AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 11: The Contemporary Era—Criminal Justice/Juries and Lawyers/Lawyers

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Lafler v. Cooper, 566 U.S. ___ (2012)

Anthony Cooper was charged with assault with intent to murder and several other crimes after he shot Kali Mundy in the buttock, hip, and abdomen. Before trial, the prosecutor agreed to drop several charges and recommend a sentence between fifty-one and eighty-five months if Cooper pled guilty. Cooper rejected that plea because his lawyer erroneously informed him that he could not be found guilty of murder under the relevant state law if all the wounds were below the waist. At trial, Cooper was convicted and sentenced to between 185 and 360 months in prison. After exhausting his direct appeals, Cooper filed a motion for a writ of habeas corpus on that ground that his attorney's advice during the plea bargain was constitutionally ineffective under the Sixth and Fourteenth Amendments (Blaine Lafler was the warden of the Michigan prison in which Cooper was residing). The local federal court agreed that his constitutional rights were violated and that decision was affirmed by the Court of Appeals for the Sixth Circuit. Michigan appealed to the Supreme Court of the United States.

The Supreme Court by a 5–4 vote ruled that Cooper's Sixth Amendment rights were violated when his lawyer gave him clearly erroneous advice during plea bargaining. Justice Kennedy's majority opinion maintained that defendants may be prejudiced by advice that influences their decision to go to trial as well as by counsel's errors that influence the outcome of the trial. Was this the correct interpretation of the Sixth Amendment? Or was Justice Scalia correct when he claimed that the Sixth Amendment is limited to errors that affect the outcome of a trial. Justices Kennedy and Scalia disputed the place of plea bargaining in the constitutional order. What positions did each take? How did those positions influence their decisions? Whose understanding of plea bargaining do you find most consistent with the American constitutional order?

The Supreme Court by the same 5–4 vote on the same day that Lafler *was decided held in* Missouri v. Frye *(2012) that the right to effective assistance of counsel under the Sixth and Fourteenth Amendments included the right to be informed of bona fide plea bargains. When justifying extending the constitutional right to counsel to the plea bargaining phase, Justice Kennedy declared,*

> *The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours "is for the most part a system of pleas, not a system of trials," it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. "To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system."*

JUSTICE KENNEDY delivered the opinion of the Court.

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Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process. . . . In this case all parties agree the performance of respondent's counsel was deficient when he advised respondent to reject the plea offer on the grounds he could not be convicted at trial. In light of this concession, it is unnecessary for this Court to explore the issue.

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To establish prejudice a defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice. . . .

[H]ere the ineffective advice led not to an offer's acceptance but to its rejection. Having to stand trial, not choosing to waive it, is the prejudice alleged. In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. . . .

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. . . The Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding. Its protections are not designed simply to protect the trial, even though "counsel's absence [in these stages] may derogate from the accused's right to a fair trial." The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice. . . .

In the instant case respondent went to trial rather than accept a plea deal, and it is conceded this was the result of ineffective assistance during the plea negotiation process. Respondent received a more severe sentence at trial, one 3 1/2 times more severe than he likely would have received by pleading guilty. Far from curing the error, the trial caused the injury from the error. Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence. . . . If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.

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. . . *Strickland v. Washington* (1984) recognized "[t]he 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." The goal of a just result is not divorced from the reliability of a conviction, but here the question is not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance.

In the end, petitioner's 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. [T]he 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.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom THE CHIEF JUSTICE joins in part, dissenting.

. . . [B]ad plea bargaining has nothing to do with ineffective assistance of counsel in the constitutional sense. *Strickland v. Washington* (1984) explained that "[i]n giving meaning to the requirement [of effective assistance] . . ., we must take its purpose—to ensure a fair trial—as the guide." Since "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial," the "benchmark" inquiry in evaluating any claim of ineffective assistance is whether counsel's performance "so undermined the proper functioning of the adversarial process" that it failed to produce a reliably "just result." That is what *Strickland*'s

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requirement of "prejudice" consists of: Because the right to effective assistance has as its purpose the assurance of a fair trial, the right is not infringed unless counsel's mistakes call into question the basic justice of a defendant's conviction or sentence. That has been, until today, entirely clear. A defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

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[A] criminal defendant has no right to a plea bargain. Counsel's mistakes in this case thus did not "deprive the defendant of a substantive or procedural right to which the law entitles him." Far from being "beside the point," that is critical to correct application of our precedents.

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In the United States, we have plea bargaining a-plenty, but until today it has been regarded as a necessary evil. It presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense; and for guilty defendants it often—perhaps usually—results in a sentence well below what the law prescribes for the actual crime. But even so, we accept plea bargaining because many believe that without it our long and expensive process of criminal trial could not sustain the burden imposed on it, and our system of criminal justice would grind to a halt.

Today, however, the Supreme Court of the United States elevates plea bargaining from a necessary evil to a constitutional entitlement. It is no longer a somewhat embarrassing adjunct to our criminal justice system; rather, as the Court announces in the companion case to this one, "'it is the criminal justice system.'" Thus, even though there is no doubt that the respondent here is guilty of the offense with which he was charged; even though 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 that the prosecution can bring forward, the requirement of a unanimous guilty verdict by impartial jurors; the Court says that his conviction is invalid because he was deprived of his constitutional entitlement to plea-bargain.

I am less saddened by the outcome of this case than I am by what it says about this Court's attitude toward criminal justice. The Court today embraces the sporting-chance theory of criminal law, in which the State functions like a conscientious casino-operator, giving each player a fair chance to beat the house, that is, to serve less time than the law says he deserves. And when a player is excluded from the tables, his constitutional rights have been violated. I do not subscribe to that theory. No one should, least of all the Justices of the Supreme Court.

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JUSTICE ALITO, dissenting.

. . . Respondent received a trial that was free of any identified constitutional error, and, as a result, there is no basis for concluding that respondent suffered prejudice and certainly not for granting habeas relief.

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