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A PROPOSED FRAMEWORK FOR ANSWERING FOR THE LAFLER QUESTION

by Jamie Pamela Rasmussen

Some initial reviews of the United States Supreme Court’s opinions in *Lafler v. Cooper*¹ and its companion case *Missouri v. Frye*² treated the decisions as either expected or necessary: as one commentator noted, “The only surprise about the Supreme Court’s recent decisions in *Missouri v. Frye* and *Lafler v. Cooper* is that there were four dissents.”³ Nevertheless, *Lafler’s* discussion of the remedy for ineffective assistance of counsel during plea negotiation raised more questions than it answered. Based on the facts before it, the Court ordered reinstatement of the plea offer and gave the trial court discretion regarding sentencing after acceptance of the guilty plea.⁴ Yet in announcing that decision, the Court failed to discuss the contours of the rule it applied.⁵ This approach ignored the history of guilty plea jurisprudence and the long record of lower court cases that struggled with the issue of an appropriate remedy to afford a defendant who has received ineffective assistance of counsel during plea negotiations.

In *Frye* and *Lafler*, the Supreme Court recognized that the criminal justice system is no longer based primarily on a system of trials. It did so by deciding that prejudice from ineffective assistance of counsel can be demonstrated even if the defendant cannot prove he would have gone to trial. The Supreme Court, however, failed to provide adequate guidance for fashioning a remedy. This failure has left lower courts without a compass for navigating the murky waters of providing an appropriate remedy in these types of cases. Such difficulties gives rise to what one jurist has called “the *Lafler* question.”⁶

The *Lafler* question is narrow in two respects: first, it arises only after the prisoner has proven ineffective assistance of counsel under *Strickland v. Washington;⁷* and second, it arises only in the context of a lost plea agreement. That is, the defendant alleges his counsel’s ineffectiveness caused him to reject or miss out on a favorable plea agreement. Under these circumstances, the problematic policy issue is determining the best way to ensure that a defendant’s constitutional right to effective assistance of counsel during plea negotiations is vindicated, while not unduly infringing on the government’s competing interest in the administration of justice. In *Lafler*, the Supreme Court noted the difficulties in providing such a remedy but essentially left the determination to the discretion of the lower courts.

Other commentators have suggested justifications for the enunciation of a single specific remedy that would apply in all cases.
presenting a *Lafler* question. Yet, as the Supreme Court recognized, to enunciate a uniform remedy for a problem that could present itself in myriad ways would unfairly impinge on competing interests. Thus, instead of offering a justification for one particular remedy, this article attempts to provide a framework for answering the *Lafler* question on its own terms. As the Supreme Court recognized in *Lafler*, trial courts need discretion to fashion appropriate remedies to account for the fact that plea agreements, unlike most trials, determine not only guilt but also the appropriate sentence in a single judicial proceeding without the safeguards of a full trial on the merits. That discretion, however, should be guided by explicit consideration of: one, the government’s interest as measured by the nature of subsequent proceedings; and two, the defendant’s interest as measured by the defendant’s actions during the plea negotiation. By enunciating these factors and giving each its appropriate weight, courts will be able to fashion appropriate remedies for ineffective assistance of counsel during plea bargaining, that is, remedies that are tailored to each case and that do not infringe upon the competing interests at stake.

To explain the development of such a rule and how it should be applied, this article proceeds in four parts. The first two parts examine the legal background which gave rise to the problem presented by the *Lafler* question. Part I examines the Supreme Court case law regarding the constitutional validity of guilty pleas and the evaluation of ineffective assistance of counsel claims. Part II discusses the lower courts’ struggle to provide remedies for ineffective assistance of counsel during plea negotiations. Part III then discusses the *Lafler* opinion, showing how it failed to adequately address the problem of remedy. Finally, Part IV uses the principles in *Lafler* and the earlier lower court cases to create an explicit balancing test for providing a remedy to a defendant who has received ineffective assistance of counsel during plea negotiations.

I. Supreme Court Precedent

In a series of cases decided in the early 1970s, the Supreme Court recognized the changing circumstances surrounding defendants’ bargaining power and approved the practice of plea bargaining. These decisions relied heavily on the availability of competent representation for the defendant. Despite the lack of an explicit constitutional guarantee of effective assistance of counsel during plea negotiations, such a guarantee is inferred from the Sixth Amendment, which provides, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.” The use of the phrase “all criminal prosecutions” rather than “all criminal trials” suggests the intention of a broad interpretation. Many Supreme Court decisions also hinted at a right that applied to proceedings other than the trial itself. That is, while the Sixth Amendment is often seen as a guarantee of trial rights, its text is broad enough to en-

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12 See Nix v. Whiteside, 475 U.S. 157, 184 (1986) (‘The touchstone of a claim of prejudice is an allegation that counsel’s behavior did something ‘to deprive the defendant
compass a guarantee of the right to counsel in a prosecution that ends in a guilty plea because its guarantee applies in “all criminal prosecutions.” While this doctrine was not explicit at the time the Supreme Court began to develop rules governing plea negotiations, the Court’s reasoning in the cases relied on the practical effects of plea negotiations and the presence of effective assistance of counsel to support the conclusion that a plea negotiation was not coercive.

For example, in Brady v. United States, the Court distinguished a leading Fifth Amendment case by pointing to the fact that the defendant in Brady had the advice of counsel when deciding whether to plead guilty. That advice gave the defendant a “full opportunity to assess the advantages and disadvantages of a trial as compared with those attending a plea of guilty,” and so “there was no hazard of an impulsive and improvident response to a seeming but unreal advantage.”

The decision in Brady paved the way for what one jurist has called the administrative system of criminal justice, i.e., a system of criminal justice based on guilty pleas as opposed to trials. The analysis for determining the validity of a guilty plea in this system was practical rather than doctrinal. For example, in North Carolina v. Alford, a defendant facing strong evidence of guilt decided to accept a plea agreement so he would receive a lesser sentence even though he would not admit he was guilty of the offense charged. The Court discussed the issue of “whether a guilty plea can be accepted when it is accompanied by protestations of innocence and hence contains only a waiver of trial but no admission of guilt.”

The Court concluded a confession of guilt was not constitutionally necessary to a valid guilty plea, so long as the record contained strong evidence of guilt. Instead of discussing the intricacies of Fifth Amendment doctrine, the Court emphasized the practical effects of the plea stating, “The Constitution is concerned with the practical consequences, not the formal categorizations, of state law.”

The next important decision in the development of the Supreme Court’s plea negotiation theory was Tollett v. Henderson. In Tollett, the defendant, advised by counsel, pleaded guilty to first-degree murder and was sentenced to ninety-nine years in prison. Many years after his conviction, the defendant challenged his conviction through a federal habeas corpus action, arguing he had been deprived of his constitutional rights because African-Americans had been systematically excluded from the grand jury that returned the indictment against him. In the district court, the defendant focused on the fact that his lawyer failed to inform him of the possibility of a successful challenge; the court of appeals held that based on this lack of knowledge, there could be no valid waiver.

The Supreme Court reviewed the case to determine “whether a state prisoner, pleading guilty with the advice of counsel, may later obtain release through federal habeas corpus by proving only that the indictment to which he pleaded was returned by an unconstitutionally selected grand jury.” The majority answered

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of a fair trial, a trial whose result is reliable.”); Strickland v. Washington, 466 U.S. 668, 685 (1984) (“An accused is entitled to be assisted by an attorney ... who plays the role necessary to ensure that the trial is fair.”); see also Dery & Soo, supra note 10, at 105.
14 Id. at 754.
15 Id.
18 Id. at 27-28.
19 Id. at 33.
20 Id. at 37.
21 Id.
23 Id. at 259.
24 Id.
25 Id. at 260.
26 Id.
that question in the negative by relying on Brady. The Supreme Court opined that the court of appeals interpreted Brady and its companion cases too narrowly. Those cases were not simply about whether a guilty plea after an involuntary confession was invalid; instead, the reasoning in those cases applied in any case where the “petitioner alleged some deprivation of constitutional rights that preceded his decision to plead guilty.” Thus, to be entitled to relief after a guilty plea, the petitioner would have to prove a constitutional violation and that his counsel’s “advice was not ‘within the range of competence demanded of attorneys in criminal cases.’” Under this reasoning, almost all challenges to guilty pleas became, of necessity, challenges alleging ineffective assistance of plea counsel.

These decisions implicitly recognized the differences between a criminal justice system that makes the factual determination of guilt via trial and a criminal justice system that makes the factual determination of guilt via plea. In the latter, prosecutors serve two functions: first, they make the initial determination of guilt; second, they determine what sentence is appropriate. Unfortunately, this allocation of authority does not comport with the traditional norms of our system of justice. The result is that the procedures that govern the finding of guilt and the imposition of sentences i.e., plea negotiations are very informal and not always followed. While plea negotiations can provide powerful opportunities for zealous defense counsel to improve the position of his or her client, the informality of the process makes it even more difficult than in trial situations to determine what constitutes effective representation. Furthermore, as the system hinged on the availability of competent counsel for the defense, it was inevitable that defendants would begin to challenge their attorneys’ performance.

Thus, the next step in the development of the administrative system of criminal justice was enunciating standards for determining when a criminal defendant had received ineffective assistance of counsel. When the Supreme Court addressed the issue of evaluating the effectiveness of counsel during plea negotiations in Hill v. Lockhart, it went back to familiar ground. Although the opinions in Brady, Alford, and Tollett had begun to recognize that plea negotiations were best governed by practical considerations, the analysis in Hill v. Lockhart looked to the constitutional guarantee of a fair trial to provide guidance for evaluating claims of ineffective assistance of counsel prior to a guilty plea. At the same time, the decision in that case set the stage for the conflict that would create the questions presented in Lafler and Frye.

In Hill v. Lockhart, the Supreme Court addressed the question of whether a post-conviction movant was entitled to an evidentiary hearing on a claim for post-conviction relief. The movant claimed his guilty plea was involuntary because his attorney had failed to advise him that the applicable law would require him to serve fifty percent of the sentence he would receive after the guilty plea before he would become eligible for parole. In addressing this question, the Court first looked at whether the standard enunciated in Strickland v. Washington applied in the context of guilty pleas and determined that it did for two reasons: one, in both types of cases the government was unable to prevent ineffective assistance of counsel and two, in both types of cases the public had the same interest in the finality of a conviction. Based on this reasoning, and without discussion of the ways in which determination of guilt by plea negotiations is different from determination of guilt by trial, the Court decided the

27 Id. at 267.
28 Tollett, 411 U.S. at 265.
29 Id.
30 Id. at 266.
32 Id. at 2127.
33 Id. at 2124.
34 See id. at 2129.
36 Id. at 53.
37 Id. at 57-58.
same test for ineffective assistance of counsel applied in cases where guilt was determined by plea as in cases where guilt was determined by trial.

In addressing the prejudice prong of the Strickland test, the Court in Hill relied primarily on the trial model of the criminal justice system. The Court stated the determination “focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process.” It attempted to clarify this pronouncement by stating that “in order to satisfy the ‘prejudice’ requirement, the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” Since the defendant in Hill did not allege he would have gone to trial, the Supreme Court held that the lower court did not err in denying the claim without an evidentiary hearing. Thus, the result in the Hill case suggested a defendant had to prove he would have gone to trial in order to prove prejudice from ineffective assistance of counsel during plea negotiations. At the same time, the broader language regarding a different result left open the possibility of other tests for prejudice.

Where a conviction is the result of a guilty plea, the most critical phase of the prosecution is not the presentation of evidence or the cross-examination of the government’s star witness, but the decision of the terms on which the defendant will plead guilty. A guilty plea, unlike a trial, is the result of a negotiation. After a jury trial, assuming there has been no significant error in the trial, the conviction is supported by the decision of a group of twelve citizens who believed the evidence proved the defendant’s guilt beyond a reasonable doubt. No such assurances exist in the case of a guilty plea. Furthermore, after a trial, the government has expended considerable resources prosecuting the defendant. These factors alter the interests at stake when evaluating a claim of ineffective assistance of counsel. Because the Court in Hill did not pause to consider the ways in which a plea of guilty differs from a trial finding of guilt, the Court enunciated a test for ineffective assistance of counsel that did not effectively balance the interests at stake. This situation caused much confusion in the lower courts.

II. Lower Court Confusion

After Hill, lower courts split regarding which test to apply to determine whether a defendant who had pleaded guilty was prejudiced by his attorney’s deficient performance. Some courts followed the more general statement that prejudice was shown when the deficient performance affected the outcome of the plea process. Other courts took a more narrow approach, relying on the Supreme Court’s hold-

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38 Id. at 59.
39 Id.
41 See Lafler v. Cooper, 132 S. Ct. 1376, 1397-98 (2012) (Scalia, J., dissenting) (noting “there is no doubt that the respondent here is guilty of the offense with which he was charged” because “he has received the exorbitant gold standard of American justice—a full-dress criminal trial with its innumerable constitutional and statutory limitations upon the evidence the prosecution can bring forward”). In re Winship, 397 U.S. 358, 363 (1970) (noting that proof of guilt beyond a reasonable doubt “is a prime instrument for reducing the risk of convictions resting on factual error”).
42 See Lafler, 132 S. Ct. at 1388-89 (“The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendant to expend further time, energy, and other resources to repeat a trial that has already taken place.”) (quoting United States v. Mecham, 475 U.S. 66, 72 (1986)).
44 See, e.g., Riggs v. Fairman, 178 F. Supp. 2d 1141, 1150 (C.D. Cal 2001) (noting that “a large body of federal case law holds that a defendant who rejects a plea offer due to improper advice from counsel may show prejudice under [Strickland] even though he ultimately received a fair trial.”) (quoting Wanatche v. Ault, 259 F.3d 700, 703 (8th Cir. 2001)); Carmichael v. Colorado, 206 P.3d 800, 807 (Colo. 2009) (holding that to prove prejudice the defendant “must demonstrate there is a reasonable probability that, but for counsel’s errors, he would have accepted the plea offer rather than going to trial”); see also Illinois v. Curry, 687 N.E.2d 877, 879 (Ill. 1997) (finding prejudice where the defendant was not made aware of mandatory consecutive sentences if found guilty at trial).
ing in the Hill. Those courts found prejudice could not be proven after a guilty plea unless the petitioner would have insisted on trial. The conclusion was also supported by the proposition that the right to effective assistance of counsel was a right designed merely to assist the defendant in obtaining a fair trial. Thus, if the defendant obtained a fair trial, he could not have been prejudiced by any ineffective assistance of counsel during the plea negotiation stage.

This split in authority over how to determine prejudice after ineffective assistance of counsel in the plea negotiation phase also resulted in discrepancies in the appropriate remedy afforded to defendants who could prove their attorneys had been ineffective. The lower courts dealt with the complex problem of providing a remedy to a defendant who received ineffective assistance of counsel but nevertheless was convicted after fair proceedings in a variety of ways. The most common remedies ordered in cases of lost plea bargains include ordering a new trial, ordering the government to reoffer the plea, or ordering specific performance of the lost plea bargain. Each of these remedies, if chosen as the exclusive remedy for cases presenting a Lafler question would strike an unfair balance between the defendant’s interests and the government’s interests because they do not take into account the manner in which the balancing of the parties’ interests differ after a trial as opposed to after a guilty plea.

Ordering a new trial is by far the most popular of these options. The reasoning for such a remedy is generally based on the premise that a new trial returns the parties to a stage prior to any constitutional error. The corollary of this reasoning is that ordering a new trial allows resumption of plea bargaining with effective assistance of counsel for the defendant. A second fairly popular remedy is specific performance of the lost plea offer. Some courts reasoned specific performance is an authorized remedy and made an analogy to Santobello. In support of this analogy, courts asserted the remedy was narrowly tailored and restored the defendant to the position he would have been in without the constitutional error.

Somewhere between the remedy of ordering a new trial and ordering specific performance of the lost plea agreement was the remedy of ordering the government to reinstate the plea offer. Generally, courts choosing this remedy offer little or no reasoning for their choice of remedy. See, e.g., Napper, 385 A.2d at 524; Revelle, 989 So.2d at 753. See, e.g., Williams, 605 A.2d 103 (Md. 1992); Alvernaz v. Ratelle, 831 F. Supp. 790 (S.D. Cal 1993); Becton v. Hun, 516 S.E.2d 762 (W.Va. 1999); Sanders v. Comm’r of Corr., 851 A.2d 313 (Conn. App. Ct. 2004); Ebron v. Comm’r of Corr., 992 A.2d 1200 (Conn. App. Ct. 2010). Ebron, 992 A.2d at 1215.

 ld. at 1217; Williams, 605 A.2d 110-11; Becton, 516 S.E. 2d at 768.


46 See Nix v. Whiteside, 475 U.S. 157, 184 (1986); Strickland v. Washington, 466 U.S. 668, 687 (1984); Beach, 220 S.W.3d at 364; see also George Dery and Annelie Soo, Turning the Sixth Amendment upon itself: The Supreme Court in Lafler v. Cooper Diminished the Right to Jury Trial with the Right to Counsel, 12 CONN. PUB. INT. L. J. 101, 105 (2012); Donna Lee Elm, Lafler and Frye: Constitutionizing Plea Bargaining, 36 CHAMPION 30, 31 (2012).


50 See, e.g., Riggs, 178 F. Supp. 2d at 1154; Carmichael, 206 P.3d at 809. Other cases employing this remedy offer little or no reasoning for their choice of remedy. See, e.g., Napper, 385 A.2d at 524; Revelle, 989 So.2d at 753. See Riggs, 178 F. Supp. 2d at 1154 (“The parties then will be free to engage in plea bargaining or to decline to do so.”); Curvy, 687 N.E.2d at 890 (“The remedy of a new trial may include the resumption of the plea bargaining process.”); Carmichael, 206 P.3d at 810 (“The parties may, of course, reengage in plea negotiations.”).

remedy did so because other remedies were unsatisfying. For example, in *Iowa v. Kraus*, the Supreme Court of Iowa held that a new trial was not appropriate because it did not restore the lost chance of a bargain and specific performance was not appropriate because if the defendant knew that was the remedy, there would be no risk for a defendant who chose to go to trial.\(^5\) In economic terms, if the law provided specific performance as a remedy, then the defendant could demand the government expend resources on a trial and yet still obtain the benefit of a plea agreement in the form of a sentencing discount that was supposed to reflect the savings the government obtained from not having to go to trial. Additionally, the court in *Ex parte Lemke* reasoned that reinstating a plea offer put the defendant in the position he would have been in had the constitutional violation not occurred.\(^5\)

A frequently overlooked option is the option of resentencing.\(^5\) In *Davie v. South Carolina*, defense counsel failed to convey a favorable plea offer and the defendant pleaded guilty under a later, less favorable offer.\(^5\) The court held that a new trial would not be an appropriate remedy because the defendant never indicated he wanted to go to trial.\(^5\) On the other hand, the court found specific performance would also not be an appropriate remedy because the defendant could not have relied on the earlier, more favorable offer or any advice related to the offer in his later decision to plead guilty. *Davie* differs from earlier remedy cases because it examined the particular facts in the case before the court rather than doctrinal considerations.

Other cases that have come closer to the appropriate remedy also rely on the particular facts and circumstances of the case before them, but they begin their analysis by skipping the Supreme Court’s guilty plea jurisprudence and relying on general Sixth Amendment principles. For example, in *United States v. Gordon*, the court, relying on the balancing test enunciated in *United States v. Morrison*, \(^6\) considered the following factors: whether a subsequent trial was infected with constitutional error, whether the witnesses would be available for a new trial, and a comparison of the time already served by the defendant with the sentence in the lost plea bargain.\(^3\) The court found the trial had not been infected with constitutional error but there was no significant lapse of time between the first trial and the collateral attack.\(^6\) Because of the short period of time between the criminal trial and the collateral attack, there were no significant practical barriers to a retrial.\(^6\) The court found that a new trial was an appropriate remedy in such a case.\(^6\)

Some courts, most notably those that found no prejudice where the defendant could not prove he would have gone to trial, would order no remedy. At first, this might seem to be problematic. In his dissent in *Lafler*, Justice Scalia expressed disdain “that the remedy could ever include no remedy at all.”\(^6\) This is less of a problem than it appears. The requirement of proving prejudice itself recognizes that not all constitutional violations are so egregious as to require reversal of a conviction.\(^6\) Furthermore, in many cases, courts affirm convictions despite improper procedures. A conviction may stand despite a constitutional error if that error was harmless beyond a reasonable doubt.\(^6\) In some cases, as will be shown be-
low, no remedy will be appropriate even if the
defendant can show he would have received a
better outcome based on the lost plea bargain.

The proliferation of remedies demonstrat-
es the confusion created by the Supreme
Court’s guilty plea jurisprudence. The Court
at first carefully delineated the various func-
tions and doctrinal justifications for the prac-
tice. Then, as the differences between the trial
system and the guilty plea negotiation system
became more apparent, the Court abandoned
the doctrinal justifications one by one with-
out providing alternative guidelines. The only
guidance was the central importance of effec-
tive assistance of counsel. The decision in Hill
inadequately addressed the problem of inef-
flective assistance of counsel during plea nego-
tiations by failing to recognize the difference
between plea negotiations and trial as a mech-
anism for proving guilt. The Supreme Court
began to recognize that important difference in
Frye and Lafler.

III. Lafler and Frye

In Missouri v. Frye and Lafler v. Cooper, the
Supreme Court definitively resolved the split
regarding the appropriate test for determi-
ning prejudice after finding ineffective assistance
of counsel during plea negotiations. In each case,
the defendant satisfied the first prong of the
Strickland test so the only issue remaining was
a determination of prejudice. Thus, in each
case, the Court had to determine what facts a
defendant had to prove to show prejudice aris-
ing from ineffective assistance of counsel
during plea negotiations. While this was an im-
portant step forward, the Court obscured the
different interests at stake by using the phrase
“constitutionally adequate procedures.” If the
Court had used the phrase “a fair trial” or “a
constitutionally valid guilty plea” it would have
drawn attention to the different interests at
stake in each situation and would have made it
easier to craft an appropriate remedy.

The defendant in Frye had been charged
with driving with a revoked license, an offense
for which he had been convicted three times
before. For that reason, the fourth offense was
a felony and it carried a maximum possible punish-
mont of four years in prison. The pros-
ceutor offered a choice of plea offers with an
expiration date, and defense counsel failed to
inform his client of those offers prior to their
expiration date. When the defendant was sub-
sequently arrested for the same offense, he de-
cided to plead guilty to the first charge with-
out the benefit of a plea agreement. The court
imposed a three-year prison sentence. In his
state-level post-conviction case, Frye argued he
had received ineffective assistance of counsel
when his attorney failed to inform him of the
initial plea offer before it had expired.

The Supreme Court granted certiorari
to determine the appropriate standard for de-
termining prejudice arising from ineffective as-
sistance of counsel in a case involving the entry
of a guilty plea. The Court discussed Strick-
land, Hill, and Padilla, distinguishing the latter
two. It noted that in Hill and Padilla the plea
was entered based on erroneous advice, while
the defendant in Frye received correct advice.
The Court stated, “The challenge is not to the
advice pertaining to the plea that was accepted
but rather to the course of legal representation
that preceded it with respect to other potential
pleas and plea offers.” In rejecting the gov-
ernment’s argument that the entry of a knowing
and voluntary plea cured any prejudice arising
from prior errors, the Court emphasized the
prevalence of guilty pleas in today’s criminal
justice system to support its conclusion that
the plea process must be fair:

Instead, relying on Glover v. United States, the
Court held that “to establish prejudice in this
instance, it is necessary to show a reasonable
probability that the end result of the criminal
process would have been more favorable by

\[\text{70} \quad \text{Missouri v. Frye, 132 S. Ct. 1399, 1404 (2012).}\]
\[\text{71} \quad \text{id. at 1404.}\]
\[\text{72} \quad \text{id. at 1405.}\]
\[\text{73} \quad \text{id. at 1404.}\]
\[\text{74} \quad \text{id. at 1406.}\]
\[\text{75} \quad 531 U.S. 198, 203 (2001).}\]
reason of a plea to a lesser charge or a sentence of less prison time.” The Court also relied heavily on the general Strickland test for prejudice, i.e., whether in the absence of the errors of counsel “the result of the proceeding would have been different.” Based on this analysis, the Court determined that the relevant issue in the case was whether the plea agreement would have resulted in a lesser sentence; this required analysis of whether the prosecutor would have withdrawn the agreement and whether the trial court would have been obligated to accept it. The Court remanded those questions for consideration by the lower court.

In Lafler, defense counsel advised the defendant in an attempted murder case to reject a plea agreement. The attorney explained that the government could not prove the defendant intended to kill the victim because the victim had only been shot below the waist. The defendant proceeded to trial, was convicted, and received a harsher sentence than he would have received under the rejected plea agreement. The defendant sought state post-conviction relief, claiming his counsel was ineffective in advising him to reject the plea offer, and the state court denied the claim on the grounds that the defendant had made a knowing and voluntary decision to proceed to trial. He renewed his claims in a federal habeas corpus action, and the federal district court granted relief, ordering specific performance of the original plea offer.

The Supreme Court again rejected the government’s reliance on Hill, stating that “here the ineffective advice led not to an offer’s acceptance but to its rejection.” The Court rejected the related argument that there could be no Strickland prejudice because the defendant had received a fair trial. The Court concluded that “[f]ar from curing the error, the trial caused the injury from the error.” In summarizing its rejection of the government’s arguments, the Court further laid bare the rationale underlying its decision:

In the end, petitioner’s three arguments amount to one general contention: A fair trial wipes clean any deficient performance by defense counsel during plea bargaining. That position ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. As explained in Frye, the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences.

That is, the Court justified its decision primarily on the practical functioning of the criminal justice system rather than on doctrinal considerations. However, the mere fact that most convictions are obtained by guilty plea does not mean that the interests that must be balanced to remedy ineffective assistance of counsel after a guilty plea are the same as those existing after a trial.

The Court’s discussion of the prevalence of guilty pleas is important for two reasons: one, it recognizes the administrative nature of our current system of criminal justice; and two, it paves the way for development of more appropriate standards—standards that are not based on the assumption that the trial is the normative procedure. The discussion stopped short of a clearly enunciated test for determining the appropriate remedy. In Frye, the Court did not address the issue of remedy, and in Lafler it did so only briefly. This difference, as Justice Scalia points out in his dissent, may account for the Court’s lack of clarity when it comes to a

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76 Frye, 132 S. Ct. at 1409.
77 Id. at 1410.
79 Id. at 1383-84.
80 Id. at 1385.
81 Id. at 1386.
82 Id. at 1388 (citations omitted).
remedy.83

In *Lafler*, the Court began its discussion of remedy with general Sixth Amendment principles, quoting *United States v. Morrison*. The goal of the remedy is to “neutralize the taint of a constitutional violation, while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution.”84 The Court then noted the injury the defendant suffered could be a greater sentence to the same charges, or a conviction of more charges than under the lost plea agreement; therefore, different remedies would be appropriate in different circumstances.85 It held, “Principles elaborated over time in decisions of state and federal courts, and in statutes and rules, will serve to give more complete guidance as to the factors that should bear upon the exercise of the judge’s discretion.”86 The Court did mention two factors that should be considered: the defendant’s willingness to plead guilty and the existence of new information discovered after the lost plea bargain.87 Then, without analysis, the Court simply stated, “The correct remedy in these circumstances . . . is to order the State to reoffer the plea agreement.”88

The decisions in *Lafler* and *Frye* advanced the state of the law by acknowledging that a trial is not the normative procedure for determining guilt and refusing to base the test for prejudice on the issue of whether the defendant can prove he would have gone to trial. Unfortunately, the opinions in those cases do not recognize important differences between a conviction and sentence based on a guilty plea and a conviction and sentence based on a trial. Any balancing test must consider these differences yet the Supreme Court glossed over such differences by looking at the constitutional requirements rather than the practical effects.

This disconnect gave the Court little to work with when it tried to enunciate factors for determining the remedy. The lower courts that have addressed the *Lafler* question have looked at those differences and granted different remedies accordingly. Thus, a balancing test for answering the *Lafler* question can be seen by applying the factors enunciated in *Lafler* to the results from the lower court cases.

**IV. Proposed Details for the Balancing Test**

In *Lafler*, the Supreme Court suggested a factor-based, totality of the circumstances test to determine the remedy in cases of ineffective assistance of counsel in plea negotiation but did not explain how the factors and circumstances should be balanced. The skeleton of an appropriate balancing framework can be seen by looking at the lost plea agreement and the subsequent proceedings to determine what factual questions were resolved and then determine a remedy that balances the interests implicated by those facts.

In determining a remedy, many cases, including *Lafler*,89 begin with a discussion of Supreme Court precedent in *United States v. Morrison*.90 In *Morrison*, federal agents spoke to the represented defendant in a drug case without her attorney’s knowledge.91 The defendant entered a conditional guilty plea and raised a Sixth Amendment challenge on appeal. The Third Circuit found a violation and ordered dismissal of the indictment as a remedy. The government appealed. The Supreme Court assumed a Sixth Amendment violation and went on to discuss the appropriate remedy. The Court began by noting the importance of both the right to counsel and the government’s interest “in the administration of criminal justice.”92

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83 Id. at 1392 (Scalia, J., dissenting).
85 Id. at 1389.
86 Id.
87 Id.
88 *Lafler*, 132 S. Ct. at 1391.
89 Id. at 1388.
90 449 U.S. 361 (1981); see, e.g., *Turner v. Tennessee*, 858 F.2d 1021, 1207 (6th Cir. 1988) (stating that remedies for the deprivation of the right to the effective assistance of counsel “should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests”) (quoting *Morrison*, 449 U.S. at 364).
91 *Morrison*, 449 U.S. at 362-63.
92 Id. at 364.
The Court continued, stating, “Cases 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.” It noted that instead of dismissing the indictment, the proper approach was “to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial.” The Court reversed the decision of the Court of Appeals, observing that in other constitutional cases, the remedy is not dismissal of the charges but is “limited to denying the prosecution the fruits of its transgression.”

From this case, two important general principles emerged for determining the appropriate remedy for a Sixth Amendment violation. First, the remedy must be tailored to the violation alleged. Second, in cases where the government is not at fault, the interests of the government must be given more consideration than in cases where the violation was based on government wrongdoing. This suggests the appropriate analysis of the Lafler question must consider what type of procedures occurred after the lost plea agreement because those procedures reveal the strength of the government’s interest. If the subsequent proceedings involved a guilty plea, the government’s interest is lower because it expended fewer resources, while the defendant’s interest is greater because he waived important procedural rights.

Morrison also states that a remedy must neutralize the taint of the constitutional violation. Thus, it is imperative to consider how the constitutional violation wronged the defendant. As the Court stated in Lafler, one factor to consider is the defendant’s prior expressions of a willingness to plead guilty, but the Court did not explain how it should be weighed. This creates confusion for practitioners. Below, the weight to be given to these factors is assessed in light of the practical effects of each possible remedy.

A. Specific Performance as a Remedy

Specific performance is almost never an appropriate remedy for ineffective assistance of counsel during plea negotiation. One popular justification for specific performance as a possible remedy is to make an analogy to Santobello. However, an analogy to Santobello is grossly inappropriate in cases involving ineffective assistance of counsel. In Santobello, the government breached a plea agreement to stand silent at sentencing. That is, the prosecution bore moral responsibility for the violation of the defendant’s rights. In the case of ineffective assistance of counsel, however, the government does not bear such moral responsibility.

An analogy between cases where there is prosecutorial fault and cases where there is no prosecutorial fault ignores the precept that the remedy for ineffective assistance of counsel must be narrowly tailored and not unduly infringe on competing interests.

Furthermore, the underlying assumption in Santobello that plea negotiation is like...
contract negotiation does not always result in a proper balancing of the various interests involved. One major effect of Santobello has been to dramatically increase the use of contract theories in deciding plea negotiation cases. By employing the term “specific performance” the Court in Santobello invoked a well-established area of law that attorneys and courts would quickly begin to employ. The invocation of this established body of law had several advantages, the first of which is a body of principles, i.e., contract law, for settling disputes. True, contract law is a factual fit for plea bargaining in many ways. First, like a contract, a plea bargain rests on a theory of exchange. Defendants exchange expensive procedural rights for a less severe sentence or for a less severe charge. Second, it grants trial courts the authority to order specific performance as a remedy.

However, as some scholars have pointed out, the nature of a negotiation for a plea of guilty is fundamentally different from the nature of arm’s length negotiation between parties engaged in commercial enterprises. Duress and conflicts of interest abound in plea negotiations and are especially relevant in considering claims of ineffective assistance of counsel.

Probably the most problematic difference is the pervasive existence of duress in plea negotiations. If a commercial negotiator faces a bad deal, he can simply walk away. With a criminal defendant, on the other hand, the government can impose restrictions on his liberty until a disposition is reached.

Further, defendants who bargain for a plea serve lower sentences than those who do not. For a defendant facing serious charges, a plea bargain that dramatically reduces the prison time he is likely to serve is often irresistible, regardless of the existence of suppressible evidence or a better than fair possibility of acquittal after trial. That is, unlike ordinary commercial negotiation, plea negotiation is to some extent inherently coercive.

A second problem with employing analogies to contract law in the plea negotiation setting is that the institutions involved in guilty plea negotiation create inherent conflicts of interest. Appointed attorneys are often paid a low flat rate for each case. Thus, they have a financial incentive to resolve the case quickly through a guilty plea even if that course of action may not be in their client’s best interest. Public defenders may also be motivated to resolve cases quickly as they often work under crushingly large caseloads. These constraints may cause attorneys to exert pressure on defendants to plead guilty. These problems mean a criminal defendant is not as able to protect his own interests as an ordinary economic actor. Because of these problems, regulating plea bargains under the same rubric as contract cases is not appropriate.

Mandating specific performance or reinstatement of the plea offer also confuses the nature of the deprivation. As one court observed:

To focus the remedy on the foregone plea offer is to confuse the nature of the injury suffered. Rather than losing the benefit of the potential plea bargain, the defendant


Id. at 1913–16.

See, e.g., Santobello, 404 U.S. at 263.


Scott & Stuntz, supra note 103, at 1919.


Scott & Stuntz, supra note 103, at 1951–52; Rubin, supra note 106, at 1716–17.


Id.

Id.

Id.

Id.

Id.
has lost the effective assistance of counsel to which he is constitutionally entitled. Thus, a restoration of that counsel, rather than a mandated sentencing outcome, is the most narrowly tailored way to address the prejudice.116

**B. Ordering a New Trial as a Remedy**

Some observers have suggested that a new trial is always the most appropriate remedy.117 Nonetheless, the courts have criticized this remedy. The main criticism has been that a new trial does not eliminate the constitutional error because the constitutional error did not occur during the trial.118 This reasoning is flawed because when the court orders a new trial, the parties do not proceed directly to jury selection. Instead, the defendant again receives an expensive set of procedural rights, which he may later decide to exchange in a guilty plea for sentencing concessions.119 Thus, ordering a new trial encourages the parties to return to the negotiation phase the precise phase where the constitutional error occurred.120 Ordering a new trial effectively turns the clock back to before the constitutional deprivation.121

On the other hand, the remedy of a new trial allows for consideration of intervening circumstances. Because the case will have to be tried again, intervening circumstances, such as the potential new crimes or the discovery of new evidence, can be accounted for through the ordinary process of negotiation. For these reasons, the remedy of a new trial should be favored, especially where the lost plea offer contemplated conviction of different charges from the charges of which the defendant was ultimately convicted or where the ineffectiveness of counsel involved a failure to convey a plea offer.

At least one commentator has suggested that an order of a new trial does not cure the prejudice suffered by a defendant because of the problem of overcharging or charge stacking.122 Overcharging or charge stacking is the practice of filing multiple charges or more serious charges regarding a single event. Many commentators condemn this practice because it allows prosecutors to up the ante and coerce defendants to enter plea agreements.123 This practice should not be considered in determining the appropriate remedy for lost or rejected plea bargains for a number of reasons. First, prosecutors are ethically bound to not file charges for which they do not believe there is probable cause.124 For this reason, courts must indulge a presumption that prosecutors charge legitimately.125 Second, and more importantly, the principles of double jeopardy prevent multiple punishments for the same offense.126 Thus, if the defendant’s conduct constitutes more than one offense, it is more blameworthy. To the extent that the available crimes listed in the statutes of the jurisdiction could allow more punishment for a particular act than observers believe is fair, the problem is not one of prosecutorial overreaching, but rather one of legislation and politics.127

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116 Carmichael v. People, 206 P.3d 800, 809-10 (Colo. 2009).
119 See Perez, supra note 117, at 1555.
121 Perez, supra note 117, at 1553.
122 See Gutierrez, supra note 43, at 709.
124 Model Rules of Proc. Con. Rule 3.8(a) (2013) (“The prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”).
127 See Kyle Graham, Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials, 100 Cal. L. Rev. 1573, 1627-29 (2012) (explaining why analysis of the interaction between the substance of the charge and the likelihood of a guilty plea should be considered when adopting new criminal legislation); Stuntz, supra note 123, at 579 (arguing that depoliticizing criminal law by taking the
charging decision is ultimately backed by the threat of a jury trial. After plea negotiations fail, the defendant has all the protections the Constitution affords, including the due process right that his guilt be proven beyond a reasonable doubt. After a trial resulting in a guilty verdict on all charges, any argument that the prosecutor overcharged the case is merely an argument that the legislature should not view the conduct as blameworthy.

Unfortunately, as the Lafler Court recognized, the cost of a new trial infringes on the government’s interest in the efficient administration of justice. This is why courts must consider whether the proceedings following the ineffective assistance of counsel involved a guilty plea or a trial. If the subsequent proceedings involved a trial, the cost of a second trial might be seen to unnecessarily infringe on the government’s interest. Contrariwise, if the subsequent proceedings did not involve a trial, the infringement on the government’s interest would be less.

C. Reoffering the Plea Agreement as a Remedy

Forcing the government to reoffer the plea agreement presents many of the same advantages of an order of a new trial. Like an order of a new trial, it forces the parties back to the negotiation phase. Unlike the order of a new trial, however, it unnecessarily discounts consideration of intervening factors, which the Court in Lafler specifically mentioned. For example, if a defendant were convicted of a more serious offense after trial than the offense to which the plea offer would have allowed him to plead guilty to, allowing the defendant the benefit of the plea offer not only ignores the cost of the trial, but also ignores the fact that the defendant has been proven guilty beyond a reasonable doubt of a more serious offense and is consequently more deserving of punishment. Furthermore, “[f]orcing the prosecu-

128 See Lafler, 132 S. Ct. at 1388-89.
129 Id. at 1389.
130 Perez, supra note 117, at 1551.
131 Lafler, 132 S. Ct. at 1389.
132 See id. at 1389.
than contemplated in the lost plea offer, the defendant should be afforded resentencing or a new trial.

V. Conclusion

The decisions in *Frye* and *Lafler* were important, not because they were unexpected, but because the Supreme Court began to recognize that our system of criminal justice is administrative in nature and announced rules that reflect this circumstance. The decisions, however, stopped short of what was necessary. Instead of precisely addressing the issue of remedy, the Court simply gave two possible factors without clear guidance on how to weigh each one. Most importantly, the Court overlooked how the nature of subsequent proceedings can affect the relative interests of the parties. By looking at prior lower court cases that have already addressed the *Lafler* question, practitioners can see how the factors enunciated in *Lafler* should be weighed. A balancing test which would mandate a new trial when the defendant’s interests are weightier, while leaving open the possibility of no remedy or only resentencing when the government’s interest is weightier is the best way to vindicate the defendants’ right to counsel without unfairly infringing on society’s interest in the efficient administration of criminal justice.

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