No. 10–209

In the Supreme Court of the United States

BLAINE LAFLER, PETITIONER

v.

ANTHONY COOPER

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

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

A defendant raising an ineffective-assistance claim must prove that counsel's conduct deprived the defendant of a "substantive or procedural right," *Lockhart* v. *Fretwell*, 506 U.S. 364, 372 (1993), and show that the deprivation so undermined the process that the reliability of the trial result is called into question, *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984).

Here, Anthony Cooper faced charges of assault with intent to murder. Based on a misunderstanding of Michigan law, Cooper's counsel advised him to reject a plea offer. Cooper rejected the offer and was convicted; he does not contest that he received a fair trial. The questions presented for review are:

1. Whether a defendant seeking habeas is entitled to relief based on ineffective assistance of counsel where counsel's deficient advice caused the defendant to reject a plea bargain in which the defendant had no vested right, and where the rejection did not deny the defendant a fair trial.

2. What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. The Petitioner is Blaine Lafler, Warden of a Michigan correctional facility. The Respondent is Anthony Cooper, an inmate.

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JURISDICTION

This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Counsel Clause of the Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104–132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2254), provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court

proceedings unless the adjudication of the claim–

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in State court proceedings.

INTRODUCTION

This Court has construed the Sixth Amendment to guarantee effective assistance of counsel at all critical stages of a criminal proceeding. But not every deficient act of counsel violates the Amendment. A defendant pursuing an ineffective-assistance claim must be able to prove actual prejudice, i.e., "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984). And there is no unreliability unless the defendant can 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).

The question presented here is whether there has been a Sixth Amendment violation when a defendant alleges that ineffective assistance caused him to reject a favorable plea offer, and he was subsequently convicted at a fair and constitutional trial. The answer is no, for three reasons.

First, a decision to enter a not-guilty plea does not diminish a defendant's right to a fair trial. To the contrary, deciding to plead "not guilty" invokes the constitutional right to a trial. And if that trial is fairly conducted, the Sixth Amendment requires nothing more. In that important respect, a not-guilty plea is very different than a decision to accept a plea offer, which necessarily involves giving up the right to a trial and all the constitutional protections a trial entails.

Second, a defendant has no "substantive or procedural right" to a plea deal. A prosecutor is not obliged

to make a plea offer, nor required to keep an offer open once made. And even if a defendant accepts a plea offer, the trial court need not accept it. That is why this Court has held that "there is no constitutional right to plea bargain," *Weatherford* v. *Bursey*, 429 U.S. 545, 561 (1997), much less a right to a particular plea deal. As a result, a defendant cannot use a rejected plea offer to establish the threshold showing under *Fretwell* that ineffective assistance deprived the defendant of a substantive or procedural right.

Third, there is no rational remedy for alleged ineffective assistance in the rejection of a plea offer. Forcing a prosecutor to re-offer a plea *after* a fair trial has been conducted places the defendant in a better position than he would have been in had he received adequate representation, and also violates separation-of-power principles. Requiring a prosecutor to conduct a new trial makes no sense, because a duplicative trial does not restore the alleged lost opportunity to plead. Other, hybrid remedies are similarly unworkable. These intractable difficulties in fashioning an appropriate remedy emphasize that a defendant has no substantive or procedural right to a particular plea offer.

Accordingly, the State of Michigan respectfully requests that the Court reverse the Sixth Circuit's ruling and hold that there is no Sixth Amendment violation when, after being convicted pursuant to a fair trial, a defendant claims that ineffective assistance caused him to reject a favorable plea offer. 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.

STATEMENT OF THE CASE

A. Cooper's crime and the plea offer

On March 25, 2003, Anthony Cooper shot Kali Mundy four times as she was fleeing from him, hitting her twice in the right buttock, once in the hip, and once to the right side of her abdomen. Pet. App. 27a. Mundy survived her "potentially fatal" wounds after a three-week hospital stay. Pet. App. 27a.

Cooper was arrested soon after the shooting and was charged with three crimes: assault with intent to murder, possession of a firearm by a felon, and using a firearm during the course of a felony. The lead charge of assault with intent to murder carries up to a maximum punishment of life imprisonment under Michigan law. Mich. Comp. Laws § 750.83.

At his July 17, 2003 pretrial, Cooper was offered the opportunity to plead guilty to the charge of assault with intent to murder with an agreement that the guidelines governing the lower-end of the sentence would be calculated as 51-to-85 months, and that Cooper's minimum sentence would be within that range.[1] Pet. App. 49a. Cooper's counsel indicated on

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[1] Unlike the federal system, Michigan has an indeterminate sentencing scheme in which a criminal defendant is given a minimum sentence and a maximum sentence. *People* v. *Lowe*, 484 Mich. 718, 724; 773 N.W.2d 1, 3–4 (2009). As a consequence of truth-in-sentencing legislation, an offender will generally serve his minimum sentence. See Mich. Comp. Laws § 791.234(1). Once the minimum is served, the decision whether to hold the criminal defendant beyond the minimum sentence is vested with the parole board. *People* v. *Idziak*, 484 Mich. 549, 555; 773 N.W.2d 616, 620 (2009).

the record that Cooper was rejecting the offer because the medical records did not support the conclusion that this was assault with intent to murder, and Cooper was going to await a better plea offer:

> I think the evidence will show that there is insufficient evidence. . . . By the way we have rescheduled these dates and I just got the medicals, and I have reviewed the nature of the injuries of the person.
>
> After reviewing the medical report, your Honor, I believe that the [p]rosecution does not have the evidence to try this case. We're willing to go to trial, but in the interest of [j]ustice and due to the fact that [the courtroom prosecutor] is not trying the case, I would like to discuss this matter with the attorney [who] will . . . make the case for the [p]rosecution. I think he would be a little more reasonable about making a more reasonable offer so that we won't have a trial.

Pet. App. 49a.

Cooper's counsel was hoping to receive a plea offer for the lesser crime of assault with intent to do great bodily harm less than murder, which is a ten-year statutory maximum under Michigan law, Mich. Comp. Laws § 750.84, and would further reduce the guidelines. Pet. App. 30a. Thus, Cooper's counsel informed the court that "[w]e're just rejecting the offer." Pet. App. 51a.

On the first day of trial, the prosecutor offered Cooper a plea to assault with intent to murder with an

agreement that the guidelines for the lower end of the sentence would be 126-to-210 months, to run consecutive to the two years that Cooper would serve for possessing a firearm during the course of a felony. Cooper's counsel also rejected this offer. Pet. App. 29a.

Cooper was convicted as charged. At sentencing, the guidelines for the lower-end of the charge for assault with intent to commit murder were calculated as 135-to-225 months, enhanced to a range of 135-to-281 months based on Cooper's status as a habitual offender. Cooper was ultimately sentenced to 185 to 360 months for the assault with intent to commit murder, to run consecutively with his two years for possessing a firearm during the course of a felony. Pet. App. 44a. Significantly, even if Cooper had accepted the original plea offer, the Michigan trial court would have been free to reject it. Mich. Ct. Rule 6.302(C)(3). Accord Fed. R. Crim. P. 11(c)(3)(A) (even if the government agrees that a particular sentencing range is the appropriate disposition of the case, the court may "reject it").

B. State-court review of Cooper's conviction

Following his jury-trial conviction, Cooper filed a post-conviction motion in Michigan trial court, claiming that his counsel was ineffective for providing deficient legal advice at the plea stage. There was a hearing held on this motion over two days in the trial court. After Cooper's trial counsel testified, and after Cooper testified, the trial court rejected the claim. Pet. App. 53a, 54a.

The Michigan Court of Appeals affirmed in an unpublished opinion, holding that Cooper rejected the plea offers and elected to go to trial:

> [Cooper] contends that defense counsel failed to convey the benefits of the plea offer to him and ignored his desire to plead guilty, and that these failures led him to reject a plea offer that he now wishes to accept. However, the record shows that [Cooper] knowingly and intelligently rejected two plea offers and chose to go to trial. The record fails to support [Cooper's] contentions that defense counsel's representation was ineffective because he rejected a defense based on [a] claim of self-defense and because he did not obtain a more favorable plea bargain for [Cooper.]

Pet. App. 45a. The Michigan Supreme Court denied leave without dissent. Pet. App. 43a.

C. Habeas review

In federal district court, Cooper's sole habeas claim was that trial counsel provided incompetent advice during the plea bargaining process. Pet. App. 32a. In reviewing this claim, the federal district court determined that Cooper's trial counsel did provide affirmatively deficient advice in wrongly asserting that "the victim's injuries did not satisfy the necessary elements for the charge of assault-with-intent-to murder." Pet. App. 39a–40a. The federal court concluded that the decision of the Michigan Court of Appeals was an erroneous application of clearly established law by failing to account for this point. Pet. App. 40a.

The federal district court then decided that the appropriate remedy was to order "specific performance," conditioning the writ on the re-conveyance of the original plea offer. Pet. App. 41a.

On appeal, the State claimed that there was no deficient performance, no prejudice to Cooper, and that there was no clearly established Supreme Court precedent that supported such a remedy. Pet. App. 12a–20a. The Sixth Circuit rejected these claims.

Regarding deficiency, the Sixth Circuit rejected the State's argument that Cooper's counsel was only "offer[ing] a prediction about the outcome of the trial." Pet. App. 15a. The Sixth Circuit relied on trial counsel's testimony from the post-conviction hearing at which he stated that the charge "could not be supported by the evidence."[2] Pet. App. 15a.

Regarding prejudice, the Sixth Circuit did not address whether a defendant has a substantive or procedural right to a plea offer. Instead, the Court only applied *Strickland*'s prejudice test and, in applying that test, did not consider whether counsel's conduct so undermined the adversarial process as to call into question the trial's reliability. Contra *Strickland*, 466 U.S. at 686, 687. According to the Sixth Circuit, a defendant claiming ineffective assistance is only obligated to show that "there is a reasonable

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[2] As noted in the State's reply brief in support of the petition for certiorari, p. 14 n.34, the State does not contest the deficiency of Cooper's counsel at the plea stage. The State does note, however, that the underlying factual claims here demonstrate the ease by which criminal defendants and habeas petitioners may second-guess the pre-conviction plea advice that trial counsel provided.

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Pet. App. 11a–12a. Under that standard, the Sixth Circuit concluded that Cooper was prejudiced because he could have accepted a plea for a shorter sentence: "[Cooper] lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him . . . . Thus, he has established prejudice." Pet. App. 19a.

Finally, regarding remedy, the Sixth Circuit said that clearly established Supreme Court precedent is "not relevant" when fashioning a habeas remedy, because the law on remedy is not governed by § 2254(d). Pet. App. 20a. In reviewing for an abuse of discretion, the Sixth Circuit determined that the relief the district court ordered was appropriate. The State must either offer the original plea deal to Cooper or release him from custody. Pet. App. 21a n.5.

On August 9, 2010, the State timely filed a petition for certiorari and invoked the Court's jurisdiction under 28 U.S.C. § 1254(1). The Court granted the petition on January 7, 2011.

SUMMARY OF ARGUMENT

Cooper's habeas petition fails for two basic reasons. First, Cooper is unable to establish that his counsel's ineffective assistance caused *Strickland* prejudice, i.e., that his counsel's defective advice so undermined the process that the reliability of Cooper's trial result is called into question. *Strickland*, 466 U.S. at 687. To the contrary, Cooper does not contest in federal court the point that he received a fair and constitutional

trial. Moreover, Cooper cannot show that his counsel's conduct deprived him of any substantive or procedural right. This Court has correctly recognized that "there is no constitutional right to plea bargain," *Weatherford* v. *Bursey*, 429 U.S. 545, 561 (1997), much less a right to a particular plea deal. This point is emphasized when analyzing the conflicting and constitutionally suspect remedies that federal courts have tried to fashion when a defendant claims that ineffective assistance caused the defendant to reject a plea offer and invoke his constitutional right to a trial. The difficulty in designing a suitable remedy flows from the fact that there has been no denial of a substantive or procedural right in the first instance.

Second, Cooper is unable to show that his right to relief was "clearly established" by this Court's precedent at the time of his conviction. This Court has never held that *Strickland* is or should be watered down in the context of a rejected plea offer, nor has the Court endorsed the theory that a defendant has a substantive or procedural right in a particular plea offer. Absent such precedent, 28 U.S.C. § 2254(d) precludes habeas relief.

Strickland and its progeny make clear that when a court reviews a trial-court criminal proceeding, a fair trial is the main event; alleged error that does not impact a trial's reliability does not implicate the Sixth Amendment. Given the widespread use of plea agreements, a decision that adopts the Sixth Circuit's approach will invite ineffective-assistance claims following virtually every fair and constitutional trial. This Court should emphatically reject the invitation to create such a system.

ARGUMENT

I. Ineffective assistance leading to the rejection of a plea offer does not deprive a defendant of a substantive or procedural right that renders a subsequent trial unfair as to undermine confidence in the trial's outcome.

In *Strickland*, this Court established the familiar two-part test for establishing a claim of ineffective assistance of counsel.[3] "First, the defendant must show that counsel's performance was deficient." 466 U.S. at 687. "Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Ibid*. In other words, the touchstone for proving *Strickland* prejudice is whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id*. at 686.

This Court refined *Strickland*'s prejudice analysis in *Fretwell*. *Fretwell* clarified the point that showing the unreliability of a trial is not an abstract proposition, but affirmatively requires a defendant to prove that he was deprived of a substantive or

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[3] The *Strickland* test only applies if the rejection of a plea offer is a "critical stage" of the criminal proceedings. This Court made clear in *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1486 (2010), *Iowa* v. *Tovar*, 541 U.S. 77, 81 (2004), and *Hill* v. *Lockhart*, 474 U.S. 52 (1985), that *acceptance* of a plea offer is a "critical stage." Whether *Padilla*, *Tova*r, and *Hill* should be extended to not-guilty pleas is an open question. For purposes of the following argument, the State will assume that *Strickland* applies.

procedural right. 506 U.S. at 372 ("Unreliability 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."). Accordingly, this Court has rejected ineffective-assistance claims where the defendant could not make this threshold showing. E.g., *Nix* v. *Whiteside*, 475 U.S. 157 (1986) (Sixth Amendment not violated by attorney who refused to cooperate in presenting perjured testimony).

Here, Cooper is unable to demonstrate that attorney error caused his conviction to be unreliable, and he is also unable to prove that he has a substantive or procedural right to a plea deal.

A. A convicted criminal's inability to fairly assess a plea offer does not, by itself, undermine confidence in the outcome of a subsequent trial.

Cooper is unable to demonstrate that his counsel's deficient performance at the plea stage cast doubt on the reliability of his conviction following trial. Absent such proof, Cooper's Sixth Amendment claim fails. *Strickland*, 466 U.S. at 686 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.").

This Court has held that the right to 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*." *United States* v. *Cronic*, 466 U.S. 648, 658 (1984) (emphasis added).

Thus, "absent some effect of the challenged conduct *on the reliability of the trial process*, the Sixth Amendment guarantee is generally not implicated." *Ibid.* (emphasis added). Accord, e.g., *United States* v. *Gonzalez*, 126 S. Ct. 2557, 2563 (2006) (unlike the right to counsel of choice, the right to effective assistance of counsel is derived from the right to a fair trial); *United States* v. *Wade*, 388 U.S. 218, 227–28 (1967) (pretrial lineup is a critical stage, but analysis of accused's fingerprints, blood samples, clothing, and hair did not implicate a right to counsel because there was little risk counsel's absence would damage defendant's "right to a fair trial").

And although this Court has never had the opportunity to apply *Strickland* to a not-guilty plea, a per curiam opinion of the Court applied a parallel analysis to a Vienna Convention claim in *Breard* v. *Greene*, 523 U.S. 371 (1998). There, a convicted foreign national filed a federal habeas petition, alleging that state authorities violated the consular-notification provisions of the Vienna Convention. The foreign national's asserted claim of prejudice was that, "had the Vienna Convention been followed, he would have accepted the State's offer to forgo the death penalty in return for a plea of guilty." *Id.* at 376.

After noting that the foreign national had not properly raised and proved his claim, this Court reiterated the necessity of showing a prejudicial impact on the trial itself: "it is extremely doubtful that the [Vienna Convention] violation should result in the overturning of a final judgment of conviction *without some showing that the violation had an effect on the trial*." 523 U.S. at 371 (citing *Arizona* v. *Fulminante*,

499 U.S. 279 (1991) (emphasis added)). The same is true here.

Once it is understood that an ineffective-assistance claim requires proof of an unreliable trial result (including the sentence), there is remarkably little over which to argue. Cooper has pointed to nothing in his counsel's conduct suggesting that Cooper's trial cannot be relied on as having produced a just result. Rather, he now effectively concedes that he had a fundamentally fair trial.[4] While it might be theoretically possible that attorney error during the plea process could render a subsequent trial unfair, that is not this case. Cooper admittedly received the fundamental right that the Sixth Amendment protects—a fair trial. And that is the end of the *Strickland* analysis. A defendant who argues that his lawyer's incompetence *resulted* in a fair and reliable trial cannot prove a claim under *Strickland*.

Every circuit court to address the issue presented by this case reached the wrong result by collapsing the *Strickland* prejudice analysis into a "best-outcome test."[5] E.g. Pet. App. 19a ("[Cooper] lost out on an

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[4] Cooper raised two claims in State court regarding his trial counsel's performance that allegedly affected the trial but did not re-assert these claims in his habeas petition. Pet. App. 29a–30a, 32a.

[5] The genesis for this test appears to be this Court's statement in *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985), that the *Strickland* prejudice prong "focuses on whether counsel's constitutionally ineffective performance *affected the outcome* of the plea process." (emphasis added). An outcome-based test may be appropriate where a plea is accepted, as in *Hill*, because in that situation, a defendant gives up his right to a fair trial. But there is no corresponding rationale when a defendant *invokes* his trial rights.

opportunity to plead guilty and receive the lower sentence that was offered to him . . . . Thus, he has established prejudice."); accord *United States* v. *Day*, 969 F.2d 39, 44 (3d Cir. 1992) ("Failure by defense counsel to communicate a plea offer to defendant deprives defendant of the opportunity to present a plea bargain for the consideration of the state judge . . . . A subsequent fair trial does not remedy this deprivation."); *United States* v. *Herrera*, 412 F.3d 577, 581 (5th Cir. 2005) ("a 27-month increase in a sentence constitutes prejudice"); *Julian* v. *Bartley*, 495 F.3d 487, 499 (7th Cir. 2007) ("but for the ill-advice, Julian would have taken the plea"); *Nunes* v. *Mueller*, 350 F.3d 1045, 1054 (9th Cir. 2003) (defendant made out a prima facie case of ineffective assistance by alleging that if he had "been informed accurately, he would expressly have taken the bargain"); *Williams* v. *Jones*, 571 F.3d 1086, 1091 (10th Cir. 2009) ("the prejudice Mr. Williams identified was that, had he been adequately counseled, there is a reasonable probability that he would have accepted the plea offer"). This Court should reject such a watered-down formulation of the *Strickland* prejudice requirement.

The *Strickland* opinion expressly disclaimed outcome as the *sine qua non* of prejudice. 466 U.S. at 694 ("It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding."). Rather, proof of prejudice depends on the *reliability* of the trial result, *id*. at 686, 687, a factor that is unaffected by counsel's competency when rejecting a plea offer. And there is a sound reason for such a stringent formulation: "Virtually every act or omission of counsel would meet [the best-outcome] test." *Id*. at 694.

This Court has recognized that the plea-bargaining context is a particularly vital area for a strict application of *Strickland*'s principles. "Plea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risk." *Premo* v. *Moore*, 131 S. Ct. 733, 741 (2011). "These considerations make strict adherence to the *Strickland* standard all the more essential when reviewing the choices an attorney made at the plea bargain stage." *Ibid.* Accordingly, "ineffective-assistance claims that lack necessary foundation may bring instability to the very process the inquiry seeks to protect." *Ibid.* "The prospect that a plea deal will afterward be unraveled [or, in this case, imposed after a fair and constitutional trial] when a court second-guesses counsel's decision while failing to accord the latitude *Strickland* mandates . . . could lead prosecutors to forgo plea bargains that would benefit defendants, a result favorable to no one." *Id.* at 742.

What seems to have led the circuits to abandon the *Strickland* formulation in the context of rejected plea offers is a concern that a defendant who rejects such an offer based on faulty advice has lost an opportunity. But there is nothing novel about the fact that some lost opportunities in the criminal process do not shake confidence in the ultimate result, provided the defendant receives a fair trial. *Williams* v. *Jones*, 571 F.3d 1086, 1103 (2009) (Gorsuch, J., dissenting).

This Court made that exact point in *United States* v. *Mechanik*, 475 U.S. 66 (1986). There, the prosecution violated Federal Rule of Criminal Procedure 6(d) by allowing two witnesses to give simultaneous testimony

before the grand jury. The indictment might have been dismissed had that violation been brought timely to the trial court's attention. *Id.* at 69–70. Instead, the trial proceeded to conviction, and this Court held that any error in the grand-jury proceeding was washed away by the guilty verdict. *Id.* at 70. In other words, the fair trial extinguished any error that occurred at the grand-jury stage. This is the ordinary way harmless error operates. "[E]ven when a criminal trial might have been averted through the assertion of an entitlement to dismiss the indictment outright, the fact that the defendant subsequently received a fair trial was enough to preclude reversal." *Williams*, 571 F.3d at 1103 (Gorsuch, J., dissenting). It is difficult to see why the Constitution would treat the present situation any differently.

The result is the same if counsel is ineffective at a preliminary hearing. The preliminary hearing is a critical stage of the criminal process, and an indigent criminal defendant is entitled to the appointment of counsel.[6] *Coleman* v. *Alabama*, 399 U.S. 1, 9–10 (1970). Depending on the state, the prosecution ordinarily establishes that there is sufficient evidence to support probable cause to allow the "bind over" of the criminal defendant to the next stage in the criminal process. 4 W. LaFave, J. Israel, N King & O. Kerr, Criminal Procedure § 14.1(a) (3d 2007), p. 274. See, e.g., Mich. Comp. Laws § 766.13. But there is generally no remedy for an error at this preliminary hearing when raised post-conviction unless the defendant can show that he was deprived of a fair trial as a result of the

[6] Michigan is an information state, which provides for a preliminary examination. Mich. Comp. Law § 766.1 *et. seq.*

preliminary-examination error. *People* v. *Pompa-Ortiz*, 27 Cal.3d 519, 529; 612 P.2d 941, 947 (1980); accord *People* v. *Hall*, 435 Mich. 599, 615–16; 460 N.W.2d 520, 528 (1990) ("the error at the preliminary examination was unrelated to the issues which were the focus of the trial") (citing *Mechanik*, 475 U.S. at 72). This appears to be the majority rule. 4 W. LaFave et al, Criminal Procedure § 14.4(e), p. 368 ("[m]ost [courts] take the view that the conviction should be treated as having automatically rendered harmless the magistrate's error.").

This same principle applies when preliminary-hearing error arises specifically from the deficient performance of counsel: there is no remedy if that ineffective assistance does not affect the fairness of trial. See, e.g. *People* v. *Coleman*, 46 Cal. 3d 749, 773; 759 P.2d 1260, 1275-1276 (1988) (rejecting a request to dismiss the information under state law for an error at the preliminary hearing when raised on appeal post-conviction because any ineffective assistance of counsel at the preliminary examination did not affect the trial counsel's performance at trial and therefore was not prejudicial.). That is why this Court has recognized that failure to provide counsel at a preliminary hearing is subject to a harmless error analysis, even though the hearing is a critical stage. *Coleman* v. *Alabama*, 399 U.S. at 11; see also *Coleman* v. *Alabama* , 399 U.S. at 20 (Harlan, J., concurring in part and dissenting in part) ("I do not think that reversal of these convictions, for lack of counsel at the preliminary hearing, should follow unless petitioners are able to show on remand that they have been prejudiced in their defense at trial"). Unless a criminal defendant can prove prejudice at trial, the vacating of the conviction and beginning

the process again would be an unjustified "windfall." See *State* v. *Webb*, 467 N.W.2d 108, 112 (Wis. 1991). The same is true here, where Cooper has received precisely the sentence that a legislative body prescribed for the crimes Cooper committed.

Migrating from this Court's reliable-trial test to the Sixth Circuit's best-outcome test would have a serious and detrimental practical implication: opening the floodgates to post-conviction litigation. "Every defendant whose attorney reasonably predicted a likely sentence which turned out to be wrong, or who erroneously predicted the direction of the [trial] court's constitutional holdings, has a claim of deficient performance." *Hoffman* v. *Arave*, 481 F.3d 686, 688 (9th Cir. 2007) (Kozinski, O'Scannlain, Kleinfeld, Tallman, Bybee, and Callahan, JJ., dissenting from denial of rehearing en banc).

Worse yet, a best-outcome test allows a defendant to play with house money. "So long as a defendant can claim his lawyer mishandled a plea offer, he can take his chances at a fair trial and, if dissatisfied with the result, still demand and receive the benefit of the forgone plea." *Williams*, 571 F.3d at 1094 (Gorsuch, J., dissenting). This incentive will inevitably reduce the number of pleas accepted in the first instance, severely burdening law-enforcement and prosecutorial resources. Such an adverse impact can be wholly avoided simply by reaffirming the *Strickland* prejudice test that has governed this area of the law for more than a quarter century.

B. Defective advice that results in entry of a not-guilty plea does not deprive a defendant of any substantive or procedural right.

In addition to Cooper's inability to prove the unreliability of his jury-trial conviction, Cooper is unable to show that ineffective assistance deprived him of a substantive or procedural right. *Fretwell*, 506 U.S. at 372; accord *Williams* v. *Taylor*, 529 U.S. 362, 393 n.17 (2000) ("Unreliability 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."). Cooper's inability to make this showing provides a separate and independent ground for reversal.

Cooper does not allege that there was any constitutional defect in his trial, conviction, or sentencing, so he is left with the theory that a lawyer's bad advice caused Cooper to reject a favorable plea offer. The problem with Cooper's theory is that "there is no constitutional right to plea bargain." *Weatherford* v. *Bursey*, 429 U.S. 545, 561 (1977). First, a prosecutor has no obligation to offer a plea deal and is free to withdraw any plea offer made. As this Court noted in *Weatherford*, a "prosecutor need not [plea bargain] if he prefers to go to trial. It is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty." *Id.* That is because plea offers represent prosecutorial grace, not a substantive or procedural right.

Second, even where a prosecutor chooses to offer a plea deal, and the defendant elects to accept it, it is the trial court that retains ultimate authority whether to

effectuate the deal. Mich. Ct. Rule 6.302(C)(3) ("If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may (a) reject the agreement . . ."); Fed. R. Crim. P. 11(c)(3)(A) (even if the government agrees that a particular sentencing range is the appropriate disposition of the case, the court may "reject it"). *Santobello* v. *New York*, 404 U.S. 257, 262 (1971) (a defendant may not force a trial court to adopt an accepted bargain, even if the prosecutor chooses to honor the agreement). As this Court observed in *Mabry* v. *Johnson*, 467 U.S. 504 (1984), a "plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest."

If an accused has no constitutional right to plea bargain, then it follows logically that the accused has no constitutional right *to a particular* plea bargain. Yet that is precisely the "right" that Cooper invokes here.[7] In the absence of any other alleged deprivation, Cooper is unable to satisfy the threshold requirement that

[7] To the extent Cooper tries to invoke a "right to competent counsel when considering a plea offer," his reasoning is circular. Assuming, *arguendo*, that plea bargaining is a critical stage, Cooper is already guaranteed a right to competent counsel; the question is whether counsel's defective advice caused *Strickland* prejudice, i.e., denied Cooper's right to a reliable trial. Because a defendant cannot show *Strickland* prejudice unless he has been deprived of a substantive or procedural right, the lack of any right to a particular plea offer is dispositive on the issue of prejudice.

ineffective assistance of counsel deprived him of a substantive or procedural right to a plea bargain.

II. There is no rational remedy for alleged ineffective assistance in the rejection of a plea offer.

Even if the Court were to reverse longstanding precedent and hold both that a defendant has a constitutional right to a plea offer, and that a deprivation of that right casts doubt on the validity of an otherwise constitutional trial, there is still the problem of fashioning an appropriate remedy. When ineffective assistance causes a defendant to accept a plea, the obvious remedy is to allow the defendant to rescind the plea and proceed with his constitutionally guaranteed fair trial. But when a defendant rejects a plea, "it is impossible to resuscitate the original opportunity." *State* v. *Greuber*, 165 P.3d 1185, 1190 (Utah 2007). "Courts cannot recreate the balance of risks and incentives on both sides that existed prior to trial, and the attempts to do so raise their own serious constitutional problems." *Ibid.* (quotation omitted).

First, consider the remedy the Sixth Circuit endorsed here: requiring the prosecutor to either reoffer the rejected plea deal or release the convicted criminal. Pet. App. 8a, 19a–22a.[8] To begin, such a remedy places Cooper in a *better* position than he was in before the alleged ineffective assistance. "Even if [a defendant] had managed to accept [a] plea offer, under Supreme Court precedent the prosecutor would have been free to withdraw it on a whim, and the state trial

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[8] Accord, e.g., *Hoffman* v. *Arave*, 455 F.3d 926, 943–43 (9th Cir. 2006); *State* v. *Kraus*, 397 N.W.2d 671, 676 (Iowa 1986).

judge would have been free to reject it or to impose a different sentence than the one contemplated by the parties' plea." *Williams*, 571 F.3d 1086, 1109 (Gorsuch, J., dissenting). Ordering specific performance of a plea agreement confers on a defendant a legal entitlement, rather than a mere chance, to a particular sentence. *Ibid*.

Equally important, the Sixth Circuit's remedy ignores the substantial change in circumstances. Plea offers are typically made to avoid the expense and risk of a trial. *Greuber*, 165 P.3d at 1190.But the state has already accepted these burdens once a case has been tried to verdict. Moreover, in the absence of prosecutorial misconduct, courts lack the power to require a prosecutor to dismiss charges. Imposing such a requirement if a prosecutor refuses to re-offer a plea deal violates separation-of-power principles. *Ibid*. (citation omitted); *Williams*, 571 F.3d at 1103 (Gorsuch, J., dissenting) ("It has long been settled that . . . 'the Executive Branch has exclusive authority and absolute discretion' to select its charge.") (quoting *Greenlaw* v. *United States*, 128 S. Ct. 2559, 2565 (2008)). In sum, forcing a prosecutor to re-offer a plea deal or release is not an appropriate remedy.

Next, consider a remedy that many other courts have endorsed: requiring the prosecution to conduct a new trial. E.g., *United States* v. *Gordon*, 156 F.3d 376, 381–82 (2d Cir. 1998).[9] Such a remedy bears little relation to the alleged harm. That is because a new trial does not restore an alleged lost opportunity to

[9] Accord, e.g., *State* v. *Tacetta*, 797 A.2d 884, 888 (N.J. Sup. Ct. App. Div. 2002); *People* v. *Curry*, 687 N.E.2d 877, 890 (Ill. 1997); *State* v. *Lentowski*, 569 N.W.2d 768, 761–62 (Wis. 1997).

plead. *State* v. *Kraus*, 397 N.W.2d 671, 674 (Iowa 1986) ("[I]t is difficult to see how a new trial restores the lost chance of the bargain."). More fundamentally, the remedy is nonsensical, regardless of the second trial's result. The remedy to a loss of a plea cannot be the replay of a fair trial with the same evidence presented against the criminal defendant. Even if the prosecution prevails, the state will have been forced to expend precious resources conducting an unnecessary and duplicate trial. *Greuber*, 165 P.3d at 1190 (citation omitted). And if witnesses have died, or evidence is unavailable, a second trial may result in acquittal, "a 'remedy' out of all proportion to the damage allegedly done by the ineffective assistance in connection with the earlier plea offer." *Id*. at 1191.

Finally, consider other creative remedies that courts have endorsed. E.g., *Boria* v. *Keane*, 99 F.3d 492, 498–99 (2d Cir. 1996) (ordering defendant's sentence to be reduced to time served); *Beckham* v. *Wainwright*, 639 F.2d 262, 267 n.7 (5th Cir. 1981) (granting the alternative of either reinstatement of the original plea offer or a new trial); *Tucker* v. *Holland*, 327 S.E.2d 388, 396 (W. Va. 1985) (refusing to reinstate original plea offer but directing the trial court to consider that plea for approval). Such remedies represent sentencing by judicial fiat, giving no respect (much less authority) to prosecutorial discretion or legislative sentencing guidelines.

In sum, there is no rational remedy for alleged ineffective assistance of counsel resulting in the rejection of a plea offer. And the difficulty in fashioning an appropriate remedy emphasizes why there is no constitutional violation in the first instance: because a

criminal defendant has no constitutional right to the plea offer he asserts was lost as a result of his counsel's ineffective assistance, and because the rejection of a plea offer does not call into question the reliability of a subsequent trial. This Court should decline the invitation to concoct a non-constitutional remedy.

III. The state-court decision rejecting Cooper's claim for relief was not an unreasonable application of clearly established Supreme Court precedent under AEDPA.

A federal court may not grant habeas relief under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) unless a state-court merits ruling was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Accordingly, if the state-court decisions here are entitled to AEDPA deference, Cooper's habeas petition necessarily fails, because this Court has not previously resolved the issue whether a conviction obtained at a fair trial must be set aside because deficient advice led a defendant to plead not guilty.

In fact, both state-court decisions are entitled to deference. The Michigan Court of Appeals did not expressly say whether it was rejecting Cooper's claim on the first or second *Strickland* prong. But its opinion was undeniably an adjudication on the merits and therefore entitled to deference under this Court's recent decision in *Harrington* v. *Richter*, 131 S. Ct. 770 (2011), which gave deference to a summary order that contained no reasoning whatsoever. If courts must give AEDPA deference to an order with no reasoning, it

follows logically that courts should defer to an order that provides only limited reasoning.

Alternatively, the Michigan trial court opinion, when fairly read, did address prejudice, suggesting that Cooper would not have accepted the prosecution's plea offer even if his counsel had properly advised him. As the last reasoned decision of a state court with respect to the prejudice issue, that issue is entitled to deference under *Ylst* v. *Nunnemaker*, 501 U.S. 797, 803–04 (1991). In other words, even if the Court is inclined to grant deference to a wholly unexplained order but no deference to a partially explained order, then the Court should look to the last place containing an analysis—the Michigan trial court. Regardless, deference is owed to the state-court decisions under AEDPA, and that deference is dispositive.

A. The Michigan state-court decisions are entitled to deference.

In rejecting Cooper's claim that ineffective assistance caused him to enter a not-guilty plea, the Michigan Court of Appeals did not expressly say whether it was addressing prong one (ineffective assistance) or prong two (prejudice) of the *Strickland* test. Rather, the court simply noted that Cooper's decision to plead guilty was knowing and intelligent, and that the record did not support his claim. Pet. App. 45a. That partial explanation logically brings this case within the scope of *Harrington* v. *Richter*, 131 S. Ct. 770 (2011), in which this Court held that even a state-court summary order (i.e., one with no explanation at all) is entitled to AEDPA deference, provided the order is on the merits. That is because it is the state-court

decision itself that is entitled to deference, not the reasons underlying that decision.

In *Harrington*, this Court resolved the issue "whether § 2254(d) applies when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied," where the summary order rejected a claim of ineffective assistance of counsel. 131 S. Ct. at 784. In determining that such an order *was* entitled to deference, this Court noted that the habeas statute refers to a "decision" that resulted from an adjudication, not to an issue or an analysis:

> Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief. This is so *whether or not* the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a "claim," not a component of one, has been adjudicated.

Id. at 784 (emphasis added).[10] The Court went on to explain that it is "presumed" that the state court adjudicated the claim on the merits "in the absence of any indication or state-law procedural principles to the contrary." *Id.* at 784–85. See also *Early* v. *Packer*, 537

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[10] This Court has previously held that where a state court *expressly* says it is ruling on only one prong of the *Strickland* analysis, then no deference is owed with respect to the other prong. *Wiggins* v. *Smith*, 539 U.S. 510, 534 (2003); *Rompilla* v. *Beard*, 545 U.S. 374, 390 (2005). That was not the case in *Harrington*, nor is it what happened here.

U.S. 3, 8 (2002) (recognizing that a state-court decision "does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them.").

Here, the Michigan Court of Appeals rejected Cooper's ineffective-assistance claim on the merits without specifying the *Strickland* prong that dictated that result. Pet. App. 45a ("The record fails to support [Cooper's] contentions that defense counsel's representation was ineffective[.]"). Under *Harrington*, therefore, the Michigan Court of Appeals' decision is entitled to deference on both *Strickland* prongs. There should be no difference between a summary order, as in *Harrington*, and the decision here, which provided some analysis, but did not clearly specify the basis of its ruling.

As for the Michigan trial-court decision, it did provide a prejudice analysis regarding whether Cooper would have ultimately accepted the plea offer. In rejecting Cooper's claim in a post-conviction hearing, the trial court placed its reasoning on the record and noted that Cooper had consistently maintained a claim of self defense, which is inconsistent with a plea of guilty:

> It was Mr. Cooper's belief . . . that at the absolute most[,] if his self-defense claim did not work, that he should only be found guilty of a felonious assault.
>
> * * *
>
> Mr. Cooper was alleging that Miss Mundy [i.e., the victim] had a weapon and so there was

> always the claim of self-defense out there that was being explored by Mr. McClain [i.e., State trial counsel] as a result of the conversations with Mr. Cooper.

Pet. App. 53a, 54a. The Michigan trial court concluded that, although the parties were attempting to resolve the matter with a plea, it was Cooper who wanted to go to trial: "There's a point where a plea becomes unacceptable and people decide to go to trial and that's what I think that happened in this case." Pet. App. 54a.

A fair reading of this decision is that the Michigan trial court rejected the ineffective-assistance claim because Cooper was claiming self defense and did not believe that he should be convicted for any greater offense than a four-year felony, felonious assault. Mich. Comp. Laws § 750.82. And, as the "last reasoned decision" of the state courts, the trial court's ruling is also entitled to deference. *Ylst*, 501 U.S. at 803–04 ("The maxim is that silence implies consent, not the opposite—and courts generally behave accordingly, affirming without further discussion when they agree, not when they disagree, with the reasons given below. . . . We think that a presumption which gives them no effect—which simply 'looks through' them to the last reasoned decision—most nearly reflects the role they are ordinarily intended to play.").

In sum, deference is owed to both the Michigan Court of Appeals and Michigan trial-court decisions.

B. This Court has never held that rejection of a plea based on deficient advice is prejudicial under *Strickland* where the defendant is then convicted at a fair trial.

The State does not contest whether Cooper's trial counsel was deficient. So the only question is whether this deficiency prejudiced Cooper under *Strickland*. The state-court decisions holding that Cooper was not entitled to relief are not an unreasonable application of clearly established Supreme Court precedent. In other words, there was no "extreme malfunction" here. *Harrington*, 131 S. Ct. at 786. Accordingly, reversal is warranted.

The seminal cases examining the right to effective assistance of counsel during the plea process have examined that issue in the circumstance in which the criminal defendant pled guilty. E.g., *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1483–84 (2010) (counsel ineffective for giving incorrect advice regarding deportation to a criminal defendant who then pled guilty); *Hill* v. *Lockhart*, 474 U.S. 52, 60 (1985) (rejecting a claim of ineffective assistance during the plea stage regarding erroneous advice on parole eligibility where there was no evidence that habeas petitioner would not have pled guilty if correctly advised). In *Padilla*, this Court remanded the issue of prejudice and only examined the question of deficient performance. *Padilla*, 130 S. Ct. at 1483–84. In *Hill*, this Court applied the *Strickland* prejudice standard to the plea process, predicated exclusively on the circumstance in which the criminal defendant pled guilty and was convicted as a consequence of the plea. *Hill*, 474 U.S. at 59 ("in order to satisfy the 'prejudice'

requirement, 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.") (emphasis added). This Court did not address in these cases the situation in which a criminal defendant elected to go to trial as a consequence of the legal advice of counsel.

In his brief in opposition, Cooper relied primarily on *Padilla* and *Hill* to support the position that there is prejudice under *Strickland* in the circumstance in which a criminal defendant goes to trial based on deficient advice. Res. Br. in Opp. 12–22. But these cases do not resolve this issue. One of the other cases Cooper cited is *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 145 (2005), in which this Court reversed the conviction of a criminal defendant convicted at a fair trial. But *Gonzalez-Lopez* did not address the issue of the effective assistance of counsel and prejudice at the plea stage, but rather the point that a criminal defendant has a right to select his counsel of choice. *Gonzalez-Lopez*, 548 U.S. at 146 ("In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation 'complete.'"). There is no claim here that Cooper was deprived of his counsel of choice.

In response to this open question, the federal circuits and other lower courts have provided a range of answers. Some courts have granted a new trial, see, e.g., *Gordon*, 156 F.3d at 381–82; some required the conveyance of the same offer, see, e.g., *Hoffman* v. *Arave*, 455 F.3d 926, 942–43 (9th Cir. 2006); some

required giving the option of either a new trial or the original offer to the criminal defendant, see, e.g., *Beckham* v. *Wainwright*, 639 F.2d 262, 267 n.7 (5th Cir. 1981); and some have rejected the claim altogether because there was no prejudice where there was a fair trial, see, e.g., *Greuber*, 165 P.3d at 1188–91 (Utah 2007). Pet. 14–15 ns. 19–22. This Court's recognition of "diverg[ent]" treatment by the lower courts supports the conclusion that there is no clear guidance from this Court. *Carey* v. *Musladin*, 549 U.S. 70, 74 (2006) ("Reflecting the lack of guidance from this Court, lower courts have diverged widely in their treatment" of the claim).

In any event, Cooper cannot rely on the lower courts to establish this point, because AEDPA requires that the clearly established law be determined from the precedent of *this Court*. 28 U.S.C. § 2254 ("as determined by the Supreme Court of the United States"). See also *Thayer* v. *Haynes*, 130 S. Ct. 1171, 1175 (2010) ("we hold that no decision of this Court clearly establishes the categorical rule on which the Court of Appeals appears to have relied"). In fact, this Court's 2007 grant of the petition in *Arave* v. *Hoffman*, 552 U.S. 1008 (2007), to examine the same issue presented, underscores the point that this was an open question for this Court at the time of the Sixth Circuit decision.

In the absence of any controlling authority, the Michigan state-courts' decisions were not objectively unreasonable. AEDPA imposes a "highly deferential standard," *Renico* v. *Lett*, 130 S. Ct. 1855, 1862 (2010), and *Strickland* requires an evaluation of the reliability of the trial, the fairness of which is no longer at issue.

Strickland, 466 U.S. at 685. In this posture, the state-court adjudication was not an "extreme malfunction."

In conclusion, Cooper is unable to prove that his conviction is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by [this Court]." 28 U.S.C. § 2254(d)(1). Quite the opposite, granting Cooper's claim for relief would be a novel expansion of the Sixth Amendment, creating out of whole cloth a right that this Court has never recognized in the Amendment's 220-year history. Cooper is not entitled to habeas relief.

CONCLUSION

The judgment of the court of appeals should be reversed.

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