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No. 10-209

In The

# Supreme Court Of The United States

BLAINE LAFLER,
*Petitioner,*
v.
ANTHONY COOPER,
*Respondent.*

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

**BRIEF OF AMICI CURIAE CONNECTICUT AND 26 OTHER STATES IN SUPPORT OF PETITIONER**

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## QUESTIONS PRESENTED

I. Is a state habeas petitioner entitled to relief where his counsel deficiently advises him to reject a favorable plea bargain but the defendant is later convicted and sentenced pursuant to a fair trial?

II. 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?

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## STATEMENT OF INTEREST

The *amici* states have a compelling interest in defending presumptively valid judgments of their courts against post-conviction claims of ineffective assistance. They therefore have a strong interest in ensuring that the law governing such claims is properly applied. Thus, the *amici* states have a substantial interest in this Court's determination of whether states must provide relief to, and a remedy for, a criminal defendant who has received a fair trial after he has forfeited the potential for "more favorable" pretrial disposition due to attorney error.[1]

## SUMMARY OF THE ARGUMENT

The Sixth Circuit Court of Appeals ruled that Michigan courts unreasonably applied or contravened this Court's precedents in concluding that the respondent, convicted after a constitutionally sound trial, was not deprived of the effective assistance of counsel when he rejected a "more favorable" plea offer due to attorney error. In fact, no ruling from this Court clearly establishes that a constitutional violation results in this "foregone plea" context. The Court has, however, touched upon the foregone plea situation in the context of a treaty violation claim.

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[1] Rule 37(4) permits the Attorneys General to file amicus curiae briefs without permission of the parties. In Connecticut, the Chief State's Attorney serves as the equivalent of the Attorney General for criminal matters. CONN. CONST. Amd. XXIII; Conn. Gen. Stat. § 51-278(c).

In Breard v. Greene, 523 U.S. 371 (1998) (per curiam), a foreign national rejected a plea offer that would have spared his life, and he was sentenced to death following trial. He claimed that the Vienna Convention on Consular Relations was violated because he was not given the right, upon arrest, to contact his nation's Consulate, upon whose advice he would have accepted the offer. This Court held that the claim was procedurally defaulted, but nonetheless opined:

> Even were Breard's Vienna Convention claim properly raised and proved, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial.

Id. at 377 (citing Arizona v. Fulminante, 499 U.S. 279 (1991)) (harmless error analysis). Admittedly, this dictum does not "clearly establish" any rule arising in the foregone plea context. Williams v. Taylor, 529 U.S. 362, 412 (2000). However, it *is* consistent with the rule, clearly established in Strickland v. Washington, 466 U.S. 668 (1984), that the Constitution is not violated merely because a defendant does not receive the "most favorable" disposition.

At the time this Court heard and decided Strickland, a debate existed regarding the role of a criminal defendant's attorney. That debate is reflected in the following note, published that same year:

> The role of a [defense attorney] is not [to] see that his or her client received a fair trial and that a just outcome resulted. The attorney's role is to do everything ethically proper to see that the client receives the most favorable outcome possible – whether or not it produces an outcome which society considers just. . . . The guiding principle in determining whether an attorney has provided effective representation must then be whether he or she discharged the role of partisan advocate faithfully and zealously, not whether the performance yielded what a court views as a just result.

William Genego, "The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation," 22 Am.Crim.L.Rev. 181, 200 (1984).

The Court rejected the view that the *Constitution* requires counsel to procure the "most favorable outcome possible – whether or not it produces an outcome which society considers just." The Court *unambiguously* held that the effective assistance of counsel is embodied in the opposite view, stating:

> 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*.

Strickland, 466 U.S. at 685 (emphasis added). Thus, the Strickland rule is that attorney error is not *constitutional* error unless it causes an unreliable or unfair judgment. Here, the Sixth Circuit's ruling overturns the "just result" of a constitutionally sound trial in order to give to a defendant the "most favorable outcome." Accordingly, the Sixth Circuit's decision, rather than that of the Michigan courts, contravenes clearly established law embodied in this Court's rulings.

The Sixth Circuit is far from alone. This case and the closely related case of Missouri v. Frye, No. 10-444, 79 U.S.L.W. 7 (August 24, 2010), are the culmination of a phenomenon that emerged shortly after the Strickland decision. Specifically, beginning with the Sixth Circuit's 1988 decision in Turner v. Tennessee, 858 F.2d 1201 (1988), vacated, 492 U.S. 902 (1989), courts have almost universally failed to apply Strickland in the foregone plea context. Some courts reason that a failure in the communication of a plea offer between attorney and client is an "inherent prejudice" constituting ineffective assistance of counsel without regard to whether, as required by Strickland, there is *actual* prejudice to the defense. E.g., United States v. Rodriguez, 929 F.2d 747, 753 (1st Cir. 1991), Cottle v. State, 733 So.2d 963, 969 (Fla. 1999), State v. James, 48 Wash. App. 353, 364 (1987). In doing so, these courts treat the error not as trial error, which Strickland is designed to identify, but as "structural" error, undermining the reliability of the conviction without regard to the "effect on the trial" that this Court considered in its Breard dictum. Other courts, like the Sixth Circuit below, invoke Strickland's *trial error* test; however, they unwittingly abandon Strickland's prejudice requirement and render the

attorney's error *per se* prejudicial. Consequently, they use the Constitution to enforce attorney ethics rather than to deliver a "just result."

In this case, for example, the Sixth Circuit, while ostensibly applying Strickland, determined there to be a constitutional deprivation because of deficient performance alone. Whereas Strickland requires that ineffective assistance flow from prejudice, in the Sixth Circuit's view, prejudice flowed from ineffective assistance ("If counsel provided ineffective assistance, we must *then* determine whether the petitioner was prejudiced", "[we have] consistently rejected such a myopic view of *prejudice from a deprivation of the right to counsel*", "[defendant] was deprived of his constitutional right to effective assistance of counsel. *Thus he has established prejudice*"). Accordingly, the test employed by the Sixth Circuit was the inverse of Strickland; its effect was to treat the error as structural in nature.

These and similar approaches, while purporting to correct constitutional violations, simply enforce professional mores. There is perhaps no better example of this trend than that found in the Ninth Circuit. In Nunes v. Mueller, 350 F.3d 1045 (9th Cir. 2003), the Ninth Circuit Court of Appeals held that a defendant led by his attorney's mistake to stray from "more favorable" pretrial disposition is deprived of constitutional guarantees. According to Nunes, a defendant in the plea-rejection-due-to-attorney-error context loses key rights to make an informed decision and decide his own fate. Id. at 1052-53. However, where a *judge's* error prompted a *pro se* defendant to

reject a plea offer, the Ninth Circuit acknowledged that there is no constitutional entitlement to a plea, and that, "[w]hen a defendant turns down a guilty plea, he is giving up only the opportunity to limit his exposure to the terms of that plea." United States v. Forrester, 616 F.3d 929, 939 (9th Cir. 2010). Such dual reasoning evinces a focus -- not on *constitutional* error -- on *attorney* error.

In granting to a defendant what he may view as an optimum outcome, rather than the "just result" that the Constitution guarantees, courts have employed overly broad definitions of "defense" and "adversarial process," reasoning that these things are impeded when counsel error causes the forfeiture of the potential for pretrial disposition. The short answer to the controversy now before the Court is that the State is not obligated to resolve criminal matters through plea disposition. Likewise, the defendant is not entitled to have his criminal matter disposed of by plea arrangement more favorable that the "just result" produced by trial. The inquiry ends there.

The Constitution guards the adversarial process, and flaws in that process are therefore attributable to the State. The "adversarial process," in Sixth Amendment jurisprudence, is the system by which the State's evidence against a criminal defendant is tested to ensure a reliable answer to the question of whether the defendant is guilty of the crime charged. Structural errors, which pervade the framework within which a criminal trial is conducted, warrant a *presumption* of a breakdown in the adversarial process. Trial errors, however, are harmless unless reasonably likely to have

rendered the factual determination of a defendant's guilt unreliable – i.e., that the *defense* (not the *defendant*) has been prejudiced. Finally, some errors that have no bearing on the determination of guilt nonetheless warrant remedial measures because they cast doubt upon the integrity of the adversarial process.

The failure of a defendant's attorney to properly convey to him the State's discretionary plea offer – or to convey it at all – neither affects the framework within which a criminal trial is conducted nor casts doubt upon a determination of guilt after trial unencumbered by constitutional error. Moreover, because the State is not involved in the error, a remedial or "prophylactic" measure to restore confidence in the judicial system is unnecessary. In short, attorney error that causes the loss of a plea offer is just that – attorney error. It is not *constitutional* error.

For this reason, the *amici* respectfully urge that relief from the just results of a constitutionally sound trial or a constitutionally valid guilty plea is not available to a defendant who has suffered – and no remedy can cure – the loss of "the most favorable outcome possible" when attorney error causes the forfeiture of a prosecutor's discretionary plea offer.

## ARGUMENT

### I. INTRODUCTION

Constitutional rights emanate from the State's obligation to provide a criminal defendant all to which he is entitled. Connecticut Board of Pardons v.

Dumschat, 452 U.S. 458, 465 (1981); Schmerber v. California, 384 U.S. 757, 766 (1966); Cf., Greenholtz v. Inmates, 442 U.S. 1, 7 (1979) (internal cite and quote omitted) ("to obtain a protectible right, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it"). The Sixth Amendment entitles a criminal defendant to the assistance of counsel "for his defence." U.S. CONST. Amend. VI. This "defense" for which a defendant is entitled to assistance, however, does not itself create entitlements to all things an attorney may obtain for a defendant. The word "defence," as it is used in the Sixth Amendment, means "defense at trial, not defense in relation to other objectives that may be important to the accused." Rothgery v. Gillespie County, 554 U.S. 191, 216 (*Alito, J.*, concurring); see Faretta v. California, 422 U.S. 806, 818 (1975) (emphasis added) ("the [Sixth] Amendment constitutionalizes the right in an adversary criminal trial to *make a defense as we know it.*"). Thus, the right to counsel secures for a defendant all *other* rights to which he is entitled. Maine v. Moulton, 474 U.S. 159, 169 (1985); see Schmerber, 354 U.S. at 766 (emphasis added) (rejecting Counsel Clause claim because "[n]o issue of counsel's ability to assist petitioner in respect of any right he *did* possess is presented.").

At the same time, the State is not obligated to grant a defendant all benefits or advantages he would like to have. For this reason, the Court has recognized that "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." Strickland, 466 U.S. at 693. The State *is*, however, responsible to cure

defects caused by attorney errors to the extent they impede its obligation to provide a fair and reliable adjudication. Kimmelman v. Morrison, 477 U.S. 365, 382-83 (1986).

> The constitutional mandate is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standards of due process of law. "Unless a defendant charged with a serious offense has counsel able *to invoke the procedural and substantive safeguards* that distinguish our system of justice, a serious risk of injustice infects the trial itself. *When a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty*."

Evitts v. Lucey, 469 U.S. 387, 396 (1985) (emphasis added) (quoting Cuyler v. Sullivan, 446 U.S. 335, 343 (1980)).

The adversarial process balances the defendant's substantive and procedural entitlements and the State's obligations. The "adversarial process," as this Court has defined it, is one in which factfinding and truth-seeking take place in a rule-based environment to reach a reliable judgment. United States v. Nobles, 422 U.S. 225, 230-31 (1975); Herring v. New York, 422 U.S. 853, 862 (1975); Polk County v. Dodson, 454 U.S. 312, 318 (1981). For that reason, "the right to the effective assistance of counsel is recognized not for its own sake,

but because of the effect is has on the ability of the accused to receive a fair trial." United States v. Cronic, 466 U.S. 648, 658 (1984).

> [T]he right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled.

Strickland, 466 U.S. at 685 (internal quote omitted); see also, Herring, supra, at 857:

> ([T]he right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the *adversary factfinding process* that has been constitutionalized in the Sixth and Fourteenth Amendments.)

Thus, the Court's Sixth Amendment jurisprudence recognizes that counsel's assistance is necessary – not to procure benefits and advantages – when a defendant is *confronted* by his adversary (the prosecution) on the road toward a fair and reliable adjudication *on the merits* of his criminal case. United States v. Ash, 413 U.S. 300, 307-15 (1973).

Most ineffective assistance cases involve counsel's performance during the course of a legal proceeding.

Roe v. Flores-Ortega, 528 U.S. 470, 481-82 (2000). In those cases, whether a defendant must show actual prejudice resulting from the error, or whether a breakdown in the adversarial process will be presumed, depends upon the magnitude of the deprivation. Id. If the error constitutes "structural error," a breakdown in the adversarial system is presumed. Cronic, 466 U.S. at 659-60. That is, the State is burdened with a presumption that it has not met its constitutional mandate of providing a fair adjudication, for two reasons. First, prejudice is so likely in these circumstances that case-by-case inquiry is not worth the cost. Second, the impairments are easy to identify and, because the prosecution is directly responsible for them, easy for the State to prevent. Strickland, 466 U.S. at 692.

Aside from these situations, a defendant must show, in accordance with Strickland, that the claimed error *actually* undermined the trial's fairness and reliability – *i.e.*, that it is reasonably likely that harmful trial error resulted. The Court has applied Strickland's prejudice requirement where claims of counsel error led not to a judicial proceeding of disputed reliability, but to the forfeiture of a proceeding to which the defendant was entitled. Flores-Ortega, 528 U.S. at 483. In Flores-Ortega, for example, the claim was that counsel erred in failing to file appeal papers, and the defendant was denied an opportunity to appeal. Similarly, in Hill v. Lockhart, 474 U.S. 52 (1985), it was claimed that counsel was ineffective when his advice caused the defendant to enter a plea and forfeit his trial. In these cases, a defendant had to prove a breakdown in the adversarial process by showing that,

but for counsel's error, he would not have forfeited the proceeding to which he was *entitled*. See Roe v. Flores-Ortega, 528 U.S. 470, 485 (2000) (emphasis added) ("counsel's advice in Hill might have caused the defendant to forfeit a judicial proceeding *to which he was otherwise entitled*.")

Here, though, it is claimed that counsel error during the pretrial period caused the forfeiture – not of a proceeding to which the defendant was entitled – of plea disposition that the State is not obligated to provide and the defendant is not entitled to receive. The definition of "adversarial process" should not bow to accommodate a defendant's desire to receive the most favorable outcome, to which he is *not* entitled. It should remain, as it always has, a process that provides to a criminal defendant his right to *confront the State's evidence* against him in a factfinding process to "ensure that justice is done" – *i.e.*, a "just result." United States v. Nixon, 418 U.S. 683, 709 (1974). Plea disposition is not concerned with factfinding; it is not concerned with the adversarial process at all until the *entry* of a plea eclipses that process. Mabry v. Johnson, 467 U.S. 507-08 (1984), unrelated dictum disavowed, Puckett v. United States, 120 S.Ct. 1423, 1430 n. 1 (2009); Menna v. New York, 423 U.S. 61, 63 n. 2 (1975). The mere extension of a plea offer is neither confrontational nor adversarial. Accordingly, by definition, there is no breakdown in the adversarial process in the foregone plea context.

The Sixth Circuit below and many other courts have not ended the analysis there. They have drawn from various precedents to piece together a resolution

that provides to the defendant the terms of the foregone plea, often blending the lines between Cronic (prejudice presumed) and Strickland (no presumption). In fact, an attorney's error that causes the loss of the *potential* for pretrial disposition is not "structural" error. Hence, a defendant must show a breakdown in the adversarial process by showing that the error was reasonably likely to render the judgment unreliable or unfair. Because he cannot, the error is not *constitutional* error at all.

## II. ATTORNEY ERROR THAT CAUSES FORFEITURE OF PLEA DISPOSITION IS NOT "STRUCTURAL" ERROR

Attorney error that causes forfeiture of potential pretrial disposition does not fit the definition of "structural error." This "limited class of cases" involves errors that are "so intrinsically harmful as to require automatic reversal (i.e., 'affect substantial rights') without regard to their effect on the outcome." Neder v. United States, 527 U.S. 1, 7-8 (1999) (citations omitted). They "contain a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself . . . and necessarily render a trial fundamentally unfair." Id.

This Court has recognized three Sixth Amendment contexts giving rise to structural error:

1.) Where counsel is totally absent, or prevented from assisting the defendant at a "critical stage" of the prosecution (which this Court has referred to as a "complete denial of counsel");

2.) Where counsel fails entirely to subject the prosecution's case to meaningful adversarial testing; and,

3.) Where the surrounding circumstances are such that no competent attorney could assist a defendant.[2]

Wright v. Van Patten, 552 U.S. 120, 124-25 (2008); Bell v. Cone, 535 U.S. 685, 695-96 (2002). The error at issue here is none of these things.

The fact that the attorney's error has caused the loss of potential pretrial disposition does not indicate that the surrounding circumstances were such that *no* attorney could assist the defendant. See Powell v. Alabama, 287 U.S. 45, 58 (1932) (defendant not assisted "in any substantial sense" because no definitive appointment of counsel). Nor does such error mean that counsel failed *entirely* to subject the prosecution to meaningful adversarial testing. In such a case, the attorney's failure to test the prosecutor's case must be "complete"; he must have failed to oppose the prosecution *throughout the proceeding as a whole*. Bell, supra, 535 U.S. at 697.

The third category of *per se* prejudice cases is where courts typically blend the concepts of structural error and Strickland-type trial error. The Sixth Circuit below, like many courts in this context, reasoned that the respondent was denied his right to counsel at the

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[2] Conflicts of interest justify a limited presumption of prejudice. Strickland, 466 U.S. at 692.

critical stage of plea bargaining and, consequently, he was prejudiced. However, denial at a "critical stage" is the hallmark of *structural* error. See Cronic, 466 U.S. at 659 (discussing "critical stage" concept as a basis for a "*presumption* that counsel's assistance is essential"); Bell, 535 U.S. at 695-96 (same); Wright, 552 U.S. at 125. It, too, allows for *presumed* prejudice where there is a *complete* denial of counsel's presence at a "critical stage" of the prosecution. If the court could conclude that counsel was denied at a "critical stage," then prejudice is presumed and there is no need to apply Strickland. The Strickland test is employed for the very reason that there is *not* a denial of counsel's assistance at a critical stage.

The *amici* acknowledge that this Court recently stated:

> [W]e have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.

Padilla v. Kentucky, 130 S.Ct. 1473, 1486 (2010) (citing Hill, 474 U.S. at 57). Padilla and Hill involved counsel's advice to *accept* a plea offer. To be sure, "[t]he entry of a guilty plea . . . ranks as a 'critical stage' at which the right to counsel adheres." Iowa v. Tovar, 541 U.S. 77, 81 (2004) (emphasis added, citations omitted). However, plea negotiations alone do not implicate the Constitution:

> 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. It is the ensuing guilty plea that implicates the Constitution.

Mabry v. Johnson, 467 U.S. at 507-08. Hence, if Padilla means that plea negotiations implicate the Constitution even where they do not result in plea disposition, it cannot coexist with Mabry. Attorney error that causes forfeiture of pretrial disposition does not amount to the denial of counsel at a critical stage.

Whether an event constitutes a "critical stage" of the proceeding depends upon the right sought to be vindicated. The interest at stake in a claim of ineffective assistance is the trial right. Because forfeiture of pretrial disposition, even due to attorney error, does not risk the trial right, it does not amount to a "critical stage" of the proceedings. Indeed, this Court has noted:

> It is true enough that the purpose of the rights [set forth in the Sixth Amendment] is to ensure a fair trial . . . [but] it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair.

United States v. Gonzalez-Lopez, 548 U.S. 140, 145 (2006). However, this statement pertains to situations

where the interest at stake is not the trial right. For example, in Gonzalez-Lopez,

> The right at stake [was] 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 [was] required to make the violation "complete."

Id. at 146. This was so because "[t]he right to select counsel of one's choice . . . has never been derived from the Sixth Amendment's purpose of ensuring a fair trial." Id. at 147. Similarly, in Kansas v. Ventris, 129 S.Ct. 1841 (2009), the right at stake was "the right to be free of uncounseled interrogation," thus, "[t]he constitutional violation occur[ed] when the uncounseled interrogation [was] conducted," regardless of its effect on an ensuing trial. Id. at 1846 ("The assistance of counsel has been denied at the prior critical stage which produced the inculpatory evidence.").

However, the right to the *effective* assistance of counsel was derived from the due process purpose of ensuring a fair trial. Gonzalez-Lopez, 548 U.S. at 147 (citing McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970)). The limits of the right to effective assistance of counsel, therefore, are logically derived from the same purpose. Gonzalez-Lopez, supra, at 147.

> The requirement that a defendant show prejudice in ineffective representation cases arises from the very nature of the specific element of the right to counsel at

> issue there – *effective* (not mistake-free) representation. Counsel cannot be "ineffective" unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Thus a violation of the Sixth Amendment right to effective representation is not "complete" until the defendant is prejudiced.

Id. (citation omitted, emphasis in original). Thus, *in ineffective assistance cases*, there is no denial of counsel's assistance at a critical stage unless counsel's absence at that stage risks a substantial probability of derogation from the right to a fair trial.

It is true that, in Powell, this Court stated that "the period from arraignment to trial [is] perhaps the most *critical period* of the proceedings . . . during which the accused requires the guiding hand of counsel." Powell, 287 U.S. at 57 (emphasis added). However, this Court has never held the determination of whether counsel is absent at a "critical stage" to be as simple as answering whether the pretrial event in question occurred during Powell's "critical period." See Rothgery, 554 U.S. at 213-14 (*Alito, J.*, concurring) (distinguishing between "attachment of" and "substantive entitlement to" right to counsel).

The Court has expanded the right to counsel to pretrial events, but "only when new contexts appear presenting the same dangers that gave birth initially to the right itself." United States v. Ash, 413 U.S. 300, 311 (1973); see also, Powell, 287 U.S. at 70, quoting Ex

Parte Cin Loy You, 223 F. 833, 838 (D.C. 1915) (noting that Counsel Clause was inserted into the Sixth Amendment "because the assistance of counsel was recognized as essential to any fair trial of a case against a prisoner"). Accordingly, "[t]he Court has defined as 'critical stages' those petrial procedures that would *impair defense on the merits* if the accused is required to proceed without counsel." Gerstein v. Pugh, 420 U.S. 103, 122 (1975) (emphasis added); see United States v. Gouveia, 467 U.S. 180, 188-90 (1984) (quoting United States v. Ash, 413 U.S. 300, 309 (1973)); Evitts v. Lucey, 469 U.S. 387, 395 (1985) (emphasis added) (denial at critical stage when defendant's ability to "obtain a fair decision *on the merits*" is affected).

"The principle of Powell v. Alabama and succeeding cases," this Court has explained,

> 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* . . . and to have effective assistance of counsel at the trial itself.

United States v. Wade, 388 U.S. 218, 227 (1967) (emphasis added). These events "might appropriately be considered to be parts of the trial itself" because the results of these confrontations between the prosecutor and the defendant "might well settle the accused's fate and reduce the trial itself to a mere formality." Ash, supra, at 310; Maine v. Moulton, 474 U.S. 159, 170 (1985), quoting Wade, supra, at 224.

Hence, early on, the Court found to exist a "critical stage," at which assistance was denied, even *before* arraignment (i.e., even *before* commencement of Powell's critical period), where counsel's absence affected the defense *at trial*. Escobedo v. Illinois, 378 U.S. 478, 486 (1964), (citing Hamilton v. Alabama, 368 U.S. 52, 54 (1961)) (emphasis added) (extending Sixth Amendment guarantee to pre-indictment interrogation because "[w]hat happened at this interrogation could certainly 'affect the whole trial'").[3] Even the arraignment itself – which commences Powell's critical *period* – may not constitute a critical *stage*. Whether the arraignment is a "critical stage" depends upon its potential to impact the trial. Hamilton, 368 U.S. at 53-54; Coleman v. Alabama, 399 U.S. 1, 9-10 (1970); see Gerstein v. Pugh, 420 U.S. at 123 (emphasis added). (Hamilton and Coleman arraignments in Alabama were "critical stages" because "the suspect's *defense on the merits* could be compromised if he had no legal assistance"). Conversely, the Gerstein probable cause hearing was not a critical stage.

> Because of its limited function [addressing only pretrial custody] and the nonadversary character, the probable cause determination is not a "critical stage" in the prosecution that would require appointed counsel.

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[3]The Court later narrowed the Escobedo holding. Kirby v. Illinois, 406 U.S. 682 (1972). Nonetheless, the rationale for determining the pre-arraignment stage to be critical appears to have remained unchanged.

Gerstein, 420 U.S. at 122.

Similarly, post-indictment identification procedures may, or may not, be "critical stages" implicating the Counsel Clause, depending upon whether they are likely to have trial consequences. A post-indictment line-up was a critical stage in Wade because of the "grave potential for prejudice . . . which may not be capable of reconstruction *at trial*." Wade, 388 U.S. at 236-37 (emphasis added).[4] Ash's post-indictment photographic display was not a "critical stage," though, because it did not pose the same risk of harm at trial. Ash, 413 U.S. at 321. The Court emphasized that applying the Sixth Amendment guarantee to a *non-adversarial* event like the photo display in Ash would be a "substantial departure" from the guarantee's historic application, because it:

> Would not be used to produce equality in a trial-like adversary confrontation. Rather, the guarantee [would be] used . . . to produce confrontation at an event that previously was not analogous to an adversary trial.

Ash, 413 U.S. at 317. Similarly, the Counsel Clause is not implicated at pre-trial analyses of fingerprints, blood, clothing, hair, and the like, even if conducted during Powell's "critical period."

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[4]Indeed, even after reaching this conclusion the Court left open the possibility of harmless error if the in-court identification at trial derived from an independent source. Wade, 388 U.S. at 242.

> *[T]hey are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate from [the defendant's] right to a fair trial.*

Wade, 388 U.S. at 227-28 (emphasis added); see Gilbert v. California, 388 U.S. 263, 267 (1967) (taking of handwriting exemplars not "critical stage" for same reason).

Finally, to be a "critical stage," counsel's absence at the event must risk *a significant impact* on the trial. In finding that the Gerstein probable cause hearing (addressing only pretrial custody) was not a "critical stage," this Court stated:

> To be sure, pretrial custody may affect *to some extent* the defendant's ability to assist in preparation of his defense, but this does not present the *high probability of substantial harm* identified as controlling in Wade and Coleman.

Gerstein, 420 U.S. at 123 (emphasis added).

Plea bargaining, though perhaps influenced by the "merits" of a case, is not itself a means of *testing the merits* of a case. The loss of the *potential* for pretrial disposition does not pose a "high probability of substantial harm" to the "merits of the defense" at trial, and does not "settle the accused's fate." The occasion of the forfeiture, therefore, does not ascend to a "critical stage" at which counsel's assistance is guaranteed. Until the acceptance of a plea offer is "embodied in the

judgment of the court," an opportunity has not arisen for "the prosecuting authorities to take advantage of the accused." Ash, 413 U.S. at 312-13. It simply is not realistic to believe that a prosecutor would *voluntarily* extend a *wholly discretionary* plea offer, and then work to prevent a defendant from accepting it, or that the prosecutor would extend the offer to an attorney and impede its conveyance to the defendant. Thus, the prosecutor's act in extending the offer and the defendant's consideration of it are entirely non-adversarial. These events, therefore, are not "critical stages" implicating the Counsel Clause. See Gerstein, 420 U.S. at 122 (probable cause determination not a critical stage because of "nonadversary character").

Even if "plea negotiations" as a whole are considered a singular "critical stage" of the proceedings, the forfeiture of pretrial disposition removes the criticality. "[T]here [are] times when the subsequent trial [will] cure a one-sided confrontation between prosecuting authorities and the uncounseled defendant. In other words, such stages [are] not 'critical'." Ash, 413 U.S. at 315. Further, efforts to "eliminate the risks . . . to meaningful confrontation at trial *may also remove the basis for regarding the stage as 'critical'.*" Wade, 388 U.S. at 239 (emphasis added). Indeed, "the opportunity to cure defects at trial causes the confrontation *to cease to be 'critical'.*" Ash, 413 U.S. at 316 (emphasis added). The opposite is also true. An event that is normally "non-critical" can become "critical" if it is found to have trial consequences. White v. Maryland, 373 U.S. 59, 60 (1963) (Maryland's arraignment procedures may not affect trial in the way Alabama's do, but nonetheless

critical where plea of guilty entered at arraignment used against defendant at later trial).

Accordingly, rejecting the prosecutor's offered recommendation, even if due to attorney error, has "remove[d] the basis for regarding the stage as 'critical'." Wade, 388 U.S. at 239. To the extent that plea *acceptance* can amount to a "critical stage," passing on the plea deal causes the stage to "cease to be critical." Ash, 413 U.S. This is so because there is no possibility of derogation from the delivery of a fair trial, or to the ability to "obtain a fair decision on the merits." Evitts, 469 U.S. at 395. Simply put, unless plea negotiations bring about a conviction through the entry of a guilty plea and the forfeiture of trial, they do not "settle the petitioner's fate." Wade, 388 U.S. at 227.

An unexecuted plea bargain does not ascend to a "critical stage" at which the Counsel Clause guarantees counsel's assistance. To hold otherwise would be the "substantial departure" from, and the "drastic expansion of," the guarantee's historic application that this Court rejected in Ash. Ash, 413 U.S. at 317. Thus, error that results in the loss of the possibility of pleading guilty is not structural, and does not warrant automatic relief absent a showing of prejudice. Accordingly, the instant controversy should be governed by Strickland. See Smith v. Robbins, 528 U.S. 259, 287 (2000) (Strickland must be applied because claimed error does not fall within any of the three categories where prejudice is presumed).

## III. ATTORNEY ERROR THAT CAUSES FORFEITURE OF POTENTIAL PLEA DISPOSITION DOES NOT CONSTITUTE *STRICKLAND* ERROR

Strickland prejudice cannot be shown in the foregone plea context. In the most general sense, the outcome may have been different had the defendant accepted and the court imposed the plea offer terms. But, a different result alone does not inform the prejudice inquiry.

> [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. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993).

> Thus, to show prejudice, it must be established that the claimed lapses in counsel's performance rendered the trial unfair so as to "undermine confidence in the outcome" *of the trial*.

Nix v. Whiteside, 475 U.S. 157, 165 (1986), quoting Strickland, 466 U.S. at 694 (emphasis added).

A trial is rendered unfair or unreliable if the defendant is deprived of a "substantive or procedural right to which the law entitles him." Fretwell, 506 U.S. at 372. In Strickland, this Court enumerated several things to which "[a] defendant has no entitlement," and concluded that counsel error resulting in the loss of things to which there is no entitlement does not give rise to legitimate prejudice. Strickland, 466 U.S. at 694-95. In subsequent cases, the Court has further illuminated this principle.

In Nix, the Court held that where an attorney prevents his client from testifying falsely, Strickland prejudice is not established, even if the false testimony would have changed the outcome of the proceeding. Nix, 475 U.S. at 175-76. There is no entitlement to false testimony. It is not merely the lawlessness of the false testimony that makes it an improper basis for Strickland prejudice. Instead, false testimony is an improper basis for Strickland prejudice because it is within a broader category of things to which there is no entitlement. Fretwell, 506 U.S. at 370 n. 3.

Likewise, in Fretwell, the petitioner claimed that he would have enjoyed a "different outcome" if his attorney made an objection which would have been based, and sustained, upon an incorrect interpretation of the law. Fretwell, 506 U.S. at 366. Because there is no entitlement to incorrect interpretation of the law, the Fretwell petitioner was unable to show Strickland prejudice. Fretwell, supra, at 372; see also, Id. at 374-75 (*O'Connor, J.*, concurring) (prejudice inquiry "ought not be informed" by the loss of "an advantage the law simply does not recognize").

Williams v. Taylor, supra, 529 U.S. 362, presented the opposite problem. There, this Court overruled a determination that Strickland prejudice did not result from counsel error, even though the error *did* deprive the defendant of a right to which he *was* entitled. The lower court, misinterpreting Fretwell, erroneously imposed an additional requirement that fundament unfairness be shown – a showing that had already been made because it was established that counsel's error resulted in the loss of a substantive or procedural right.

Thus, consistent with the entire body of this Court's Counsel Clause jurisprudence, the Strickland test for prejudice requires that a breakdown in the adversary process be shown by the deprivation of something that the defendant was *entitled* to receive and the State was *obligated* to provide.

### A. There is No Entitlement to Plea Disposition

This Court has unequivocally stated that a defendant does not have an entitlement to resolve his criminal case by plea bargain.

> There is no constitutional right to a plea bargain; the prosecutor need not do so 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.

Weatherford v. Bursey, 429 U.S. 545, 560-61 (1977). In granting relief in the foregone plea context, no court, including the Sixth Circuit below, has expressly challenged this rule. Some courts, like the Sixth Circuit here, have impliedly rejected Weatherford because this Court has recognized plea bargaining's importance to the criminal justice system. Other courts, as in Nunes, supra, have reasoned that the plea offer, albeit unexecuted, becomes an entitlement once the State, in its discretion, extends it. These legal conclusions contradict this Court's precedents.

Some courts justify a departure from Weatherford by reasoning that the entitlement at issue is not the right to a guilty plea, but the "*right to counsel's assistance* in making an informed decision once a plea had been put on the table." Nunes, 350 F.3d at 1052 (emphasis added); see also, e.g., Ebron v. Commissioner of Correction, 120 Conn. App. 560, 582, cert. granted, 297 Conn. 912 (2010) (same). This reasoning is flawed in two ways. First, it turns "the right to counsel's assistance" in making the decision into the very entitlement protected by the Sixth Amendment's right to counsel's assistance. In other words, it makes the right "exist for its own sake." Contra Cronic, 466 U.S. 458. Second, it creates a constitutional entitlement derived from the State's discretionary act in extending the offer. Contra Mabry, 467 U.S. at 507-08.

"[T]here is a critical difference between an entitlement and a mere hope or expectation that the trial court will follow the prosecutor's [plea] recommendation." Id. at 508 n. 5. "In terms of the due process clause," the defendant's expectation "is simply

a unilateral hope." Dumschat, 452 U.S. at 465. "A constitutional entitlement cannot be created – as if by estoppel" – from the State's discretionary act. Id. Rather, "[t]he ground for a constitutional claim, if any, must be found in statutes or other rules defining the *obligations* of [the State]." Id. (emphasis added).

The State is not *obligated* to recommend pretrial disposition. Thus, the act of doing so does not create a constitutional entitlement "as if by estoppel," not only against the State, but against the judicial authority that typically retains the right to accept or reject the plea bargain, and, where applicable, against a victim who loses the opportunity to oppose the plea bargain. See Santobello v. New York, 404 U.S. 257, 262 (1971) (there is "no absolute right to have guilty plea accepted. . . . A court may reject a plea in exercise of sound judicial discretion"); Fed.R.Crim.Proc. 11 ("The court may refuse to accept a plea of guilty"); Michigan Rules of Court § 6302(c)(3) (same); CONN. CONST. Art. 1 § 8 (granting victims the right to oppose plea bargain through statement prior to court's acceptance).

Nor does the importance of plea bargaining constitutionalize it. The Sixth Circuit below, like many courts, rested its holding, in part, on this Court's recognition of the importance of plea bargaining to the administration of criminal justice. Santobello, supra, 261 (plea disposition is "not only an essential part of the process but a highly desirable one for many reasons."). Notwithstanding its utility, the Court has never held plea bargaining to have constitutional prowess superior to Weatherford's clear mandate that "there is no constitutional right to a plea bargain." Neither the

purpose nor history of plea bargaining suggests that the Court should do so now.

Plea bargaining is important because it promotes promptness and finality in criminal cases, avoids idle pre-trial confinement, protects the public from recidivist criminals, lends expediency to the process, and enhances rehabilitative prospects. Santobello, 404 U.S. at 261. Restoring a defendant's ability to procure the foregone plea after his guilt has been established at trial does nothing to advance these goals. Indeed, it impedes them. What was final becomes indefinite. The proceedings have been no more prompt, rehabilitative prospects no more enhanced, and pre-trial confinement no less idle, than had there been no plea offer to begin with. Finally, rather than affording protection from recidivism, the public becomes susceptible to a criminal who is released earlier than the time deemed warranted upon a full vetting, at trial and sentencing, of his conduct. Thus, the purpose of plea bargaining is not served by creating a constitutional right to it.

Additionally, the history of plea bargaining does not suggest that Weatherford should be reversed in order to find a constitutional entitlement to pre-trial disposition. The idea that a defendant could "bargain" for something in return for an admission of guilt would not have been foreign to the framers of the Constitution. "There is solid evidence of plea bargaining in earlier centuries." George Fisher, Plea Bargaining's Triumph: A History of Plea Bargaining in America, 12 (Stanford University Press, 2003). But, the Constitution is silent as to plea bargaining. Thus, in the criminal justice

system envisioned by the framers, all criminal cases would end in trial.

Modern plea bargaining, as a "systemic regime" in America, finds its roots in the early nineteenth century. Id. at 19-32. By 1970, at least seventy-five percent, and as many as ninety-five percent, of the criminal convictions in this country emanated from either charge bargaining or sentence bargaining. Brady v. United States, 397 U.S. 742, 752 & n. 10 (1970); Plea Bargaining's Triumph, supra, 12. This prevalence is explained by the "mutuality of advantage" offered by plea resolution. Brady, supra, at 752. It is because of this "mutual advantage" that this Court recognized plea bargaining as a constitutionally legitimate means of disposition. Bordenkircher v. Hayes, 434 U.S. 357, 363-64 (1978). The defendant limits his exposure, begins his term immediately, and avoids the practical burdens of trial. Id. For its benefit, the State preserves "scarce judicial and prosecutorial resources." Id. When a defendant is granted relief in the foregone plea context, the State, having met its constitutional mandate by providing a trial, has lost its part of the "mutual advantage." The State's discretionary plea offer and executory bargain have been converted into a unilateral constitutional entitlement secured by the Counsel Clause, even though it was never "embodied in the judgment of the court." Contra Mabry, 467 U.S. at 507. As such, the very basis for this Court's recognition of plea disposition as "legitimate" – the "mutual advantage" it provides – is gutted. Accordingly, neither the history of plea bargaining nor this Court's recognition of it justify its transformation into an entitlement.

### B. There Is No Entitlement To Other Benefits Lost In The Foregone Plea Context

Courts often find prejudice from lost *benefits* or *advantages* that they predict *would have* otherwise inured to a defendant. For example, some courts, like the Sixth Circuit here, reason that the defendant *would have* enjoyed a shorter sentence (in the sentencing bargain context), or less severe charges (in the charge bargaining context, as in Frye). Some courts reason further that a defendant *would have* benefitted from earlier plea disposition because factors that played into his later sentencing – such as damaging pre-sentence investigation, criminal history, and victim input – *would have* remained unknown. See, e.g., Ebron, supra,120 Conn. App. 560 (severe criminal history must be ignored because entry of earlier plea would have insured its secrecy). They then remedy the loss of these benefits to the defendant. In doing so, courts harness these benefits – "unilateral expectations" – with constitutional protections and transform them into entitlements, in contravention of so much of this Court's jurisprudence.

This Court long ago rejected the notion that a defendant is entitled to a sentence based on less than full exploration of his crime and his criminal history through pre-sentence investigation ("PSI") and victim input. Williams v. New York, 337 U.S. 241, 249-251, 69 S.Ct. 1079 & n. 14 (1949) (quoting Schwellenbach, Information vs. Intuition in the Imposition of Sentence, 27 J.Am.Jud.Soc 52 (1943)) (affirming trial court's imposition of death sentence over jury's more lenient recommendation, and noting that "[f]ailure to make full

use of [sentencing tools such as a PSI] cannot be justified."). Additionally, if a defendant is not entitled to "the luck of a lawless decisionmaker," Strickland, 466 U.S. at 695, it makes little sense to bestow upon him an entitlement to the luck of an uninformed one. Moreover, this Court has clearly stated that imposition of a sentence greater than that involved in the plea bargain, and commensurate instead with information later developed at trial, does not offend due process. Alabama v. Smith, 490 U.S. 794, 801 (1989). Simply put, the *benefit* of being sentenced upon less than full information is not a substantive or procedural *entitlement* that the Constitution allows a defendant to recapture.

In fact, there is no entitlement to a "lesser sentence" in any event. In Glover v. United States, 531 U.S. 198 (2001), the Court found Strickland prejudice to exist where "counsel failed to object to an *error of law*" in the sentencing calculation and the resulting sentence was legally incorrect. Id. at 204 (emphasis added). But, the Court made clear that:

> This is not a case where trial strategies, in retrospect, might be criticized for leading to a harsher sentence. Here we consider the sentencing calculation itself, a calculation resulting from a ruling which, if it had been error, would have been *correctable on appeal*.

Id. (emphasis added). As long as the sentence is within the range set by statute, "appellate review is at an end." Dorszynski v. United States, 418 U.S. 424, 431

(1974); See Townsend v. Burke, 334 U.S. 736 (1948) ("we are not [granting relief] because of petitioner's allegation that his sentence was unduly severe. The sentence being within the limits set by statute, its severity would not be grounds for relief here even on direct review of the conviction, much less on [habeas review]."); See also, Colten v. Kentucky, 407 U.S. 104 (1972) (due process not offended when trial *de novo* results in longer sentence). Thus, there is no entitlement to a "lesser sentence," as long as it is a legal sentence within the limits established by the statute under which the defendant is convicted.

Similarly, in the charge bargaining context, there is no entitlement to the lesser charges that a prosecutor offers to recommend (absent prosecutorial vindictiveness). United States v. Goodwin, 457 U.S. 368 (1982). Indeed, it makes little sense to create such an entitlement from the prosecutor's recommendation because, at the plea bargaining stage, "the prosecutor's assessment of the proper extent of prosecution may not have crystallized." Id. at 381. Put another way, absent a vindictive motive, there is no due process violation when a defendant is charged and convicted at trial of crimes greater than those contemplated by a plea recommendation, as long as the charges are justified given the criminal conduct and supported by the evidence. Id. at 382 ("the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution").
In short, in the foregone plea context, as in all these other areas, a constitutional deprivation cannot be based upon a prediction of benefits a defendant *would have* received; the deprivation must be shown by what

the State was obligated to provide and what the defendant was *entitled* to receive. Because there is no lost entitlement, Strickland prejudice cannot be shown.

## IV. THIS ATTORNEY ERROR IS NOT CONSTITUTIONAL ERROR WARRANTING REVERSAL REGARDLESS OF AN EFFECT ON THE JUDGMENT

In the foregone plea context, there is neither "structural" nor Strickland-type trial error allowing the conclusion that the judgment is unreliable. "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." Delaware v. Van Arsdell, 475 U.S. 673, 681 (1986) (citing and quoting R. Traynor, The Riddle of Harmless Error 50 (1970)).

In limited contexts, this Court has recognized a need to reverse a conviction in the absence of error affecting the judgment – typically where law and public policy support the reversal. For example, in Rose v. Mitchell, 443 U.S. 545 (1979), the Court set aside a conviction because of racial discrimination in the selection of grand jurors, notwithstanding that the trial itself was error-free. The Court reasoned that racial discrimination is itself unconstitutional, and was the particular evil for which the Fourteenth Amendment was enacted to eliminate. While perhaps resulting in no error in the judgment against the defendant, the Court reasoned that the harm of racial discrimination within the mechanisms of justice is to society as a whole.

Similarly, the Fourth Amendment's proscription against unreasonable searches and seizures is a right enjoyed by all people, not just criminal defendants. Schneckloth v. Bustamonte, 412 U.S. 218, 267 (1973). Thus, the "exclusionary rule" requires that illegally seized evidence be excluded at trial, even if it is reliable evidence, and even if its exclusion results in acquittal. "The criminal is to go free," it is said, not because the judgment is unreliable, but "because the constable blundered." Mapp v. Ohio, 367 U.S. 643, 659 (1961) (citation omitted). However, as with the unconstitutionality of racial discrimination at issue in Rose, "[t]he criminal goes free, if he must, but it is the [Fourth Amendment's proscription] that sets him free." Id. In each of these contexts, the State is directly responsible for the violation of a law, and tolerating such violations "breeds contempt for the law." Id. Moreover, the State actors in each scenario are accountable to the people through the political process; hence, the threat of reversing conviction to ensure that the State complies with the law is an effective deterrent to rogue State behavior.

Attorney error causing the loss of potential plea disposition involves no State action; there is no consequence to society as a whole; there is no underlying law broken; and the people can neither hold the attorney accountable nor effectively deter his error. To hold the people responsible for this error is the classic example of a reversal for error that had no effect on the judgment, and which, therefore, "bestirs the public to ridicule" the criminal justice system and "breeds contempt for the law." First, the criminal avoids the penalty that employment of the adversarial

process has determined to be most effective because it is commensurate with his conduct. See Bordenkircher v. Hayes, 434 U.S. 357, 364-65 (1978) (re-indictment on more serious charges after breakdown in plea negotiations is not a due process violation where later conviction and sentence are commensurate with criminal conduct). This is the very windfall to which this Court has said a criminal defendant is not entitled. Fretwell, 506 U.S. at 369-70. Second, it requires the people to exceed their constitutional mandate. See Evitts v. Lucey, 469 U.S. at 396. Thus, there is no justification for reversing a conviction in this context where there is no error upon the judgment.

The inquiry in this foregone plea context ends where it begins. Attorney error does not alter the fact that the State is not obligated to provide, and the defendant is not entitled to receive, pretrial plea disposition.

## V. CONCLUSION

The decision of the Sixth Circuit Court of Appeals should be reversed.

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