

No. 10-209

In the Supreme Court of the United States

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BLAINE LAFLER, PETITIONER

v.

ANTHONY COOPER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

It is undisputed that Respondent Cooper committed assault with intent to murder. It is also undisputed that Cooper's sentence is precisely what the Michigan Legislature prescribed for that crime. There is no "miscarriage[] of justice," Resp. Br. 46, when a defendant is fairly convicted and forced to pay the full penalty that the People have approved as appropriate for the criminal conduct in which the defendant chose to engage.

Ideally, every criminal defendant would pay this full penalty. But prosecutors sometimes make pre-trial deals due to a lack of resources, a desire to shield victims from having to testify at trial, or to avoid the risk of an acquittal. But the circumstances change after trial, because the potential benefits of a plea deal are no longer available: the prosecutor has expended resources, the victim has been cross-examined, and the jury has found proof beyond a reasonable doubt. And it makes no difference whether trial went forward because the prosecutor never made an offer, the defendant chose not to accept an offer, or a trial judge rejected an accepted offer; the mere fact that a trial took place extinguishes any benefit the prosecutor could have otherwise obtained from a plea deal.

Cooper says that he is somehow constitutionally prejudiced by having to serve the full sentence for a person convicted of assault with intent to murder. In other words, he asserts a right to consummate a better deal, even though the Constitution guarantees no such right. But in making that argument, Cooper misconstrues this Court's ineffective-assistance-of-counsel precedent in two respects.

Cooper first misapprehends *Strickland*'s primary teaching: it is not enough to show that ineffective assistance resulted in a lost opportunity; a defendant must prove that deficient performance “*deprive[d] the defendant of a fair trial, a trial whose result is reliable.*” *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (emphasis added). According to Cooper, prejudice will almost always be established when a criminal defendant complains that he would have pled guilty, because he would have received a lesser sentence. That analysis collapses the two-part *Strickland* test into a single prong, examining alone whether trial counsel’s performance was deficient. Thus, the test becomes one that guarantees the “best outcome.”

But *Strickland* requires more. This point is exemplified by *United States v. Mechanik*, 475 U.S. 66 (1986). There, competent counsel would have successfully moved for dismissal of the indictment based on a procedural defect at the grand-jury stage. Defendant’s counsel missed that opportunity, and the defendant was later convicted. This Court refused to set aside the conviction based on ineffective assistance, because the fair trial rendered “any error in the grand jury proceeding . . . harmless beyond a reasonable doubt.” *Id.* at 70. As Judge Gorsuch observed in his *Williams* dissent, “It seems more than unlikely that the Constitution could be offended by a fair trial that occurs because of the loss of a plea bargain to which the defendant had no entitlement, but not by a fair trial that occurs only after counsel failed to pursue defendant’s entitlement to a dismissal of the indictment.” *Williams v. Jones*, 571 F.3d 1086, 1103 (10th Cir. 2009) (Gorsuch, J., dissenting).

Cooper also misinterprets the primary teaching of this Court's decision in *Fretwell*, which requires a defendant to show that ineffective assistance deprived him of a "substantive or procedural right to which the law entitles him." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). *Fretwell* involved a defendant who could have avoided the death penalty had his lawyer raised a certain point of law (later overruled by this Court) at sentencing. Despite the greatest possible lost opportunity—avoiding a death sentence—this Court rejected the claim because giving the defendant the benefit of a legal argument later held erroneous would "grant [him] a windfall to which the law does not entitle him." *Id.* at 370. "[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Id.* at 369.

Here, Cooper lacks a substantive or procedural right to a plea deal, and his attorney's ineffective assistance at the plea stage ultimately resulted in a fair trial with a reliable result. There is no constitutional basis for granting Cooper a "do over" based on a lost opportunity, because there is no constitutional right to a plea offer. Moreover, Cooper does not deserve this windfall. Now that a jury has rejected his theory of innocence, the Constitution does not require the prosecutor to extend a previously-rejected plea offer, regardless of the reason for the rejection. Accordingly, the State of Michigan respectfully requests that the Court reverse the court of appeals.

REPLY ARGUMENT

I. A lost opportunity to consummate a plea bargain does not undermine confidence in the result at trial.

This Court's opinion in *Strickland* could not be clearer: "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.*" 466 U.S. at 686 (emphasis added). Respondent Cooper does not contend that his trial produced an unreliable result; accordingly, that should be the end of the story.

Tellingly, Cooper does not even acknowledge this key language from *Strickland*. Instead, Cooper propounds the same watered-down prejudice standard that the federal circuits have applied when evaluating ineffective-assistance cases involving rejected plea agreements: whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Resp. Br. 24, 26 (quotation omitted); accord ABA Amicus Br. 16; Center on the Admin. of Criminal Law Amicus Br. 15; Nat'l Assoc. of Criminal Defense Lawyers Amicus Br. 6; Constitution Project Amicus Brf. 12. This Court should reject that standard for two reasons.

First, Cooper's test (evaluating whether the result of the proceeding would have been different) is only a partial quote from *Strickland*. He omits the very next sentence: "A reasonable probability is a probability *sufficient to undermine confidence in the outcome.*" 466

U.S. at 694 (emphasis added). Two paragraphs later, the opinion reiterates this point, “*the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.*” *Id.* at 695 (emphasis added). When an attorney gives defective plea advice and his client is then convicted following a fair, constitutional trial, there is no effect on the reliability of the guilty verdict. In *Strickland* terms, nothing Cooper’s lawyer did at the plea stage could have caused the factfinder “to have had a reasonable doubt respecting guilt.” *Ibid.*

Instead, Cooper argues that, but for his attorney’s ineffective assistance, he never would have gone to trial. Resp. Br. 17 (“there should not, and would not have been a trial in this case at all had Mr. Cooper received minimally competent advice”). But that argument has nothing to do with the *Strickland* test. A trial, standing alone, is not prejudice; an *error-free* trial certainly is not prejudice. Rather, under *Strickland*, proof of prejudice requires a defendant to show doubt about the conviction. And where (as here) a defendant alleges that he would have pleaded guilty to the underlying facts to obtain a favorable plea deal, the jury’s finding looks *more* reliable, not less.

As noted above, *Mechanik* exemplifies the approach this Court takes when confronted with an allegation of pre-trial ineffective assistance that did not raise any concerns about the reliability of the trial result. There, a guilty verdict rendered “any error in the [pre-trial proceedings] . . . harmless beyond a reasonable doubt.” 475 U.S. at 70. Accordingly, there was no basis to set aside the conviction, even though the defendant lost the opportunity to dismiss the indictment altogether:

The[] societal costs of reversal are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way *when an error has had no effect on the outcome of the trial*.

Id. at 73 (emphasis added). See also, e.g., *Coleman v. Alabama*, 399 U.S. 399 U.S. 1, 11 (1970) (failure to provide counsel at a preliminary hearing is subject to harmless error analysis, even though the hearing is a critical stage). And although Lafler’s initial brief gave considerable attention to *Mechanik* and the principles it embodies, Pet. Br. 17, 18, 19, Cooper does not even cite the case, presumably because he cannot explain how the result should be any different here.

Second, Cooper’s watered-down standard has the practical effect of eliminating *Strickland*’s prejudice inquiry in many cases. Acceptance of a plea agreement will frequently result in a shorter sentence than conviction.¹ In other words, but for counsel’s unprofessional conduct at the plea stage, there will virtually always be a reasonable probability that the

¹ Although Cooper’s claim could be interpreted as a complaint that his *sentence* was the result of ineffective assistance, that is not really the case. It is undisputed that the sentence Cooper desires (via specific performance of the plea offer) is unavailable for a person convicted of assault with intent to murder. And Cooper cannot claim prejudice based on the inability to pursue something the law forbids. *Nix v. Whiteside*, 475 U.S. 157 (1986); contra Resp. Br. 29 (“Because of that affirmative misadvice, Mr. Cooper is now serving a much higher sentence than that offered in the plea bargain.”).

result of the proceeding will be different if a criminal defendant does not plead guilty because of deficient advice. As a result, under Cooper's test, the only prerequisite for an ineffective-assistance claim involving a rejected plea is proof of attorney negligence. There is no basis for such a test anywhere in this Court's precedent, and this Court should emphatically reject it.

In support of his prejudice-less test, Cooper cites this Court's decisions in *Hill v. Lockhart*, 474 U.S. 52 (1985), and *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). That reliance is misplaced. Both *Hill* and *Padilla* involved ineffective assistance in a defendant's *acceptance* of a plea.

Cooper mistakenly asserts that for the purpose of examining whether an attorney has provided effective assistance, there is no "differen[ce]" between a criminal defendant who decides to accept an offer and one who pleads guilty. Resp. Br. 18. But this argument ignores the significance of the plea. The plea acceptance deprives a defendant of his constitutional right to trial, because that right has been waived. Accordingly, there is no jury verdict in which to be confident. In contrast, "a not-guilty plea is a waiver of nothing; it is an *invocation* of the constitutional right to a trial, and it is effective whether or not it is made knowingly and voluntarily." *Williams*, 571 F.3d at 1098 (Gorsuch, J., dissenting).

In other words, an *assertion* of rights (pleading not guilty, remaining silent, proceeding while represented by counsel) does not have to meet the same constitutional standards as a *waiver* of rights (pleading guilty, talking to the police, proceeding *pro se*). Here,

Cooper asserted his rights and proceeded to trial, and a jury convicted him. It is therefore appropriate to apply *Strickland's* confidence-in-the-jury-verdict test. And because there is no lack of confidence in the trial outcome based on a defendant's rejection of a plea offer (no matter the reason), there is no basis to grant Cooper's request for relief.

II. A lost plea deal does not deprive a defendant of a substantive or procedural right.

As explained in Lafler's initial brief, Cooper's claim also fails because he is unable to show that ineffective assistance deprived him of a substantive or procedural right. Pet. Br. 21–23 (citing *Fretwell*). That is because “there is no constitutional right to plea bargain.” Pet. Br. 21 (quoting *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977)). Cooper has two responses; both lack merit.

Initially, Cooper says that *Fretwell* was of no lasting significance, its holding confined to the “exceptional” facts presented there. Resp. Br. 27–28. That position is belied by this Court's post-*Fretwell* decision in *Williams v. Taylor*, 529 U.S. 362 (2000), which reaffirmed that “[u]nreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any *substantive or procedural right* to which the law entitles him.” *Id.* at 393 n.17 (emphasis added).²

Next, Cooper says that an inquiry into substantive or procedural rights “is irrelevant in this case where a

² Cooper quotes from *Taylor* but neglects to include this Court's statement regarding substantive and procedural rights. Resp. Br. 27.

specific and favorable plea bargain had been offered and was open at the time counsel rendered his constitutionally defective advice.” Resp. Br. 29. That argument misses the point. In *Fretwell*, at the time counsel failed to raise the winning argument that would have saved his client from the death penalty, the legal argument was likewise “available.” That fact made no difference to the prejudice inquiry: “Because the result of the sentencing proceeding . . . was rendered neither unreliable nor fundamentally unfair as a result of counsel’s failure,” there was no *Strickland* prejudice. *Fretwell*, 506 U.S. at 366. “To hold otherwise would grant criminal defendants a windfall to which they are not entitled.” *Ibid*. It is a novel suggestion that the mere extension of a plea offer creates a right to avoid trial.

The same conclusion applies here. Because Cooper lacks a substantive or procedural right to plea bargain, *Weatherford*, 429 U.S. at 561, much less to a specific plea, he cannot prove prejudice under *Strickland*. And there is nothing unfair about forcing Cooper to serve the full sentence for someone found guilty of committing assault with intent to murder.

III. Cooper’s overarching error relates to his misunderstanding of the nature of prejudice under *Strickland*.

Cooper’s remaining arguments ignore or misapply *Strickland*’s requirement that a criminal defendant prove that deficient performance deprived the defendant of a fair trial. *Strickland*, 466 U.S. at 687.

First, Michigan’s position does not require this Court to “adopt the unprecedented proposition that there is a constitutional deprivation that a habeas court must refuse to remedy.” *Contra* Resp. Br. 34. Cooper attacks a straw man when he asserts that habeas courts have the power to set aside convictions or order specific performance when necessary to remedy a constitutional violation. The question here is whether such a constitutional violation has occurred. The Sixth Amendment guarantees effective “Assistance of Counsel,” but counsel’s actions do not violate the Amendment unless they cause the defendant cognizable prejudice, i.e., a suspect trial result. The problem here—just like in *Mechanik*—is not a refusal to provide a judicial remedy, but Cooper’s inability to prove *Strickland* prejudice.

Second, Cooper is wrong when he argues that a fair trial cannot cure a lost opportunity to plead guilty. Resp. Br. 16–19. In support, Cooper cites *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), and *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), for the proposition that once the Sixth Amendment is violated, “no additional showing of prejudice is required to make the violation complete.” Resp. Br. 18. But *Gonzalez-Lopez* involved a trial court error that deprived the defendant of his right to choice of counsel, which “has never been derived from the Sixth Amendment’s purpose of ensuring a fair trial.” *Gonzalez-Lopez*, 548 U.S. at 147. This Court held that the nature of the right is bound up with the attorney’s identity, and a deprivation cannot be remedied by another attorney. By contrast, the right to effective assistance of counsel is *not* a structural error. *Strickland* and dozens of subsequent cases confirm

that establishing a Sixth Amendment violation in that context requires that the defendant show prejudice.

Similarly, *Bullcoming* involved the defendant's right under the Confrontation Clause to cross-examine a witness in open court, and held that no other procedure could substitute for confrontation. Where a Confrontation Clause error is harmless, however, that error provides no grounds for setting aside the conviction. See *Bullcoming*, 131 S. Ct. at 2719 n.11; *Delaware v. Van Arsdall*, 475 U.S. 673, 683–84 (1986). Neither *Bullcoming* nor *Gonzalez-Lopez* even suggests that the ordinary *Strickland* prejudice inquiry should not apply in this context. If Cooper was correct, there would never be a need for a *Strickland* prejudice inquiry; simply proving deficient performance, standing alone, would be sufficient to throw out the conviction.

Third, Cooper errs in his attempt to address why requiring the prosecution to re-extend the plea offer is the proper remedy based on counsel's deficient performance, even though it impinges on an executive function. Resp. Br. 44. Cooper says that the interest of the prosecution to protect its authority in this sphere "pales" in comparison to his Sixth Amendment right. Resp. Br. 44. This position understates the importance of the prosecution maintaining its discretion to extend plea offers and of the benefits of avoiding trial. Here, for example, the prosecutor has lost all pre-trial consideration, such as the time and cost of conducting a jury trial, the ability to shield the victim from having to undergo cross examination, and avoiding the risk of an acquittal. And the prosecutor may learn additional facts as a result of going to trial that, had they been

revealed earlier, would have caused the prosecutor not to offer the plea in the first instance.

Fourth, Cooper erroneously fails to acknowledge that a ruling in his favor (i.e., granting him the same plea following a constitutionally valid trial) would place him in a much better position than before trial. Resp. Br. 41 (“Mr. Cooper would not be in a better position as a result of the ordered remedy.”). Cooper has had an opportunity to test his claim of innocence before a jury, and it was rejected, yet he wants a plea offer made before the prosecution had to run the risk of an acquittal. To set aside a guilty verdict because the defendant would have pleaded guilty, and to give him a plea bargain that lacks mutuality of obligation (i.e., the defendant gives up nothing), would be the strangest of Sixth Amendment remedies.

Fifth, Cooper agrees that conducting a second trial is not an appropriate remedy. See Resp. Br. 39–45 (advocating instead that the lost plea be reinstated). But a second trial is precisely what will sometimes occur under Cooper’s approach. To circumvent the reality that Cooper lacks a constitutional right to have his plea deal accepted, he concedes that once the plea is re-offered, the state trial court could still “reject the plea bargain in accordance with Michigan’s sentencing guidelines or in a manner otherwise consistent with state law.” Resp. Br. 40, 45. To begin with, that position is contrary to the one Cooper took below. At Cooper’s request, the District Court ordered specific performance of the plea offer. Cooper is actually backing away from that remedy and re-characterizing the relief that he has won.

More important, Cooper's concession exemplifies the illusory nature of the "right" Cooper seeks to enforce. And it also illustrates the lack of *Strickland* prejudice. If the state court does reject his plea, the prosecutor will be forced to go to trial a second time, *even though there was nothing constitutionally improper about the first trial.*

Sixth, adopting Cooper's test does not create "incentives for counsel to understand and communicate the elements of a crime with which his client is charged." Resp. Br. 15. Michigan, like the ABA, believes that members of the defense bar seek to comply with their ethical responsibilities, rules of professional conduct, and standards of care. ABA Amicus Br. 23. The question in this case is not whether attorneys will generally seek to provide correct advice, but whether Cooper suffered cognizable prejudice when (for whatever reason) his attorney did not provide correct advice. Prejudice is a distinct component of the Sixth Amendment standard, apart from attorney performance, and the prejudice test appropriately focuses on whether the defendant has been deprived of any substantive or procedural right to which the law entitles him.³ The test does not focus on punishing the prosecution for defense counsel's missteps.

The ABA attempts to make the same point, citing *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1977).

³ Cooper has the same problem with his surgeon and contractor hypotheticals. Resp. Br. 21. The requirements that a surgeon obtain consent or that a contractor conduct a proper survey do not include a prejudice component. An ineffective assistance claim does. And prejudice in the ineffective-assistance-of-counsel context is the effect on the right to receive a fair trial.

ABA Amicus Br. 18. But *Kimmelman* merely held that defense counsel's failure to conduct pre-trial discovery and to move for suppression warranted a prejudice hearing. *Kimmelman* did not decide the "more difficult question[:] whether the admission of illegally seized but reliable evidence can ever constitute 'prejudice' under *Strickland*." *Id.* at 391 (Powell, J., concurring). Thus *Kimmelman* does *not* say that a court may find ineffective assistance even in the absence of an unreliable guilty verdict. That is the question posed here.⁴

Finally, Cooper denies that a ruling in his favor will "open the floodgates to post-conviction litigation" because (1) only a fraction of prosecutions are not resolved by a guilty plea, and (2) a defendant must meet both elements of the *Strickland* test. Resp. Br.

⁴The Center on the Administration of Criminal Law suggests that prosecutors should always offer any plea bargain "on the record in the presence of the defendant." Center Amicus Br. 23–29. That suggestion may sound good in theory, but it is hopelessly impractical. In 2010, there were more than 300,000 new case filings in Michigan Circuit Court, Michigan's trial court of general jurisdiction. Michigan Supreme Court Annual Report at 32 (2010). Available at <http://courts.michigan.gov/scao/resources/publications/statistics/2010/2010ExecSum.pdf>. With only 219 Michigan Circuit Court judges, *id.* at 69, that is an average of roughly 1,370 new case filings per judge per year. This Court's imposition of an extra-constitutional burden—placing all pleas on the record in open court—is neither wise nor necessary.

Nor is there any dispute in this case about what the plea offer was or whether the defendant rejected it. The problem is defense counsel's strategic advice about the best course of action. No one suggests that the attorney's legal advice should be placed on the record. The Center's proposal does nothing to solve the problem actually presented by this case.

40–41. But it is not difficult to imagine that once criminal defendants realize they are playing with “house money” under Cooper’s test, Pet. Br. 20, there will be far fewer cases resolved by a guilty plea. And as explained above, Cooper’s test collapses the two-part *Strickland* test into a single inquiry regarding the effectiveness of counsel’s advice at the plea stage. Once that inquiry is satisfied, prejudice will likely ensue because a plea-based sentence will likely be shorter than a sentence imposed after a trial and conviction. A ruling in Cooper’s favor is an invitation for upsetting myriad jury convictions based on after-the-fact assertions of flaws in the plea process. And while Cooper asserts that his rule does not apply where a defendant is merely “second guessing” his counsel’s strategic decisions, Resp. Br. 15, it is difficult to see how his approach can be so narrowly cabined.

In any event, the answer is even clearer that Cooper is not entitled to relief when this issue is examined under the prism of the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d). Cooper struggles to explain that the state trial court did not reach the merits of this issue on the issue of prejudice, asserting that the court’s determination “lack[ed] any support in the record” that Cooper had raised a claim of self-defense with his counsel pretrial. Resp. Br. 32. But the record directly supports this factual determination by the state court in its questioning of Cooper’s state trial counsel:

THE COURT: I mean [*Cooper*] said that she had a gun and shot in self-defense because he didn’t know what she was going to do. Didn’t he tell you that?

- A. I remember that. I remember discussing that, yes.

Motion hearing, May 28, 2004, p. 16 (emphasis added). And trial counsel testified that Cooper did not back down from this position. *Id.* at 17. As a consequence, Cooper has not overcome the presumption of correctness of the state court's factual determinations. 28 U.S.C. § 2254(e)(1).

Once recognized that the state courts rejected Cooper's claim on the merits on the issue of prejudice, the conclusion that there is no clearly established law requiring the result directed here by the Sixth Circuit is manifest. There is no case from this Court that would require the prosecution to re-extend its plea offer after a fair trial because of the pre-trial deficient advice of counsel. See *Carey v. Musladin*, 549 U.S. 70, 74 (2006) (requiring that the clearly established law had to emanate from this Court's holdings). To the contrary, as already noted, a criminal defendant must show under *Strickland* that the deficient advice affected the fairness of the trial.

In sum, the right of an accused to effective assistance of counsel is "recognized not for its own sake," as Cooper maintains, but "because of the effect it has on the ability of the accused to receive a fair trial." *United States v. Cronin*, 466 U.S. 648, 658 (1984). "Absent some effect of the challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Id.* Cooper cannot prove a Sixth Amendment violation here, because nothing in his counsel's plea-stage conduct suggests "that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

Accordingly, this Court should decline to adopt Cooper's suggestion that every allegation of bad advice in connection with a rejected plea constitutes a *per se* Sixth Amendment violation. Alternatively, the State asks that the Court reverse because the Sixth Circuit's view was not "clearly established" at the time of conviction, as 28 U.S.C. § 2254(d) requires before a court may grant habeas relief.

CONCLUSION

The judgment of the court of appeals should be reversed.

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