No. 10-209

In the Supreme Court of the United States

BLAINE LAFLER, PETITIONER

v.

ANTHONY COOPER

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a state habeas petitioner is 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.

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

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INTEREST OF THE UNITED STATES

This case presents an asserted Sixth Amendment claim of ineffective assistance of counsel based on allegedly deficient advice to forgo a guilty plea, after which the defendant was convicted at a fair trial. Although this case involves a claim by a state prisoner under 28 U.S.C. 2254, the Court's analysis will likely affect federal prisoners' ineffectiveness claims under 28 U.S.C. 2255. The United States therefore has a substantial interest in the resolution of this case.

STATEMENT

Following a jury trial in the Circuit Court of Wayne County, Michigan, respondent was convicted of assault with intent to murder, being a felon in possession of a

firearm, possession of a firearm in the commission of a felony, and misdemeanor possession of marijuana. He was sentenced to 185 to 360 months of imprisonment. The Michigan courts denied postconviction relief, but the district court granted habeas corpus relief on grounds of ineffective assistance of counsel in plea negotiations. The court ordered the State either to reinstate a plea offer that respondent had declined before trial or to release respondent altogether. The court of appeals affirmed. Pet. App. 1a-22a.

1. The evidence showed that, on March 25, 2003, respondent shot Kali Mundy on a street in Wayne County, Michigan. Respondent drew a handgun, pointed it at Mundy's head, and fired from a range of six feet. The shot missed and Mundy ran, but respondent continued to fire and two shots struck Mundy, in her buttocks and thigh. One bullet pierced Mundy's intestines, inflicting a life-threatening injury that required surgery and continues to cause Mundy daily pain. A police officer witnessed the shooting, and respondent was apprehended almost immediately. Pet. App. 2a-3a.

2. After the preliminary examination hearing, the prosecutor communicated a verbal plea offer to respondent's lawyer, Brian McClain. Under the proposal, respondent would have been allowed to plead guilty to assault with intent to murder and would have faced a below-sentencing-guidelines minimum sentence of 51 to 85 months of imprisonment. Respondent was willing to accept a plea offer because he "was guilty," but McClain changed respondent's mind by telling him that, because the victim was injured below the waist, the State could not establish the element of intent. McClain believed that, closer to trial, the prosecutor would ultimately offer a plea deal of 18 to 84 months, even though he later

acknowledged that he was unaware of any instance in which a prosecutor's plea offer had improved by the time of trial absent a change in the evidence. Pet. App. 4a-5a. When the prosecutor reduced the offer to writing, McClain rejected it, stating on the record that the offer was "not reasonable" and that the prosecutor had insufficient evidence to try the case. *Id.* at 5a. At that point, the prosecutor withdrew the offer. The court did not ask respondent for his views and respondent did not volunteer any comment. *Ibid.*

Before trial, respondent sent a letter to the court offering to plead guilty to felonious assault, which carried a lower sentence than the deal offered by the prosecutor. In the letter, he stated that Mundy had a gun and that he shot her because he believed she was going to harm another person. Lacking the authority to compel the prosecutor to accept such a deal, the court took no action. Then, on the first day of trial, the prosecution offered respondent a plea deal less favorable than its earlier offer: the guidelines range for respondent's minimum sentence would have been 126 to 210 months. Respondent rejected the offer. Pet. App. 6a.

3. At trial, the defense did not dispute that respondent had committed the shooting. Instead, the defense offered testimony about a previous dispute between Mundy and a companion of respondent's; the defense argued that Mundy was responsible for the confrontation and, indeed, had been lying in wait for respondent. The defense also advanced the theory that the location of Mundy's injuries suggested a lack of intent to kill. Pet. App. 6a.

The jury found respondent guilty on all charges. See p. 2, *supra*. The trial court imposed a sentence of 185 to 360 months of imprisonment. Pet. App. 6a-7a.

4. Respondent did not appeal. In a postconviction proceeding in state court, however, he argued that McClain had rendered ineffective assistance by, among other things, counseling him to reject the prosecutor's plea offer. After an evidentiary hearing at which both respondent and McClain testified, the state trial court rejected the claim, finding that both respondent and McClain were convinced that respondent could not be convicted of assault with intent to murder and that "[respondent] had made his own choices." Pet. App. 7a.

The Michigan Court of Appeals affirmed in an unpublished per curiam opinion. Pet. App. 44a-47a. The court reasoned that "[t]he record shows that [respondent] knowingly and intelligently rejected two plea offers and chose to go to trial." *Id.* at 45a.

The Michigan Supreme Court denied respondent's application for leave to appeal. Pet. App. 43a.

5. Respondent then filed a federal habeas petition under 28 U.S.C. 2254, in which he renewed his ineffective-assistance claim. The district court conditionally granted relief. Pet. App. 24a-32a. The court concluded that the state courts had unreasonably applied the clearly established standards governing ineffective-assistance claims, as set forth in *Strickland* v. *Washington*, 466 U.S. 668 (1984). Pet. App. 38a. The court held that McClain had provided respondent with ineffective assistance by advising him that the circumstances failed to satisfy the elements of assault with intent to commit murder and that McClain could negotiate a better deal. *Id.* at 38a-40a.[1]

[1] As for whether that deficient performance prejudiced respondent, the district court recited the Sixth Circuit's test for prejudice in this context ("whether there is a reasonable probability that the petitioner would have pleaded guilty"), Pet. App. 36a, but never specifically ad-

The district court concluded that the remedy should be "specific performance" of the plea deal that respondent would have accepted but for McClain's advice. Pet. App. 40a-41a. Accordingly, the court required the State to offer respondent a sentence agreement of 51 to 85 months or to release him. *Id.* at 42a.

6. The court of appeals affirmed the grant of habeas relief. Pet. App. 1a-22a.

The court of appeals applied a modified version of the two-part *Strickland* test to respondent's ineffective-assistance claim. Pet. App. 12a. First, the court examined whether respondent had demonstrated that McClain's advice to plead not guilty was deficient. Second, the court applied its own precedent regarding prejudice in cases involving forgone guilty pleas and inquired whether respondent had "show[n] a '*reasonable probability* that, but for his counsel's erroneous advice . . . he would have accepted the state's plea offer.'" *Ibid.* (quoting *Magana* v. *Hofbauer*, 263 F.3d 542, 551 (6th Cir. 2001)). Under that standard, the court concluded, respondent was entitled to habeas relief, whether or not the deferential standard of review under 28 U.S.C. 2254(d)(1) applied. Pet. App. 11a; see also *id.* at 19a & n.4.

a. The court of appeals concluded that McClain was "wrong" in advising respondent that the prosecution could not establish the element of intent because Mundy

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dressed whether respondent had made that showing. See *id.* at 34a-40a. In his habeas petition, respondent averred that he would have accepted the plea offer, although he did not discuss whether the trial court would likely have accepted the plea or what maximum sentence the trial court would have imposed. See Mem. of Law in Supp. of Pet. for Writ of Habeas Corpus 16-17; see also Pet. Br. 5 & n.1 (discussing Michigan sentencing procedure).

was shot below the waist. Pet. App. 13a. The court emphasized that McClain had not just made a poor prediction about a trial's outcome or informed respondent of an incorrect legal rule; rather, he had "focused" on the incorrect rule and advised respondent not to accept the plea deal because he thought a conviction for assault with intent to murder "could not" occur. *Id.* at 14a-15a. That advice, the court concluded, was constitutionally deficient, and the state court was unreasonable in holding the contrary. *Id.* at 15a-16a.

b. The court of appeals rejected the State's argument that respondent had suffered no prejudice because he was convicted at a fair and error-free trial and sentenced accordingly. Pet. App. 17a-19a. In the court's view, respondent had established prejudice by showing that he would have accepted the plea offer but for counsel's advice, *id.* at 16a-17a, and that he ultimately received a sentence "greater than that promised by the plea deal," *id.* at 18a. Thus, the court concluded, respondent "lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him." *Id.* at 19a.

c. Finally, the court of appeals concluded that the district court had not abused its discretion in ordering specific performance. The court stated that federal courts have "wide latitude in structuring * * * habeas relief," Pet. App. 20a (citation omitted), and that the relief chosen by the district court "remedies the constitutional violation without unduly infringing upon the state's interests." *Id.* at 21a. The court acknowledged that "there are such interests to be taken into account," though it did not identify them. *Ibid.*

SUMMARY OF ARGUMENT

I. The purpose of the Sixth Amendment right to the effective assistance of counsel is to ensure that the defendant receives a fair trial that reliably determines his guilt or innocence. That purpose is central to this Court's cases defining the elements of an ineffective-assistance claim.

The element at issue here requires a defendant to show prejudice, *i.e.*, a "reasonable probability" that his counsel's deficient performance affected the outocme of the proceeding. *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984). A defendant must show more than that the attorney's actions were the but-for cause of an unfavorable outcome. This Court has rejected a test of "[s]heer outcome determination"; the defendant has not shown prejudice "if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Lockhart* v. *Fretwell*, 506 U.S. 364, 370, 372 (1993).

Respondent cannot make the necessary showing. Respondent was convicted after a fair trial, and advice to forgo a guilty plea, including a plea bargain, did not "deprive the defendant of any substantive or procedural right to which the law entitles him." First, a not-guilty plea is merely an *assertion* of the defendant's constitutional right to a trial; unlike a guilty plea, a not-guilty plea does not waive anything and does not produce a conviction. The assertion of rights cannot, by itself, be cognizable prejudice. Second, errors made in plea-bargaining negotiations do not rise to the level of cognizable prejudice: a defendant has no constitutional right to plea-bargain, and even if a bargain is reached, the prosecution and the judge have discretion to reject that bargain before the defendant gains any enforceable enti-

tlement. Third, and relatedly, respondent cannot contend that the sentence he received after his fair trial demonstrates prejudice because it is longer than the sentence he might have received under the plea bargain. The bargain was never adopted by the parties or accepted by the trial court, and the premises on which it would have rested (avoiding the costs and risks of trial, obtaining respondent's cooperation, showing acceptance of responsibility) were eliminated when the case went to trial. Accordingly, respondent cannot show any legal entitlement to be resentenced now in accordance with the bargain he declined in 2003.

II. The absence of any coherent remedy for the Sixth Amendment violation that the court of appeals identified illustrates the flaws in the court's prejudice analysis. Remedies for Sixth Amendment violations must "be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). Neither the remedy imposed here, nor any other remedy identified by other courts, intelligibly remedies the injury that the court of appeals identified.

Reversing respondent's conviction would not be a tailored remedy, for a simple reason: guilt has never been in dispute. Respondent was found guilty at an undisputedly fair trial, and his constitutional theory is that he should have pleaded guilty sooner. Setting aside his conviction and requiring the State to retry him does nothing to remedy the constitutional error the court of appeals identified; that disposition will lead only to a windfall (if respondent is acquitted because the passage of time has degraded the State's evidence) or to a wasteful and time-consuming proceeding (a fair trial that duplicates the one respondent already received).

Nor is "specific performance," the remedy ordered below, either appropriate or tailored. Respondent never had a legal entitlement to the sentence proposed in the original plea offer; indeed, if he had accepted the offer he would have had no such entitlement until the court accepted the plea and imposed sentence. Specific performance thus puts him in a better position than if no constitutional violation had occurred.

Imposing the plea agreement on the prosecution years after the fact also contravenes important principles of plea bargaining and the separation of powers. Plea bargaining rests on mutuality of advantage. Plea offers like the one respondent received avoid the uncertainty, expense, and human toll of a trial, and they may secure the defendant's cooperation in other cases. When the facts change, the plea offers change, and the facts of respondent's situation have significantly changed since 2003. Nonetheless, the courts below imposed a remedy that ignores those changed circumstances and gives respondent a substantial *quid* for essentially no *quo*. Imposing that unbalanced remedy improperly denies both the prosecution and the sentencing court their proper roles in deciding what charges to bring and what sentence ultimately to impose.

ARGUMENT

I. A DEFENDANT DOES NOT SUFFER COGNIZABLE PREJUDICE WHEN HE DECLINES TO PLEAD GUILTY AND IS CONVICTED AT A FAIR AND ERROR-FREE TRIAL

A defendant's Sixth Amendment rights are not violated when counsel's advice, however deficient, causes the defendant no cognizable prejudice. *Strickland* v. *Washington*, 466 U.S. 668, 691-696 (1984). The defen-

dant suffers no such prejudice when he rejects a guilty plea that, in hindsight, would have been to his advantage if accepted and entered. If the result of his decision not to waive his rights by pleading guilty is a fair and error-free trial, the Sixth Amendment guarantees no more.[2]

A. Prejudice Requires An Effect On The Trial That Calls Its Fairness Into Question

In *Strickland*, this Court phrased the prejudice inquiry as calling for "a reasonable probability" of a "different * * * outcome." 466 U.S. at 694. But *Strickland*'s test does not mean that *any* difference in probable outcome constitutes prejudice. Rather, the type of prejudice that qualifies is determined by the purpose of *Strickland*'s guarantee: to provide assistance of counsel at trial (or in deciding to waive trial).

1. The purpose of the Sixth Amendment right to counsel is to secure a fair trial

Setting out the test for ineffective assistance of counsel in *Strickland*, this Court began with the well-established principle "that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." 466 U.S. at 684. As the Court has long recognized, "the core purpose of the [Sixth Amendment] counsel guarantee was to assure 'Assistance' *at trial*, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States* v. *Cronic*, 466 U.S.

[2] Throughout this brief, references to "trial" broadly include both guilt and sentencing proceedings; counsel's deficient performance may cause prejudice not only at trial, but at other adjudications of guilt (plea hearings) or at sentencing. See, *e.g.*, *Hill* v. *Lockhart*, 474 U.S. 52 (1985) (guilty-plea proceeding); *Glover* v. *United States*, 531 U.S. 198 (2001) (sentencing).

648, 654 (1984) (quoting *United States* v. *Ash*, 413 U.S. 300, 309 (1973)) (emphasis added)); see also *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 275, 276 (1942). Indeed, the proposition that the Constitution requires not just the assistance of counsel, but *effective* assistance, has its origins in the requirement that the criminal trial, the proceeding by which a defendant is deprived of liberty, provide due process of law. See *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 147 (2006); *McMann* v. *Richardson*, 397 U.S. 759, 771 n.14 (1970).

As respondent notes (Br. in Opp. 21), the right to counsel does not begin at trial. But a pretrial proceeding's impact on trial is what determines its coverage by the counsel guarantee. This Court has extended the right to counsel to "pretrial events that might appropriately be considered to be *parts of the trial itself*." *Ash*, 413 U.S. at 310 (emphasis added); accord *Gonzalez-Lopez*, 548 U.S. at 147. At these "'critical' pretrial proceedings, * * * the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both, in a situation where the results of the confrontation might well settle the accused's fate and reduce the trial itself to a mere formality." *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984) (brackets in original; citations and internal quotation marks omitted). Thus, the right to counsel attaches at those stages "where counsel's absence *might derogate from the accused's right to a fair trial.*" *United States* v. *Wade*, 388 U.S. 218, 226 (1967) (emphasis added); accord, *e.g.*, *Mickens* v. *Taylor*, 535 U.S. 162, 166 (2002).

Respondent thus is incorrect in treating the pretrial right to counsel as a free-standing constitutional norm untethered from the trial process. See Br. in Opp. 20-21.

Rather, as this Court has emphasized, the right to the effective assistance of counsel is "recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Cronic*, 466 U.S. at 658.

2. The Sixth Amendment prejudice standard focuses on the constitutional purpose of preserving trial integrity, not on comparing hypothetical outcomes

Because the right to effective assistance "derive[s] * * * from the purpose of ensuring a fair trial," this Court has explained, "logically enough, * * * the limits of that right [also derive] from that same purpose." *Gonzalez-Lopez*, 548 U.S. at 147; see *Strickland*, 466 U.S. at 686. The "ultimate focus" of the prejudice inquiry, therefore, is on whether the attorney's performance impaired the "fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696.

a. The central importance of ensuring the reliability of trial proceedings led the Court to adopt the "reasonable probability" standard for showing prejudice. A defendant may establish prejudice under *Strickland* even if he cannot show that the attorney's error more likely than not affected the outcome. 466 U.S. at 694. Rather, the defendant need only "show that there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Ibid.* (emphasis added).

That less-than-a-preponderance standard is supported by two reasons that are relevant here. First, ineffective assistance of the sort at issue in *Strickland* "asserts the absence of one of the crucial assurances

that the result of the proceeding is reliable." 466 U.S. at 694. As a result, "finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower." *Ibid.* And second, when ineffective assistance is sufficiently prejudicial to call the result of the proceeding into question, the remedy is a new proceeding, not an imposition of the opposite outcome—*e.g.*, a new trial, not a judgment of acquittal.

Thus, the Court concluded, an ineffective-assistance claim does not focus on showing that the *outcome* was incorrect—which presumably would require at least a preponderance of evidence. See *Strickland*, 466 U.S. at 693-694. Rather, because the focus is on whether "the proceeding itself [was rendered] unfair" and its result "unreliable," the requisite showing is one "sufficient to undermine confidence in the outcome." *Id.* at 694. And as a result, a new trial—with constitutionally effective counsel—provides a complete Sixth Amendment remedy, irrespective of the outcome of that new trial. See, *e.g.*, *Kimmelman* v. *Morrison*, 477 U.S. 365, 389 (1986) (remedy for ineffective assistance is retrial).

b. For similar reasons, *Strickland* prejudice is not established merely by showing that different conduct by the attorney would have produced a different result. *Lockhart* v. *Fretwell*, 506 U.S. 364, 370 (1993) ("[s]heer outcome determination" is not always enough to show Sixth Amendment prejudice). Indeed, in *Fretwell*, raising a particular objection would have produced a sentence of life imprisonment rather than death, *id.* at 376 (Stevens, J., dissenting), but the Court found no *cognizable* prejudice. The Sixth Amendment does not require setting aside a conviction or sentence based on prejudice to "a right the law simply does not recognize." *Id.* at 370 (majority opinion) (citation omitted); *id.* at 375 (O'Con-

nor, J., concurring) (citation omitted). Rather, the difference must reflect a lack of confidence in the reliability of the proceeding.

In *Fretwell*, defense counsel failed to raise an objection, based on a federal appellate decision that was then good law, that would have invalidated the sole aggravating circumstance on which Fretwell's capital sentence rested. Had that aggravator been stricken before the verdict, therefore, Fretwell would have been acquitted of the death penalty. See 506 U.S. at 366-367. Fretwell contended that his lawyer's failure to raise the objection prejudiced him because it resulted in a death sentence—even though the case that the lawyer had failed to cite was subsequently overruled. *Id.* at 368. The Court concluded that Fretwell had shown that "the outcome would have been different but for counsel's error," *id.* at 369-370, but had not shown prejudice under the Sixth Amendment. The result of the trial is not rendered unreliable "if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Id.* at 372; see *id.* at 369-372.

Similarly, in *Nix* v. *Whiteside*, 475 U.S. 157 (1986), the defendant argued that he received ineffective assistance because his counsel refused to cooperate in presenting perjured testimony. If the defendant had presented that testimony, there might have been a reasonable probability that the jury would not have returned a guilty verdict. The Court held, however, that "as a matter of law, counsel's conduct * * * cannot establish the prejudice required for relief under the second strand of the *Strickland* inquiry." *Id.* at 175.

This Court has since reiterated its understanding that a "likelihood of a different outcome" will not itself

qualify as "legitimate 'prejudice'" because "prejudice" relevant under *Strickland* requires that "'counsel's deficient performance render[] the result of the trial unreliable or the proceeding fundamentally unfair.'" *Williams* v. *Taylor*, 529 U.S. 362, 392, 393 n.17 (2000) (quoting *Fretwell*, 506 U.S. 372). No separate inquiry into fundamental fairness is required once cognizable *Strickland* prejudice is shown. *Id.* at 393; accord *Glover* v. *United States*, 531 U.S. 198, 204 (2001). But a defendant must establish that counsel's deficient performance deprived him of a "substantive or procedural right to which the law entitles him." *Williams*, 529 U.S. at 393.

3. Ineffective assistance at a pretrial stage causes prejudice when it affects the reliability of the trial

The foregoing principles apply fully to claims of ineffective assistance before trial. In every case in which this Court has applied the *Strickland* test to claims of pretrial error by counsel (whether committed in or out of court), the claim was that the error in some way affected the trial process or unfairly resulted in a waiver of trial altogether.[3]

This Court's treatment of pretrial ineffective assistance that leads to the entry of a guilty plea well illustrates those principles. When a defendant challenges his guilty plea based on the ineffective assistance of counsel, the defendant must demonstrate a reasonable

[3] See, *e.g.*, *Premo* v. *Moore*, 131 S. Ct. 733 (2011) (claim that counsel misadvised defendant to plead guilty without first seeking to suppress his confession); *Padilla* v. *Kentucky*, 130 S. Ct. 1473 (2010) (claim that counsel failed to advise defendant who pleaded guilty about immigration consequences of his guilty-plea conviction); *Bell* v. *Thompson*, 545 U.S. 794 (2005) (claim that counsel failed to determine defendant's mental condition before trial); *Kimmelman*, *supra* (claim that counsel failed to make a pretrial discovery request and suppression motion).

probability that, but for counsel's errors, he would have pleaded not guilty and proceeded to trial. See *Premo* v. *Moore*, 131 S. Ct. 733, 743 (2011); *Hill* v. *Lockhart*, 474 U.S. 52, 58-59 (1985). Such an error affects the reliability of the process by which the defendant was convicted: unlike a not-guilty plea, see pp. 17-18, *infra*, a guilty plea is both a conviction and a waiver of the right to trial. The prejudice standard accordingly "closely resemble[s]" the assessment of trial prejudice. *Hill*, 474 U.S. at 59-60.

In other contexts, too, this Court has held that demonstrating a pretrial infringement of the right to counsel requires a showing that the challenged conduct impaired the defendant's right to a fair trial. Thus, for example, the Court has concluded that denial of counsel at a post-indictment lineup does not justify reversing the subsequent conviction if the lineup results are not admitted at trial and any in-court identification by the witness rests on observation of the defendant independent of the lineup. *Wade*, 388 U.S. at 239-240.[4] See also *Kimmelman*, 477 U.S. at 389 (prejudice from failure to file timely pretrial suppression motion derived from challenged evidence's admission at trial and effect on verdict).[5]

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[4] This Court has applied a different rule in the context of the Sixth Amendment "right to be free of uncounseled interrogation," which is violated by the interrogation rather than the admission of evidence, because of counsel's special "'usefulness * * * at th[at] particular [pretrial] proceeding.'" *Kansas* v. *Ventris*, 129 S. Ct. 1841, 1846 (2009) (quoting *Patterson* v. *Illinois*, 487 U.S. 285, 298 (1988)) (second brackets in original). Uncounseled interrogation, however, raises unique concerns because of its potential to generate incriminating evidence that will render the trial a formality (or nearly so). See *id.* at 1845; *Massiah* v. *United States*, 377 U.S. 201, 206 (1964).

[5] In instances of complete deprivation of counsel, or counsel laboring under a conflict that actually affected his performance, this Court has

B. A Defendant Who Forgoes A Guilty Plea And Is Convicted At A Fair Trial Suffers No Sixth Amendment Prejudice From Counsel's Performance In Plea Negotiations

Respondent does not dispute that his trial and sentencing proceedings were fair and resulted in no constitutional error. Nor did the court of appeals. Respondent must therefore identify some cognizable prejudice stemming from his decision *not* to plead guilty. That he cannot do. A not-guilty plea is merely an assertion of rights; it does not itself cause any prejudice. And respondent cannot show prejudice merely by comparing the sentence he received to the sentence in the State's plea offer. Even had respondent decided to accept the plea offer, he would have had no legal entitlement to be sentenced in accordance with the agreement, or indeed to enter the contemplated plea. He therefore cannot show prejudice to any "substantive or procedural right to which the law entitles him." *Williams*, 529 U.S. at 393; *Fretwell*, 506 U.S. at 372.

1. Respondent contends (Br. in Opp. 19-20) that because deficient advice to enter a *guilty* plea may cause prejudice under the Sixth Amendment, so too may advice to enter a *not-guilty* plea. But the two types of plea have distinct consequences. A guilty plea both waives trial and results in a conviction, and in both respects can lead to the sort of prejudice that this Court described in *Strickland*, *i.e.*, prejudice to the reliability of the proceeding. Neither consequence results from a not-guilty plea.

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presumed that such prejudice exists. *Cronic*, 466 U.S. at 659 & n.25.

The entry of a guilty plea involves the ultimate determination of criminal liability and, in that sense, produces the same results as a guilty verdict after a trial. See *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969) ("[A] plea of guilty is more than an admission of conduct; it is a conviction."); see also *Mabry* v. *Johnson*, 467 U.S. 504, 507-508 (1984) (guilty pleas implicate the Constitution because they give rise to a conviction and punishment). Because valid guilty pleas waive the right to trial (and other associated rights) and lead automatically to conviction, the Constitution requires that they be knowing and voluntary and that the trial court ensure that those requirements are satisfied. See *Parke* v. *Raley*, 506 U.S. 20, 28-29 (1992); *Boykin*, 395 U.S. at 242; see also, *e.g.*, Fed. R. Crim. P. 11 (setting forth a detailed procedure governing the acceptance of guilty pleas and the concomitant waiver of trial rights).

No equivalent requirements govern not-guilty pleas, because such pleas are not tantamount to conviction and are effective whether or not they are made knowingly and voluntarily. "[A] not-guilty plea is a waiver of nothing; it is an *invocation* of the constitutional right to a trial." *Williams* v. *Jones*, 571 F.3d 1086, 1098 (10th Cir. 2009) (Gorsuch, J., dissenting), cert. denied, 130 S. Ct. 3385 (2010). Such pleas have legal significance only in that they put the government to its proof at a subsequent trial.

2. Nor can respondent show prejudice merely by pointing to deficient advice during plea bargaining that *could* have led to a guilty plea. "[T]here is no constitutional right to plea bargain." *Weatherford* v. *Bursey*, 429 U.S. 545, 561 (1977). Thus, in *Weatherford*, the Court rejected the notion that interference with the attorney's ability to plea-bargain has constitutional signifi-

cance. An undercover agent had attended meetings between Bursey and his lawyer; the court of appeals held that the agent violated Bursey's right to a fair trial in part because the agent lulled Bursey into a false sense of security, depriving him of the opportunity to consider whether plea bargaining might be his best course. See *Bursey* v. *Weatherford*, 528 F.2d 483, 487 (4th Cir. 1975). This Court rejected that holding on the ground that plea-bargaining is not a right protected by the Constitution. 429 U.S. at 561. Respondent here had no "substantive or procedural right" to engage in plea negotiation at all. *Williams*, 529 U.S. at 393; *Fretwell*, 506 U.S. at 372.[6]

3. The court of appeals emphasized that the minimum sentence that respondent actually received after his fair and error-free trial was longer than the minimum sentence contemplated by the plea bargain respondent rejected. But as *Fretwell* illustrates, that bare comparison is insufficient. Even if respondent would have accepted the plea offer had he received better advice, he would have had no entitlement to enter the guilty plea and receive the agreed-upon sentence.

a. Until the offer gives rise to an agreement between the parties and the defendant enters a valid guilty plea pursuant to the agreement's terms, the offer has no legal force. Respondent thus cannot show that, even if he had contacted the prosecutor to accept the offer, the prosecutor necessarily would have gone forward with it;

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[6] In *Burger* v. *Kemp*, 483 U.S. 776 (1987), the Court rejected the notion that counsel's failure to secure a plea showed that a conflict of interest had adversely affected his representation (a lesser standard than *Strickland* prejudice, see *id.* at 793), because the prosecutor did not wish to plea-bargain and rebuffed counsel's overtures. See *id.* at 785-786.

nothing in the Constitution would have precluded the prosecutor from withdrawing it. In *Johnson*, *supra*, the prosecutor withdrew his plea offer when defense counsel contacted him to accept the offer. This Court rejected the notion that the withdrawal violated due process, and it explained that "[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*." 467 U.S. at 507 (emphasis added). Even if the prosecutor was "negligent or otherwise culpable" in withdrawing the plea offer, the Constitution's concern is only "with the manner in which persons are deprived of their liberty." *Id.* at 511.[7] Thus, only the entry of a guilty plea, not the acceptance of a plea offer, implicates substantive or procedural constitutional rights; it is the guilty plea, not the plea offer or agreement, that calls the Constitution into play. *Id.* at 507-508.[8]

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[7] This constitutional principle is well established in Michigan and federal practice as well. See, *e.g.*, *In re Robinson*, 447 N.W.2d 765, 769 (Mich. Ct. App. 1989); *People* v. *Heiler*, 262 N.W.2d 890, 895 (Mich. Ct. App. 1977) ("[Plea] agreements are not binding upon the prosecutor, in the absence of prejudice to a defendant resulting from reliance thereon, until they receive judicial sanction, [any more] than they are binding upon defendants (who are always free to withdraw from plea agreements prior to entry of their guilty plea * * * ."); *United States* v. *Springs*, 988 F.2d 746, 749 (7th Cir. 1993).

[8] Even when the prosecution breaches the terms of a plea agreement after entry of a guilty plea, the defendant has no automatic entitlement to specific performance of the agreement, for courts have discretion simply to nullify the agreement instead and to allow the defendant to re-plead. See *Johnson*, 467 U.S. at 510 n.11; *Santobello* v. *New York*, 404 U.S. 257, 262-263 (1971).

b. Furthermore, even if respondent and the prosecutor had agreed that respondent would plead to particular charges and receive a particular minimum sentence, that agreement would not have bound the trial judge. "There is, of course, no absolute right to have a guilty plea accepted." *Santobello* v. *New York*, 404 U.S. 257, 262 (1971). In both the Michigan and federal systems, trial judges have express authority to reject plea agreements that set forth a specific sentence or sentencing range. See *People* v. *Williams*, 626 N.W.2d 899, 900 (Mich. 2001); *People* v. *Killebrew*, 330 N.W.2d 834, 838 (Mich. 1982); Fed. R. Crim. P. 11(c)(3)(A). Under those circumstances, the defendant has the opportunity to withdraw the guilty plea—which would have put respondent back in the same situation in which his counsel's advice put him.

c. The speculative nature of both inquiries—whether the prosecutor's offer would have ripened into an agreement, and whether the court would have accepted it—precludes a finding of prejudice. *Strickland* made clear that prejudice cannot be based on "the idiosyncracies of the particular decisionmaker," any more than it could be based on "arbitrariness, whimsy, [or] caprice." 466 U.S. at 695. Under *Strickland*, a defendant cannot show that his attorney's advice caused him prejudice when intervening steps in the chain of causation depend on substantial prosecutorial and judicial discretion.

d. Even if a forgone plea offer could establish cognizable prejudice, respondent here has made no effort to demonstrate as a *factual* matter that the two crucial contingencies would have come out in his favor if he had accepted the plea offer. First, he would have to show that the prosecutor would not have withdrawn the plea

offer before sentencing. Cf. Pet. Br. at 3, *Missouri* v. *Frye*, No. 10-444 (explaining that the defendant subsequently committed another offense and the prosecutor's practice was to withdraw plea offers if the defendant reoffended); *Riggs* v. *Fairman*, 178 F. Supp. 2d 1141, 1153 (C.D. Cal. 2001) (noting that the particular plea offer was based on a misunderstanding of law and the prosecution might well have realized its error before the plea was entered), aff'd, 399 F.3d 1179, reh'g en banc granted, 430 F.3d 1222 (9th Cir. 2005), appeal dismissed.[9] Second, he would have to show that the trial court would have both accepted the guilty plea and imposed the sentence to which he now claims a legal entitlement. Respondent has made neither of those showings, nor did the courts below even inquire into either of those contingencies.

4. This Court's decision in *Glover*, *supra*, is not to the contrary. *Glover* confirmed that ineffective assistance *at sentencing* is prejudicial if it results in a longer term of imprisonment—even only a few months longer. 531 U.S. at 203-204. But that is because the attorney's error affects the sentencing proceeding itself and thus calls its reliability into question. See *Williams*, 529 U.S. at 393. Glover's attorney failed to challenge a Sentencing Guidelines calculation "which, if it [was] error, would have been correctable on appeal." *Glover*, 531 U.S. at 204. Because at the time the federal Sentencing Guidelines were binding on district courts and "constrained [their] discretion," Glover could show that the calculation error directly affected the sentence. *Ibid.* By contrast, the Court noted, it was *not* holding that a defen-

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[9] Prosecutors also remain able to withdraw from a plea agreement if the defendant breaches the agreement after the plea is entered.

dant could show prejudice simply by asserting that his sentence was increased as a result of other errors at earlier stages before sentencing. *Ibid.* ("This is not a case where trial strategies, in retrospect, might be criticized for leading to a harsher sentence.").

Respondent's sentencing proceeding, like his trial, was concededly fair. Indeed, as this Court's previous encounter with the questions presented here illustrates, a constitutional claim like respondent's ignores the fairness of the sentencing proceeding just as it ignores the fairness of the trial: in *Arave* v. *Hoffman*, 552 U.S. 117 (2008) (per curiam), the district court had already awarded Hoffman a new sentencing proceeding and the State had acquiesced in that ruling, but the Ninth Circuit nonetheless held that Hoffman was entitled to reinstatement of a plea agreement he had previously declined. *Id.* at 117-118. Thus, on the view of courts like those below and the Ninth Circuit in *Hoffman*, even an entirely new sentencing with new counsel would not cure the constitutional violation.[10]

Furthermore, unlike Glover, respondent cannot show that his attorney made an error that caused his sentence to increase: the indeterminate sentence respondent ultimately received was based on the convictions obtained after the fair trial and the resulting sentencing-guidelines calculations, which were correct. As shown above, the prosecutor's extension of a plea offer does not establish that respondent would have been *entitled* to the sentencing range reflected in the offer.

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[10] After this Court granted certiorari, Hoffman abandoned his plea-bargaining claim (presumably content to return to state court for resentencing), and this Court vacated the relevant decisions below as moot. 552 U.S. at 118-119.

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As Judge Gorsuch explained in his dissenting opinion in *Williams*, 571 F.3d at 1105, counsel's error here deprived respondent of an *opportunity* rather than a right—much as if counsel had neglected to make a personal pitch for a lenient sentence recommendation to a prosecutor whom he knew to be routinely receptive to such pitches. In such a scenario, as here, the lawyer's ineptness might potentially have cost his client a more favorable sentence. But "in neither case could the defendant complain that he * * * was deprived of a legal entitlement such that the judgment of conviction was unfair." *Ibid.* Because respondent lost no such legal entitlement when he followed his attorney's advice to plead not guilty, the court of appeals erred in finding prejudice.

II. THE ABSENCE OF ANY COHERENT REMEDY FOR A FORGONE PLEA CONFIRMS THAT RESPONDENT SUFFERED NO SIXTH AMENDMENT PREJUDICE

This Court has held that "[c]ases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). The remedy devised by the courts below fails that test. Some courts considering claims like respondent's have vacated the conviction and ordered a new trial.[11] Others, including

[11] See, *e.g.*, *United States* v. *Gordon*, 156 F.3d 376, 381-382 (2d Cir. 1998); see also *State* v. *Greuber*, 165 P.3d 1185, 1190 (Utah 2007) (citing cases).

the courts below,[12] have (Pet. App. 21a n.5) modified that approach by ordering the conviction invalidated *unless* the prosecution reinstates the same plea offer it originally made.[13] Neither reversal of the conviction, nor compelled reinstatement of a plea offer, nor giving one party the opportunity to choose between them is an appropriate remedy. Indeed, all of the alternative remedies devised by other courts suffer from similar flaws. The inability to develop an appropriately tailored remedy underscores those courts' error in identifying a Sixth Amendment violation in the first place.[14]

A. A Remedy That Vacates The Conviction Is Not Tailored To The Purported Sixth Amendment Violation

Respondent was found guilty after a fair trial. He now contends that he should have pleaded guilty sooner and thus obtained a shorter sentence. Plainly, therefore, any remedy that upsets the finding of respondent's guilt has nothing to do with respondent's constitutional claim. That form of relief is not a valid remedy, because they put the defendant in a *better* position than if he had never received the deficient advice.

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[12] See, *e.g.*, *Hoffman* v. *Arave*, 455 F.3d 926, 942-943 (9th Cir. 2006), vacated in part as moot, 552 U.S. 117 (2008); *State* v. *Kraus*, 397 N.W.2d 671, 676 (Iowa 1986) (requiring specific enforcement unless defendant does not accept the plea offer).

[13] The court below left open the possibility that it would have allowed the State to offer *a* plea deal, not necessarily *the same* plea deal; if the State had complied but respondent had declined, presumably a new trial would have ensued. The State did not ask for that form of relief.

[14] In its orders granting certiorari in this case and *Frye*, the Court directed the parties to brief the question "[w]hat remedy, *if any*, should be provided." 131 S. Ct. 856 (2011) (emphasis added); accord *Arave* v. *Hoffman*, 552 U.S. 1008 (2007) (same).

In the ordinary ineffective-assistance case, in which the defendant is deprived of a fair trial because of his lawyer's deficient performance, the remedy of a new trial (which includes a new opportunity to plead guilty) properly redresses the constitutional violation. By contrast, the remedy of retrial makes no sense in the circumstances here: respondent contends that he would have pleaded guilty, but for counsel's deficient advice, and he subsequently was found guilty. Making such a defendant whole cannot entail allowing him to walk free unless the prosecution proves guilt all over again, for several reasons.

First, that remedy gives the defendant the advantage of time: as this Court has recognized, over time important witnesses die, disappear, or become unavailable, or their memories fade. See *Premo*, 131 S. Ct. at 745-746; accord, *e.g.*, *Boria* v. *Keane*, 99 F.3d 492, 499 (2d Cir. 1996) (rejecting new-trial remedy for this reason), cert. denied, 521 U.S. 1118 (1997). Conferring that advantage may be necessary where the initial conviction rested on constitutional error, but quite another where the conviction was obtained at a fair trial. Any retrial will result in either acquittal—a windfall for a defendant who claims that he was deprived of the chance to plead guilty, cf. *Fretwell*, 506 U.S. at 370—or conviction—a pointless waste of resources that makes the proceedings no more reliable. See *Williams*, 571 F.3d at 1110 (Gorsuch, J., dissenting) ("If a fair trial is the right remedy, then in a real sense [the defendant has] already received it.").

Second, if convicted again, the defendant may actually receive a *more* severe sentence. If the claim of prejudice rests purely on comparing the sentence imposed at trial to the plea offer, then resentencing arguably

does not cure such prejudice (as the Ninth Circuit thought in *Hoffman*, see p. 23, *supra*).

Nor is the new-trial remedy warranted to encourage the State to again offer a plea bargain, perhaps the original one. The flaw in this approach is the impossibility, especially after a trial has been held, of restoring the *status quo ante*. See *State* v. *Greuber*, 165 P.3d 1185, 1190 (Utah 2007) ("Courts 'cannot recreate the balance of risks and incentives on both sides that existed prior to trial * * * .'") (quoting *Commonwealth* v. *Mahar*, 809 N.E.2d 989, 1001 (Mass. 2004) (Sosman, J., concurring)). The parties' incentives to offer or accept a particular bargain will have been reshaped by the passage of time and the experience and expense of having already been through trial, conviction, and sentencing. The parties will have more information about the likely outcome of trial and the likely sentence if the defendant is convicted at trial. And the government's incentives to avoid trial may have changed for other reasons as well: prosecutors commonly extend plea offers that require the defendant's cooperation in an investigation or separate prosecution, which may have already ended by the time the parties are ordered back to the negotiating table. Because the *status quo ante* cannot be restored, the result in many cases will be either that no bargain is reached and the case is retried, or that the parties reach a bargain less favorable than the one the defendant previously declined. Neither outcome justifies upsetting the conviction to prompt new negotiations as a purported cure for an attorney's previous failure to obtain a better bargain.

B. A Remedy That Imposes The Terms Of A Past Plea Offer Is Contrary To Principles Of Plea Bargaining And Separation Of Powers

Recognizing the unsuitability here of the standard remedy for ineffective-assistance claims—a fair trial—courts have improvised other remedies, but these are likewise unsatisfactory. Some courts, including both federal courts below, have required the prosecution to offer the defendant the same plea bargain that he would have accepted but for his attorney's deficient performance. Affording a defendant the benefits of the rejected plea offer creates serious problems, both legal and practical.

First, this approach overlooks the "critical difference between an entitlement and a mere hope or expectation" that the defendant might ultimately realize an accepted plea offer's benefits. *Johnson*, 467 U.S. at 507 n.5. As discussed above, a plea offer is without legal force until it is embodied in a guilty plea. Accordingly, even if respondent had accepted the offer, the prosecutor would have been free to withdraw it and the trial judge free to reject it. See pp. 19-21, *supra*. Thus, instead of restoring the defendant to his original position, the remedy of specific performance awards him with something he never had: a legal entitlement to the benefits of the offer. Indeed, he would have had no such entitlement if he had *accepted* the plea—the judge could have rejected it or the prosecution could have withdrawn the offer before the plea was tendered to the court. The remedy thus anomalously places the defendant who *rejects* a plea offer because of his attorney's blunder in a better position than the defendant who *accepts* the offer subject to possible withdrawal by the prosecution or rejection by the court.

Second, the reinstatement remedy is unfairly one-sided and contrary to the purpose of plea bargaining. As this Court has explained, the essence of plea bargaining is "mutuality of advantage." *Brady* v. *United States*, 397 U.S. 742, 752 (1970). The defendant gains leniency; the prosecution avoids a trial, allowing it to conserve resources and eliminate uncertainty. *E.g.*, *ibid.*; *United States* v. *Goodwin*, 457 U.S. 368, 379-380 (1982). Awarding a defendant the benefits of a past plea offer, long after trial, conviction, and sentencing, upsets the mutuality of advantage. The government's plea offer presumably was based on the anticipated benefit of avoiding a trial. Once a trial has taken place, that benefit to the government is gone.[15] The defendant, on the other hand, gets an undeserved windfall—both a trial at which he had the chance to win an acquittal, and the benefits of a plea offer that had been predicated on the avoidance of a trial.

Third, and relatedly, this approach perversely encourages sandbagging. "So long as a defendant can claim his lawyer mishandled a plea offer, he can take his chances at a fair trial and, if dissatisfied with the result, still demand and receive the benefit of the forgone plea." *Williams*, 571 F.3d at 1094 (Gorsuch, J., dissenting). Accepting that notion could cause prosecutors to hesitate before offering a plea agreement, concerned that any sentence being offered would be the sentence that a postconviction court would ultimately impose if the defendant showed that his counsel gave him deficient advice. Indeed, in theory *any* pretrial guilty plea—even without a plea agreement—might have resulted in a

[15] As noted above, any benefit to be gained from the defendant's cooperation in other proceedings will likely have dissipated as well.

more lenient sentence than the one imposed after a trial. See, *e.g.*, Sentencing Guidelines § 3E1.1(a) & comment. (n.3). Accordingly, even if no plea agreement is ever offered, *any* defendant might have an incentive to argue that he was prejudiced by pretrial advice that led him not to plead guilty, and demand an appropriate sentence reduction.

Fourth, the remedy contravenes separation-of-powers principles.[16] In the federal system, the Executive Branch "retain[s] 'broad discretion' to enforce the Nation's criminal laws." *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (citation omitted); *United States* v. *Cox*, 342 F.2d 167, 171-172 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965); *id.* at 190-193 (Wisdom, J., concurring specially). Like the decisions whether to prosecute and what charges to bring, the decisions whether to engage in plea bargaining and the sort of deal to offer belong solely to the Executive. Although a trial court has authority to reject certain types of plea agreements, it cannot compel the prosecutor to plea-bargain nor dictate the terms of any deal. See, *e.g.*, *Government of the Virgin Islands* v. *Scotland*, 614 F.2d 360, 364-365 (3d Cir. 1980); accord, *e.g.*, *People* v. *Heiler*, 262 N.W.2d 890, 893, 895-896 (Mich. Ct. App. 1977) (same, under Michigan's "constitutional separation of powers").[17]

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[16] Although a federal court reviewing a state conviction on habeas may not be bound by state separation-of-powers principles, it would be unusual for a federal court in enforcing the Sixth Amendment (which, in pertinent part, applies identically to federal and state governments) to order a remedy against a state government that would contravene the *federal* separation of powers if employed against the United States.

[17] Indeed, both federal and Michigan judges are barred from any role in plea negotiations. See Fed. R. Crim. P. 11(c)(1); *People* v. *Mathis*,

Requiring that the State renew its previous plea offer, as the courts below did, violates those principles because it imposes on the prosecution a plea deal to which it never gave final agreement and which it would no longer voluntarily offer, given the changed circumstances. As the Third Circuit has explained, "binding the prosecutor to his original plea [offer] * * * interfere[s] with his discretionary functions, *i.e.*, determining what he feels is fairest in light of the defendant's circumstances, the government's resources, and the statute involved." *Scotland*, 614 F.2d at 364.

Indeed, in some cases specific performance of the plea agreement would override the prosecutor's discretion not just over plea-bargaining, but over charging decisions. In some cases, the sentence contemplated by the plea agreement cannot lawfully be imposed for the count of conviction, *e.g.*, if a mandatory-minimum statute precludes it. See *Williams*, 571 F.3d at 1088. Where a plea agreement would have involved charging a lesser offense than the one ultimately reflected in the conviction, specific performance of that agreement requires dismissing one count and charging a new one—requiring judicial assumption of a strictly executive function. See *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978); *Frye* v. *State*, 311 S.W.3d 350, 360 (Mo. Ct. App. 2010), cert. granted, 131 S. Ct. 856 (2011).

Finally, to the extent that the reinstatement remedy requires the State not just to offer the original bargain again, but actually to resentence the defendant in accordance with those terms, that remedy improperly allows the postconviction court to override the sentencing discretion of the trial court. See also, *e.g.*, *Boria*, 99 F.3d

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285 N.W.2d 414, 416 (Mich. Ct. App. 1979).

at 499 (on habeas review, leaving state conviction intact but ordering the defendant released because he had already served more time than the plea bargain would have permitted). Absent the attorney's deficient advice, the trial court plainly would be empowered to impose a higher sentence, which likely would involve rejecting the plea agreement, allowing the defendant to withdraw the guilty plea, see Fed. R. Crim. P. 11(c)(5), and proceeding to trial.

* * * *

The inability to identify any appropriate remedy for the Sixth Amendment violation that the court of appeals identified flows from the conceptual difficulties inherent in the notion that a forgone guilty plea may cause Sixth Amendment prejudice. "[E]xamination of the remedial question * * * serves only to underscore one thing: the absence of anything in need of remedying in the first place." *Williams*, 571 F.3d at 1109 (Gorsuch, J., dissenting).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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