

Supreme Court, U.S.
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No. ~~OFFICE OF THE CLERK~~

In The

Supreme Court of the United States

BLAINE LAFLER

Petitioner,

v.

ANTHONY COOPER

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Anthony Cooper faced assault with intent to murder charges. His counsel advised him to reject a plea offer based on a misunderstanding of Michigan law. Cooper rejected the offer, and he was convicted as charged. Cooper does not assert that any error occurred at the trial.

On habeas review, the Sixth Circuit found that because there is a reasonable probability that Cooper would have accepted the plea offer had he been adequately advised, his Sixth Amendment rights were violated. The writ was conditioned on Michigan re-offering the plea agreement. The question presented is:

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

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. The Petitioner is Blaine Lafler, Warden of a Michigan correctional facility. The Respondent is Anthony Cooper, an inmate.

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OPINIONS BELOW

The opinion of the Sixth Circuit is unpublished. Pet. App. 1a-22a. The order of the United States District Court granting the petition is also unpublished. Pet. App. 24a-42a. The decision of the Michigan Court of Appeals affirming Cooper's conviction is unpublished. Pet. App. 44a-47a.

JURISDICTION

The opinion of the Sixth Circuit filed May 11, 2010, affirmed the decision of the Eastern District of Michigan granting Cooper habeas relief. Pet. App. 1a – 22a. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Counsel Clause of the Sixth Amendment of the United States Constitution provides:

In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2254), provides in relevant part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated

on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in State court proceedings.

INTRODUCTION

After a fair and reliable trial, Respondent Cooper was convicted of assault with intent to commit murder in a Michigan court, but the United States Court of Appeals for the Sixth Circuit determined that he was entitled to a writ of habeas corpus because his trial counsel deficiently advised him to reject a plea bargain before trial. This decision violates the statutory restrictions on federal habeas corpus review of State court convictions and is wrong as a matter of Sixth Amendment interpretation. It created a species of prejudice cognizable under the Sixth Amendment that ignores the Amendment's purpose: to ensure a fair trial for the criminally accused. The kind of prejudice suffered by Cooper cannot form the basis for relief under the Sixth Amendment because his conviction was obtained after an admittedly fair and reliable trial.

28 U.S.C. § 2254(d) required the Sixth Circuit to limit its review to whether the State court adjudication contravened "clearly established" Supreme Court law. This Court has not clearly established that a criminal defendant in Cooper's situation is prejudiced in a way that is cognizable under the Sixth Amendment. Neither *Strickland v. Washington* nor *Hill v. Lockhart*, the two cases relevant to the issue, supports such a new rule.¹ The prejudice requirements of both those cases limit relief to circumstances where counsel's deficient performance affected the fairness or existence of a trial. *Strickland* requires that a defendant show that his counsel's conduct affected the fairness or reliability of a trial that was held, and *Hill* requires

¹ *Strickland v. Washington*, 466 U.S. 668 (1984); *Hill v. Lockhart*, 474 U.S. 52 (1985).

that a defendant show that his counsel's conduct resulted in his client's decision to forgo a trial altogether. No case from this Court addresses the situation where deficient performance resulted in a fair and reliable trial rather than a plea. Accordingly, the Sixth Circuit was required to reject Cooper's claim under §2254(d) because it could not be supported by this Court's clearly established precedent.

Moreover, as a matter of constitutional law, even if counsel deficiently advises his client to reject a plea deal, there is no violation of the Sixth Amendment if the defendant thereafter receives a fair trial. When prosecutorial misconduct prevents a plea bargain, this Court has found that a receipt of a fair trial bars relief. The same rationale should prevent relief here. In *Strickland*, this Court identified the purpose of the Counsel Clause as ensuring that a defendant receives a fair trial. The purpose of the Clause is fulfilled despite bad advice by counsel to reject a plea offer when the conviction nevertheless results from a fair trial. It is true that a criminal defendant in this situation may receive a harsher sentence than he would have but for his counsel's deficient performance, but because that injury does not stem from any unfairness in the trial that resulted in the harsher sentence, it is not actionable under the Sixth Amendment.

The Constitution guarantees a criminal defendant a fair trial or fair plea, and Respondent had a fair trial. And while the Constitution also guarantees effective counsel, it does not require a court to overturn a conviction based on a fair trial because effective counsel would have procured a more favorable plea.

STATEMENT OF THE CASE

A. The Facts of the Crime

Cooper's imprisonment arises from the March 25, 2003, shooting of Kali Mundy outside of an apartment building in Detroit. As Ms. Mundy walked towards her car, she saw Cooper pull up in a vehicle. Mundy and Cooper began walking towards each other. When they were about six-feet apart, Cooper pulled out a handgun, pointed it at Mundy's head, fired, but missed. Mundy ran but Cooper fired additional shots and hit her in the thigh and buttocks. She collapsed at the door of a nearby house. One bullet perforated her intestines and the resulting injury was life-threatening. Mundy survived after a two and one-half week hospital stay.

Detroit Police Officer Randell Coleman happened to be nearby and witnessed the shooting. He radioed a description of the shooter, and he saw two other officers almost immediately apprehend Cooper.

B. State Court Proceedings

At a pretrial conference the prosecutor acknowledged a sentence offer of 51-to-85 months (on the minimum sentence) in exchange for pleading guilty to assault with intent to murder. Pet. App. 48a – 49a.² At the end of the pretrial conference, trial counsel stated that he had talked with Cooper about the offer and that the offer would not be accepted. Pet. App. 51a. Trial counsel had mistakenly advised Cooper that

² Michigan has an indeterminate sentencing scheme in which a criminal defendant receives a minimum sentence and a maximum sentence. *People v. Lowe*, 484 Mich. 718, 724; 773 N.W.2d 1, 3-4 (2009).

the location of the wounds precluded a finding that he intended to murder the victim.³ Following trial, the accuracy and fairness of which was not challenged by Cooper in his federal habeas proceeding, the jury found Cooper guilty as charged. Cooper was subsequently sentenced to a minimum prison term of 185 months for the assault conviction and lesser terms for related firearm convictions. The maximum sentence was 30 years.

Cooper filed a direct appeal with the Michigan Court of Appeals and raised, among others, the following claim:

Defense counsel rendered ineffective assistance, under the State and federal constitutions, where he failed to convey the sentencing benefits of the plea offer to [Cooper] and ignored his desire to plea guilty.

Cooper received an evidentiary hearing on his ineffective assistance of counsel claim. Following the hearing, the trial court determined that there was no ineffective assistance of counsel based on the record. Pet. App. 52a-55a.

On March 15, 2005, the Michigan Court of Appeals issued an unpublished *per curiam* opinion affirming Cooper's convictions. Pet. App. 44a-47a. The court summarily rejected the claim on the merits, finding that "[t]he record fails to support [Cooper's]

³ Petitioner does not challenge the finding by the District Court and Sixth Circuit that counsel's advice was based on a mistaken belief regarding State law. Pet. App. 12a-16a.

contentions that defense counsel's representation was ineffective because . . . he did not obtain a more favorable plea bargain for defendant." Pet. App. 45a. On October 31, 2005, the Michigan Supreme Court denied Cooper's application for leave to appeal. Pet. App. 43a.

C. Federal Court Proceedings

Cooper, through counsel, filed a petition for writ of habeas corpus, raising the following claim:

Trial counsel rendered incompetent advice during the plea bargaining process which denied [Cooper] the effective assistance of counsel.

The District Court conditionally granted habeas relief, requiring the State to release Cooper if it did not re-offer him the 51-to-85 month sentence agreement on the minimum. Pet. App. 42a.

The Sixth Circuit affirmed. Modifying the prejudice component of *Hill* to fit the facts of the case, the court found that to sustain a claim of ineffective assistance of counsel, Cooper was required to show a "reasonable probability that, but for his counsel's erroneous advice . . . he would have accepted the state's plea offer." Pet. App. 12a. The Sixth Circuit reasoned "to say that there is no prejudice because [Cooper] ultimately received a fair trial is to understate the value of plea bargaining – not just to the state, but also to defendants. . . . [Cooper] lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him because he was deprived of his constitutional right to effective assistance of counsel." Pet. App. 18a-19a.

REASONS FOR GRANTING THE PETITION

- I. The Sixth Circuit contravened 28 U.S.C. §2254(d)(1) where this Court has not clearly established entitlement to relief for ineffective assistance of counsel during plea bargain negotiations when the defendant is later convicted and sentenced pursuant to a fair trial.**

In the Antiterrorism and Effective Death Penalty Act (AEDPA), Congress placed strict limits on when federal courts can grant habeas relief. In particular, 28 U.S.C. § 2254(d)(1) forbids federal courts from granting habeas relief based on a state court merits decision unless that decision conflicts with "clearly established Federal law, as determined by the Supreme Court of the United States." The Michigan Court of Appeals summarily denied Petitioner's claim on the merits by finding that "[t]he record fails to support [Cooper's] contentions that defense counsel's representation was ineffective because . . . he did not obtain a more favorable plea bargain for defendant."

Pet. App. 45a. Though brief, this adjudication was on the merits and is entitled to § 2254(d)(1) deference.⁴

This Court has not clearly established that a defendant is prejudiced as that term has been defined by this Court's ineffective-assistance-of-counsel jurisprudence when the defendant rejects a plea offer because of deficient advice by his attorney but is then convicted after a fair and reliable trial. A defendant is not prejudiced in a cognizable way in that situation because he ultimately received precisely the process that the Counsel Clause of the Sixth Amendment guarantees – a fair trial. Although lower courts have held that a defendant can state a Sixth Amendment claim in this situation, several courts have reached the contrary conclusion. Until this Court resolves the question, a State court cannot be said to conflict with "clearly established Federal law, as determined by the Supreme Court of the United States" when it denies such a claim of ineffective assistance of counsel.

⁴ *Luna v. Cambra*, 306 F.3d 954, 960 (9th Cir. 2002); *Wright v. Secretary for Dept. of Corrections*, 278 F.3d 1245, 1254 (11th Cir. 2002); *Sellan v. Kuhlman*, 261 F.3d 303, 310-312 (2d Cir. 2001); *Bell v. Jarvis*, 236 F.3d 149, 158-62 (4th Cir. 2000)(*en banc*); *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000); *Miller v. Johnson*, 200 F.3d 274, 281 (5th Cir. 2000); *Aycox v. Lytle*, 196 F.3d 1174, 1177 (10th Cir. 1999); *Schaff v. Snyder*, 190 F.3d 513, 523 (7th Cir. 1999); *James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999). In *Harrington v. Richter*, 130 S. Ct. 1506 (2010), this Court granted certiorari and asked the parties to address the question: "Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under *Strickland v. Washington*?" The Sixth Circuit assumed for purposes of argument that this was a merits determination. Pet. App. 36a. And even if this Court determines that AEDPA deference does not apply, the decision is wrong on the merits. See Argument II.

In *Arave v. Hoffman*, the Court granted certiorari, in part, to address this precise issue.⁵ The Court specifically ordered the parties to answer the following question: "What, if any, remedy should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial?"⁶ The court dismissed the case, however, under Rule 46 on mootness grounds and never reached the merits.⁷ Accordingly, the issue of whether a criminal defendant suffers cognizable prejudice in such a situation remains open. This Court did not clearly establish an answer in *Arave* and has not done so in any subsequent case.

A. This Court's ineffective-assistance-of-counsel-jurisprudence does not clearly establish entitlement to relief when counsel's deficient performance results in a fair and reliable trial.

Neither *Strickland* nor *Hill* supports a finding of cognizable prejudice when deficient performance results in nothing more than a fair and reliable trial. *Strickland* exists specifically to ensure that a criminal defendant receives a fair trial. While a criminal defendant in Cooper's position has obviously suffered a form of factual prejudice – but for the bad advice he likely would have accepted a plea bargain with a more favorable sentence – that sort of prejudice is not the type of injury this Court's ineffective-assistance-of-counsel jurisprudence was created to remedy.

⁵ *Arave v. Hoffman*, 552 U.S. 1008 (2007).

⁶ *Arave*, 552 U.S. at 1008.

⁷ *Arave v. Hoffman*, 552 U.S. 117 (2008).

Strickland noted that "the Sixth Amendment right to counsel exists in order to protect the fundamental right to a fair trial."⁸ The Court explained that "[t]he Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results."⁹ The *Strickland* test was developed to ensure a fair trial.¹⁰ Therefore, "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."¹¹ Despite the loss of the favorable sentencing agreement, the State process in this case ultimately produced a just result: Cooper's trial was fair and reliable and his sentence was lawful and proportionate.

The *Strickland* prejudice inquiry was likewise designed to "ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."¹² Therefore, "[i]n every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system

⁸ *Strickland*, 466 U.S. at 684-685.

⁹ *Strickland*, 466 U.S. at 685.

¹⁰ The Sixth Amendment right to *counsel of choice*, also based on the Counsel Clause, is not grounded on fair trial concerns but is not implicated by this case. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006).

¹¹ *Strickland*, 466 U.S. at 686.

¹² *Strickland*, 466 U.S. at 691-692.

counts on to produce just results."¹³ The trial here was undeniably reliable as Cooper does not contest anything that occurred there.

To the extent there was a breakdown in the adversarial plea-bargaining process, it merely resulted in the loss of a settlement – it did not affect the fairness of the proceeding that produced the conviction. As this Court found in *Lockhart v. Fretwell*, the "prejudice" component of ineffective assistance "focuses on the question whether counsel's deficient performance renders the result of the [proceeding] unreliable or fundamentally unfair. . . . Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him."¹⁴ Cooper had no right to settle his case.¹⁵ There is nothing about counsel's performance in Cooper's case that calls into question the justness, fairness, or reliability of his trial. As a consequence of counsel's bad advice, Petitioner went to trial and received a fair and reliable proceeding – which, this Court held in *Strickland*, is all that the Sixth Amendment's Counsel Clause seeks to protect.

Nor does *Hill* support the decision of the Sixth Circuit. In *Hill*, the habeas petitioner argued that his counsel's deficient advice caused him to *accept* a plea offer and forego his constitutional right to a fair trial. This is a critical factual distinction from the present

¹³ *Strickland*, 466 U.S. at 696.

¹⁴ *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

¹⁵ *Mabry v. Johnson*, 467 U.S. 504, 510-511 (1984), abrogated on other grounds by *Puckett v. United States*, 129 S. Ct. 1423 (2009).

case. This Court found 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.¹⁶ This application of the *Strickland* standard is in keeping with its purpose; more than adversely affecting the fairness of the trial, the deficient performance in *Hill* resulted in the complete loss of a trial. The same is not true of the situation presented by this case. When counsel's deficient advice results in nothing less than a fair and reliable trial, the interests of the Counsel Clause have been fully served. Because Cooper was not cognizably prejudiced, there was no violation of the Sixth Amendment.¹⁷

In *Wright v. Van Patten*, this Court reiterated that the term "clearly established federal law" in 28 U.S.C. § 2254(d)(1) is a narrow one and that only decisions that "squarely address[]" the issue in a case fit the bill.¹⁸ Because there was no such decision that could form the basis for the Sixth Circuit's decision in this case, the Court should grant the petition and reverse the Sixth Circuit.

¹⁶ *Hill*, 474 U.S. at 58-59.

¹⁷ *Gonzalez-Lopez*, 548 U.S. at 147 (2006) ("The requirement that a defendant show prejudice in effective representation cases arises from the very nature of the specific element of the right to counsel at issue there--effective (not mistake-free) representation. Counsel cannot be 'ineffective' unless his mistakes have harmed the defense [A] violation of the Sixth Amendment right to effective representation is not 'complete' until the defendant is prejudiced.").

¹⁸ *Wright v. Van Patten*, 552 U.S. 120, 125 (2008).

B. The existence of divergent remedies applied by lower courts indicates a lack a clear direction emanating from this Court.

Moreover, lower courts have imposed divergent remedies in this situation. This provides further evidence that there is no clearly established law from this Court controlling the lower courts' choice of remedy. Some courts have granted the defendant a new trial.¹⁹ Other courts have specifically enforced the forgone plea offer.²⁰ And still other courts have crafted remedies that are hybrids of the new-trial and reinstatement-of-plea approaches or that are entirely

¹⁹ See, e.g., *United States v. Gordon*, 156 F.3d 376, 381-82 (2d Cir. 1998); *State v. Taccetta*, 797 A.2d 884, 888 (N.J. Sup. Ct. App. Div. 2002); *People v. Curry*, 687 N.E.2d 877, 890 (Ill. 1997); *State v. Lentowski*, 569 N.W.2d 758, 761-62 (Wis. 1997); *Larson v. State*, 766 P.2d 261, 263 (Nev. 1988); *Commonwealth v. Copeland*, 554 A.2d 54, 61 (Pa. Super. Ct. 1988); *Ex Parte Wilson*, 724 S.W.2d 72, 74-75 (Tex. Crim. App. 1987); *State v. Simmons*, 309 S.E.2d 493, 498 (N.C. App. 1983).

²⁰ See, e.g., *Hoffman v. Arave*, 455 F.3d 926, 942-43 (9th Cir. 2006); *Satterlee v. Wolfenberger*, 453 F.3d 362, 368-69 (6th Cir. 2006); *Magana v. Hofbauer*, 263 F.3d 542, 553 (6th Cir. 2001) (requiring specific enforcement of the original plea unless the prosecution shows non-vindictive reasons for changing or withdrawing it); *State v. Kraus*, 397 N.W.2d 671, 676 (Iowa 1986) (requiring specific enforcement unless defendant does not accept the plea); *De Jesus Garcia Jiminez v. State*, 114 P.3d 903, 907 (Ok. Ct. Crim. App. 2006).

different.²¹ Lastly, some courts believe no remedy is appropriate because there is no prejudice in the first place.²²

In *Carey v. Musladin*, this Court stated, "Reflecting the lack of guidance from this Court, lower courts have diverged widely in their treatment" of the issue.²³ The lack of uniformity in the lower courts'

²¹ See, e.g., *Boria v. Keane*, 99 F.3d 492, 498-99 (2d Cir. 1996) (ordering defendant's sentence to be reduced to the time he had already served and him discharged because that period was more than double what he would have served under the plea offer); *Beckham v. Wainwright*, 639 F.2d 262, 267 n.7 (5th Cir. 1981) (permitting defendant to choose between reinstatement of the original plea or a new trial); *In re Alvernez*, 830 P.2d 747, 760 (Cal. 1992) (permitting prosecutor to choose between resubmission of the original plea within thirty days or a new trial); *Tucker v. Holland*, 327 S.E.2d 388, 396 (W.Va. 1985) (refusing to reinstate the original plea but directing trial court to consider that plea for approval (or rejection)); *Harris v. State*, 437 N.E.2d 44, 45 (Ind. 1982) (permitting defendant to choose between reinstatement of the original plea or a new trial); *Lyles v. State*, 382 N.E.2d 991, 994 (Ind. App. 1978) (directing trial court to consider original plea for approval unless state withdraws plea, in which case defendant gets a new trial); *Commonwealth v. Napper*, 385 A.2d 521, 524 (Pa. Super. 1978) (granting defendant the opportunity to engage in a new plea bargain with the advice of counsel, and if discussion breaks down, a new trial).

²² See, e.g., *State v. Greuber*, 165 P.3d 1185, 1188-91 (Utah 2007); *Bryan v. State of Missouri*, 134 S.W.3d 795, 802-04 (Mo. Ct. App. 2004); *Louisiana v. Monroe*, 757 So. 2d 895, 898 (La. Ct. App. 2000); see also *United States v. Springs*, 988 F.2d 746, 749 (7th Cir. 1993) (No prejudice as matter of law for failing to advise defendant to take plea bargain where subsequent, less favorable, plea was voluntarily entered). This Court recognized that this is one of the possible remedial options through the phrasing of its question in *Arave*: "What, if any, remedy should be provided . . ." *Arave*, 552 U.S. at 1008 (emphasis added).

²³ *Carey v. Musladin*, 549 U.S. 70, 76 (2006).

approaches to this issue is powerful evidence that this Court's ineffective-assistance-of-counsel jurisprudence does not clearly establish a right to specific performance of the plea-bargain as ordered by the Sixth Circuit. Because this Court has not clearly established the appropriate remedy, if any, for deficient performance in this context, habeas relief under § 2254(d)(1) is foreclosed.

II. Irrespective of the limitations imposed by §2254(d)(1), the State court correctly denied relief.

In habeas corpus proceedings, this Court has the authority to clarify constitutional rules as long as these clarifications do not create new rules providing a basis for obtaining habeas relief. For example, in *Berghuis v. Thompkins*, the Court did not limit its holding to a determination of the reasonableness of the State court decision, but also found that it was correct.²⁴ So too here, not only did the State court issue a decision that did not contravene clearly established precedent of this court, the result was also correct.

There is no constitutional right to relief for a criminal defendant who has been convicted after a fair and reliable trial on account of his attorney's failure to secure a more favorable resolution of the case. To be sure, the plea bargaining process is critical to the functioning of our criminal justice system. But not every break-down in that system violates the Constitution. Even where a break-down in the plea

²⁴ *Berghuis v. Thompkins*, 560 U.S. ____ ; 130 S. Ct. 2250, 2264 (2010).

bargaining process is attributable to a mistake of defense counsel, if the system nevertheless nets a fair and reliable trial, then the purpose of the Counsel Clause has been fulfilled.

As Judge Easterbook wrote in *United States v. Springs*, "[n]ot every adverse consequence of counsel's choices is 'prejudice' for constitutional purposes."²⁵ In that case, the Seventh Circuit found that a criminal defendant, as a matter of law, could not demonstrate *Strickland* prejudice for defense counsel's failure to secure a favorable plea deal, where the defendant subsequently voluntarily accepted a second, less-favorable deal and pled guilty. This is because, as this Court stated in *Fretwell*, an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective.²⁶ "Prosecutors need not offer discounts and may withdraw their offers on whim. Defendants have no substantive or procedural right to bargain-basement sentences. As a matter of law, Springs did not suffer 'prejudice' from the representation he received."²⁷

Limiting the Counsel Clause as in *Springs* would also be consistent with the reasoning of *Mabry v. Johnson* and *Weatherford v. Bursey*.²⁸

In *Mabry*, the government offered a plea but when defense counsel called later and attempted to

²⁵ *Springs*, 988 F.2d at 749.

²⁶ *Fretwell*, 506 U.S. at 372.

²⁷ *Springs*, 988 F.2d at 749.

²⁸ *Weatherford v. Bursey*, 429 U.S. 545 (1977).

accept the deal, the prosecutor changed his mind and withdrew it. The defendant subsequently accepted a harsher plea bargain. The defendant argued that due process principles entitled him to the benefit of the first offer, and the Sixth Circuit agreed, holding that "fairness" prevented the government from withdrawing the original plea offer after it had been accepted.²⁹ This Court reversed, explaining that only the plea that resulted in the sentence had constitutional significance:

A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution. Only after respondent pleaded guilty was he convicted, and it is that conviction which gave rise to the deprivation of respondent's liberty at issue here.³⁰

The Court held that even if the prosecutor was "negligent or otherwise culpable" in renegeing on the original plea agreement, the Constitution's concern is only "with the manner in which persons are deprived of their liberty."³¹ The same reasoning applies here. Cooper is in prison because of a fair and reliable trial,

²⁹ *Mabry*, 467 U.S. at 506.

³⁰ *Mabry*, 467 U.S. at 507-08.

³¹ *Mabry*, 467 U.S. at 511.

not because of a plea offer that was never executed. The prosecutor's conduct in *Mabry* did not affect the fairness of the proceeding that resulted in that defendant's imprisonment, and so too defense counsel's conduct here did not affect the fairness of the proceeding that resulted in Cooper's imprisonment.

Weatherford is similar. There, the defendant complained that an undercover government agent, pretending to be a co-defendant, affected the fairness of the plea bargaining process. The Supreme Court noted that the prosecution's misconduct may have denied the defendant the opportunity to engage in plea bargaining, but it found that there was no cognizable prejudice because the defendant "was not denied a fair trial."³² An unfairly lost opportunity to resolve the case on more favorable terms did not provide grounds for relief because the conviction was ultimately obtained after a fair trial. There is no principled reason the result of the present case should be different.

Cooper had a fair trial. His counsel performed competently at trial and it produced a just and reliable result. Cooper does not dispute that. It is strange then, that the Counsel Clause could be interpreted to require the State to vacate the conviction that resulted from that trial and require it to offer Cooper a plea bargain to which he never had entitlement. The Court should reverse the judgment and of the Sixth Circuit and clarify that the Counsel Clause does not support such a result.

³² *Weatherford*, 429 U.S. at 560.

CONCLUSION

The petition for writ of certiorari should be granted, and the decision of the Sixth Circuit should be reversed.

Respectfully submitted,

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