Journal of Gender, Social Policy & the Law

Volume 21 | Issue 3 Article 7

2013

Losing Sight of the Forest for the Trees: the Supreme Court's Misapplication of Sixth Amendment Strickland Analysis in Missouri v. Frye and Lafler v. Cooper

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LOSING SIGHT OF THE FOREST FOR THE TREES: THE SUPREME COURT'S MISAPPLICATION OF SIXTH AMENDMENT *STRICKLAND* ANALYSIS IN *MISSOURI V. FRYE* AND *LAFLER V. COOPER*

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I. INTRODUCTION

Today, plea bargaining is an essential component of the American criminal justice system.[1] While there is neither a constitutional right of the accused to plea bargain, nor a government duty to offer a plea bargain, it is generally considered a beneficial practice for all parties involved.[2]

The Sixth Amendment protects several rights of those accused in criminal trials; among these is the right to effective counsel.[3] In *Lafler v. Cooper* and *Missouri v. Frye*, the Supreme Court ruled that this right applies retroactively to the plea bargaining process.[4] However, defendants are only entitled to a remedy if their counsel's ineffectiveness prejudiced the result of their trial, and this determination is made using the test established in *Strickland v. Washington*.[5]

This Comment argues that the Supreme Court was incorrect in finding a violation of the defendants' Sixth Amendment rights in *Cooper* and *Frye*. The Court's holdings in these two cases imply a constitutional right to plea bargain, although this is completely refuted by prior case law, and the circuitous remedy not only violates legal precedent, but also is too arbitrary

1. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012) (observing that guilty pleas currently lead to ninety-four percent of state convictions and ninety-seven percent of federal convictions).

2. *See* Blackledge v. Allison, 431 U.S. 63, 71 (1977) (commenting that defendants benefit by avoiding pretrial incarceration and the stresses of trial, while judges and prosecutors benefit by conserving important resources).

3. U.S. CONST. amend. VI (granting those accused of a crime the assistance of counsel for their defense during a speedy, public trial by an impartial jury).

4. *See Cooper*, 132 S. Ct. at 1384 (explaining that constitutional rights extend regardless of a defendant's guilt); Missouri v. Frye, 132 S. Ct. 1399, 1402 (2012) (stating that plea bargaining is a critical stage of the criminal process, and the right to effective assistance of counsel applies to all critical stages of the criminal procedure).

5. 466 U.S. 668, 687 (1984) (requiring defendants to satisfy both prongs of the *Strickland* test to prove that their conviction was derived from an unreliable judicial process and must be vacated).

and illogical to be effective law.[6] Part II summarizes the history of Sixth Amendment analysis of the right to effective counsel, as well as the extension of that right to the plea bargaining process.[7] Part II also introduces the facts of *Cooper* and *Frye* and briefly discusses the Court's opinions from each case.[8] Part III argues against the Court's extension of Sixth Amendment rights to *Cooper* and *Frye* because neither case involved an interference with the defendants' right to a fair trial.[9] Additionally, Part III contends that the Court's application of the *Strickland* analysis in these two cases conflicts with the established precedent that defendants are not constitutionally entitled to receive plea bargains.[10] Part III also argues that the remedy implemented in *Cooper* violates both prosecutorial discretion and the separation of powers doctrine, in addition to being too arbitrary and inefficient.[11] Part IV identifies several legal complexities arising from these decisions that the Court will need to resolve in numerous additional cases.[12] Finally, Part V concludes that the Court should reverse these two decisions and return to the traditional jurisprudence governing the Sixth Amendment right to effective counsel, as failure to do so could impede the plea bargaining process and burden the criminal justice system.[13]

II. BACKGROUND

A. The Sixth Amendment and the Right to Effective Counsel

The Sixth Amendment sets forth several rights for defendants in criminal

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6. *See Cooper*, 132 S. Ct. at 1390 (finding that Cooper's attorney satisfied both the performance and prejudice prongs of the *Strickland* analysis); *Frye*, 132 S. Ct. at 1410 (holding that Frye's attorney's actions did not meet the necessary standard of reasonableness).

7. *See infra* Part II (explaining the evolution of the right to effective counsel and its specific application to the plea bargaining process).

8. *See infra* Part II (asserting that the Court's extension of the *Strickland* analysis to *Cooper* and *Frye* is based on the overwhelming number of plea bargains that are accepted by courts).

9. *See infra* Part III (arguing that the Court failed to consider the purpose behind the Sixth Amendment when applying it).

10. *See infra* Part III (contending that the Court's holdings in *Cooper* and *Frye* impliedly create a constitutional entitlement to plea bargaining).

11. *See infra* Part III (maintaining that the remedy proposed by these cases instills excess power into the hands of trial court judges, infringes on prosecutorial discretion, and constitutes a separation of powers violation).

12. *See infra* Part IV (noting that the Court's decisions in *Cooper* and *Frye* prompt a conflict between defense counsels' goals, establish a standard that will require clarification through further cases, and may jeopardize the effectiveness of plea bargaining).

13. *See infra* Part V (observing that the Court has created a new field of law while failing to adequately define it, and noting the potential burden these decisions could impose on courts).

prosecutions, including the right "to have the Assistance of Counsel for his defence."[14] This clause recognizes the right to counsel's assistance, ensuring that defendants receive a fair trial.[15] In 1970, the Supreme Court in *McMann v. Richardson* established that this right to counsel requires effective and competent legal representation for defendants.[16] However, the Court explicitly refused to further define this standard of effectiveness.[17] Accordingly, in *Tollett v. Henderson*, the Court only required counsel to act within the range of competence necessary for criminal law attorneys.[18] The Court eventually articulated a test for ineffective assistance claims in *Strickland*.[19]

B. The Right to Effective Counsel and the Strickland *Test*

In *Strickland*, the Court recognized the purpose of the Sixth Amendment and its necessity to protect a defendant's right to a fair trial.[20] Thus, the purpose behind the Sixth Amendment's requirement for effective assistance of counsel is also protection of a fair trial.[21] Moreover, this purpose of ensuring a fair trial also presents the limits of Sixth Amendment protection.[22] The Court stated that claims of ineffective counsel are only recognizable when an attorney's ineffectiveness impeded the adversarial proceeding to the point that the result at trial is no longer reliable.[23]

In *Strickland*, the Court established two requirements necessary to show that counsel's lack of effective assistance led to an unreliable conviction

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14. U.S. CONST. amend. VI (securing a defendant's right to know the crime for which he is accused and be tried where the crime allegedly occurred).

15. *See* United States v. Cronic, 466 U.S. 648, 658 (1984) (declaring that the Sixth Amendment is not implicated unless the reliability of the trial procedure is called into question).

16. *See* 397 U.S. 759, 771 (1970) (evaluating counsel's performance in comparison with the spectrum of criminal attorney practices).

17. *See id.* (holding that determinations of ineffective counsel should be left to trial court judges to maintain proper standards of performance).

18. *See* 411 U.S. 258, 266-67 (1973) (stating that an attorney's failure to properly investigate facts of a constitutional claim may satisfy this standard of proof for showing incompetence).

19. *See* Strickland v. Washington, 466 U.S. 668, 684 (1984) (explaining that, before this case, the Court had never completely addressed the issue of ineffective counsel where the case went to trial).

20. *See id.* at 687 (indicating that the standard for "adequate legal assistance" under the Sixth Amendment is reasonableness under prevalent professional standards).

21. *See id.* at 686-87 (claiming that judgments should not be set aside unless counsel's errors had an effect on the judgment that made the proceeding unreliable).

22. *See, e.g.*, United States v. Gonzalez-Lopez, 548 U.S. 140, 147 (2006) (explaining that effective counsel is not the equivalent of mistake-free legal representation).

23. *See Strickland*, 466 U.S. at 686-93 (opining that any error can impair the presentation of a defense, but the right to effective counsel is only violated when the errors are serious enough to necessitate throwing out the proceeding).

requiring reversal.[24] First, a defendant must show that his counsel's performance was ineffective to the extent that it cannot be said to have constituted "counsel" under the Sixth Amendment.[25] This is referred to as the "performance prong" of the *Strickland* analysis.[26] The Court refused, however, to specifically explain how determinations of counsel's effectiveness should be made, simply stating that attorney performance is owed substantial deference.[27]

Second, under the *Strickland* test, a defendant must satisfy the "prejudice prong" by showing that his counsel's ineffectiveness was substantial enough to deprive him of a reliable result at trial.[28] Thus, a defendant must demonstrate a reasonable probability that his trial would have arrived at a different result had counsel's assistance been effective.[29]

C. Ineffective Assistance Under Strickland

Several cases following *Strickland* exemplify what constitutes ineffective assistance under the performance prong of the *Strickland* analysis.[30] In *Kimmelman v. Morrison*, the Court found actual ineffectiveness under *Strickland* where the defense counsel did not perform pretrial investigation and, consequently, failed to discover important evidence held by the State that could have been suppressed prior to trial.[31] In 2003, the Court held in *Wiggins v. Smith* that a defense attorney's failure to investigate and present his client's difficult life history as a mitigating circumstance at trial satisfied the *Strickland* test.[32] However, the Court

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24. *See id.* at 687 (mandating that a defendant make both showings to prove that a conviction is unreliable).

25. *See id.* (requiring defendants to show that their defense counsel failed to meet an objective standard of reasonableness based on the practices of the legal community).

26. *See id.* at 697 (explaining that a defendant's failure to demonstrate either component of the test precludes the Court from addressing the other component).

27. *See id.* at 689 (reasoning that a set of detailed rules for attorney conduct would interfere with a counsel's independence in making appropriate tactical decisions for clients).

28. *See id.* at 687 (observing a presumption of prejudice in cases where there is constructive or actual deprivation of representation or where counsel has a conflict of interest).

29. *See id.* at 694 (communicating that a reasonable probability is one sufficient to undermine confidence in the outcome).

30. *See generally* JOHN M. BURKOFF & NANCY M. BURKOFF, INEFFECTIVE ASSISTANCE OF COUNSEL § 4:8 (2012) (surmising that a defendant's actions toward counsel play a crucial role in investigating the reasonableness of counsel's actions).

31. *See* 477 U.S. 365, 385 (1986) (concluding that the defense counsel's sufficiency in other respects and overall performance do not alleviate his failure to conduct pretrial discovery, although that sufficiency was significant for effectiveness analysis).

32. *See* 539 U.S. 510, 512 (2003) (concluding that tactical decisions made after a cursory investigation are only reasonable when the decision not to investigate further is reasonable).

found the *Strickland* test was not met in *United States v. Mechanik*; although the defense attorney was ineffective under the performance prong of *Strickland* for failing to move to dismiss the defendant's indictment over a procedural issue, the prejudice prong was not satisfied because the subsequent legitimate trial made this mistake "harmless beyond a reasonable doubt."[33]

In two additional cases, the Court held that the prejudice analysis under *Strickland* is only applicable when it is impossible to rely upon the outcome of the judicial process in question.[34] First, in *Lockhart v. Fretwell*, the Court found that Fretwell was not prejudiced by his counsel's mistake in missing an opportunity to object and invalidate Fretwell's capital conviction, even though the result at trial would have been different without the attorney's mistake.[35] Second, in *Nix v. Whiteside*, the Court held that the defense counsel's failure to allow the defendant to commit perjury in an attempt to be acquitted does not satisfy *Strickland* prejudice, even though the result at trial would likely be different.[36]

D. The Right to Effective Counsel During Plea Bargaining

1. Applying Strickland *to Plea Bargaining*

In *Hill v. Lockhart*, the Court expanded the right of effective counsel to plea bargaining, requiring effective counsel before a defendant accepts a deal.[37] In *Iowa v. Tovar*, the Court justified this expansion by describing guilty pleas as an important point in the criminal justice process.[38]

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33. *See* 475 U.S. 66, 70, 72-73 (1986) (ruling that the guilty verdict at trial made harmless any error in the pre-trial grand jury proceedings and that the societal costs of retrial did not justify vacating a guilty verdict over a pre-trial error).

34. *See* Brief for the United States as Amici Curiae Supporting Petitioner at 15-16, Missouri v. Frye, 132 S. Ct. 1399 (2011) (No. 10-444) (requiring claims of *Strickland* prejudice to show that the trial was unfair rather than simply showing that the result at trial was affected).

35. *See id.* at 16 (contending that a proceeding is unfair, and the result is not reliable, when mistakes by defense counsel cause a defendant's forfeiture of a substantive or procedural right); *see also* Lockhart v. Fretwell, 506 U.S. 364, 369 (1993) (finding that generally, the Sixth Amendment right to effective counsel is only implicated when the fairness of the trial is questioned).

36. *See* Brief for the United States as Amici Curiae Supporting Petitioner, *supra* note 34, at 17 (stating that the defendant received a fair trial and did not suffer a loss of any procedural or substantive right; thus, the defendant could not successfully make a *Strickland* prejudice claim); *see also* Nix v. Whiteside, 475 U.S. 157, 175 (1986) (ordering defendants bringing *Strickland* claims to show a reasonable probability that a proceeding's outcome would have been different and that the original proceeding was unfair).

37. *See* 474 U.S. 52, 57 (1985) (finding that the *Strickland* analysis must be used for claims of ineffective assistance of counsel during guilty pleas).

38. *See* 541 U.S. 77, 80-81 (2004) (concluding that defendants of misdemeanor and felony charges facing incarceration are protected under the Sixth Amendment); *see also*

When applying *Strickland*'s analysis to plea bargaining, the performance prong requires counsel to meet the aforementioned standard for incompetence before acceptance of the plea offer.[39] The prejudice requirement—that the defendant suffered prejudice as a result of ineffective assistance of counsel—hinges on whether the defendant shows a reasonable probability that he would not have pleaded guilty and would have demanded to proceed to trial if counsel had been effective.[40]

2. Defining "Effective Assistance of Counsel" in the Context of Plea Bargaining

In recent years, the Court has clarified what constitutes ineffective assistance of counsel in relation to a plea bargain.[41] In *Padilla v. Kentucky*, the Court held that an attorney's failure to inform a defendant of the effects of a guilty plea on the defendant's immigration status constituted incompetent counsel under the performance prong of the *Strickland* test.[42] While the Court in *Padilla* discussed the standard of performance required of defense attorneys prior to acceptance of a guilty plea, the Court in *Hill* refused to discuss the performance prong of *Strickland* because the prejudice prong was not met.[43]

3. Remedies for Defendants Who Establish Ineffective Assistance of Counsel During Plea Bargaining

In *Lafler v. Cooper*, the Court dismissed the argument that a fair trial

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Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) (noting that plea bargaining is a vital point during litigation for Sixth Amendment purposes involving effective assistance of counsel).

39. *See Hill*, 474 U.S. at 58-59 (finding the first part of the *Strickland* analysis to be a restatement of the standard for competent counsel in *McMann v. Richardson* and *Tollett v. Henderson*); *see also* Tollett v. Henderson, 411 U.S. 258, 266-67 (1973) (holding that an attorney's failure to investigate or analyze facts prompting a constitutional claim may meet the standard of proof required to show incompetent counsel); McMann v. Richardson, 397 U.S. 759, 771 (1970) (allowing trial court judges to enforce proper standards of attorney competence).

40. *See Hill*, 474 U.S. at 59 (framing the issue as a determination of whether the result of the plea bargaining process was altered by the constitutional violation of ineffective performance of counsel).

41. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010) (examining whether a defense attorney has a duty to advise a defendant of the implications that a guilty plea will have on his immigration status).

42. *See id.* (holding that when deportation is an evident consequence of entering a guilty plea, defense counsel is responsible for providing correct legal advice on this matter).

43. *See id.* at 1482 (confirming that the constitutional standard required of defense counsel under *Strickland* is reasonableness as based on the practices of the legal community); *Hill*, 474 U.S. at 60 (finding that the facts of this case failed to show *Strickland* prejudice because the defendant did not state that, given additional information, he would have pled not guilty and insisted on trial).

neutralizes any claim of ineffective performance by counsel during plea bargaining.[44] From its origin, the Supreme Court has set forth the principle that, in keeping with the separation of powers, the judiciary should not question executive officials' performance of discretionary responsibilities.[45] Thus, prosecutors traditionally have discretion in choices involving plea bargains as a function of executive authority.[46] According to *Cooper*, however, if a defendant would have only received a lesser sentence from a plea bargain, and it is determined that the defendant would have accepted the plea bargain without counsel's mistake, it is up to the judge's discretion whether to mandate the sentence provided in the original plea, the sentence levied at trial, or an alternative sentence.[47] In situations where the plea bargain involved a lesser charge than the trial conviction, it may be necessary to reoffer the plea proposal and allow a judge to determine whether to accept it.[48]

4. Lafler v. Cooper

In *Lafler v. Cooper,* Anthony Cooper was charged in Michigan with four crimes, including assault with intent to murder, for pursuing Kali Mundy and shooting at her multiple times.[49] The prosecution offered to drop two of the four charges and recommend a fifty-one to eighty-five month sentence in exchange for a guilty plea.[50] Cooper expressed guilt and communicated that he was willing to accept the offer, but eventually rejected the offer.[51] At trial, Cooper was convicted on all counts and received a sentence of 185-360 months in prison.[52]

Cooper claimed ineffective counsel, alleging that his attorney advised

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44. 132 S. Ct. 1376, 1388 (2012) (stating that the justice system is one of pleas, not trials).

45. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) (asserting that the Supreme Court is responsible for decisions involving individual rights but not discretionary functions of executive officers).

46. *See* United States v. Nixon, 418 U.S. 683, 693 (1974) (explaining that the executive branch possesses complete discretion in choosing whether or not to prosecute a specific case).

47. *See Cooper*, 132 S. Ct. at 1389 (commenting that resentencing may not always remedy a defendant's constitutional injury, especially where a plea offer for a less serious offense is lost, at which point the original offer may require reinstatement).

48. *See id.* (describing circumstances where a defendant pleads guilty to counts more serious than those in the originally offered plea bargain).

49. *See id.* at 1383 (commenting that Cooper may have been acting in self-defense, but his motivation for shooting at the victim was unclear).

50. *See id.* (explaining that Cooper was charged with six different offenses).

51. *See id.* (justifying Cooper's rejection of the plea bargain by alleging that counsel said it would be impossible to establish intent to murder because the victim was shot below the waist).

52. *See id.* (noting that Cooper's sentence was within the mandatory minimum).

him to reject the offer due to counsel's belief that the prosecution could not establish intent to murder because Cooper shot Mundy below the waist.[53] After several appeals, the District Court overturned the decision under the *Strickland* test and mandated specific performance of the original plea bargain.[54] After the Sixth Circuit Court of Appeals affirmed the District Court's decision, the Supreme Court granted certiorari.[55]

5. Missouri v. Frye

In *Missouri v. Frye*, Galin Frye was charged with driving with a revoked license for a fourth time, constituting a felony under Missouri law with a maximum sentence of four years imprisonment.[56] The prosecutor offered two possible plea bargains via a letter to Frye's attorney, but counsel did not mention the offers to Frye, and they expired.[57] Before his preliminary hearing, Frye was again arrested for driving without a license, pled guilty, and received a three-year sentence.[58] Frye claimed that his attorney's failure to disclose the two plea bargains violated his right to effective counsel.[59] The Missouri Court of Appeals reversed the decision, and the Supreme Court granted certiorari.[60] The Court held that the Sixth Amendment right to effective assistance of counsel extends to all critical stages of criminal justice proceedings—including consideration of rejected or expired plea offers—and remanded the case to the Missouri Court of Appeals to determine whether *Strickland* prejudice had been shown.[61]

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53. *See id.* (justifying Cooper's behavioral change from admitting guilt and showing interest in plea offers to his refusal of two different plea bargains).

54. *See id.* at 1384 (describing Cooper's appeal for federal habeas relief under the Antiterrorism and Effective Death Penalty Act of 1996, and mandating reinstatement of a fifty-one to eighty-five month sentence).

55. *See* Cooper v. Lafler, 376 F. App'x 563, 573 (6th Cir. 2010), *cert. granted*, 131 S. Ct. 856 (2012) (No. 09-1487) (finding that *Strickland* was met because Cooper showed that counsel told him of an incorrect legal rule that led to a harsher sentence).

56. 132 S. Ct. 1399, 1404 (2012) (detailing the Class D Felony with which Frye was charged in August 2007).

57. *See id.* (discussing the prosecution's first offer of a three-year sentence in exchange for a guilty plea to the felony charge and second offer to reduce the offense to a misdemeanor, and recommending a ninety-day sentence in exchange for a guilty plea).

58. *See id.* at 1404-05 (describing the prosecution's recommendation and the judge's sentence of a three-year sentence and ten days of incarceration, known as "shock time," to coerce future law-abiding behavior).

59. *See id.* at 1405 (stating that Frye would have accepted the plea bargain for the misdemeanor charge).

60. *See* Frye v. State, 311 S.W.3d 350, 360-61 (Mo. Ct. App. 2010), *cert. granted*, 131 S. Ct. 856 (2011) (ordering Frye to either go to trial or plead guilty; his right to effective counsel was not infringed by his attorney's failure to mention the plea offer).

61. *See Frye*, 132 S. Ct. at 1405, 1411 (listing arraignments, interrogations, lineups, and entry of guilty pleas as critical stages in criminal proceedings).

III. ANALYSIS

A. The Court Erred in Finding a Sixth Amendment Issue in Cooper *and* Frye *Because Neither Case Involved an Impediment to the Defendants' Right to a Fair Trial.*

1. Cooper Did Not Suffer Prejudice Under Strickland *Because His Case Involved Rejection—Not Acceptance—of a Plea Offer, and He Suffered No Impediments to His Right to a Fair Trial.*

When the Court extended Sixth Amendment rights in *Cooper*, it was wrong to apply the *Strickland* test to the rejection of a plea bargain.[62] In *Cooper*, the Court began its analysis by reasserting that defendants' Sixth Amendment rights apply to plea bargaining.[63] In *Hill* and *Padilla*, the right to effective assistance of counsel was implicated before the defendants accepted plea agreements.[64] Contrarily, *Cooper* involved a defendant's rejection of a plea agreement and decision to proceed with a fair trial.[65] Thus, no Sixth Amendment issue arose in *Cooper* because it involved a defendant's decision to proceed to a fair trial and reject a plea offer, not the decision to accept a plea bargain.[66] Further, Cooper still retained his Sixth Amendment rights after rejecting the prosecution's plea offer; if defense counsel was ineffective during trial, he still could bring a constitutional claim under the Sixth Amendment.[67]

Moreover, the right to effective counsel was not an issue in this case

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62. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1393 (2012) (Scalia, J., dissenting) (recognizing that the purpose of the right to effective assistance of counsel is to protect a defendant's right to a fair trial).

63. *See id.* at 1384 (majority opinion) (holding that defendants are entitled to effective counsel during plea bargaining).

64. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1480-81 (2010) (mandating that defendants are entitled to effective counsel before deciding whether to accept a plea deal); Hill v. Lockhart, 474 U.S. 52, 57 (1985) (elucidating the focus of *McMann v. Richardson* that all defendants charged with felonies have a right to effective counsel when deciding whether to plead guilty); *see also* McMann v. Richardson, 397 U.S. 759, 771 (1970) (leaving the trial courts with discretion as to what constitutes effective counsel, but noting that defendants facing felony charges have a right to competent counsel).

65. *See Cooper*, 132 S. Ct. at 1385 (finding that expansion of the *Strickland* test was consistent with appellate court decisions and did not cause problems).

66. *See Padilla*, 130 S. Ct. at 1486 (affirming that negotiation of a plea bargain is a critical point at which Sixth Amendment rights must be protected); *see also Frye*, 132 S. Ct. at 1407-08 (2012) (alleging that criminal defendants require effective counsel during plea bargaining). *But see Cooper*, 132 S. Ct. at 1388 (holding that a defendant's guilt does not prove effective performance of counsel or negate a defendant's Sixth Amendment right to effective counsel).

67. *See Cooper*, 132 S. Ct. at 1398 (Scalia, J., dissenting) (undermining the Court's decision invalidating Cooper's conviction after he received a fair criminal trial in accordance with constitutional guidelines).

because the defendant's right to a fair trial was not violated.[68] *Cooper* involved application of the *Strickland* test where counsel's deficient assistance led to the defendant's refusal of a plea agreement and subsequent conviction at trial.[69] Because both parties agreed in this case that defense counsel's performance was insufficient under the performance prong of *Strickland*, whether Cooper's Sixth Amendment rights were violated hinged on the prejudice prong of the *Strickland* test.[70] The Court held that the prejudice requirement of *Strickland* was met because the defendant showed a reasonable probability that all parties involved would have accepted the guilty plea were it not for his attorney's ineffective assistance.[71]

However, Cooper's right to a fair trial was not violated.[72] Thus, he cannot bring a Sixth Amendment claim; such issues are only constitutionally significant when they deprive the defendant of the ability to receive a fair trial.[73] Because the government is not responsible for ineffective assistance of defense counsel, the Sixth Amendment must only be invoked where the trial does not produce a just result.[74] Cooper's decision to reject the plea bargain and proceed with a trial based on his counsel's mistake does not provide a legitimate ground for a Sixth Amendment claim because he received a fair trial.[75] Cooper knowingly and voluntarily rejected two plea offers, chose to go to trial, and, upon an

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68. *See id.* at 1393 (majority opinion) (conveying that ineffective counsel must call into question the proper functioning of the judicial process to be constitutionally significant).

69. *See id.* at 1385 (explaining that the injury alleged in this case is the trial itself, and in such cases, defendants must show that the plea bargain would have been presented to the court without withdrawal, been accepted, and contained a lower sentence than the sentence levied at trial).

70. *See id.* at 1384-85, 1390-91 (remarking that the record is unclear whether counsel believed it would be impossible to charge the defendant with assault with intent to murder because he shot the victim below the waist or whether counsel thought this argument would prove that the defendant lacked the requisite specific intent, while noting that having to stand trial is the prejudice alleged in this case).

71. *See id.* at 1391 (confirming prejudice as evinced by the defendant's sentence, which was three-and-a-half times greater than the original plea bargain).

72. *See id.* at 1392 (Scalia, J., dissenting) (contending that Cooper is precluded from Sixth Amendment relief because he went through a complete and fair trial, was found unanimously guilty by a jury of his peers, and received a fair sentence).

73. *See* Strickland v. Washington, 466 U.S. 668, 686 (1984) (indicating that the Sixth Amendment's purpose is ensuring a fair trial and that this purpose is the standard for determining the validity of ineffective counsel claims).

74. *See* Brief Amici Curiae of the Criminal Justice Legal Foundation and the National District Attorneys Association in Support of Petitioners at 7, Lafler v. Cooper, 132 S. Ct. 1376 (2011) (Nos. 10-209, 10-444) (observing that the only constitutional claims where the government's mistake is not the reason for the overturned conviction are claims of ineffective assistance of counsel).

75. *See Cooper*, 132 S. Ct. at 1395 (Scalia, J., dissenting) (arguing that the ultimate purpose of a *Strickland* analysis is to assure the fairness of the trial proceeding).

unfavorable sentence, claimed that his defense attorney failed to provide effective assistance and caused him to reject a favorable plea offer.[76] Cooper's refusal of a plea bargain and decision to go to trial is in fact an assertion of his Sixth Amendment rights, and the resulting guilty verdict at trial is not made unfair by his voluntary choice.[77] Because the trial proceeding was fundamentally fair, Cooper has no ground for a Sixth Amendment claim.[78]

In fact, the Court's decision in Cooper misconstrues the very purpose behind the Sixth Amendment protection of effective counsel.[79] Given the Court's ruling in *United States v. Mechanik*, the lack of interference with Cooper's fair trial precludes him from satisfying the *Strickland* analysis.[80] By holding that a defendant's decision to reject a plea offer and proceed to trial can give rise to a constitutional violation involving the right to effective counsel, the Court invalidated a legitimate trial and a unanimous guilty verdict.[81] Because the Sixth Amendment's right to effective counsel was afforded to ensure a defendant's right to a fair trial, this decision incorrectly applies *Strickland* and distorts the intended purpose behind the right to effective counsel.[82]

2. Frye's Conviction Was Established Through His Admission of Guilt; Thus, He Suffered No Prejudice and Is Precluded from Sixth Amendment Relief.

Like *Cooper*, *Frye* does not involve a violation of Sixth Amendment

76. *See id.* at 1396 (interpreting Cooper's decision to go to trial as proof that the criminal proceeding was not unfair and therefore failed to show *Strickland* prejudice).

77. *See id.* at 1395 (opining that the notion that constitutional rights are infringed when a defendant chooses to go to trial as opposed to accepting a plea bargain ignores the purpose of *Strickland*).

78. *See id.* at 1397-98 (stating explicitly that there is no doubt of Cooper's guilt and that his Sixth Amendment rights were fully honored throughout his fair criminal trial).

79. *See id.* at 1395-96 (reciting the articulated standard used by the Michigan Court of Appeals in deciding this case, and proposing that prejudice under *Strickland* must deprive defendants of a fair trial).

80. *See* United States v. Mechanik, 475 U.S. 66, 70 (1986) (reasoning that the guilty verdict at trial shows defendant's guilt beyond a reasonable doubt; thus, any error committed by the grand jury in charging the defendant is harmless beyond a reasonable doubt); *see also* Brief Amici Curiae of the Criminal Justice Legal Foundation, *supra* note 74, at 5-6 (assuming that Cooper's decision not to cite *Mechanik* in his brief is based on his inability to reconcile it with his legal argument and desired outcome).

81. *See Cooper*, 132 S. Ct. at 1396-97 (Scalia, J., dissenting) (correcting the District Court's remedy by ordering the state to reoffer the plea bargain and, if the defendant chooses to accept it, allowing the state trial court to exercise discretion in sentencing the defendant).

82. *See id.* at 1395-98 (asserting that the defendant in this case received the highest standard of American justice).

rights because *Strickland* prejudice cannot be sufficiently shown.[83] Frye's second guilty plea and the proceedings leading up to it were not corrupted by any mistake caused by counsel's ineffectiveness.[84] In fact, Frye intelligently and voluntarily entered his second guilty plea and, in doing so, accepted the validity of his conviction.[85] Because there was no error in the process leading to Frye's second guilty plea, he cannot argue a denial of his right to a fair trial.[86] The Sixth Amendment's purpose is to protect a defendant's right to a fundamentally fair trial; therefore, Frye did not suffer a constitutionally significant violation.[87] For this reason, the Court's decision to extend the Sixth Amendment's protection of the right to effective counsel to this case goes against the very purpose behind the creation of that right as articulated in *Strickland*.[88] Thus, the Court erred when it remanded the case to the Missouri Court of Appeals, ordering an application of the *Strickland* test in order to rule on whether the defendant suffered a Sixth Amendment violation.[89]

Although the defense attorney in *Frye* did not communicate the plea bargain to the defendant, this does not satisfy *Strickland* prejudice because Frye merely lost an unrecognized plea offer that presented no constitutional issue due to its lack of recognition before a court.[90] To show *Strickland*

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83. *See* Missouri v. Frye, 132 S. Ct. 1399, 1412 (2012) (Scalia, J., dissenting) (finding Frye's conviction evidently fair as acknowledged by Frye himself, thus failing the prejudice prong of the *Strickland* test).

84. *Compare Frye*, 132 S. Ct. at 1406 (distinguishing this case from *Lockhart* and *Padilla* because the alleged error occurred before the accepted plea bargain), *with* Hill v. Lockhart, 474 U.S. 52, 56 (1985) (identifying the petitioner's argument that his guilty plea was based on erroneous information from his counsel constituting ineffective assistance), *and* Padilla v. Kentucky, 130 S. Ct. 1473, 1485 (2010) (imposing a duty on attorneys to advise defendants about the deportation consequences of a guilty plea before it is entered).

85. *See Frye*, 132 S. Ct. at 1411-12 (Scalia, J., dissenting) (contending that Frye had no entitlement to the plea deal in this case because the trial court probably would have rejected the original plea bargain given Frye's subsequent offense).

86. *But see id.* at 1407 (majority opinion) (holding that it does not suffice to argue that a fair trial remedies all mistakes during the pre-trial phase, particularly given the monumental role that plea bargaining plays in the criminal justice system).

87. *See id.* at 1412 (Scalia, J., dissenting) (maintaining that Sixth Amendment analysis is only proper when it keeps with the Amendment's focus on facilitation of a fair trial); *see also* Strickland v. Washington, 466 U.S. 668, 686 (1984) (setting forth the benchmark for evaluating claims of ineffective counsel as the fairness of the trial in question).

88. *See Strickland*, 466 U.S. at 686 (remarking that the Supreme Court has established the minimum requirements necessary to demonstrate right of effective counsel violations and that further protections are left to the discretion of lower courts).

89. *See Frye*, 132 S. Ct. at 1411 (asserting that the showing of a Sixth Amendment violation in the case hinges on whether the trial court or the prosecutor would have cancelled the agreement upon Frye's subsequent crimes).

90. *See* Brief for the United States as Amici Curiae Supporting Petitioner, *supra* note 34, at 18-19 (holding that a lack of opportunity to accept a plea offer fails to constitute one of the defendant's rights under the law).

prejudice, the Court in *Frye* required the defendant to show a reasonable probability that: (1) he would have accepted the earlier plea offer, and (2) if the prosecution or trial court had discretion to cancel the offer, that neither would have done so.[91] Plea bargains, though, are not constitutionally significant until a court's acceptance of the guilty plea.[92] In Frye's case, the court would not have considered his plea bargain before his second offense, and this new charge would likely have prevented the trial court from accepting the original plea offer.[93] Therefore, the failure of Frye's attorney to present him with a plea offer before his subsequent offense and decision to plead guilty does not interfere with the constitutionality of his conviction.[94] In subjecting the facts of *Frye* to the prejudice prong of *Strickland*, the Court noted the difficulty of proving prejudicial effect because Frye's most recent infraction caused doubt that the prosecution would have maintained the original plea offer.[95]

B. Applying Strickland *to* Cooper *and* Frye *Leads to the Presumption That Defendants Have a Right to Receive a Plea Offer; This Inference Is Completely Refuted by Precedent.*

Applying the *Strickland* standard to *Cooper* creates an implied notion that there is a constitutional right to plea bargaining; this is entirely precluded by case law.[96] The Court stated that this rule—that there is no

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91. *See Frye*, 132 S. Ct. at 1409-10 (noting that any amount of additional time in prison has Sixth Amendment significance and asserting that defendants are not guaranteed a right to be offered a plea bargain, nor a right to have a judge accept a plea bargain).

92. *See* Brief for the United States as Amici Curiae Supporting Petitioner, *supra* note 34, at 18 (stating that plea bargains can be revoked by prosecutors at any time before they are recognized by the court even if the defendant has accepted the offer).

93. *See Frye*, 132 S. Ct. at 1411 (doubting that the prosecution and trial court would have maintained the original plea offer following Frye's subsequent incident, but allowing this question to be decided by the trial court).

94. *See id.* at 1412 (Scalia, J., dissenting) (contending that counsel's error caused no injury to Frye, as he only lost the opportunity to accept a plea bargain that would have been withdrawn before its confirmation by the court); *see also* Brief for the United States as Amici Curiae Supporting Petitioner, *supra* note 34, at 19 (remarking that defendants can plead guilty when defense counsel has failed to present a plea offer and the guilty plea can still be reliable).

95. *See Frye*, 132 S. Ct. at 1411 (remanding the case to the Missouri Court of Appeals to determine whether a reasonable probability exists that defendant, prosecution, and the trial court would have accepted the offer).

96. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting) (commenting that this decision turns plea bargaining into a constitutional entitlement); *see, e.g.*, *Frye*, 132 S. Ct. at 1410 (finding that, because defendants have no right to plea bargaining, a showing of *Strickland* prejudice requires defendants to show that both the prosecutor and court would have enforced the offer); *see also* Ethan D. Feldman & Meghan P. Saleebay, *Victims' Rights and Defendants' Rights: Is There a Conflict?*, 36 COLO. LAW. 45, 47 (2007) (observing that defendants have no right to a plea bargain and thus have no right to plea bargain immediately).

constitutional right to plea bargain—is inconsequential to the ruling in *Cooper*.[97] However, the *Cooper* holding invalidated a legitimate trial in favor of a plea bargain offered before the proceeding.[98] The decision indicates that defendants can reject a plea bargain under their Sixth Amendment right to a fair trial, be found guilty in a trial, and then have that conviction invalidated and the original plea reinstated because of a mistake by defense counsel.[99] This implies an entitlement under the Constitution to plea bargaining, although no such entitlement is constitutionally recognized.[100]

The *Frye* decision also leads to an inference that effective plea bargaining is elevated to an established constitutional right.[101] In *Frye*, the State argued that defendants do not have a right to receive a plea bargain.[102] The Court explained that, while this argument is logical, plea bargains have become prevalent in criminal procedure.[103] Thus, it is necessary to ensure that defendants retain effective counsel during the plea bargaining process.[104] However, the entire process leading to Frye's second guilty plea was untainted by attorney error.[105] Consequently, the *Frye* holding signifies that even if a defendant's right to a fair, full trial is protected and the defendant admits guilt through the plea bargaining process, the defendant is still entitled to a previous plea bargain if he can meet the two

97. *See Cooper*, 132 S. Ct. at 1387 (contending that once a state makes a plea offer, it is bound to uphold the requirements of the Constitution).

98. *See id.* at 1391 (ordering the State to reoffer the plea-agreement and vacating the original verdict after trial).

99. *See id.* at 1388 (conveying that a fair trial does not negate ineffective performance by counsel; therefore, a guilty verdict at trial does not preclude a defendant from his Sixth Amendment right to effective assistance of counsel).

100. *See id.* at 1397 (Scalia, J., dissenting) (opining that the Court's holding in *Cooper* changes plea bargaining from an adjunct of the criminal justice system to a requirement).

101. *See Frye*, 132 S. Ct. at 1414 (Scalia, J., dissenting) (explaining that plea bargaining is not covered under the protection of the Sixth Amendment, which ensures fair convictions as opposed to fair plea bargains).

102. *See id.* at 1407 (majority opinion) (observing the persuasiveness of the State's argument against subjecting it to the mistakes of defense attorneys).

103. *See id.* (discussing the notion that defense counsel must satisfy certain responsibilities, including but not limited to plea bargains, under the Sixth Amendment given the crucial role that plea bargaining plays in the criminal process).

104. *See id.* at 1407-08 (mentioning that deals between prosecutors and defense attorneys determine defendants' sentences).

105. *Compare id.* at 1406 (noting that this case involved no mistakes from counsel leading to acceptance of the guilty plea by the court), *with* Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010) (pinpointing the issue of the case as whether an attorney's failure to advise his client of prescient information regarding deportation consequences can give rise to a Sixth Amendment claim) *and* Hill v. Lockhart, 474 U.S. 52, 56 (1985) (identifying the defendant's argument that his guilty plea was invalid because his attorney supplied him with incorrect information about his parole eligibility).

prongs of the *Strickland* analysis.[106] In effect, the Court overturned an untainted, fair conviction, thereby punishing the victim of a crime for defense counsel's incompetence rather than punishing the attorney responsible for the mistake.[107]

C. The Remedies Discussed in Cooper *and* Frye *Violate Legal Boundaries and Are Too Inefficient, Illogical, and Arbitrary to Constitute Effective Law.*

By holding that specific performance of a previous plea bargain can provide an appropriate remedy for defendants who were not permitted to accept the plea offer, the Court in *Frye* risks violating the discretion of prosecutors.[108] In Missouri, for example, prosecutors are free to cancel a plea bargain until a guilty plea is offered in court.[109] The remedy suggested by *Frye* would allow trial court judges to mandate reinstatement of an original plea bargain, effectively eliminating prosecutorial discretion from the plea bargaining process.[110] The State in *Frye* argued against subjecting prosecutors to the consequences of defense counsel's pretrial mistakes—particularly when a fair trial has subsequently taken place.[111]

In addition, *Frye*'s remedy arguably violates the separation of powers doctrine at the federal level.[112] Prosecutorial choices involving plea bargaining fall under executive authority.[113] However, the remedy suggested by *Frye* can, in some circumstances, result in a judicial order that a prosecutor reoffer a previously presented plea bargain.[114] Such a judicial

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106. *See Frye*, 132 S. Ct. at 1407 (claiming that procedures for plea bargaining are often unsupervised and somewhat nebulous).

107. *See id.* at 1414 (Scalia, J., dissenting) (explaining that the Court is limited to overturning convictions in solving these problems, whereas a legislature could punish attorneys for errors and remedy these mistakes more efficiently).

108. *See* Brief for the United States as Amici Curiae Supporting Petitioner, *supra* note 34, at 29-30 (noting that prosecutors should have broad discretion before trial to use new information to accurately determine the social interest in specific prosecutions).

109. *See Frye*, 132 S. Ct. at 1411 (mentioning that Missouri law typically allows plea offers to be withdrawn by prosecutors "without recourse," even when the defendant has accepted the offer).

110. *See id.* at 1413 (Scalia, J., dissenting) (arguing that it is extremely unwise to retroactively determine the manner by which prosecutors and trial court judges use their discretion).

111. *See id.* at 1407 (majority opinion) (alleging that the State's arguments fail to account for the reality of the criminal justice system).

112. *See* Brief for the United States as Amici Curiae Supporting Petitioner, *supra* note 34, at 30-31 (noting that the executive branch has significant discretion in promulgating federal laws).

113. *See* United States v. Nixon, 418 U.S. 683, 692-93 (1974) (contending that the executive branch is responsible for enforcing criminal laws in order to determine whether the federal judiciary violated executive authority).

114. *See Frye*, 132 S. Ct. at 1411 (ruling that state law is the place to determine

mandate would bind a prosecutor to a plea offer that he never accepted and eliminate his discretion from the process.[115] This constitutes a judicial intrusion into the scope of executive power of the prosecutor, and, therefore, violates the separation of powers between the judiciary and the executive branches at the federal level.[116]

Furthermore, the remedy implemented in *Cooper* is repetitive given the requirements necessary to show ineffective counsel under *Strickland*.[117] According to the Court, the appropriate remedy for this violation must be tailored to the injury while not entirely absolving the defendant or overusing prosecutorial resources.[118] The Court determined in *Cooper* that the correct remedy for prejudicial violations of the Sixth Amendment right to effective assistance of counsel is requiring the State to reoffer the plea agreement and allowing the defendant to choose whether he will accept it.[119] This requirement fails to comport with judicial efficiency because a defendant attempting to prove a Sixth Amendment violation under *Strickland* must show a reasonable probability that he would have accepted the plea offer.[120]

The Court's creation of a remedy for the alleged constitutional violation in *Cooper* gives far too much power to trial court judges.[121] In *Cooper*, the remedy established by the Court is such that, once a defendant accepts a reoffered plea agreement following violation of his right to effective counsel, the trial court has discretion whether to vacate all convictions and order performance of the plea agreement, vacate some convictions and

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whether the prosecution would have maintained, and the trial court would have accepted, the original plea bargain).

115. *See* Brief for the United States as Amici Curiae Supporting Petitioner, *supra* note 34, at 31 (remarking that judicial enforcement of a previous plea bargain prevents prosecutorial determination of the fairest sentence based on the alleged offense, the defendant's history, and the State's resources).

116. *See id.* at 30-31 (commenting that a reanimation of an original plea offer as a mandatory criminal sentence would force the judiciary to take control of an exclusively executive duty).

117. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1396-97 (2012) (Scalia, J., dissenting) (inquiring why it is necessary to reoffer a plea agreement when the *Strickland* analysis requires a showing that the defendant would have accepted the original offer).

118. *See id.* at 1388-89 (majority opinion) (explaining that there are numerous costs associated with the reversal of a conviction, not least of which is that witnesses may be required to relive traumatic occurrences for a second time in court).

119. *See id.* at 1391 (noting that the State must reoffer the plea agreement and, assuming the defendant accepts the plea offer, the trial court has discretion in determining the correct convictions and sentence).

120. *See id.* at 1385 (requiring defendants to show that the plea bargain would have been presented to the court and accepted by it).

121. *See id.* at 1396-97 (Scalia, J., dissenting) (questioning the Court's decision to allow a trial court judge to choose a remedy for an unconstitutional conviction and surmising that the motivation behind this remedy is to compensate for the lack of an actual constitutional violation in this case).

resentence the defendant, or implement the original sentence at trial.[122] The Court advised that the appropriate remedy for these cases must ameliorate the harm caused by the Sixth Amendment violation while not wasting prosecutorial resources or giving the defendant a windfall.[123] However, invalidation after trial of all convictions by a unanimous guilty verdict would seem to constitute both a waste of prosecutorial resources and a windfall for the defendant.[124] Justice Scalia comments in his dissent in *Cooper* that the remedy proposed by the Court is bizarre, as it presents the possibility that leaving the original sentence intact—effectively doing nothing—could solve a violation of a defendant's constitutional rights.[125] As these examples illustrate, the Court's created remedy in *Cooper* gives too much power to trial court judges.[126]

Additionally, the remedy created by the Court in *Cooper*—discretionary sentencing after a conviction is ruled unconstitutional due to ineffective counsel during plea bargaining—is inarticulate and illogical.[127] The Court's decision to note two factors relevant to these remedies, but not to provide full guidance on this discretionary sentencing, is arbitrary and fails to ensure that the constitutional harm will be remedied.[128] The explicit reference to the possibility that the trial court judge can maintain the original conviction following an infringement of a defendant's Sixth Amendment right to effective counsel demonstrates that amelioration of the harm is not ensured through the remedy provided in *Cooper*.[129] Because

122. *See id.* at 1391 (majority opinion) (correcting the remedy suggested by the District Court by mandating the sentence of the original plea agreement).

123. *See id.* at 1388-89 (suggesting that Sixth Amendment remedies should be tailored to the constitutional injury and should not encroach upon the other purposes of the criminal justice system).

124. *See id.* (highlighting that this remedy involves significant social costs, as it makes key trial personnel and parties exert additional time, money, and effort for a repeated trial).

125. *See id.* at 1397 (Scalia, J., dissenting) (criticizing the Court's decision to allow statutes, rules, and trial court judges to create remedies for violations of defendants' constitutional rights).

126. *See id.* at 1398-99 (Alito, J., dissenting) (remarking that it is unsound for the Court to leave the responsibility of determining the limits of Sixth Amendment remedies to trial court judges).

127. *See id.* at 1396-97 (Scalia, J., dissenting) (arguing that the remedy to a Sixth Amendment violation leading to a conviction should not be subject to the discretion of a trial court judge, as the trial judge is not simply accepting a plea agreement but creating a remedy for a constitutional violation).

128. *See id.* at 1389 (majority opinion) (noting that both a defendant's willingness to take responsibility for his actions and evidence discovered after a plea bargain is offered can be relevant to determining a remedy, while assuming that federal and state courts will establish the complete standard of factors that trial court judges should consider when exercising discretion in these cases).

129. *See id.* at 1396-97 (Scalia, J., dissenting) (alleging that the remedy provided by the Court invalidated a conviction derived from a fair trial, and in doing so failed to conclusively remedy the constitutional violation because trial court discretion is not

the solution used in *Cooper* does not guarantee that the constitutional harm will be fixed, it is incoherent and potentially ineffective.[130]

Lastly, the Court's remedy to the constitutional harm in *Cooper* could directly conflict with the standards the Court deemed necessary when creating this solution by placing an undue burden on prosecutors.[131] The remedy established in *Cooper* allows trial court judges to mandate prosecutorial reoffering of a plea bargain where they deem it necessary to redress the constitutional harm.[132] In his dissent, Justice Alito notes two examples of situations where a mandatory reoffering of a plea bargain would constitute an abuse of discretion.[133] The first example is when vital information concerning a defendant's guilt surfaces following rejection of a plea bargain, and the second example is when the prosecution incurs significant costs of limited resources due to rejection of a plea offer.[134] In both circumstances, ordering the prosecution to reoffer the plea bargain would cause an undue burden for prosecutors and would not comport with the requirements of such a remedy as set forth by the Court.[135]

IV. POLICY IMPLICATIONS

The Court's decisions in *Cooper* and *Frye*—finding *Strickland* prejudice while refusing to identify the requirements of defense counsel or qualities constituting ineffective counsel—create numerous legal difficulties.[136] The

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proper for a constitutional harm).

130. *See id.* at 1397 (distinguishing the perceived notion that this case involves courts' acceptance or rejection of plea bargains from the actuality that this case involves discretionary establishment of a resolution for an unconstitutional criminal conviction).

131. *See id.* at 1398 (likening the Court's understanding of criminal law as interpreted in *Cooper* to a casino, where the state gives defendants the opportunity to plea bargain and win a lighter sentence, but any defendant "excluded from the tables" can assert his Sixth Amendment rights).

132. *See id.* at 1389 (majority opinion) (asserting that in circumstances where plea bargains must be reoffered, trial court judges may choose either to accept the plea and overturn the conviction or reject the plea and uphold the conviction).

133. *See id.* at 1399 (Alito, J., dissenting) (contending that the Court understands how required renewal of a plea bargain would cause significant injustice in numerous circumstances).

134. *See id.* at 1398 (noting that the Court's decision creates the potential for abuse of discretion and relies on trial court judges to apply the rule in *Cooper* in a manner that will not lead to unjust reversal of decisions).

135. *See id.* at 1388-89 (majority opinion) (prefacing their creation of a remedy with the rule that such solutions must not impede competing interests such as justice for victims and security of prosecutorial resources).

136. *See* Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012) (failing to define the responsibilities of defense attorneys because it would be imprudent and unfeasible to do so given the role of alternative tactics in negotiation); *Cooper*, 132 S. Ct. at 1391 (lacking guidance for the standard necessary to show deficient performance of counsel during plea bargaining because ineffective counsel was conceded by both parties).

Court in *Frye* admitted that defining the responsibilities of defense counsel is difficult due to the distinctive nature of trial advocacy.[137] However, the Court also declared that *Frye* was not the appropriate occasion to explain the responsibilities of defense attorneys in the plea bargaining process.[138] The Court's lack of guidance on effective performance is also present in *Frye*: in subjecting the facts of *Frye* to the performance prong of *Strickland*, the Court mentioned that the standards for professional practice provide a guide for effective performance of counsel.[139] However, the Court explicitly refused to define the duties of defense counsel in plea bargaining.[140]

The complexities of defining what constitutes effective assistance during plea bargaining should have precluded the Court from applying constitutional analysis to the facts in *Frye*.[141] The Court gives deference to reasonable tactical decisions, but finds ineffective assistance of counsel when an attorney unreasonably chooses not to investigate a necessary element of a defendant's case; thus, retroactive analysis of attorney performance under *Strickland* can hinge on the difficult determination of whether a Court finds counsel's performance to be reasonable based on tactical choices.[142] Justice Scalia noted in his dissent in *Frye* that "hard-bargaining" presents just one example of the incredibly thin line between tactical decisions and Sixth Amendment violations as a result of *Cooper* and *Frye*.[143]

Additionally, the determination of whether ineffective assistance of counsel has a prejudicial effect and meets the prejudice prong of the *Strickland* test will present more difficulties in cases where a defendant's potential acceptance of a previous plea bargain is less certain.[144] The Court

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137. *See Frye*, 132 S. Ct. at 1408 (suggesting that plea bargaining is contingent on an attorney's personal style and the tactics necessitated by each individual case).

138. *See id.* (explaining that it is only necessary to determine whether defense counsel must communicate offers to defendants to decide the outcome of this case, but nothing more).

139. *See id.* (citing the American Bar Association's recommendation that defense attorneys explain all plea offers to defendants with punctuality).

140. *See id.* (finding the expiration of a plea offer prior to *Frye* evaluating it as sufficient to constitute ineffective assistance under the Sixth Amendment).

141. *See id.* at 1412 (Scalia, J., dissenting) (contending that the issue of whether defense counsel is sufficient for Sixth Amendment purposes will be less clearly decided in other cases).

142. *See* Strickland v. Washington, 466 U.S. 668, 690-91 (1984) (affirming that counsel is responsible for either performing reasonable investigations or coming to a reasonable decision that renders additional investigation unnecessary).

143. *See Frye*, 132 S. Ct. at 1412-13 (Scalia, J., dissenting) (criticizing the logic behind the possibility that a "hard-bargaining" attorney could violate his client's constitutional rights in an attempt to effectively assist future clients).

144. *See id.* at 1413 (remarking that the Court's analysis of the prejudice prong of the *Strickland* test demonstrates the complexities of proving prejudice in these cases).

indicated that determining whether a defendant would have accepted an earlier plea bargain, although easy to determine in *Frye*, might pose a more difficult question in different circumstances.[145]

Further, in cases like *Frye* where the state of jurisdiction allows plea bargains to be withdrawn by the prosecution, the Court must speculate about whether the prosecution would have done so.[146] Additionally, the Court must consider whether the trial court would have accepted the plea bargain.[147] While both of these questions were easy to resolve in *Frye*, the estimation as to whether the prosecution and trial court would have proceeded with an original plea offer may prove difficult in later cases.[148]

Frye creates a tension between two competing ethical principles for defense counsel.[149] Defense attorneys are expected not only to pursue the optimal sentences for defendants, but also to promptly communicate plea bargains to defendants.[150] The new rule established by *Frye* brings with it a realistic possibility that counsel's failure to communicate a plea offer will provide the best possible result for a defendant.[151] Effectively, this decision could give defendants "two bites at the apple" by allowing defense attorneys to retain an offer as a maximum possible sentence for their client, due to the fact that a setback during trial could prompt a defense attorney to suddenly discover the plea offer and later communicate it to the defendant, thereby allowing the defendant to claim ineffective assistance under *Strickland*.[152]

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145. *See id.* at 1411 (concluding that in some cases it may be required to provide more than a subsequent guilty plea or a harsher sentence in order to demonstrate reasonable probability that a defendant would have accepted a previous plea offer).

146. *See id.* at 1413 (Scalia, J., dissenting) (rephrasing the Court's process for *Strickland* analysis of cases similar to *Frye* as a form of retrospective crystal-ball gazing).

147. *See id.* (remarking that Frye's subsequent infraction makes the prejudice prong of the *Strickland* analysis easier in this case).

148. *See id.* (reasoning that while Frye's second infraction leads to a clear assumption that *Strickland* prejudice cannot be shown, this decision will likely prompt numerous cases that will not be easily decided where a defendant does not commit a subsequent offense).

149. *See* Reply Brief at 17, Missouri v. Frye, 132 S. Ct. 1399 (2011) (No. 10-444) [hereinafter Missouri v. Frye Reply Brief] (clarifying that the State is not implying that defense attorneys will deliberately violate ethical duties, but rather that defense attorneys may be compelled to choose their ethical responsibility to procure the best sentence for a defendant over their ethical duty to promptly communicate plea offers).

150. *See id.* (reasoning that this ethical dilemma will become even more prominent in cases involving higher charges, where the State offers a beneficial plea bargain at the beginning of the criminal process).

151. *See id.* at 17-18 (confirming that the rule under *Frye* will allow defendants to retain the benefit of a reduced sentence in the original plea bargain while taking a chance of acquittal at trial).

152. *See id.* at 19 (contending that because American Bar Association standards only provide a base guideline for counsel's behavior and do not set forth any additional requirements of counsel, defense attorneys may be tempted to remain silent about

Lastly, these cases could make plea bargaining a more difficult and cumbersome criminal process.[153] Because prosecutors are burdened when a defense attorney makes a mistake due to ineffectiveness, they could understandably be hesitant to offer a plea bargain, particularly in important cases that may necessitate a great deal of prosecutorial resources.[154] Further, this movement from off-the-record discussions towards open formality and structure in plea bargaining could bind together the trial courts and plea offers until the process is significantly less efficient.[155] Moreover, prosecutorial hesitance to offer pleas could neutralize the benefits of plea bargaining,[156] and without plea bargaining, the long and expensive criminal justice process could become overwhelmed.[157]

V. CONCLUSION

The Court's analysis in *Cooper* and *Frye* failed to account for the purpose behind the Sixth Amendment's right to effective counsel.[158] Thus, the Court should overturn the decisions in these two cases and return to the narrow jurisprudence of constitutional claims involving effective counsel that was originally promulgated by *Strickland*.[159] Failure to do so could significantly complicate and burden the plea bargaining process and,

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offers to ensure a benefit for their client). *But see* David A. Perez, *Deal or No Deal? Remedying Ineffective Assistance of Counsel During Plea Bargaining*, 120 YALE L.J. 1532, 1575 (2011) (proposing that the risk of conviction at trial and failing on an ineffective counsel plea would ward off those defendants intelligent enough to exploit the system).

153. *See* Missouri v. Frye Reply Brief, *supra* note 149, at 19-20 (proposing that the problems with the *Frye* ruling are evident not only when defense counsel intends to withhold a plea bargain based on strategy, but also when defense counsel inadvertently fails to communicate a plea bargain).

154. *See id.* at 20 (surmising that prosecutors' fear of mistakes resulting from ineffective defense counsel will cause the plea bargaining process to become disjointed).

155. *See id.* (asserting that the rule articulated in *Frye* would substantially and unnecessarily weigh down the criminal justice system due to its effects on plea bargaining).

156. *See* Missouri v. Frye, 132 S. Ct. 1399, 1407-08 (2012) (affirming that the plea bargaining process benefits both defendants and prosecutors by granting lighter sentences to the former and conserving the limited resources of the latter).

157. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting) (describing plea bargaining as a necessary evil because the criminal justice system could not sustain itself if every case were resolved by trial); *see also* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 38 (1979) (claiming that Supreme Court decisions led to a logjam of criminal cases, thus raising the intensity of plea bargaining).

158. *See Cooper*, 132 S. Ct. at 1393 (surmising that the right to effective assistance of counsel only is relevant insofar as it impacts a defendant's right to a fair trial).

159. *See* Strickland v. Washington, 466 U.S. 668, 686 (1984) (proposing that evaluation of claims of attorney ineffectiveness hinge on whether counsel's mistake interfered with the defendant's right to a fair trial).

consequently, the justice system as a whole.[160] Even if the Court refuses to reverse its decisions in *Cooper* and *Frye*, the Court should reexamine the remedies implemented in the cases, as they are illogical and place too much power in the hands of trial court judges.[161]

160. *See* Missouri v. Frye Reply Brief, *supra* note 149, at 20 (claiming that the remedy proposed in *Frye* would not encourage punctual disclosure of plea bargains or promote optimal legal advice for clients).

161. *See* Cooper, 132 S. Ct. at 1399 (Alito, J., dissenting) (concluding that it is unwise to rely on lower court judges to perpetually apply the remedies in *Cooper* and *Frye* cautiously).