plea offer."[177] The obvious reason for such difficulty is the exposure of truth at trial, which an order returning parties to the original plea offer would demand courts ignore.[178] This allows the judge to consider aggravating facts that came out in trial when determining the remedy.[179] The Sixth Amendment may be important, but not so important as to mandate a taint analysis akin to the Fourth Amendment.[180]

For cases involving the second injury of conviction on more serious counts, *Lafler* suggested requiring the prosecution to reoffer the plea proposal, enabling the trial court to "vacate the conviction from trial and accept the plea or leave the conviction undisturbed."[181] Here, *Lafler* once again presented trial courts with the power to both identify a Constitutional violation and to deny it any remedy through keeping the original sentence.[182] The Court went a long way to create a right only to deny it a

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[174] *Id*.

[175] In *United States v*. *Wade*, a case the *Lafler* Court itself cited, the Court offered the following factors to determine whether, in a case involving an out-of-court identification procedure held in violation of the Sixth Amendment right to counsel, the subsequent in-court identification was tainted: Application of this test in the present context requires consideration of various factors: for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification.

Wade, 388 U.S. at 241.

[176] *Lafler*, 132 S. Ct. at 1389.

[177] *Id*.

[178] *Id*.

[179] *Id*.

[180] Wong Sun v. United States, 371 U.S. 471, 485 (1963).

[181] *Lafler*, 132 S. Ct. at 1389.

[182] *Id*.

consistent remedy.[183]

Lafler's remedy rulings generated still more confusion when the Court applied them to the facts in the case. *Lafler* rejected the simplest remedy, offered by the district court, of specific performance of the plea agreement, in favor of ordering the prosecution to "reoffer the plea agreement."[184] This option left the *Lafler* Court in the awkward position of assuming that Cooper would accept the offer.[185] Theoretically, the defendant could reject the plea, which could leave the trial court in an absurd situation. The defendant, winning his Sixth Amendment claim by fervently stating that he would have accepted the original plea but for his attorney's incompetence, now could turn his nose up at it. To the pragmatic argument that this event, in all practicality, would never actually occur, one could respond by questioning the Court's refusal to simply impose the plea deal.[186] Should the defendant indeed accept the plea offer, the trial judge could exercise discretion ranging from sentencing according to the plea to leaving the original sentence after trial undisturbed.[187] Thus, once again, a court could find the defendant the victim of a Constitutional violation yet award him or her nothing for the trouble. *Lafler* thus created a Sixth Amendment right without a guarantee of a genuine remedy.[188]

C. The Lafler Decision, By Unnecessarily Deciding an Issue of Constitutional Dimension, Violated Long-Standing Court Restraint Against Creation of New Constitutional Rule:

The very existence of the *Lafler* decision demonstrated a lack of judicial restraint. Since this case reached the Court through federal habeas corpus, it was governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which limits the granting of habeas relief to decisions "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[189] *Lafler* crafted a new defense right to challenge the rejection of a plea offer after a "full and fair trial before a jury."[190] Justice Scalia characterized *Lafler* and *Frye*, its companion case, as opening "a whole

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[183] *Id*.

[184] *Id*. at 1391. The *Lafler* Court's curious rejection of opting to simply implement the prior plea agreement did not go unnoticed by Justice Alito, who noted: "If a defendant's Sixth Amendment rights are violated when deficient legal advice about a favorable plea offer causes the opportunity for that bargain to be lost, the only logical remedy is to give the defendant the benefit of the favorable deal." *Id*. at 1398 (Alito, J., dissenting). Justice Scalia saw less than pure motives in the Court's proposed remedy, deriding it as "camouflage." *Id*. at 1397 (Scalia, J., dissenting).

[185] *Lafler*, 132 S. Ct. at 1398.

[186] *Id*. at 1391.

[187] *Id*.

[188] *Id*.

[189] *Id*. at 1395 (Scalia, J., dissenting) (quoting 28 U.S.C. § 2254(d)(1)).

[190] *Id*. at 1383.

new field of constitutionalized criminal procedure: plea-bargaining law."[191] It is arguably impossible for the lower courts to apply "unreasonably" or act "contrary to" law that had yet to be established. Justice Scalia flatly stated as much.[192] The *Lafler* case was therefore not properly considered by habeas review.[193]

Furthermore, the decision to hear the case was contrary to the Court's best traditions. The *Lafler* Court departed from a "longstanding principle of judicial restraint" which "requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."[194] One of the Court's longest-serving justices, Justice Stevens, once discussed the dangers inherent in the Court unnecessarily deciding an issue:

> [W]hen the Court goes beyond what is necessary to decide the case before it, it can only encourage the perception that it is pursuing its own notions of wise social policy, rather than adhering to its judicial role. I do not believe the Court should reach out to decide what is undoubtedly a profound question concerning the administration of criminal justice before assuring itself that this question is actually and of necessity presented by the concrete facts before the Court. Although it may appear that the Court's broad holding will serve the public interest in enforcing obedience to the rule of law, for my part, I remain firmly convinced that "the preservation of order in our communities will be best ensured by adherence to established and respected procedures."[195]

Emphasizing the importance of judicial restraint is hardly new. In 1936, Justice Brandeis explained, "[t]he Court developed, for its own

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[191] *Lafler*, 132 S. Ct. at 1391 (Scalia, J., dissenting).

[192] Justice Scalia declared that it was "impossible" for the Court to conclude that the state court unreasonably applied clearly established law in holding that there was a lack of *Strickland* prejudice, because "this Court has never held that a defendant in Cooper's position can establish *Strickland* prejudice." *Id*. at 1396 (Scalia, J., dissenting).

[193] *Id*.

[194] Camreta v. Greene, 131 S. Ct. 2020, 2031 (2011) (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988)).

[195] United States v. Leon, 468 U.S. 897, 963 (1984) (Stevens, J., dissenting) (quoting Groppi v. Leslie, 436 F.2d 331, 336 (7th Cir. 1971) (en banc) (Stevens J., dissenting), *rev'd,* 404 U.S. 496 (1972)). Justice Stevens believed such restraint was particularly valued by judges:

> Judges, more than most, should understand the value of adherence to settled procedures. By adopting a set of fair procedures, and then adhering to them, courts of law ensure that justice is administered with an even hand. "These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice." *Id*. at 962 (Stevens, J., dissenting) (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)).

governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision."[196] Among these rules, Justice Brandeis offered, "[t]he Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"[197] Additionally, "[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."[198] *Lafler's* crafting of a Constitutional rule in a case not properly presenting an issue for habeas relief demonstrated a failure to follow this long-held notion of judicial restraint.[199]

It was particularly unfortunate that the Court's activism occurred in a context where it could so distort the parties' incentives. Although Justice Kennedy dismissed such a worry when he denied any risk of the Court's ruling opening "the floodgates to litigation,"[200] such a concern is significant in light of the route Cooper took to reach the Court. The crucial fact here is that Cooper sought to overturn a conviction after jury trial rather than a guilty plea.[201] The nature of relief obtained when an individual challenges a plea—the "opportunity to withdraw the plea and proceed to trial,"—possesses its own disincentive, for those who successfully attack their pleas must then risk a trial, losing "the benefit of the bargain obtained as a result of the plea."[202] In contrast, a defendant who challenges a conviction after jury trial faces no similar risk, because there is no prior bargain limiting prison time. Instead, the defendant has suffered a sentence based on all the facts that came out at trial. At minimum, *Lafler's* ruling provides defendants sitting in prison with another avenue of attack should they suffer remorse about rejecting an earlier plea offer after the trial. Future defendants might reject pleas in an attempt to game the system; they can roll the dice with a jury and, if convicted, seek a second chance by contending ineffective counsel during plea negotiations.

The cost of *Lafler's* decision is hardly minimal.[203] In the past, the Court has found the societal costs of reversal to be acceptable "when an

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[196] Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936).

[197] *Id*. at 347 (quoting Liverpool, N.Y. and Phila. Steamship Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885)).

[198] *Id*.

[199] *Id*.

[200] *Lafler*, 132 S. Ct. at 1389.

[201] *Id*.

[202] *Padilla*, 130 S. Ct. at 1485.

[203] The Court has previously noted, "[a]t the same time and without detracting from the fundamental importance of the right to counsel in criminal cases, we have implicitly recognized the necessity for preserving society's interest in the administration of criminal justice." United States v. Morrison, 449 U.S. 361, 364 (1981).

error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence."[204] In *Lafler*, no such concerns exist where all agree that the defendant was accorded a full and fair trial.[205] In *United States v. Morrison*, the Court recognized the general rule that remedies of Sixth Amendment violations must be specifically tailored "to the injury suffered from the constitutional violation" without unnecessarily infringing on competing interests.[206] The key is to "neutralize the taint" to "assure the defendant the effective assistance of counsel and a fair trial."[207] Such precedent might explain *Lafler's* curious remedy ruling; the trial court, even after a *Lafler* violation, has the option of simply keeping the original sentence handed down after jury trial because in reality the defendant suffered no prejudice after a full and fair trial.[208] This perhaps would be the best tailored remedy of all.

D. Lafler's Reasoning Contrasts with Approaches in Europe.

Lafler's holding would find scant support from nations across the Atlantic.[209] A sense of Europe's approach to ineffective counsel can be gleaned from study of the European Court on Human Rights (ECtHR). The ECtHR has held that "although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial."[210] The ECtHR has also emphasized that the aim of the European

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[204] United States v. Mechanik, 475 U.S. 66, 72 (1986).

[205] *Lafler*, 132 S. Ct. at 1383.

[206] *Morrison*, 449 U.S. at 364.

[207] *Id*. at 365.

[208] *Id*. at 367.

[209] Justice Scalia took notice of the usual practice of courts in Europe in his *Lafler* dissent. *Lafler*, 132 S. Ct. at 1397 (Scalia, J., dissenting). He noted, "In many—perhaps most—countries of the world, American-style plea bargaining is forbidden in cases as serious as this one . . . .In Europe, many countries adhere to what the aptly call the 'legality principle' by requiring prosecutors to charge all prosecutable offenses, which is typically incompatible with the practice of charge-bargaining. *Id*.

For instance in Estonia, the Code of Criminal Procedure § 239 (2) (1) provides a list of crimes for which case plea bargaining is forbidden (this list consists of the most serious crimes). CODE OF CRIMINAL PROCEDURE, (Nov. 17, 2012), http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X60027K6&keel=en&pg=1&ptyyp=RT&tyyp=X&query=kriminaalm. When it comes to the principle of legality, dismissing some charges as a result of bargain is not acceptable in Estonia. In addition, although not stated explicitly, at least by the Supreme Court, it seems that Estonian courts disapprove bargaining over legal assessment of the offense. There are some strict rules about the punishment also: the Supreme Court of Estonia has declared that during the plea bargaining the prosecutor should not agree with considerably more lenient punishment than he or she would have sought upon conviction after trial, as the punishment should be in accordance with the defendant's guilt and guilt is the same during all stages of the proceedings. Hassan Mohamed Siadi kriminaalasi, Riigikohtu kriminaalkolleegium [Criminal Chamber of the Supreme Court of Estonia], Case No. 3-1-96-09, ¶ 9, (2 December 2009), available at http://www.nc.ee/?id=11&tekst=222521168.

[210] Poitrimol v. France, 277 Eur. Ct. H.R. (ser. A) 2, 14–15 (1993).

Convention on Human Rights (ECHR)[211] is to guarantee not rights that are "theoretical or illusory" but rights that are "practical and effective:" "this is particularly so of the rights of the defence [sic] in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive."[212] The ECtHR's right to counsel has two prongs, although not the same as those of *Strickland*.[213] To assess counsel's effectiveness, a court should inquire: 1) "whether the defendant was denied effective assistance of counsel," and 2) "whether the State had adequate notice of this deficient assistance."[214]

The rights guaranteed in the rule's first prong can be violated by such pragmatic problems as counsel's illness, lack of time to prepare a case, or inability to converse with the client.[215] The ECtHR has also placed practical limits on official responsibility over an attorney's performance, indicating in its case law that it will find a breach only "where counsel completely fails to perform some duty."[216] This conclusion can be derived from the ECtHR's most important ineffective counsel case, *Artico v. Italy*, in which counsel refused to provide legal assistance to the defendant. In *Goddi v. Italy*,[217] counsel failed to appear in court. In *Daud v. Portugal*,[218] the first appointed counsel provided no legal assistance whatsoever while the second failed to prepare for the trial. In all of these cases, the ECtHR concluded that there was a breach of the ECHR.[219] In *Kamasinski v. Austria*, where the defendant claimed that although counsel fulfilled his duties generally, he failed to fulfill particular duties effectively, the ECtHR has referred to the independence of counsel and refused to assess counsel's acts.[220]

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[211] Convention for the Protection of Human Rights and Funadamental Freedoms (1950), *available at* http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/The+Convention+and+additional+protocols/The+European+Convention+on+Human+Rights/.

[212] Artico v. Italy, 37 Eur. Ct. H.R. (ser. A) 1, 15–16 (1980).

[213] Richard E. Meyers, *Adversarial Counsel in an Inquisitorial System*, 37 N.C.J. INT'L L. & COM. REG. 411, 424 (2012).

[214] *Id*.

[215] *Id*. at 424–25. As the ECtHR stated in Artico: "mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties." Artico v. Italy, 37 Eur. Ct. H.R. (ser. A) 1, 15–16 (1980).

[216] Anneli Soo, *An Individual's Right to the Effective Assistance of Counsel Versus the Independence of Counsel: What Can the Estonian Courts Do in Case of Ineffective Assistance of Counsel in Criminal Proceedings?* XVII JURIDICA INTERNATIONAL 252, 256 (2010).

[217] Goddi v. Italy, 76 Eur. Ct. H.R. (ser. A) 1 (1984).

[218] Daud v. Portugal,1998-II Eur. Ct. H.R. 739, 749.

[219] Artico v. Italy, 37 Eur. Ct. H.R. (ser. A) (1980); Goddi v. Italy, 76 Eur. Ct. H.R. (ser. A) 1, 14 (1984); Daud v. Portugal,1998-II Eur. Ct. H.R. 739, 752.

[220] Kamasinski v. Austria, 168 Eur. Ct. H.R. (ser. A) 1, 32 (1989). The defendant claimed that the lawyer did not attend the indictment hearing, visited him at prison only briefly, failed to acquaint him with the prosecution evidence prior to the trial and did not perform adequately at the trial. *Id*. at 32. The ECtHR denied violation of the ECHR and concluded that "[i]t follows from the independence of the legal profession from the State that the conduct of the defense is essentially a matter between the

The second prong of the ECtHR's rule, regarding notice of ineffective counsel, provides an even sharper contrast with *Lafler*. To satisfy the notice requirement, "the defendant must show that the State was on "notice" that counsel's performance was ineffective."[221] Here, the ECtHR has concluded that the State has an obligation "to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way."[222] Such a mandate reflects the ECtHR's particular philosophy regarding the relationship between counsel and client, which is seen as a private matter. This is also the reason why the ECtHR has noted that a "State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes."[223] As previously stated, courts are mandated to intervene only if the failure is manifest or it is brought to their attention in any other way.[224] However, European scholars have interpreted this ECtHR mandate as requiring that "the shortcomings (be) so blatant as to prevent there being the possibility of effective representation"" rather than that these shortcomings be brought to the state authorities' attention.[225] Estonia, a country under ECtHR jurisdiction, has had few cases of ineffectiveness of counsel reach its Supreme Court. In *Riigikotus kriminaalkolleegium*, where the defendant actually contested removal of counsel by a lower court due to counsel's ineffectiveness, the Supreme Court of Estonia held that even if the defendant is against removal, it is important to notice that the right to choose counsel is not just the defendant's personal matter, for the court has to make sure that counsel actually fulfills his duties.[226]

Unlike *Strickland*, the ECtHR's ineffective counsel rule does not require a showing "that actions of counsel actually prejudiced the defendant."[227] Indeed, "the existence of a violation is conceivable even in the absence of prejudice."[228] Rather than seeking evidence of prejudice, the ECtHR emphasizes the need to prevent the harm in the first place. The

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defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed. Id. at 32–33.

[221] Meyers, *supra* note 213, at 425.

[222] Kamasinski v. Austria, 168 Eur. Ct. H.R. (ser. A) 1, 32–32, (1989).

[223] Artico v. Italy, 37 Eur. Ct. H.R. (ser. A) 1, 18, (1980).

[224] Kamasinski v. Austria, 168 Eur. Ct. H.R. (ser. A) 1, 32–33, (1989).

[225] STEFAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS 287 (2005).

[226] Riigikotus kriminaalkolleegium [Criminal Chamber of the Supreme Court of Estonia], Case No. 3-1-1-61-10, ¶ 10.1, (2 August 2010), available at http://www.nc.ee/?id=11&tekst=RK/3-1-1-61-10.

[227] Meyers, *supra* note 213, at 425–26.

[228] Artico v. Italy, 37 Eur. Ct. H.R. (ser. A) 1, 17–18, (1980). Here the Court has also been sympathetic to the defendant's position and stated: "The Court points out, in company with the Commission's Delegates, that here the Government are asking for the impossible since it cannot be proved beyond all doubt that a substitute for Mr. Della Rocca would have pleaded statutory limitation and would have convinced the Court of Cassation when the applicant did not succeed in doing so." Id.

focus is on a "duty to intervene,"[229] for the state has a duty to remedy the situation by either causing the counsel to provide effective assistance or removing the ineffective counsel.[230] In *Quaranta v. Switzerland*, the ECtHR determined that the State should cure the defect before the case reaches the ECtHR at all.[231]

The *Lafler* case would be handled differently in jurisdictions under the ECtHR. While the ECtHR would presumably concur with the conclusion that Cooper's counsel improperly understood the law when he advised his client to reject the prosecution's plea offer, such an error might not meet the extremely deferential standard requiring a finding that counsel completely failed to perform his or her duty.[232] There is also a possibility that the Court, in deference to defense counsel's independence, would refrain from assessing the activities of Cooper's counsel at all.[233] Further, as mandated by the ECtHR, the defendant would have to fulfill his or her notice requirement, unless state authorities themselves had noticed the failure. Here, perhaps the defense attorney, Brian McClain, provided such notice when he flatly misstated that his client was "innocent…as a matter of law."[234] This incorrect statement of law, along with Cooper's evident willingness to enter a guilty plea, should have been sufficient to establish notice to the trial court in the case.[235] This would enable the court to follow the preferred approach of intervening early by "compelling the appointed counsel to provide effective assistance (here, by mandating he research self-defense law), or replacing the ineffective counsel."[236] Such action could have avoided the failure in the first place, removing the need to establish precedent deeming a jury trial conviction as a violation of the right to counsel.[237] Finally, and most importantly, since the right to effective counsel is a "fundamental feature of a fair trial,"[238] even if the ECtHR had found Cooper's counsel's failures to fulfill his duties during bargaining manifest, the Court would still deny violation of the ECHR since Cooper subsequently received effective defense during a fair trial in front of a jury.[239]

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[229] Soo, *supra* note 216, at 258.
[230] Artico v. Italy, 37 Eur. Ct. H.R. (ser. A) 1, 18, (1980).
[231] Quaranta v. Switzerland, 205 Eur. Ct. H.R. (ser. A) 1, 18, (1991).
[232] Soo, *supra* note 218, at 257.
[233] *Id*.
[234] Brief in Opposition at 3, Lafler v. Cooper, 132 S. Ct. 1376 (2012) (No. 10–209), 2010 WL 7096383 (U.S.), at *3.
[235] Lafler v. Cooper, 132 S. Ct. 1376, 1383–84 (2012).
[236] Meyers, *supra* note 213, at 424.
[237] *Lafler*, 132 S. Ct. at 1389.
[238] Poitrimol v. France, 277 Eur. Ct. H.R. (ser. A) 2, 14 (1993).
[239] *Lafler*, 132 S. Ct. at 1382–83.

V. CONCLUSION.

Lafler determined that the consequences of a jury trial unconstitutionally harmed a criminal defendant.[240] The Court thus concluded that a person could claim prejudice from ineffective counsel solely because he or she had to endure a right that has been traced back to the Magna Carta.[241] Such a ruling placed the Sixth Amendment in a new perspective as being the source of two potentially conflicting rights: the right to counsel and the right to jury trial.[242] Previously, as noted by one commentator, such rights appeared to be complementary:

> With trials in open court and deserved sentences imposed by a neutral factfinder, we protect the due process right to an adversarial trial, minimize the risk of unjust conviction of the innocent, and at the same time further the public interest in effective law enforcement and adequate punishment of the guilty.[243]

Defense counsel, with a duty to the client and every incentive to win the case, was free to promote the ideal of a full and fair trial by offering the most vigorous defense.[244] Thus, the jury trial was the criminal justice ideal and the attorney was the primary means of achieving this goal.[245]

The specter that endangered the adversarial ideal was not the jury trial but its expedient and inferior substitute—the plea bargain.[246] The malignant growth of plea bargaining has threatened the existence of the jury trial simply by overwhelming numbers.[247] *Lafler's* solution to this loss of genuine adversarial testing of government charges is to hinder jury trials still further by calling their finality into question should a plea offer have preceded them.[248] *Lafler* has reached this extreme due to "the reality that criminal justice today is for the most part a system of pleas, not a

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[240] *Id*. at 1389.
[241] Rees, *supra* note 161, at 321.
[242] *Lafler*, 132 S. Ct. at 1386–1388.
[243] Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 2009 (1992).
[244] *Id*.
[245] *See id*.
[246] Schulhofer determined that plea bargaining endangered the benefits of trial he had enumerated, noting, "plea negotiation simultaneously undercuts all of these interests." *Id*.
[247] From the Court's own figures, one can infer that only three percent of federal convictions and six percent of state convictions result from a trial. Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012).
[248] *Id*.

system of trials."[249] Thus, in *Lafler*, the Court waived the white flag in the battle to preserve a genuine adversarial system,[250] and it managed to blame the victim of plea bargaining, the jury trial, for its result.[251]

[249] *Id*.
[250] *See id*.
[251] *See id*.