Nos. 10-209 and 10-444

IN THE

Supreme Court of the United States

BLAINE LAFLER, *Petitioner*,

vs.

ANTHONY COOPER, *Respondent*.

MISSOURI, *Petitioner*,

vs.

GALIN E. FRYE, *Respondent*.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit and the Missouri Court of Appeals

BRIEF *AMICI CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION AND THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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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BRIEF *AMICI CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION AND THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* CJLF and NDAA made a monetary contribution to its preparation or submission.

constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The National District Attorneys Association (NDAA) is the largest and primary professional association of prosecuting attorneys in the United States. The association has approximately 7,000 members, including most of the nation's local prosecutors, assistant prosecutors, investigators, victim witness advocates, and paralegals. The mission of the association is, "To be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people." NDAA provides professional guidance and support to its members, serves as a resource and education center, produces publications, and follows and addresses public policy issues involving criminal justice and law enforcement.

Respondents' convictions in the present cases were the result of fair, reliable, and constitutionally adequate criminal proceedings. The rulings below reversed the convictions because Respondents were able to show that a more competent attorney might have obtained a more lenient sentence. These rulings, if affirmed, would significantly undermine the finality of criminal convictions and grant criminal defendants a windfall to which the Sixth Amendment does not entitle them. This result would be contrary to the rights of victims and society that CJLF was formed to protect and that NDAA's members have a duty to protect.

SUMMARY OF FACTS AND CASE

Lafler v. *Cooper*, No. 10-209

On March 25, 2003, around 7:30 in the evening, Kali Mundy was shot twice as she was running away from the assailant. *Cooper* v. *Lafler*, 376 Fed. Appx. 563, 565 (CA6 2010). She sustained life-threatening injuries, but survived. *Ibid*. Mundy identified Respondent Anthony Cooper, an acquaintance, as the shooter. *Ibid*.

Cooper was charged with several counts, including assault with intent to murder and possession of a firearm by a felon. *Ibid.* The prosecutor verbalized a plea offer to Cooper's defense attorney that would have allowed Cooper to plead guilty to assault with intent to murder and face a below-guideline minimum sentence of 51 to 85 months. *Id.*, at 566. Cooper initially wanted to accept the plea bargain "because he 'was guilty.' " *Ibid.* His attorney advised him not to accept the offer, based on a mistaken understanding of the prosecutor's burden of proof as to an assault with intent to murder charge. *Id*., at 566, 570. Cooper subsequently rejected a less favorable offer. *Id*., at 567. He was convicted in a jury trial and sentenced to 185 to 360 months in prison. *Ibid.*

In a post-conviction proceeding in the Michigan trial court, Cooper alleged that his trial counsel's ineffective assistance during plea bargaining had led him to reject the more favorable plea offer. *Ibid.* The trial court denied his claim, finding that "Mr. Cooper made his own choices." *Ibid.* The Michigan Court of Appeals rejected this and other claims and affirmed. The Michigan Supreme Court denied leave to appeal. *People* v. *Cooper*, 474 Mich. 905, 705 N. W. 2d 118 (2005).

Cooper then filed a petition for writ of habeas corpus in federal court alleging the same claim. *Cooper* App. to Pet. for Cert. 32a. The District Court conditionally

granted the writ, finding that Cooper's trial counsel had been ineffective and that the state appellate court's decisions holding otherwise was an unreasonable application of federal precedent. *Id.*, at 41a-42a. The court ordered the state to reoffer Cooper its original plea deal of 51 to 85 months in prison or release him. *Id.*, at 42a.

The Sixth Circuit Court of Appeals affirmed. *Cooper* v. *Lafler*, 376 Fed. Appx., at 575. Applying the two-prong test of *Strickland* v. *Washington,* 466 U. S. 668 (1984), for ineffective assistance claims, the court held that trial counsel had rendered deficient performance, that Cooper had suffered prejudice, and that the state court's decision to the contrary was objectively unreasonable. *Cooper*, *supra*, at 571-572. With respect to the prejudice inquiry, the court found that "Petitioner lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him because he was deprived of his constitutional right to effective assistance of counsel," rejecting the argument that Cooper's receipt of a fair trial foreclosed a finding of prejudice. *Id.*, at 572-573. The court also affirmed the District Court's remedy. *Id.*, at 574.

Missouri v. *Frye*, No. 10-444

On August 14, 2007, the State of Missouri charged Petitioner Galin Frye with felony driving on a revoked license following three prior misdemeanor convictions. *Frye* v. *State*, 311 S. W. 3d 350, 351 (Mo. App. 2010). A few months later, the prosecutor sent to Frye's defense counsel a written plea offer that would have given Frye the option of pleading guilty to a misdemeanor charge. *Id.*, at 351-352. Though defense counsel received the offer, it was never communicated to Frye before the offer's date of expiration. *Id.,* at 352. Frye ultimately entered an "open" guilty plea to a felony charge of

driving while revoked and was sentenced to three years in prison. *Id.*, at 352-353.

In a state post-conviction proceeding, Frye claimed ineffective assistance for counsel's failure to communicate the prosecutor's offer. *Id.*, at 353. The trial court denied the motion. *Ibid*.

The Court of Appeals of Missouri reversed. *Id.*, at 361. Applying *Strickland* to Frye's claim, the court found counsel's failure to communicate constituted deficient performance. *Id.*, at 353-356. The court further found the error prejudicial on the grounds that "but for" counsel's error, the outcome of the proceeding would have been different because Frye would have pleaded guilty to a misdemeanor and received a more lenient sentence. See *id*., at 357-360. Recognizing that it did not have the authority to order the state to reoffer the original plea offer, the court remanded the case to allow Frye to proceed to trial, plead guilty to the charged offense, or enter into a plea bargain should the prosecution decide to offer one. *Id.*, at 360-361. The Supreme Court of Missouri denied both parties' applications for transfer from the Missouri Court of Appeals. *Frye* v. *State*, 2010 Mo. LEXIS 415 (2010), *Frye* App. to Pet. for Cert. A1.

On January 7, 2011, this Court granted certiorari in both cases. The order further provided,

> "In addition to the Questions presented by the petitions the parties are directed to brief and argue the following question: '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?' "

SUMMARY OF ARGUMENT

A defense attorney is the opponent of the state in a criminal proceeding. A successful claim of ineffective assistance of counsel therefore punishes the state for an error over which it has no control. Such a drastic remedy should be limited to those claims that further the purpose of the right to effective assistance.

A criminal defendant is not entitled to a plea bargain. To afford the right to a more favorable outcome via the right to effective assistance of counsel is to grant defendants a windfall the Sixth Amendment does not require.

Strickland's prejudice inquiry was tethered to notions of reliability and fundamental fairness. A mechanical application of the "outcome determinative" test for prejudice is not appropriate where a defendant is convicted as a result of fair, reliable, and constitutionally adequate proceedings. A defense counsel error that simply prevented the defendant from receiving a more favorable outcome does not warrant reversal of the conviction so long as the end result is one in which we can place confidence.

The standard for reviewing prejudice in a plea bargain accepted by the defendant, which looks at whether the defendant would have insisted upon going to trial but for counsel's error, is limited to those cases in which there are no further adjudications of guilt. Where a plea bargain offer is rejected and further fact-finding or admissions of guilt occur, those later proceedings should be reviewed for reliability and fairness when evaluating an ineffective assistance claim.

ARGUMENT

I. Overturning a judgment based on the deficiency of the opposing party's attorney is a drastic remedy, to be granted only when *Strickland*'s high standard of prejudice is met.

A. A Unique Claim.

Claims of ineffective assistance of counsel are unique in constitutional criminal procedure. For all other claims of constitutional error, an overturning of a conviction is triggered by some error committed by the state or its agents, such as passing a vague law, see *Connally* v. *General Constr. Co.*, 269 U. S. 385, 393 (1926), coercing a confession, see *Brown* v. *Mississippi*, 297 U. S. 278, 286 (1936), or withholding exculpatory evidence, see *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963). In the context of ineffective assistance of counsel, however, "[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* v. *Washington*, 466 U. S. 668, 693 (1984).

While this Court has held that this seemingly counterintuitive result is dictated by the Sixth Amendment, see *Murray* v. *Carrier*, 477 U. S. 478, 488 (1986), this expansion of the Sixth Amendment right to counsel should be stretched no further than necessary to protect the core purpose of the constitutional right. That purpose is to insure that counsel's representation does not "so undermine[] the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U. S., at 686. The integrity of the criminal justice system is threatened when the state is forced to defend its convictions against conduct over which it has no control, and such threats should be minimized.

The remedy for a successful ineffective assistance claim is drastic, especially in light of the state's passive role. Reversing a conviction, particularly in collateral proceedings where these claims are usually litigated, is contrary to the "profound importance of finality in criminal proceedings." *Strickland*, 466 U. S., at 693-694. Such intrusions into this finality both "undermine[] confidence in the integrity of our procedures, and . . . inevitably delay[] and impair[] the orderly administration of justice." *Hill* v. *Lockhart*, 474 U. S. 52, 58 (1985) (internal quotation marks omitted).

Undoing guilty pleas also impairs the important interest in finality, as this Court reiterated this year. "Acknowledging guilt and accepting responsibility by an early plea respond to certain basic premises in the law and its function. Those principles are eroded if a guilty plea is too easily set aside . . . ." *Premo* v. *Moore*, 562 U. S. __, 131 S. Ct. 733, 741, 178 L. Ed. 2d 649, 660-661 (2011). Prosecutors may be less inclined to enter into the "complex negotiations suffused with uncertainty," if pleas are too freely overturned. See *id*., 131 S. Ct., at 741, 178 L. Ed. 2d., at 661. Defendants could see promised leniency slip away. See *id*., 131 S. Ct., at 742, 178 L. Ed. 2d, at 661. This lack of finality produces "a result favorable to no one." See *ibid*. The unsettling response of setting pleas aside should be limited to those cases that absolutely require it.

B. State Action.

With the exception of the Thirteenth Amendment, the federal Constitution may be invoked only to prohibit state action. 2 R. Rotunda & J. Nowak, Treatise on Constitutional Law, Substance and Procedure, § 16.1, p. 994 (4th ed. 2007). In the typical case, this limitation is not a significant issue and the triggering state action is readily apparent. *Ibid*. In those cases

that do raise the issue, where a party attempts to attribute the actions of an individual to the state, caution is prudent.

> "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. *It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.* A major consequence is to require the courts to respect the limits of their power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order." *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 936-937 (1982) (emphasis added).

Thus state action will be found only where an individual's action can "be *fairly* attributable to the State." *Id.*, at 937 (emphasis added). In the standard criminal case, the involvement of police, prosecutors, judges, or legislatures easily satisfies this requirement. A claim of ineffective assistance, however, is different. The culprit in these claims—the incompetent attorney—is immune from state supervision, and can be more accurately characterized as an opponent of the state than one whose actions are attributable to it.

C. Defense Counsel and the State.

When a defendant is able to hire his own attorney, the State has no role in the defense beyond the minimal one of regulating admission to the bar. Denial of defendant's right to choose counsel is structural error, reversible *per se*. See *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 150 (2006). When the trial court appoints counsel for an indigent defendant, the state has a role in the initial selection but virtually no control thereafter. Ineffective assistance claims are judged by

the same standard whether counsel is retained or appointed, see *Cuyler* v. *Sullivan*, 446 U. S. 335, 344-345 (1980), so the role of the state in appointing counsel cannot determine the standard to be applied in this case.

Defense counsel is the paid opponent of the state. "The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation." ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-1.2(b) (3d ed. 1993). In other words, defense counsel's duty is "to represent his client zealously within the bounds of the law." J. Burkoff, Criminal Defense Ethics § 5.1, p. 123 (2d ed. 2010) (quoting Model Code of Professional Responsibility, EC 7-19).

In *Polk County* v. *Dodson*, 454 U. S. 312 (1981), this duty of loyalty was central to the holding that a public defender's representation of a client did not fall within color of state law. That public defenders were employees of the state did not alter the traditional attorney-client relationship. " 'Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.' " *Id.*, at 318 (quoting ABA Standards for Criminal Justice 4-3.9 (2d ed. 1980)).

Nor did the fact that defense counsel is considered an officer of the court change the analysis. Our adversarial system requires defense counsel to oppose the state.

> "The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. But it posits that a defense lawyer best

> serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client.' " *Id.*, at 318-319 (quoting *Ferri* v. *Ackerman*, 444 U. S. 193, 204 (1979)).

State effort to control the public defender's representation conflicts with the accused's Sixth Amendment right to counsel. "Implicit in the concept of a 'guiding hand' is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate." *Id.*, at 322.[2]

A successful ineffective assistance claim penalizes the state for an act over which it has no control. Not only is the state an innocent bystander throughout the process, but it is also difficult for the state to spot incompetent assistance until it is too late. "Many aspects of [defense] counsel's performance either occur outside the trial court's notice or reasonably appear to be, though they are not in fact, competent. Thus, the existence of incompetence does not necessarily imply fault on the part of the state." S. Giles, Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee, 50 U. Chi. L. Rev. 1380, 1397 (1983). Imputing counsel's error to the state forces the state to stand as an insurer against a criminal defendant's risk of incompetent counsel, thereby spreading the risk from defendants to the people through reversed convictions.

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2. The precedential value of *Polk County* is not diminished by *Georgia* v. *McCollum*, 505 U. S. 42 (1992). That case deals with the unique circumstance of defense counsel using a state-granted power to discriminate against a third person in the selection of a governmental body. *Id.*, at 52.

But criminal convictions are not accidents to be insured against, and the Sixth Amendment is not an insurance policy. While some attorney error may reasonably lead to a reversed conviction, the state cannot be required to assure an ideal trial. If counsel's error does not undermine confidence in the result, the error should not be a ground for reversal. Review of counsel's performance should not be a tool to free the guilty, but an assurance of the fundamental justice of our legal system.

Ineffective assistance litigation is a heavy burden on the criminal justice system. In noncapital cases, half of all habeas petitions claim ineffective assistance. See N. King, F. Cheesman, & B. Ostrom, Final Technical Report: Habeas Litigation in U. S. District Courts 28 (2007). Yet, of a sample of 2,384 cases, there was only *one* meritorious ineffective assistance claim. See *id*., at 52. This burden is a necessary evil where the reliability of the result is in grave doubt. It becomes far less necessary and far more evil as the question moves farther away from reliability. The *Strickland* Court did not intend to "encourage the proliferation of ineffectiveness challenges," 466 U. S., at 690, but that is exactly what it did. To place some limits on this proliferation, *Strickland's* prejudice inquiry must be precisely and narrowly construed.

II. A plea bargain is a windfall to which a criminal defendant is not entitled.

Guilty pleas would be unnecessary "in an ideal world." See *Blackledge* v. *Allison*, 431 U. S. 63, 71 (1977). Nevertheless, they have become "important components of this country's criminal justice system," *ibid*., and should be encouraged to avoid the need "to multiply by many times the number of judges and court

facilities" that would be required if every case went to trial. See *Santobello* v. *New York*, 404 U. S. 257, 260 (1971). Indeed, plea bargaining is now " 'the dominant force in criminal procedure.' " 5 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 21.1(b), p. 523 (3d ed. 2007) (quoting G. Fisher, Plea Bargaining's Triumph: A History of Plea Bargaining in America 230 (2003)).

Numerous explanations for the growth of plea bargaining have been offered, including more particularized case selection by law enforcement and prosecutors, the increasingly burdensome jury trial process, and sentencing law changes that threaten bigger and more certain penalties. See LaFave § 21.1(b), at 524-525. The most important justification, however, is dealing with overburdened court calendars. See *id.*, at 526.

The institution of plea bargaining and guilty pleas, therefore, is born from the interest in judicial efficiency, not any entitlement of a criminal defendant. Despite their advantages, plea bargains are not a required step in a criminal proceeding. This Court has made clear that "there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial." *Weatherford* v. *Bursey*, 429 U. S. 545, 561 (1977).

A plea bargain that offers a less-than-required penalty, see, *e.g.*, *Premo* v. *Moore*, 562 U. S. __, 131 S. Ct. 733, 741, 178 L. Ed. 2d 649, 661 (2011), is a windfall to a defendant. A defendant who loses a windfall has not been deprived of anything to which he was entitled.

III. *Strickland's* "reasonable probability" test for prejudice is a specific test that does not apply in every situation.

A. Reliability.

Since its inception, the right to the effective assistance of counsel has been based on the unreliability of trial without counsel. The *Strickland* Court noted that, because the right to the effective assistance of counsel is born from the Sixth Amendment, "we must take its purpose—to ensure a fair trial—as the guide." *Strickland* v. *Washington*, 466 U. S. 668, 686 (1984); see also *Lockhart* v. *Fretwell*, 506 U. S. 364, 368-369 (1993). "Thus, 'the right to effective assistance 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.' " *Fretwell*, *supra*, at 369 (quoting *United States* v. *Cronic*, 466 U. S. 648, 658 (1984)). "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." *Strickland*, *supra*, at 686.

Ensuring the reliability of results materialized in the form of *Strickland's* prejudice prong. "[T]he defendant must show . . . that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is *reliable*." *Id.*, at 687 (emphasis added). The claim before the Court in *Strickland* was a fairly typical one—counsel failed to investigate and present some mitigating evidence at trial. See *id.*, at 699-700. With this scenario in mind, the Court explained its "reliable result" principle by borrowing a standard from other rules dealing with omitted evidence. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." See *id.*, at 694

(citing *United States* v. *Agurs*, 427 U. S. 97, 104 (1976) (information not disclosed by prosecutors); *United States* v. *Valenzuela-Bernal*, 458 U. S. 858, 872-874 (1982) (deported witness)).

The *Strickland* Court made clear, however, that this test was not an end in itself but only the means to implement the general principle of reliability.

> "Although these principles [on the probability of a different outcome] should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." 466 U. S., at 696.

The key focuses are reliability and confidence that the result is just. See *ibid.* In some contexts, the test of whether there is a "reasonable probability" the result "would have been different" is not the appropriate standard for implementing the principle underlying the right to effective representation.

> "It is true that while the *Strickland* test provides sufficient guidelines for resolving virtually all ineffective-assistance-of-counsel claims, there are situations in which the overriding focus on fundamental fairness may affect the analysis. Thus, on the one hand, as *Strickland* itself explained, there are a few situations in which prejudice may be presumed. 466 U. S., at 692. And, on the other hand, there are also situations in which it would be unjust to characterize the likelihood of a different

outcome as legitimate 'prejudice.'" *Williams* v. *Taylor*, 529 U. S. 362, 391-392 (2000).

B. Exceptions to the Different Result Test.

The first exception is that in assessing the "likelihood of a result more favorable to the defendant . . . [a] defendant has no entitlement to the luck of a lawless decisionmaker." *Strickland*, 466 U. S., at 695. The reviewing court must also "exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like," or the "idiosyncrasies of the particular decisionmaker, such as the unusual propensities toward harshness or leniency." *Ibid*. Even if counsel could have employed a different strategy with these considerations in mind, and even if this could have indeed achieved a more favorable result for the defendant, these possibilities are simply "irrelevant to the prejudice inquiry." *Ibid*.

Jury nullification provides the starkest example. Defense counsel's failure to make a pitch for jury nullification, even if doing so would have gotten the defendant off altogether, does not reflect an *unreliable* result. The defendant certainly did not enjoy the most advantageous outcome, but that is far different from receiving an unfair proceeding.

Application of the "different result" standard to a result achieved by perjured testimony similarly would not further the "ultimate focus" on fairness and reliability. During his trial for fatally stabbing to death a man over a drug dispute, Emmanuel Whiteside sought to lie on the stand to corroborate a theory of self defense, but his attorney refused to let him. *Nix* v. *Whiteside*, 475 U. S. 157, 160-161 (1986). The Eighth Circuit deemed this ineffective assistance of counsel. *Id.*, at 163.

The *Nix* majority devotes most of the opinion to *Strickland's* deficient performance inquiry, and its discussion of the prejudice prong is consequently brief. Noting that "Whiteside has no valid claim that confidence in the result of his trial has been diminished by his desisting from the contemplated perjury," *id*., at 175, the majority concludes, "Even if we were to assume that the jury might have believed his perjury, it does not follow that Whiteside was prejudiced." *Id.*, at 175-176.

Justice Blackmun's concurring opinion expands on this point. He would have denied the claim solely on the prejudice ground, effectively holding that Whiteside had no claim, even if his lawyer's performance did fall below the Sixth Amendment thresholds. To reach this result, the concurrence returns to the underlying principle of the *Strickland* prejudice component. "The touchstone of a claim of prejudice is an allegation that counsel's behavior did something to 'deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*, at 184 (quoting *Strickland*, 466 U. S., at 687). The appropriate question, therefore, was whether the Court's "confidence in the outcome of Whiteside's trial is in any way undermined by the knowledge that he refrained from presenting false testimony," to which an answer in the positive is "simply untenable." *Id.*, at 185. This is true, Justice Blackmun makes quite clear, *even if* the false evidence might have changed the result. *Id.*, at 186. It is therefore not a universal rule that any alleged error by defense counsel throughout criminal proceedings which may have had a reasonable probability of changing the result satisfies *Strickland's* prejudice prong. The Court unanimously rejected Whiteside's prejudice claim even assuming the result would have been different. *Id.*, at 175-176 (majority); *id*., at 186-187 (concurrence).

In *Kimmelman* v. *Morrison*, 477 U. S. 365 (1986), Morrison's trial counsel moved for the exclusion of evidence on the grounds that it had been illegally seized, but he missed the deadline, and the motion was denied as untimely. *Id.*, at 368-369. When the federal courts granted habeas relief for ineffective assistance of counsel, the state petitioned for certiorari, asking that *Stone* v. *Powell*, 428 U. S. 465 (1976), which excluded Fourth Amendment exclusionary rule claims from reconsideration on federal habeas corpus, be extended to ineffective assistance claims where the underlying error is based on the exclusionary rule. See *Kimmelman*, 477 U. S., at 368. The Court unanimously rejected this request. *Id.*, at 382-383 (majority); *id.*, at 391 (Powell, J., concurring in the judgment).

The discussion of the "reliability" component of prejudice in *Nix*, however raises another question that could have been argued in *Kimmelman* but was not. "The more difficult question is whether the admission of illegally seized but reliable evidence can ever constitute 'prejudice' under *Strickland*." *Id.*, at 391 (Powell, J., concurring in the judgment). Justice Powell pointed to *Strickland's* "ultimate focus of inquiry" on fundamental fairness and reliability, and reasoned that a conviction obtained by illegally-seized evidence does not amount to an "unjust or unfair verdict." *Id.*, at 395-396. On the contrary, such a verdict is perhaps *more just* than a decision reached by a partially uninformed jury, from which the exclusionary rule shielded relevant and incriminating evidence. See *id.*, at 396. The only "harm" suffered by a defendant under these circumstances is the "absence of a windfall." *Ibid.* To say that the Sixth Amendment right to effective assistance of counsel protects criminal defendants from this harm "would shake that right loose from its constitutional moorings." *Id.*, at 397. *Kimmelman* did not resolve the *Strickland* prejudice argument, however, because the

State did not raise it. See *ibid*. The issue "remains an open one," *id*., at 398, to this day.

In *Lockhart* v. *Fretwell*, *supra*, the Court identified another variation to be excluded from the "different result" standard—defense counsel's failure to make an objection that, though it might have been accepted at the time of trial, is known to be meritless at the time the ineffective assistance claim is decided. See 506 U. S., at 374 (O'Connor, J., concurring). In that case, Fretwell's attorney failed to object to the Arkansas jury's consideration of a certain aggravating factor during the sentencing phase. *Id*., at 366-367. Fretwell argued that, had counsel made the objection, it would have been sustained under then-existing Eighth Circuit precedent.[3] See *id*., at 367. By the time Fretwell's ineffective assistance claim reached the Eighth Circuit, however, that court had overruled the precedent, recognizing that counsel's omitted objection would have been meritless. See *id*., at 368.

Returning to *Strickland's* underlying notions of fairness and reliability, the Court determined the "different result" standard, without more, was inappropriate to determine whether prejudice was established. "[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Id*., at 369; see also *id*., at 372; *Glover* v. *United States*, 531 U. S. 198, 202 (2001) ("*Lockhart* holds that in some circumstances a mere difference in outcome will not suffice to establish prejudice). Be-

3. The Arkansas trial court was not bound to follow Eighth Circuit precedent, however. See *id*., at 375-376 (Thomas, J., concurring); *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 58-59, n. 11 (1997) (citing *Fretwell* concurrence and referring to contrary Ninth Circuit passage as "remarkable").

cause the alleged error in this case merely "deprived [Fretwell] of the chance to have the state court make an error in his favor," 506 U. S., at 371 (quoting Brief for United States as *Amicus Curiae* 10), as a matter of law he suffered no prejudice. See *id*., at 372.

C. Right to Effective Assistance Versus Right to Reversal.

There is no question that a defendant is entitled to the "guiding hand of counsel at every step in the proceedings . . . ." *Powell* v. *Alabama*, 287 U. S. 45, 69 (1932). *Strickland*'s prejudice component addresses the question of whether an error is grounds for reversal. The prejudice discussions in *Nix*, *Kimmelman*, and *Strickland* itself demonstrate that an unprofessional error, even one that satisfies the "different result" standard, does not always warrant reversal.

In *Strickland*, there was no dispute that the omitted evidence, although weak, was relevant and admissible. See 466 U. S., at 676-677. In these circumstances, the only issue regarding the reliability of the result was whether admission of that evidence would have made a difference. See *id*., at 699-700.

In *Kimmelman*, the admissibility of the evidence was hotly disputed, though its veracity and relevance were not. As a result, *Kimmelman* added to *Strickland*'s "reasonable probability" requirement a condition that the disputed evidence actually be inadmissible. 477 U. S., at 390-391. Justice Powell believed that the entire category of Fourth Amendment exclusion claims did not jeopardize the fairness and reliability of the results, because the defendant was not denied "a fair and reliable adjudication of his guilt." *Id*., at 396. This issue remains unresolved, although Justice Powell's discussion has been favorably cited by the Court twice

since then. See *Fretwell*, 506 U. S., at 372; *Williams*, 529 U. S., at 393, n. 17 (quoting *Fretwell*).

The evidence in *Nix* lies at the opposite end of the spectrum from the evidence in *Strickland*. Lying under oath is not merely an error, it is a felony. No one could reasonably contend that a trial where a defendant is restrained from lying is thereby rendered less reliable or less likely to produce a just result. See *Nix*, 475 U. S., at 185 (Blackmun, J., concurring in the result). Where introducing evidence would be wrong, omitting that evidence cannot be prejudicial, regardless of whether it might have changed the result.

The question in these cases is not whether the defendant was deprived of a "sporting chance." See *Brady* v. *Maryland*, 373 U. S. 83, 90 (1963). It is only whether there is reason to lack confidence in the result. See *Strickland*, 466 U. S., at 691-692. The scope of reversible error is therefore narrower than the scope of the defendant's right to effective assistance. Even where an effective lawyer could have "gotten him off" by causing the system to malfunction in some way, the defendant is nevertheless not entitled to a reversal.

Where a defendant voluntarily, intelligently, and knowingly, see *Brady* v. *United States*, 397 U. S. 742, 748 (1970), enters into a guilty plea, or where a criminal defendant receives a fair adjudication of guilt during a criminal trial, there is no "breakdown in the adversarial process that our system counts on to produce just results." See *Strickland*, 466 U. S., at 696. The reliability of the result is not shaken by a claim that a more effective attorney could have achieved an outcome more favorable to the defendant. Such a strict outcome-determinative inquiry would ignore the principle underlying *Strickland*—"the ultimate focus of inquiry . . . on the fundamental fairness of the proceeding whose result is being challenged." See *ibid*. To

overturn a reliable result by rigid adherence to *Strickland*'s "different result" standard under these circumstances is, in effect, granting the defendant a "windfall." See *Fretwell*, 506 U. S., at 366. The Sixth Amendment does not require such a result.

IV. Deficient performance during plea bargaining that renders a possibly unreliable result is distinguishable from the circumstances presented here.

Adhering to *Strickland*'s underlying notions of fundamental fairness and reliability will not always foreclose a defendant from successfully claiming ineffective assistance during the plea bargaining stage. The prejudice inquiry may still be satisfied, and relief warranted, where counsel's deficiency produces a result in which we cannot place confidence.

In *Hill* v. *Lockhart*, 474 U. S. 52 (1985), Hill pleaded guilty to first-degree murder. *Id*., at 53. He sought federal habeas relief years later, claiming ineffective assistance for counsel's failure to inform him correctly of his parole eligibility prior to his guilty plea. *Id*., at 54-55. Applying the regular *Strickland* test to Hill's claim, the Court explained that the prejudice inquiry in the context of guilty pleas is whether "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." *Id*., at 59. Because Hill had not shown that his mistaken belief about his parole eligibility date was a significant reason for foregoing trial, he failed to satisfy the prejudice prong. *Id*., at 60.

In *Padilla* v. *Kentucky*, 559 U. S. __, 130 S. Ct. 1473, 1483, 176 L. Ed. 2d 284, 296 (2010), counsel's failure to advise the defendant of the deportation consequences of a guilty plea was deemed deficient performance. The

Court remanded the case for an evaluation of the prejudice inquiry. See *id*., 130 S. Ct., at 1483-1484, 176 L. Ed. 2d, at 296. Although *Padilla* did not spell out the nature of that inquiry, the clear implication is that the *Hill* standard applies. See *id*., 130 S. Ct., at 1485, 176 L. Ed. 2d, at 297.

Under circumstances such as those just described, reliability is lacking where a defendant, reasonably relying on counsel's error, pleads guilty and foregoes his or her Sixth Amendment right to a trial. A showing that the defendant had a reasonable chance of prevailing at trial cannot be required because that determination could not be made without trying the underlying case within the habeas proceeding. We cannot have confidence in the result when counsel's deficient performance is potentially the primary reason for the result, as opposed to a jury verdict following a full and fair trial or a defendant's fully-informed decision to plead guilty. Such a result lacks the "fundamental fairness" emphasized in *Strickland*.

But such reasoning is inapposite in the present cases, as Respondents did not waive their right to trial in reliance on counsel error. Their convictions were obtained as a result of fair, reliable, and constitutionally adequate criminal proceedings, and any alleged error in prior negotiations does not tarnish that result. Under these circumstances, counsels' alleged deficient performance had no impact on the fairness of the proceedings. The fundamental fairness and reliability of the result remain intact, and that is all the Sixth Amendment requires. See *Strickland*, 466 U. S., at 696.

Smith v. *Robbins*, 528 U. S. 259 (2000), and *Roe* v. *Flores-Ortega*, 528 U. S. 470 (2000), provide an informative contrast in this regard. Robbins had an appeal and was represented by appellate counsel who found no issues to brief. *Robbins*, *supra*, at 267. To establish

prejudice, Robbins had to show a reasonable probability that he would have prevailed on appeal had a brief been field. See *id*., at 285. Flores-Ortega, in contrast, had no appeal because trial counsel did not file the requisite notice. See *Flores-Ortega*, *supra*, at 474. Following *Hill*, the Court decided that "prejudice" meant only "a reasonable probability that . . . he would have appealed," *id*., at 484, not that he would have prevailed on appeal. See *id*., at 486. The difference in the two cases is between "a judicial proceeding of disputed reliability [and] the forfeiture of a proceeding itself." *Id*., at 483.

The contrast between the present cases and *Hill* is even sharper than the contrast between *Robbins* and *Flores-Ortega*. In these cases not only have defendants not "forfeit[ed] a judicial proceeding to which [they were] otherwise entitled," *id*., at 485, they do not, at this point, even challenge the reliability of the proceedings that did result in their convictions.

* * *

The question added by the Court in both of these cases is, "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?" The answer, *amici* submit, is none. "To hold otherwise would grant criminal defendants a windfall to which they are not entitled." *Fretwell*, 506 U. S., at 366.

CONCLUSION

The decisions of the United States Court of Appeals for the Sixth Circuit and the Court of Appeals of Missouri should be reversed.

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Respectfully submitted,

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