2013

Effective Remedies for Ineffective Assistance

Jenia I. Turner
Southern Methodist University, Dedman School of Law

EFFECTIVE REMEDIES FOR INEFFECTIVE ASSISTANCE

Jenia Iontcheva Turner[*]

INTRODUCTION

In a pair of cases decided in 2012, *Lafler v. Cooper*[1] and *Missouri v. Frye*,[2] the Supreme Court clarified an important principle of Sixth Amendment jurisprudence.[3] Criminal defendants, the Court confirmed, have a right to competent counsel even during the plea bargaining process.[4] The Court also established that the injury caused by a violation of this right is not mooted by the subsequent conviction and sentencing of the defendant at an otherwise fair trial.[5]

Lafler involved a defendant charged with attempted murder whose lawyer erroneously advised him that because he had shot his victim below the waist, the prosecution would not be able to show

---

* Professor of Law, SMU Dedman School of Law. I thank Albert Alschuler, Jeffrey Bellin, David Ball, Darryl Brown, Donald Dripps, Andrew Kim, Justin Marceau, Meghan Ryan, Wadie Said, John Turner, and participants in the SMU Law Faculty Forum, the 2013 Law and Society Association Annual Meeting, the 2013 AALS Mid-Year Conference on Criminal Justice, and the 2013 Southwest Criminal Law Workshop for their helpful comments. Robert Wilkinson and Neil Stockbridge provided valuable research assistance. The Article has also benefited from exchanges with federal prosecutors from the Eastern and Northern Districts of Texas.

1. 132 S. Ct. 1376 (2012).
2. 132 S. Ct. 1399 (2012).
3. *See generally Lafler*, 132 S. Ct. 1376; *Frye*, 132 S. Ct. 1399.
4. *Frye*, 132 S. Ct. at 1408–10. Earlier cases had already established a right to counsel during plea bargaining, but those cases concerned defendants who had waived trials and pleaded guilty as a result of ineffective assistance. *See generally* Padilla v. Kentucky, 599 U.S. 356 (2010); Hill v. Lockhart, 474 U.S. 52 (1985). In *Frye* and *Lafler*, ineffective assistance led defendants to forego a favorable plea deal and proceed to trial or enter a guilty plea on less favorable terms. *See generally Lafler*, 132 S. Ct. at 1376; *Frye*, 132 S. Ct. at 1399. By affirming the application of the Sixth Amendment in this context, the Court offered the "clearest indication to date that the right to effective assistance extends in a meaningful way to plea bargaining." Michael M. O'Hear, *Bypassing Habeas: The Right to Effective Assistance Requires Earlier Supreme Court Intervention in Cases of Attorney Incompetence*, 25 FED. SENT'G REP. 110, 114 (2012).
5. *Lafler*, 132 S. Ct. at 1388.

the requisite intent to murder.[6] Following the lawyer's advice, the defendant rejected a plea deal, was convicted at trial, and was given a sentence over three times as long as the one the prosecution had offered.[7] Concluding that the defendant had been prejudiced by his lawyer's ineffective assistance, the Supreme Court found a Sixth Amendment violation and suggested that some form of relief was appropriate.[8] *Lafler* and its companion case, *Frye*, made headlines, and some commentators celebrated the cases for affirming the application of the Sixth Amendment to plea bargaining.[9]

The most significant and surprising part of *Lafler*, however, was the Court's holding concerning the remedies. After recognizing that the right to effective assistance of counsel applies during plea bargaining, the Court proceeded to hold that lower courts do not always have to repair the harm caused by ineffective assistance.[10] Specifically, courts need not provide defendants with the benefit of the shorter sentence that was foregone as a result of attorney incompetence.[11] The Supreme Court held that the question whether to order the shorter sentence, to allow the longer sentence to stand, or to pick a sentence somewhere in between lays within the discretion of the lower court.[12] It offered little guidance to judges concerning how they should exercise this discretion. Instead, it suggested that in determining the remedy, trial courts "must weigh various factors," which would be determined over time through case law and legislation.[13]

---

6. *Id.* at 1383.

7. *Id.*

8. *Id.* at 1388.

9. *E.g.*, Stephanos Bibas, *Taming Negotiated Justice*, 122 YALE L.J. ONLINE 35, 35 (2012). One commentator called *Lafler* and *Frye* the "single greatest revolution in the criminal justice process since *Gideon v. Wainwright* provided indigents the right to counsel." Adam Liptak, *Justices Expand Rights of Accused in Plea Bargains*, N.Y. TIMES, Mar. 22, 2012, at A1 (quoting Prof. Wesley Oliver), *available at* http://www.nytimes.com/2012/03/22/us/supreme-court-says-defendants-have-right-to-good-lawyers.html?pagewanted=all&_r=0. Others have taken a more restrained view of the novelty of the cases. *See* Albert W. Alschuler, Lafler *and* Frye*: Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 678–81 (2013).

10. *Lafler*, 132 S. Ct. at 1388–89.

11. *Id.*

12. *Id.* at 1389.

13. The opinion stated that "the boundaries of proper discretion need not be defined here. 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." *Id.* The Court mentioned only two specific factors for judges to consider: the "defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions" and "information concerning the crime that was discovered after the plea offer was made." *Id.* The Court also suggested that "the time continuum makes it difficult to restore the defendant and the

The dissent called this approach to remedies "absurd," "unheard-of," and "incoheren[t]."[14] Justice Scalia argued that the Constitution demands an effective remedy for every violation of a constitutional right.[15] The majority's flexibility on remedies neglected this cardinal principle, according to Justice Scalia, and was the result of "squeamishness . . . attributable to [the] realization, deep down, that there is no real constitutional violation here anyway."[16]

This Article argues that the dissent's ultimate position concerning remedies is correct, though not for the reasons it offered. The majority defended its decision using the principle of balancing: The defendant's right to a remedy must be balanced against competing public interests, such as the efficient administration of justice.[17] The majority did not provide a clear justification for this approach.[18] In response, the dissent implicitly attacked balancing and appeared to reject the notion that a constitutional violation could be identified but not fully redressed.[19] This Article maintains that both approaches are to some extent misplaced.

The Supreme Court has repeatedly recognized that balancing has a place in constitutional criminal procedure. The balancing approach has, for example, sharply curtailed the range of remedies provided for violations of the Fourth Amendment.[20] Yet the legitimacy of balancing in the Fourth Amendment context does not fully transfer to the Sixth Amendment context. The reason for this lies in the different interests protected by the two amendments.

The Court has concluded that the primary purpose of excluding evidence in Fourth Amendment cases is to discourage future invasions of privacy.[21] When a court suppresses evidence, it does so

---

prosecution to the precise positions they occupied prior to the rejection of the plea offer, but that baseline can be consulted in finding a remedy . . . ." *Id.*

14. *Id.* at 1392, 1397 (Scalia, J., dissenting).

15. *See id.* at 1397.

16. *Id.* at 1398. In a separate dissent, Justice Alito noted that the majority's holding on remedies was "opaque." *Id.* at 1398 (Alito, J., dissenting).

17. *Id.* at 1388–89 (majority opinion).

18. The Court simply cited to its earlier decision, *United States v. Morrison*, but as I argue later in the paper, the Court's reliance on *Morrison* to support a balancing approach is misplaced. *Id.* at 1388 (quoting United States v. Morrison, 449 U.S. 361, 364 (1981)). For a discussion of *Morrison*, see infra notes 61–70 and accompanying text.

19. *Id.* at 1392, 1396–97 (Scalia, J., dissenting).

20. Indeed, the *Lafler* dissenting Justices have themselves endorsed such a balancing approach to the exclusion of evidence as a remedy for Fourth Amendment violations. *See, e.g.*, Davis v. United States, 131 S. Ct. 2419, 2427 (2011); Herring v. United States, 555 U.S. 135, 141 (2009); Hudson v. Michigan, 547 U.S. 586, 591 (2006).

21. *See* United States v. Leon, 468 U.S. 897, 906 (1984); United States v. Calandra, 414 U.S. 338, 348 (1974).

not to repair the injury to the individual defendant but rather to deter police misconduct. By excluding the evidence, the court protects the privacy and property rights of the larger community—including the interests of citizens not guilty of criminal conduct.[22] Where the expected deterrence benefit is minimal but excluding evidence is too costly—because it may allow guilty defendants to walk free—courts refuse to order exclusion.[23] As a result, many criminal defendants whose Fourth Amendment rights are violated do not effectively enjoy a remedy for the constitutional violation.[24] In this context, where the remedy is targeted to protect the rights of others, the case for a balancing of competing social interests is more compelling.

The Sixth Amendment demands a different approach. Remedies for Sixth Amendment violations are intended to repair the harm suffered by the accused, not to deter government misconduct more generally.[25] When a defendant receives a trial whose fairness was compromised by ineffective assistance, courts order a new trial.[26] When a defendant receives a sentence that was harsher because of counsel's failure to provide competent representation, courts order resentencing.[27] And when a defendant loses the opportunity to appeal a conviction because of ineffective assistance, courts restore that opportunity to appeal.[28] In short, when the right to effective assistance of counsel has been compromised, courts have aimed to erase the effects of the constitutional violation and to return the defendant to the position he would have occupied but for the ineffective assistance. Courts have not limited remedies provided to defendants on the basis of competing social interests.

The same approach should apply to remedies for ineffective assistance of counsel during plea bargaining. Courts should aim to restore the defendant as fully as possible to the position he occupied

---

22. *See, e.g.*, *Herring*, 555 U.S. at 141; *Leon*, 468 U.S. at 906; *Calandra*, 414 U.S. at 348. In earlier Supreme Court decisions, another justification of the exclusionary rule was to preserve judicial integrity and make a statement about the importance of holding government agents accountable for violations of the law. *See* Mapp v. Ohio, 367 U.S. 643, 659 (1961).

23. *See, e.g.*, *Leon*, 468 U.S. at 907–09.

24. Sometimes, there is no remedy even on paper. *See Herring*, 555 U.S. at 156 (Ginsburg, J., dissenting); Albert W. Alschuler, Herring v. United States*: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 510–11 (2009).

25. One exception to this principle is the Court's approach to the exclusionary rule for Sixth Amendment violations caused by certain police interrogation tactics. *See* Kansas v. Ventris, 556 U.S. 586, 591–92 (2009).

26. *See, e.g.*, Kimmelman v. Morrison, 477 U.S. 365, 382 (1986); Strickland v. Washington, 466 U.S. 668, 704 (1984); Profitt v. Waldron, 831 F.2d 1245, 1250 (5th Cir. 1987); Hyman v. Aiken, 824 F.2d 1405, 1412–18 (4th Cir. 1987).

27. *See, e.g.*, Glover v. United States, 531 U.S. 198, 203 (2001); *Strickland*, 466 U.S. at 704; United States v. Kissick, 69 F.3d 1048, 1056 (10th Cir. 1995).

28. Roe v. Flores-Ortega, 528 U.S. 470, 484 (2000).

before being prejudiced by his counsel's incompetence or neglect. If a defendant can show that but for counsel's mistake, he would have received a more favorable sentence under a plea bargain, then reviewing courts should reduce the defendant's sentence to match that under the foregone bargain.[29] Intervening facts should affect the remedy for ineffective assistance only when these facts have arisen independently of the ineffective assistance. Application of a more discretionary balancing approach, such as that suggested by the *Lafler* majority,[30] is inconsistent with much of the rest of Sixth Amendment jurisprudence. It also represents a mistaken application of reasoning more appropriate for Fourth Amendment cases where community interests weigh more heavily.

In advancing the argument for more robust and bright-line remedies for ineffective assistance during plea bargaining, this Article reviews lower court decisions that have addressed *Lafler*-type claims during the year following the decision. These decisions suggest that lower courts summarily dismiss meritless claims of ineffective assistance and that the vast majority of *Lafler* claims do not reach the remedial stage. Among those that do, however, at least some courts appear to be engaging in the type of balancing analysis the *Lafler* majority discussed (though so far, most have determined that the defendant should receive the full measure of benefits that were foregone as a result of the ineffective assistance). The confusion among lower courts concerning the nature of the balancing analysis suggests the need for greater clarity.

The Supreme Court may have recognized the need to revisit its holding on remedies in *Lafler* and will hear a case on remedies for ineffective assistance in plea bargaining in the fall of 2013.[31] The most desirable outcome would be for the Court to acknowledge that an ad hoc balancing approach to remedies is ill-suited to this area of Sixth Amendment jurisprudence. The Court should read the remedial holding of *Lafler* narrowly and adopt an approach that generally aims to restore the defendant to the position he would have occupied but for the constitutional violation. The Court should allow intervening circumstances to limit the remedy in only one instance—when these circumstances have emerged independently of counsel's ineffectiveness.

---

29. This is the remedy imposed most frequently by lower courts before *Lafler*. *See infra* notes 181–83 and accompanying text.

30. Lafler v. Cooper, 132 S. Ct. 1376, 1388–89 (2012).

31. Titlow v. Burt, 680 F.3d 577 (6th Cir. 2012), *cert. granted*, 81 U.S.L.W. 3465 (U.S. Feb. 25, 2013) (No. 12-414). The Court may not reach the question about remedies, however, if it chooses to resolve the case on the grounds that the Sixth Circuit misapplied the AEDPA review standards or that it misinterpreted the prejudice standard under *Lafler*. *See id.*

Should the Court fail to modify its balancing approach, lower courts should use their discretion under *Lafler* to fully enforce the Sixth Amendment promise that every accused is entitled to effective representation in a criminal case. When a defendant receives incompetent representation and this violation prejudices the outcome of his case, the only meaningful response is to attempt to undo the prejudice. Anything less would undermine the right to effective counsel and would carve out an unnecessary exception to the longstanding principle of American constitutional law that where there is a right, there must be a remedy.[32]

I. *LAFLER*'S BALANCING APPROACH TO REMEDIES FOR INEFFECTIVE ASSISTANCE

Anthony Cooper, the defendant in *Lafler*, rejected a favorable plea offer and went to trial because of the erroneous advice of his counsel.[33] Cooper was charged by the state of Michigan with assault with intent to murder and three other counts.[34] In exchange for Cooper's guilty plea, the prosecutor offered to dismiss two of the counts and recommend a sentence of fifty-one to eighty-five months.[35] In an unusual step for a criminal defendant, Cooper wrote to the court admitting guilt and expressing willingness to accept the plea offer.[36] But Cooper's attorney later convinced him that the evidence was insufficient to establish his intent to murder because Cooper had shot the victim below the waist.[37] Based on this advice, Cooper rejected the plea offer and went to trial.[38] He was convicted on all counts and received a mandatory minimum sentence of 185 to 360 months' imprisonment.[39] In a postconviction hearing, Cooper claimed that his attorney's incompetent advice had led him to reject the prosecution's plea offer and ultimately to

32. *See* Marbury v. Madison, 5 U.S. 137, 163 (1803).
33. *Lafler*, 132 S. Ct. at 1376.
34. *Id.* at 1383.
35. *Id.*
36. *Id.*
37. At the evidentiary hearing on ineffective assistance, the attorney testified that he had told Cooper that the assault with intent to commit murder charge "could not be supported by the evidence." Cooper v. Lafler, 376 F. App'x 563, 571 (6th Cir. 2010). Cooper testified that his attorney told him that a jury "couldn't find [him] guilty of the charge [of assault with intent to commit murder] because the woman was shot below the waist." *Id.* (alterations in original). The trial court concluded that this assertion was contrary to settled Michigan law and constituted deficient performance. *Id.* On briefing to the Supreme Court, the parties agreed that the lawyer had provided deficient performance, so the Court did not explore the issue further. *Lafler*, 132 S. Ct. at 1384.
38. *Lafler*, 132 S. Ct. at 1383.
39. *Id.*

receive a sentence three-and-a-half times harsher than the one initially offered by the prosecution.[40] State courts rejected the claim, but on federal habeas review, both the district court and the Sixth Circuit granted Cooper's claim of ineffective assistance.[41]

The Supreme Court confirmed that defendants are entitled to effective assistance of counsel during plea bargaining.[42] If a defendant foregoes a favorable plea bargain and goes to trial as a result of his counsel's inaccurate advice, he may be entitled to some relief under the Sixth Amendment.[43] A fair trial does not wipe away the constitutional injury resulting from ineffective assistance during plea negotiations.[44] The defendant continues to suffer the prejudice of a longer sentence resulting from counsel's deficient performance. As the Court confirmed, even a day of additional jail time that results from inadequate representation can be constitutionally significant.[45]

While affirming the application of the right to counsel during plea bargaining, the Court equivocated when it came to the remedy. It held that the remedy should be flexible and should balance competing social interests, including the interest in the efficient administration of justice.[46] The Court rejected the argument that the defendant should be put back in the "precise position[] [he] occupied prior to" the violation of his right to counsel.[47] Pointing to the possibility of changed circumstances, the Court left trial courts with broad discretion in fashioning a remedy.

More concretely, it advised trial judges to take one of three very different steps, depending on the facts of the case: (1) impose "the term of imprisonment the government offered in the plea," (2) impose the sentence the defendant received after trial, or (3) impose "something in between."[48] Where resentencing is inappropriate (for example, because a mandatory minimum confines the judge's sentencing discretion), the trial court should order the prosecution to reoffer the plea proposal.[49] Once the defendant accepts the renewed offer, the trial court could again exercise its discretion and

---

40. *Id.*
41. *Id.* at 1383–84.
42. *Id.* at 1387.
43. *Id.*
44. *Id.* at 1388. This reflects a broad reading of the right to counsel, which "sees counsel not merely as a protection of 'the fundamental right to a fair trial,' but as a 'medium' between the defendant and the power of the state." Cecelia Klingele, *Vindicating the Right to Counsel*, 25 FED. SENT'G REP. 87, 88 (2012).
45. *See Lafler*, 132 S. Ct. at 1386 (quoting Glover v. United States, 531 U.S. 198, 203 (2001)).
46. *Id.* at 1388–89.
47. *Id.* at 1389.
48. *Id.*
49. *Id.*

either: (1) vacate the convictions and resentence the defendant pursuant to the plea deal, (2) vacate only some of the convictions and resentence accordingly, or (3) leave the convictions and sentence undisturbed.[50] Trial courts thus have three starkly different options, including the option of leaving the conviction and sentence undisturbed.[51]

Lafler's approach to remedies for ineffective assistance of counsel broke with previous Sixth Amendment jurisprudence. In earlier cases on ineffective assistance, the Court instructed courts to tailor the remedy to the underlying injury.[52] Lower courts did so by imposing remedies that attempted to restore the defendant to the position he would have occupied but for the ineffective assistance.[53] In cases where the defendant proved that ineffective assistance undermined the fairness or reliability of trial, courts ordered a new trial.[54] Where ineffective assistance undermined confidence in the outcome of a sentencing proceeding, courts ordered resentencing.[55] Where counsel's mistake rendered a guilty plea uninformed or involuntary, courts vacated the conviction.[56] Likewise, where a defendant failed to appeal because of ineffective assistance, courts restored the opportunity to appeal.[57]

In cases of ineffective assistance during plea bargaining that arose before *Lafler*, lower courts similarly attempted to follow the rule that the defendant be placed as closely as possible to the position he would have occupied but for the ineffective assistance. They either ordered a new trial or resentenced the defendant

---

50. *See id.*

51. In deciding among these, courts must consult the foregone plea bargain as a baseline but then weigh various factors, including the defendant's willingness to accept responsibility, information about the crime that was discovered after the plea offer, and other factors to be developed through case law and legislation. *Id.*

52. *E.g.*, United States v. Morrison, 449 U.S. 361, 365 (1981).

53. *E.g.*, Hoffman v. Arave, 455 F.3d 926, 942–43 (9th Cir. 2006); United States v. Blaylock, 20 F.3d 1458, 1468–69 (9th Cir. 1994); Becton v. Hun, 516 S.E.2d 762, 768 (W. Va. 1999); State v. Lentowski, 569 N.W.2d 758, 762 (Wis. Ct. App. 1997); *see also* Strickland v. Washington, 466 U.S. 668, 685 (1984).

54. *See, e.g.*, Kimmelman v. Morrison, 477 U.S. 365, 382 (1986); Strickland v. Washington, 466 U.S. 668, 704 (1984); Profitt v. Waldron, 831 F.2d 1245, 1250 (5th Cir. 1987); Hyman v. Aiken, 824 F.2d 1405, 1412–18 (4th Cir. 1987).

55. *See, e.g.*, Glover v. United States, 531 U.S. 198, 203 (2001); *Strickland*, 466 U.S. at 704; United States v. Kissick, 69 F.3d 1048, 1056 (10th Cir. 1995).

56. *See, e.g.*, Hill v. Lockhart, 474 U.S. 52, 59–60 (1985); United States v. Akinsade, 686 F.3d 248, 256 (4th Cir. 2012).

57. *See, e.g.*, Roe v. Flores-Ortega, 528 U.S. 470, 484 (2000); Solis v. United States, 252 F.3d 289, 294 (3d Cir. 2001) ("A new opportunity to directly appeal is the remedy for petitioner's alleged ineffective assistance of counsel.").

pursuant to the foregone plea bargain.[58] The passage of time meant that these measures were not always able to restore the defendant to the precise position he occupied before the constitutional violation. Courts occasionally considered facts aggravating the defendant's culpability and benefits foregone by the prosecution as a result of the ineffective assistance.[59] Still, courts aimed to approximate the status quo ante as best they could. They did not balance the defendant's right to a remedy against competing social interests.[60]

The Supreme Court never fully acknowledged its departure from these precedents in *Lafler*. It cited only *United States v. Morrison*,[61] a case in which the Court referred to "competing interests" in a very different context.[62] In *Morrison*, government agents met with a represented defendant without first informing her attorney. During their meeting, they tried to convince the defendant to cooperate with them and disparaged the competence of her attorney.[63] Morrison refused to cooperate and notified her counsel about the agents' behavior. She later moved to dismiss the indictment with prejudice, claiming that the agents had interfered with her right to counsel.[64] She did not, however, allege that the interference had prejudiced the quality or effectiveness of her lawyer's representation in any way.[65]

In determining whether Morrison was entitled to relief, the Court emphasized that remedies for right to counsel violations should not unnecessarily infringe on competing interests, such as society's interest in the administration of criminal justice.[66] The Court accordingly held that, in order to obtain dismissal of the indictment, Morrison had to prove that the agents' actions had in fact prejudiced her defense.[67]

The *Morrison* Court referred to competing interests to establish a prejudice requirement for Sixth Amendment claims that demand drastic remedies, such as dismissal with prejudice. *Morrison* can hardly be read to endorse a broadly applicable, ad hoc balancing

---

58. *See infra* notes 179–82 and accompanying text; *see also* David A. Perez, *Deal or No Deal? Remedying Ineffective Assistance of Counsel During Plea Bargaining*, 120 YALE L.J. 1532, 1551–60 (2011). A minority of courts refused to grant relief, but on grounds now repudiated by *Lafler*. *See, e.g.*, State v. Greuber, 165 P.3d 1185, 1187–88 (Utah 2007).

59. *E.g.*, United States v. Day, 969 F.2d 39, 40 (3d Cir. 1992).

60. *See infra* footnotes 179–82 and accompanying text.

61. 449 U.S. 361 (1981).

62. *Id.* at 364.

63. *Id.* at 361.

64. *Id.*

65. *Id.* at 363.

66. *Id.* at 364.

67. *Id.* at 365.

approach to remedies. In fact, lower courts before *Lafler* typically read the case as requiring courts to fashion robust remedies that restore the defendant to the position he would have occupied absent the violation of his right to counsel.[68] These courts focused not so much on the language referring to "competing interests" but instead on the language urging courts to "identify and then neutralize the taint [of the constitutional violation] by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial."[69]

In *Lafler*, however, the Supreme Court used *Morrison* to restrict remedies for Sixth Amendment violations. Even after a defendant shows prejudice and makes a valid claim of ineffective assistance, under *Lafler*, courts still have to examine competing interests to ensure that the remedy does "not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution."[70] Remarkably, in some cases—such as when new aggravating facts emerge during trial—the balancing of interests may result in no remedy for a defendant who has shown prejudice from a violation of his right to counsel.

Lafler's broad balancing approach provoked a sharp rebuke from Justice Scalia in dissent, who argued that "the remedy the Court announces—namely, whatever the state trial court in its discretion prescribes, down to and including no remedy at all—is unheard-of and quite absurd for a violation of a constitutional right."[71] As the next Part elaborates, while Justice Scalia's point may be overstated, his ultimate position is correct. Balancing may be appropriate in some constitutional contexts, but it is inappropriate in right to counsel cases.

II. THE CASE AGAINST BALANCING

A. The Close Fit Between Right and Remedy in Sixth Amendment Cases

Justice Marshall's famous pronouncement that "where there is a legal right, there is also a legal remedy" is a celebrated principle of constitutional law.[72] In reality, however, courts in various

68. *E.g.*, Williams v. Jones, 571 F.3d 1086, 1093 (10th Cir. 2009); United States v. Carmichael, 216 F.3d 224, 227 (2d Cir. 2000); United States v. Blaylock, 20 F.3d 1458, 1468–69 (9th Cir. 1994); Etheridge v. United States, Nos. 04-21090-Civ-Seitz, 01-653-Cr-Seitz, 2010 WL 5904472, at *3 (S.D. Fla. Feb. 19, 2010); Leatherman v. Palmer, 583 F. Supp. 2d 849, 871 (W.D. Mich. 2008); Ferrara v. United States, 372 F. Supp. 2d 108, 112 (D. Mass. 2005).

69. *Morrison*, 449 U.S. at 365.

70. Lafler v. Cooper, 132 S. Ct. 1376, 1388–89 (2012).

71. *Id.* at 1392 (Scalia, J., dissenting).

72. Marbury v. Madison, 5 U.S. 137, 163 (1803).

constitutional cases curtail remedies to account for a variety of competing social goals, including finality, efficiency, and truth seeking.[73] In Fourth Amendment cases, for example, the Supreme Court has recently scaled back the application of the exclusionary rule to account for such goals.[74] The Court has held that exclusion is an appropriate remedy only when benefits of deterring official misconduct outweigh the costs that exclusion imposes on society.[75] As this Part argues, however, the rationales that justify balancing in the Fourth Amendment context do not apply in right to counsel cases.

When the Supreme Court first held the exclusionary rule applicable to state criminal proceedings, it underscored the importance of providing a robust remedy for violations of the Fourth Amendment. Without a remedy as effective as exclusion, the Court declared in *Mapp v. Ohio*, the underlying right "would be 'a form of words,' valueless and undeserving of mention."[76] For the Court to recognize a constitutional right but then fail to fashion an adequate remedy would be "to grant the right but in reality to withhold its privilege and enjoyment."[77]

Despite the Court's strong support for the exclusionary rule in *Mapp*, the rule remained controversial. Just thirteen years after *Mapp*, the Court retreated from its insistence on a full remedy for every breach of the Fourth Amendment and endorsed a balancing approach to the exclusionary rule. In *United States v. Calandra*, the Court held that "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[78] From this conception of the rule followed a broad balancing test that the Court continues to use today. When the

---

73. *E.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778–87 (1991); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 87–88 (1999).

74. *See, e.g.*, Alschuler, *supra* note 24, at 500–01; William C. Heffernan, *The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 GEO. L.J. 799, 823–27 (2000); Wayne R. LaFave, *The Smell of* Herring*: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757 (2009).

75. *See supra* notes 21–23 and accompanying text.

76. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

77. *Id.* at 656.

78. *See* 414 U.S. 338, 348 (1974); *see also* United States v. Leon, 468 U.S. 897, 906 (1984). The Court arguably embraced balancing even earlier, in *Linkletter v. Walker*, where it held that the Fourth Amendment exclusionary rule did not apply retroactively. 381 U.S. 618, 637–40 (1965).

deterrence benefits are outweighed by the costs to the administration of justice, exclusion is not warranted.[79]

In *Calandra* and subsequent cases, the Court offered several justifications for balancing in Fourth Amendment exclusionary rule cases. First, the Court explained that the exclusionary rule does not aim to enforce the personal right of the criminal defendant bringing the claim.[80] Instead, the rule aims to vindicate a broader public interest in ensuring that agents of the government comply with the mandate of the Fourth Amendment.[81] In other words, the purpose of the exclusionary rule is not to make the victim of the search and seizure whole but rather to "safeguard Fourth Amendment rights generally through its deterrent effects."[82]

The Court also suggested that the exclusionary rule cannot fully redress the injury to the defendant's Fourth Amendment rights—the government's invasion of these rights "is fully accomplished by the original search without probable cause."[83] Excluding the evidence at trial cannot restore the privacy or property rights violated as a result of the unlawful search or seizure. The rule therefore operates prospectively, through its general deterrent effect, rather than retroactively. Unlike traditional legal remedies, the rule does not and cannot return the defendant to the position he would have occupied in the absence of the constitutional violation.

More recently, the Court has also justified balancing in the exclusionary rule context by pointing to the existence of adequate remedial alternatives. In *Hudson v. Michigan*,[84] the majority emphasized the ability of criminal defendants to file lawsuits against states under 42 U.S.C. § 1983 and against the federal government under *Bivens v. Six Unknown Federal Narcotics Agents*.[85] These civil actions, the majority concluded, provide

---

79. *Leon*, 468 U.S. at 907–08 (discussing the "substantial social costs exacted by the exclusionary rule," including the risk that it "would impede unacceptably the truth-finding functions of judge and jury. . . . that some guilty defendants may go free or receive reduced sentences," and that this may "generat[e] disrespect for the law and administration of justice"); *Calandra*, 414 U.S. at 351–52 ("We . . . decline to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury.").

80. Kimmelman v. Morrison, 477 U.S. 365, 375 (1986) (citing Stone v. Powell, 428 U.S. 465, 486 (1976)).

81. *Id.* at 374 (noting that "the protection it affords against governmental intrusion into one's home and affairs pertains to all citizens").

82. *Stone*, 428 U.S. at 486 (quoting *Calandra*, 414 U.S. at 348).

83. *Calandra*, 414 U.S. at 354; *accord Leon*, 468 U.S. at 906.

84. 547 U.S. 586 (2006).

85. *Id.* at 597 (citing Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971)).

sufficient deterrence of police misconduct in many circumstances, thus undercutting the need to exclude reliable evidence from trial.[86]

While these justifications for balancing might be appropriate in the Fourth Amendment context, they do not apply to remedies for right to counsel violations. Remedies for Sixth Amendment violations aim principally to vindicate a defendant's "personal right" to be represented adequately and only secondarily to deter wrongdoing by state agents.[87] The Supreme Court drew this precise distinction in *Kimmelman v. Morrison*.[88] In an earlier case, *Stone v. Powell*, the Court held that federal habeas relief was unavailable for Fourth Amendment claims that had been fully and fairly litigated at the state level.[89] But in *Kimmelman*, the Court emphasized the difference between remedies for Fourth Amendment and Sixth Amendment violations and declined to extend the habeas restrictions to ineffective assistance claims:

> [W]e reasoned in *Stone* that the exclusionary rule does not exist to remedy any wrong committed against the defendant, but rather to deter violations of the Fourth Amendment by law enforcement personnel . . . . Ineffective-assistance claims stand on a different footing . . . . [T]he right to effective assistance of counsel is personal to the defendant, and is explicitly tied to the defendant's right to a fundamentally fair trial—a trial in which the determination of guilt or innocence is "just" and "reliable." . . . A criminal defendant who obtains relief under *Strickland* does not receive a windfall; on the

86. *Id.* at 597–99. *But see* Herring v. United States, 555 U.S. 135, 156 (2009) (Ginsburg, J., dissenting) (arguing that restricting the exclusionary rule in the case leaves the petitioner with no remedy, as civil damages would be unavailable under § 1983); Hudson v. Michigan, 547 U.S. 586, 610–11 (2006) (Breyer, J., dissenting) (contesting the ability of civil actions to deter the police misconduct at issue); Arizona v. Evans, 514 U.S. 1, 22–23 (1995) (Stevens, J., dissenting) (noting that only a "fraction of Fourth Amendment violations held to have resulted in unlawful arrests is ever noted and redressed"). The irony is that the Court has scaled back the availability of damages for Fourth Amendment violations while justifying a restriction of the exclusionary rule on the grounds that damages are available as an alternative remedy. *See, e.g.*, Pamela S. Karlan, *Shoe-Horning, Shell Games, and Enforcing Constitutional Rights in the Twenty-First Century*, 78 UMKC L. REV. 875, 882–88 (2010); Jennifer E. Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 719–21 (2011).

87. Kimmelman v. Morrison, 477 U.S. 365, 377 (1986) ("In contrast to the habeas petitioner in *Stone*, who sought merely to avail himself of the exclusionary rule, Morrison seeks direct federal habeas protection of his *personal right* to effective assistance of counsel.") (emphasis added); *cf.* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.").

88. 477 U.S. at 377.

89. 428 U.S. 465, 494 (1976).

> contrary, reversal of such a defendant's conviction is necessary to ensure a fair and just result.[90]

Unlike a defendant who claims a Fourth Amendment violation, a defendant who claims a violation of the right to counsel is not simply a vehicle for deterring official misconduct.[91] He is therefore not receiving a "windfall" in an effort to protect the rights of others. Instead, a traditional Sixth Amendment remedy—retrial or resentencing—restores the defendant to the place he would have occupied in the absence of the constitutional violation. It ensures that the defendant receives what is promised by the Sixth Amendment—adequate representation and a fair trial. For this reason, the Supreme Court has treated the right to counsel "as a procedural guarantee to which an ad hoc balancing of interests is inappropriate."[92]

This highlights another difference between Sixth Amendment remedies and the Fourth Amendment exclusionary rule. Exclusion of unlawfully obtained evidence does not and cannot directly repair the injury to the privacy or property of the accused. The violation is complete by the time suppression of the evidence is requested. Exclusion will not wipe away the effects of the unlawful search. It would not help to send officers back to "redo" the search, this time lawfully. By contrast, remedies for a violation of the right to counsel can typically repair more directly the harm that the accused has suffered. If a defendant is wrongfully convicted or unjustly sentenced as a result of counsel's deficient performance, the court can order a new trial or resentencing, thus returning the defendant as closely as possible to the position he occupied before the violation. In short, the fit between the remedy and the harm suffered is much closer in Sixth Amendment than in Fourth Amendment cases.

Another important way in which remedies for Sixth and Fourth Amendment violations differ is that, in the Sixth Amendment context, alternative remedies are less likely to be available. As explained earlier, when the Court has denied a remedy for unlawful searches and seizures, it has sometimes justified denial in part by noting that the defendant can file a civil suit to pursue damages for the violation of his rights.[93] By contrast, in Sixth Amendment cases,

---

90. *Kimmelman*, 477 U.S. at 392–93 (Powell, J., concurring) (citations omitted).

91. An exception to this principle concerns the exclusion of evidence as a remedy for certain police interrogation tactics that violate the Sixth Amendment. *See, e.g.*, Kansas v. Ventris, 556 U.S. 586, 591 (2009); Michigan v. Harvey, 494 U.S. 344, 350–53 (1990).

92. Bruce Andrew Green, Note, *A Functional Analysis of the Effective Assistance of Counsel*, 80 COLUM. L. REV. 1053, 1056 (1980) (citing Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938)).

93. *E.g.*, Hudson v. Michigan, 547 U.S. 586, 597 (2006).

effective relief on appeal or on habeas remains necessary to vindicate the right to counsel. As the following paragraphs explain, other remedies are both practically unavailable and less able to redress the prejudice suffered by the defendant.

The most obvious alternative remedy—a malpractice suit against the defense attorney—is not a feasible option in most cases. To succeed in a malpractice action against an incompetent attorney, the defendant must typically show that he is actually innocent.[94] This improperly narrows the scope of relief under the Sixth Amendment to innocent defendants. The Court has repeatedly held, and affirmed most recently in *Lafler*, that the right to counsel extends to guilty and innocent alike.[95] Indeed, defendants making a *Lafler*-type claim concede their guilt and challenge only their sentences. They could never meet the actual innocence standard.[96]

Criminal defendants also find it virtually impossible to meet the strict causation standard for malpractice claims. Instead of merely proving "reasonable probability" that ineffective assistance prejudiced the outcome of the case—a standard which is notoriously difficult to meet—the claimant must show that his attorney was negligent and that the negligence proximately caused him harm.[97] Unsurprisingly, malpractice suits alleging ineffective assistance rarely succeed.

More fundamentally, monetary compensation does not offer the most adequate redress for the constitutional injury at issue. When a

---

94. *See, e.g.*, Wilkinson v. Zelen, 83 Cal. Rptr. 3d. 785, 785 (Cal. Ct. App. 2008) ("In a legal malpractice case arising out of a criminal proceeding, California, like most jurisdictions, also requires proof of actual innocence."); Rodriguez v. Nielsen, 609 N.W.2d 368, 374–75 (Neb. 2000). Only a few states allow individuals to bring a malpractice suit without showing actual innocence. Schwehm v. Jones, 872 So. 2d 1140, 1146–47 & n.7 (La. Ct. App. 2004); Marrero v. Feintuch, 11 A.3d 891, 898 (N.J. Super. Ct. App. Div. 2011); Thorp v. Strigari, 800 N.E.2d 392, 395 (Ohio Ct. App. 2003). *See generally* Kevin Bennardo, *A Defense Bar: The "Proof of Innocence" Requirement in Criminal Malpractice Claims*, 5 OHIO ST. J. CRIM. L. 341, 342 & n.3 (2007).

95. Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012); *Kimmelman*, 477 U.S. at 380.

96. *E.g.*, Justin F. Marceau, *Remedying Pretrial Ineffective Assistance*, 45 TEX. TECH L. REV. 277, 301–04 (2012).

97. Purdy v. Zeldes, 337 F.3d 253, 258 (2d Cir. 2003); Brewer v. Hagemann, 771 A.2d 1030, 1033 (Me. 2001). Another possible avenue for relief—a lawsuit under section 1983—is also unavailable to defendants who have received ineffective assistance. Marceau, *supra* note 96, at 296. The Supreme Court has held that criminal defendants cannot use section 1983 to challenge the lawfulness of incarceration unless the conviction has already been overturned. *Id.* (citing Heck v. Humphrey, 512 U.S. 477, 486–87 (1994)). Even if that principle is reinterpreted to allow lawsuits claiming ineffective assistance, the defense attorney's mistakes cannot be attributed to the state for purposes of establishing state action under section 1983. *Id.* at 298 (citing Polk Cnty. v. Dodson, 454 U.S. 312, 318–19, 321, 325–26 (1981)).

defendant suffers ineffective assistance, he is deprived of a central element of a fair proceeding. While retrial or resentencing can return the defendant very nearly to the position he would have occupied but for the constitutional violation, monetary compensation cannot. For all these reasons, if the Sixth Amendment right to counsel is not to be reduced to a "form of words," then habeas relief must remain available to convicted persons who received ineffective representation.

B. The Feasibility of Full Remedies for Ineffective Assistance

Even if one accepts that traditional remedies for right-to-counsel violations—retrial, resentencing, and the like—fittingly repair the constitutional injury to the defendant, there may still be reasons to favor balancing in the context of ineffective assistance during plea bargaining. Some might argue that practical considerations warrant a more flexible approach. This appears to be the Court's justification for balancing in *Lafler*. The *Lafler* majority made two related points: (1) that a full remedy may unduly interfere with important competing public interests and (2) that the passage of time may make it impossible to craft a workable remedy.[98] This Part responds to the first point, and Part IV addresses the second.

Lafler maintains that courts should use the balancing approach to ensure that remedies do not "needlessly squander the considerable resources the State properly invested in the criminal prosecution."[99] The Court then identifies the costs that a remedy may entail: "The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences."[100] These are significant costs, but as this Part explains, they do not accompany the remedies contemplated by *Lafler*.

When a remedy imposes exorbitant costs on the criminal justice system, it is better avoided. In practice, courts faced with costly remedies are likely to take measures to dodge them. They may use prudential doctrines to limit who can present a claim, or they may narrow the scope of the underlying right to reduce the number of successful claims.[101] In other words, demanding that courts impose costly remedies may backfire.

---

98. 132 S. Ct. at 1388–89.

99. *Id.*

100. *Id.* at 1389 (quoting United States v. Mechanik, 475 U.S. 66, 72 (1986)).

101. *E.g.*, Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 635–36 (2006); Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2005 (1998); Daryl J. Levinson, *Rights*

For several reasons, this concern does not apply to the most logical remedy for a *Lafler* violation—giving the defendant the benefit of the foregone bargain.[102] Put simply, this means either: (1) resentencing by the court to match the sentence pursuant to the lost plea deal or (2) where a mandatory minimum prevents the court from matching the sentence, vacating the conviction, ordering the prosecution to reoffer the original deal, and resentencing accordingly. When compared to other commonly used remedies in constitutional criminal procedure—retrial, exclusion of evidence, or dismissal of the indictment—resentencing appears quite economical.[103] The costs that *Lafler* itself cited when discussing the need for balancing—forcing jurors, victims, witnesses, courts, prosecutors, and defendants to expend further time and resources—are all associated with a new trial, not resentencing.[104] By comparison, asking the court to impose a largely predetermined sentence at a hearing where only the parties have to be present appears workable, predictable, and inexpensive.

This approach is feasible for another reason as well—valid claims of ineffective assistance are not likely to arise very frequently in practice. The vast majority of criminal cases result in guilty pleas, not in trials.[105] And the incentives of defense attorneys typically point in the direction of encouraging clients to accept plea bargains.[106] Defense attorneys are more likely to lean on clients too forcefully to take an offer from the prosecution than they are to

---

Essentialism and Remedial Equilibration, 99 COLUM. L. REV. 857, 889–99 (1999); Sonja B. Starr, *Rethinking "Effective Remedies": Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693, 720–24 (2008).

102. *Lafler*, 132 S. Ct. at 1398 (Alito, J., dissenting).

103. Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. REV. 1069, 1097 (2009).

104. *Lafler*, 132 S. Ct. at 1388–89 (quoting United States v. Mechanik, 475 U.S. 66, 72 (1986)). Indeed, the costs associated with resentencing must also be balanced against the cost of continued incarceration in violation of a constitutional right. *See* Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgements Less Final Can Further the "Interest of Finality,"* 2013 UTAH L. REV. *passim* (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235812.

105. HINDELANG CRIMINAL JUSTICE RESEARCH CTR., UNIV. OF ALBANY SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbl. 5.22.2009 (Kathleen Maguire ed., 2009), available at http://www.albany.edu/sourcebook/pdf/t5222009.pdf (showing that 97% percent of federal convictions result from guilty pleas) [hereinafter *Criminal Defendants Disposed of in U.S. District Courts*]; *id.* at tbl. 5.46.2006, http://www.albany.edu/sourcebook/pdf/t5462006.pdf (showing that 94% of state convictions result from guilty pleas).

106. *E.g.*, Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1205–06 (1975).

forget to relay a plea offer.[107] True *Lafler* violations are likely to remain rare.[108]

Another concern voiced by some who favor *Lafler*'s remedial approach is that recognizing a right to effective assistance of counsel during plea bargaining is likely to invite frivolous filings.[109] Plea bargaining remains a highly informal process where few of the communications between the parties, and between the attorney and client, are reduced to writing. Counsel's mistakes during plea bargaining are therefore not likely to be on the record and could easily be invented by defendants.[110] Some commentators have even worried that defendants may collude with their attorneys to exploit *Lafler* and *Frye*. In this scenario, defendants and their attorneys would agree to pursue the chance of acquittal of trial and, if that fails, argue that the defendant received ineffective assistance in rejecting a plea offer and should be given the benefits of the foregone plea bargain.[111]

---

107. *Id.* at 1180; Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2476–81 (2004) (noting the incentives of overworked defense attorneys to resolve cases through plea bargains rather than trials); *see also* Josh Bowers, Lafler, Frye, *and the Subtle Art of Winning by Losing*, 25 FED. SENT'G REP. 126, 126 (2012) (arguing that *Lafler* and *Frye* will exacerbate this problem).

108. Even when violations do occur, defendants will often be released from prison by the time an ineffective assistance claim succeeds, so only those serving long sentences would typically have an incentive to pursue such claims. *E.g.*, Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2673 (2013).

109. *See* Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 162 (2012) ("Appellate and habeas courts are understandably skeptical of the flood of post hoc, self-serving claims raised by defendants who were convicted at trial and regret their decisions not to plead.").

110. *See* Green, *supra* note 92, at 1069–70. *But cf.* Roberts, *supra* note 108, at 2672 (pointing out that "[i]nvestigations, witness interviews, and other pretrial events" are likewise not on the record, but courts routinely examine ineffectiveness claims in those contexts by relying on the "testimony of counsel and defendant").

111. Graham C. Polando, *Being Honest About Chance: Mitigating* Lafler v. Cooper*'s Costs*, 3 HLRE: OFF THE RECORD 61, 64 (2013). *But see* Darryl K. Brown, Lafler*'s Remedial Uncertainty: Why Prosecutors Can Rest Easy*, 4 HLRE: OFF THE RECORD 9, 11–13 (2013) (describing this scenario, but rejecting it as unrealistic). As Brown points out, such collusion would be a risky gamble. *Id.* at 11. If the client is convicted at trial, he would be imprisoned for years while waiting for appellate and post-conviction review. *Id.* at 12. He would then have to surmount the demanding *Strickland* and collateral review standards (discussed later in this Part) to succeed on the merits of an ineffective assistance claim. If the court concludes that the claim merits an evidentiary hearing, the defense attorney would have to provide a statement why and how he rendered ineffective assistance. It is difficult to imagine that lawyers would violate their ethical obligations and deceive the court in order to pursue a very unlikely possibility of obtaining a better sentence for a client. *Id.* at 12–13.

The possibility that *Lafler* would invite frivolous claims appears to be minimal, however. Courts have already developed several mechanisms to prevent or summarily reject unfounded claims. On the preventive side, prosecutors have begun making more plea offers in writing, and some have been placing them on the record with the court.[112] This practice is more difficult to implement in state courts, where the volume of cases is higher and plea bargaining is quicker and more informal. But even some state jurisdictions have begun requiring prosecutors to put offers in writing, suggesting that preventive steps can be taken at the state level as well.[113] Finally, at pretrial hearings, judges themselves could inquire into any outstanding plea offers and ensure that the defendant is aware of the offers and their legal consequences.[114]

Apart from these preventive measures to reduce frivolous claims, courts already have at their disposal another effective tool to deal with meritless claims—the *Strickland* test for ineffective assistance. In *Strickland v. Washington*,[115] the Supreme Court established a dual standard that governs ineffective assistance claims.[116] A defendant must demonstrate both that his attorney's performance was deficient under prevailing professional norms and that the deficient performance prejudiced his case.[117]

---

112. Missouri v. Frye, 132 S. Ct. 1399, 1408–09 (2012); *see also* Kates v. United States, 930 F. Supp. 189, 190 (E.D. Pa. 1996) (suggesting the introduction of a "pre-colloquy colloquy," at which the government informs the defendant of any offers made and of the legal consequences of such offers); Ray v. United States, No. 3.06-cr-8-1, 2013 WL 64971 (N.D.W. Va. Jan. 3, 2013) (dismissing petitioner's *Lafler* claim because prosecutor had discussed the potential penalties at a pretrial conference and this contradicted petitioner's claim that he was unaware of the possibility of a life sentence upon conviction at trial).

113. *Compare Frye*, 132 S. Ct. at 1409 (discussing state rules that require plea offers in writing or on the record), *with* Polando, *supra* note 111, at 66 (arguing that "reducing all plea *offers* to writing . . . is impracticable").

114. Although some jurisdictions have interpreted such questions to cross the line into impermissible judicial participation in the plea negotiations, most do not favor such a strict interpretation. *See* Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 202–03 nn.6–9 (2006) (discussing state and federal provisions on judicial participation in plea negotiations). Susan Klein has suggested that federal and state judges amend criminal procedure rules to require a conference between the judge and the parties before the entry of a guilty plea. Susan Klein, *Monitoring the Plea Bargaining Process*, 51 DUQ. L. REV. 559, 565–66 (2013). At the conference, the judge would inquire, inter alia, whether the government has made a plea offer, what the general substance of the offer is, and what the expected sentencing consequences are, both with and without the proposed plea agreement. *Id.*

115. 466 U.S. 668 (1984).

116. *Id.* at 690–92.

117. *Id.*

To establish the first element, the defendant must show that his lawyer's representation fell significantly below professional norms.[118] *Strickland* held that courts should defer to the professional judgment of attorneys and that "counsel is strongly presumed to have rendered adequate assistance."[119] Strategic errors, insufficient zeal, and even certain mistaken legal advice do not constitute deficient performance.[120]

The prejudice requirement is equally strict, and it was specifically designed to help courts easily dispose of frivolous and abusive claims. It also helps ensure that a defendant does not receive an undeserved remedy for a violation that has not directly harmed his interests. The prejudice requirement helps address the Court's concern about accommodating competing interests.[121]

To prove prejudice under *Strickland*, the defendant must show reasonable probability that, but for counsel's failure, the outcome of the proceeding would have been different.[122] This is essentially the reverse of the harmless error analysis used on appeal, under which courts presume that the violation influenced the proceeding and require the government to prove—beyond a reasonable doubt—that the error was harmless.[123] Under *Strickland*, the defendant bears the burden of demonstrating that the outcome would have been different—a hypothetical question that is difficult to answer.[124]

---

118. *See, e.g.*, Harrington v. Richter, 131 S. Ct. 770, 788 (2011) ("The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." (quoting *Strickland*, 466 U.S. at 690)); Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright, 122 YALE L.J. 2150, 2169–70 (2013).

119. *Strickland*, 466 U.S. at 690.

120. *See id.* at 690–91; *see also* Bethel v. United States, 458 F.3d 711, 717 (7th Cir. 2006) (holding that mere miscalculation or erroneous sentence estimation by defense counsel is not constitutionally deficient performance); United States v. Gordon, 4 F.3d 1567, 1570 (10th Cir. 1993) (same). *But cf.* United States v. Martinez, 169 F.3d 1049, 1053 (7th Cir. 1999) (citing Iaea v. Sunn, 800 F.2d 861, 865 (9th Cir. 1986)) (holding that "some [sentence] predictions are such gross mischaracterizations" that they constitute deficient performance). *See generally* Bibas, *supra* note 109, at 161; Bruce A. Green, *The Right to Plea Bargain with Competent Counsel After* Cooper *and* Frye*: Is the Supreme Court Making the Ordinary Criminal Process "Too Long, Too Expensive, and Unpredictable . . . in Pursuit of Perfect Justice?,"* 51 DUQ. L. REV. 735, 756 (2013).

121. United States v. Morrison, 449 U.S. 361, 364–65 (1981).

122. *Strickland*, 466 U.S. at 694. Reasonable probability requires less than preponderance of the evidence. *See* Williams v. Taylor, 529 U.S. 362, 405–06 (2000).

123. Chapman v. California, 386 U.S. 18, 24 (1967); David Cole, Gideon v. Wainwright *and* Strickland v. Washington*: Broken Promises, in* CRIMINAL PROCEDURE STORIES 101, 113 (Carol S. Steiker ed., 2006).

124. Cole, *supra* note 123.

In practice, it has proven virtually impossible to meet the *Strickland* standard. A study of two jurisdictions found that only about 5% of cases raising ineffective assistance claims had succeeded.[125] In one notable case demonstrating the stringent prejudice inquiry, the court found that the defendant was not prejudiced by his attorney's nap during the defendant's cross-examination because counsel was awake and effective for the remainder of the proceedings.[126]

Lafler and *Frye* likewise set a high prejudice bar. A defendant must show not simply the reasonable probability of a less severe outcome, but in addition, a reasonable probability that: (1) the defendant would have accepted the plea offer, (2) the prosecution would not have rescinded the offer, and (3) the court would have accepted the plea agreement.[127] The inquiry adds these requirements out of concern that plea bargaining is less transparent and more likely to invite frivolous claims of ineffective assistance.

As with the prejudice standard under *Strickland*, defendants under *Frye* and *Lafler* have to muster proof on hypothetical questions. In proving the first element of the prejudice test—that they would have pleaded guilty—defendants would have difficulty providing evidence other than their own affidavit. In *Lafler*, the defendant had written to the court expressing a willingness to accept the plea offer, but this was a highly unusual circumstance.[128] Most defendants would not have expressed their views about a plea offer in writing, much less on the record, particularly if they were not even aware that the prosecution had made such an offer.

In light of statistics that over 95% of convicted defendants do plead guilty,[129] the defendant's own statement ought to be enough to establish reasonable probability that he would have taken a plea offer but for the ineffective assistance. Some lower courts have in fact found the defendant's affidavit sufficient.[130] Others have

---

125. *Id.* at 117 (pointing to studies of ineffective assistance claims in California Supreme Court and the U.S. Court of Appeals for the Fifth Circuit).

126. Muniz v. Smith, 647 F.3d 619, 625–26 (6th Cir. 2011).

127. Lafler v. Cooper, 132 S. Ct. 1376, 1385 (2012). In oral argument, Justice Breyer explicitly suggested that courts adopt a heightened prejudice standard for *Frye* and *Lafler*-type claims, "something more than a reasonable probability that this would have led to the plea." Transcript of Oral Argument at 16, Missouri v. Frye, 132 S. Ct. 1399 (2012) (No. 10-444), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-444.pdf.

128. 132 S. Ct. at 1383.

129. *Criminal Defendants Disposed of in U.S. District Courts*, *supra* note 105.

130. *E.g.*, Smith v. United States, 348 F.3d 545, 551 (6th Cir. 2003) (holding that it is not required that "a defendant must support his own assertion that he would have accepted the offer with additional objective evidence" (quoting Griffin v. United States, 330 F.3d 733, 737 (6th Cir. 2003))); Etheridge v. United

insisted on additional, objective evidence to support a prejudice finding, and the Supreme Court will weigh in on this question next term.[131] Even among courts that rely on objective evidence to evaluate the credibility of the defendant's statements, most accept circumstantial evidence. A number of courts have inferred prejudice from the sentence differential between the foregone plea sentence and the post-trial sentence and presumed that the defendant would have taken the plea offer where that differential was significant enough.[132] Likewise, courts have been more likely to find prejudice when the evidence against the defendant was overwhelming and the defendant had no viable defenses.[133]

Defendants may also have difficulty establishing the likely conduct of the prosecution and the court under the second and third prong of the prejudice inquiry, particularly in cases where new circumstances have intervened since the offer was made.[134] Prosecutors have vast discretion in choosing to extend or rescind plea offers, and judges do likewise, in accepting or rejecting plea bargains. If courts require objective evidence that a particular judge would have accepted a particular deal, the defendant may have difficulty providing such evidence. Judges are unlikely to have made a statement about the plea agreement because they likely did not know about it; even if they did, they might be prohibited by local rules from expressing opinions about specific plea agreements.[135] Still, as the *Frye* majority explained, lawyers and judges should have a good sense of prevailing plea bargaining practices in a

---

States, Nos. 04-21090-Civ-Seitz, 01-653-Cr-Seitz, 2010 WL 5904472, at *2 (S.D. Fla. Feb. 19, 2010).

131. Specifically, the Supreme Court will address the question whether the defendant's testimony, standing alone, would be sufficient to meet the first part of the prejudice test. Burt v. Titlow, 680 F.3d 577 (6th Cir. 2012), *cert. granted*, 81 U.S.L.W. 3465 (U.S. Feb. 25, 2013) (No. 12-414). For courts that require objective evidence, see, for example, Toro v. Fairman, 940 F.2d 1065, 1068 (7th Cir. 1991) and Berry v. United States, 884 F. Supp. 2d 453, 463 (E.D. Va. 2012).

132. *E.g.*, Raysor v. United States, 647 F.3d 491, 496 (2d Cir. 2011); *Smith*, 348 F.3d at 552; Sirota v. State, 95 So. 3d 313, 319–20 (Fla. Dist. Ct. App. 2012).

133. *E.g.*, United States v. Simpson, No. 2:04CV746-MHT-VPM, 2006 WL 6365520, at *11 (M.D. Ala. Oct. 2, 2006); People v. Phillips, C067261, 2012 WL 3089359, at *4 (Cal. Ct. App. July 31, 2012).

134. *E.g.*, Bibas, *supra* note 109.

135. *See* Turner, *supra* note 114, at 199–201. In states like Connecticut, where judicial participation in plea negotiations is common, such statements are more likely. *See* Ebron v. Comm'r of Corr., 53 A.3d 983, 994 (Conn. 2012) ("[W]hen there is evidence that a particular judge had indicated that he would have conditionally accepted the plea agreement, such evidence is probative of the question of what a reasonable court would have done.").

particular jurisdiction.[136] This general showing should suffice to evaluate prejudice as long as no circumstances have intervened before the acceptance of the plea agreement. If the prosecution alleges that intervening circumstances would have derailed the deal, however, it would be much more challenging for the defendant to show otherwise.[137]

In addition to proving prejudice, defendants convicted in state court must surmount an additional obstacle when raising a *Lafler* claim on federal habeas—the standards governing collateral review of state convictions and sentences.[138] With respect to legal issues, a state prisoner's petition for federal habeas relief can be granted only if the state court's adjudication was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[139] On factual issues, the writ can issue if the state court's findings were "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[140] The Supreme

---

136. Missouri v. Frye, 132 S. Ct. 1399, 1410 (2012); *see also* Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1064 (1976) (noting that judges tend to accept over 90% of proposed plea agreements). Of course, some judges are known for being less likely to accept sentence recommendations by the government under a plea agreement, and in those courts, it would be more difficult to show prejudice. *See, e.g.*, United States v. Virgen, Nos. 4:12-CV-73I-A, 4:09-CR-003-A, 2013 WL 490920, at *4 (N.D. Tex. Feb. 8, 2013) ("Given the undersigned's hesitation at imposing a sentence of 360 months [after trial], the court would not have accepted a plea agreement giving movant a sentence of less than 120 months. Accordingly, movant cannot establish prejudice.").

137. O'Hear, *supra* note 4, at 117. For a broader discussion of the difficulties meeting the prejudice standard in this context, see Carissa Byrne Hessick, *Proving Prejudice for Ineffective Assistance Claims After* Frye, 25 FED. SENT'G REP. 147 (2012).

138. *See, e.g.*, Quintana v. Chandler, No. 08 C 05629, 2012 WL 3151260, at *3, *10 (N.D. Ill. Aug. 2, 2012) (holding that the state court was not unreasonable in concluding that the petitioner failed to prove a reasonable probability that he would have taken the plea deal). The habeas review standard is critical because ineffective assistance of counsel claims typically arise on collateral review rather than direct appeal; the record is rarely sufficiently developed for the claims to be adjudicated on direct appeal. *See, e.g.*, United States v. Lampazianie, 251 F.3d 519, 527 (5th Cir. 2001) ("[A] claim of ineffective assistance of counsel cannot be reviewed on direct appeal when . . . it was not raised in the district court, because there has been no opportunity to develop record evidence on the merits of the claim."); *see generally* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 679 (2007) (describing the problem and arguing that "[i]n limited circumstances, appellate attorneys should be able to open trial records in order to develop ineffective assistance of trial counsel claims").

139. 28 U.S.C. § 2254(d)(1) (2012).

140. *Id.* § 2254(d)(2).

Court emphasized these standards when it recently held that prisoners must show that "there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with this Court's precedents."[141] Numerous procedural hurdles may also prevent state prisoners from obtaining federal habeas relief.[142] These procedural and substantive obstacles are so formidable that, even when a prisoner has a legitimate claim that counsel provided ineffective assistance and a federal court recognizes that the claim is legitimate, relief may nonetheless be unavailable on habeas.[143]

The multistep prejudice test, particularly when combined with strict collateral review standards, makes it exceedingly difficult for many prisoners to succeed on *Lafler* claims.[144] A review of cases raising claims for ineffective assistance in *Lafler*-type cases (on both direct appeal and habeas) during the year after *Lafler* was decided shows that the vast majority of claims are dismissed. Courts resolved 174 *Lafler*-type claims on the merits, but only 14 of these reached the remedy stage, yielding a success rate of 8.3%.[145]

---

141. Harrington v. Richter, 131 S. Ct. 770, 786 (2011). This fall, the Court will hear a case raising the same issue in the context of *Lafler* claims, and it may affirm these strict collateral review standards. Burt v. Titlow, 680 F.3d 577 (6th Cir. 2012), *cert. granted*, 81 U.S.L.W. 3465 (U.S. Feb. 25, 2013) (No. 12-414).

142. *See, e.g.*, Stephen B. Bright, *Is Fairness Irrelevant? The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1, 8–9 (1997) (discussing, inter alia, the statute of limitations, strict rules of procedural default, and the restrictive retroactivity doctrine); Justin Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 WASH. & LEE L. REV. 85, 117–24 (2012) (discussing the limited availability of evidentiary hearings and discovery).

143. Marceau, *supra* note 142, at 113.

144. *See, e.g.*, Quintana v. Chandler, No. 08 C 05629, 2012 WL 3151260, at *10 (holding that state court was not unreasonable in concluding that petitioner failed to prove a reasonable probability that he would have taken the plea deal). *See generally* Nancy J. King, *Non-Capital Habeas Cases After Appellate Review: An Empirical Analysis*, 24 FED. SENT'G REP. 308, 317 (2012) (finding that after the AEDPA was passed, the "effective relief rate" on federal habeas review of state convictions came down from 1% to 0.64%); O'Hear, *supra* note 4, at 115 (observing that "§ 2254(d)(1) and *Strickland* have synergistic effects; considered together, the relevant legal standards raise a nearly insurmountable barrier to relief").

145. To calculate the success rate, I examined all state and federal cases that cited to *Lafler v. Cooper*, were published between March 21, 2012 and March 20, 2013, and were available on Westlaw. The total count includes only those *Lafler* claims that were resolved at least in part on the merits. It does not include petitions dismissed on procedural grounds or petitions that cite to *Lafler* but do not raise an actual *Lafler* claim. Moreover, it includes not only cases involving federal habeas review of state convictions, but also cases that were resolved on direct appeal, in state post-conviction proceedings, and on federal habeas review of federal convictions. This helps explain the much higher success rate than that reported by King, *supra* note 144. Finally, it is

Notably, of the fourteen cases that reached the remedy stage, only two involved state prisoners petitioning for federal habeas relief.[146] Most of the successful *Lafler* claims were resolved on direct appeal, upon a motion for a new trial, or during state post-conviction proceedings—not on federal habeas.[147]

In short, *Frye* and *Lafler* will not open the floodgates to ineffective assistance claims. Defense attorneys will rarely err on the side of recommending trial instead of a guilty plea, and few will fail to relay offers to their clients, especially once prosecutors and judges take steps to prevent this. The demanding *Strickland* and Antiterrorism and Effective Death Penalty Act ("AEDPA") standards will weed out frivolous claims. And when defendants rightfully succeed on the merits, the costs of the remedy—resentencing—will be relatively low, requiring no new trials and letting no guilty defendants walk free. Effective remedies in *Lafler*-type cases are therefore feasible and not likely to produce windfalls for undeserving defendants. The next Part explains why this is so, even when new, aggravating facts emerge before the court determines the remedy for ineffective assistance.

III. A RESTORATIVE APPROACH TO REMEDIES AFTER *LAFLER*

If courts are to reject the balancing approach to remedies in *Lafler*-type cases, it is important to develop an alternative that is fair and workable. This will be most challenging in two situations: (1) cases where, with the passage of time, facts aggravating the defendant's liability have emerged; and (2) cases where the prosecution is no longer able to derive benefits it expected from the bargain. In both of these situations, courts might be reluctant to give the defendant the sentence expected under the foregone bargain. This Part analyzes the extent to which intervening circumstances might be relevant to the remedy and offers principles that should guide courts in their analysis.

---

important to note that the relief rate in *Lafler*-type cases may in fact be somewhat higher than 8.3%. The total number I used does not include twenty-one decisions that were remanded for an evidentiary hearing and were not resolved as of June 21, 2013. If all of these remands were to result in a victory for the defendant, the success rate could theoretically climb up to as high as 21%. This is highly unlikely, however—of the eleven remands that were resolved after the one-year frame, but before June 21, 2013, only one was successful. For examples of cases in which petitioners have succeeded on *Lafler* claims, see infra notes 186–88.

146. Johnson v. Uribe, 682 F.3d 1238 (9th Cir. 2012); Titlow v. Burt, 680 F.3d 577 (6th Cir. 2012).

147. *See, e.g.*, United States v. Wolfe, 2012 WL 1957427 (E.D. Tenn. May 31, 2012) (motion for a new trial); Commonwealth v. Smigielski, 971 N.E.2d 336 (Mass. App. Ct. 2012) (direct appeal); People v. Douglas, 817 N.W.2d 640 (Mich. Ct. App. 2012) (direct appeal).

In sorting through the complicated scenarios that may emerge, courts should follow the traditional "restorative approach" to remedies for ineffective assistance. They should try to restore the defendant to the place he would have occupied but for the ineffective assistance. To do so, courts should generally order what some have termed "specific performance" of the foregone plea bargain. The term specific performance is not entirely accurate—the prosecution's offer was never accepted, so there is no bargain to enforce. But it is convenient shorthand for either of two possible responses to ineffective assistance during plea bargaining: resentencing the defendant consistent with the initial plea offer or when that is not possible, ordering the prosecution to reoffer the initial plea bargain and then resentencing accordingly.[148]

The only situation in which such "specific performance" remedies may not be appropriate is when aggravating facts emerge *independently* of the ineffective assistance (in other words, when a but-for causal link is missing). If courts are faced with aggravating facts intervening after the plea offer was made, courts should first examine whether these facts would have influenced the defendant's sentence in the absence of ineffective assistance. If so, then the court can properly consider them in resentencing the defendant. This would be in line with *Lafler*'s holding that certain intervening circumstances may restrict the remedy to the defendant.

But if the court concludes that counsel's incompetence likely contributed to the emergence of the aggravating circumstances, then the court should not take these circumstances into account. This would be consistent with the restorative approach generally followed by courts in right-to-counsel cases and would ensure the effectiveness of remedies for violations of the right to counsel. The following Subparts explain how this principle would apply in several concrete scenarios.

A. Scenario 1: Aggravating Facts Emerging Before Approval of the Plea Agreement by the Court

A court reviewing a *Lafler* claim may be faced with facts that aggravate the defendant's culpability and that would have emerged

148. While some commentators have argued that ordering the prosecution to reoffer the plea bargain is in tension with separation of powers, the Supreme Court rejected this concern when it held in *Lafler* that such a remedy is one of several available to the courts. *Compare* Perez, *supra* note 58, at 1551 (arguing that this remedy would violate separation of powers), *with* Lafler v. Cooper, 132 S. Ct. 1376, 1389 (2012), *and Wolfe*, 2012 WL 1957427, at *14 & n.27. Courts have broad remedial discretion in granting habeas relief. *E.g.*, Hilton v. Braunskill, 481 U.S. 770, 775 (1987). As *Lafler* recognized, ordering prosecutors to reoffer expired or rejected plea deals falls within this discretion. *Lafler*, 132 S. Ct. at 1389.

before the plea hearing at which the court typically determines whether to approve or reject the plea agreement. In *Frye*, the defendant committed another crime before the hearing at which the court would have considered the foregone plea agreement.[149] The Supreme Court suggested that such an intervening circumstance—a new crime—would make it very difficult for a defendant to prove prejudice.[150] Specifically, the defendant would be unlikely to show that the prosecution would have stuck by the plea agreement after it learned of the new crime or, even less likely, that the court would have accepted the plea agreement in light of the new facts.

Consider the example of a charge bargain presented in federal court.[151] Imagine that before the plea hearing, the prosecutor learns from a cooperating witness that the defendant played a more central role in the drug distribution scheme for which he was indicted. In most cases, the prosecutor would likely withdraw the existing plea offer; even if the prosecutor did not, the court would likely reject the charge bargain in light of the newly discovered facts. Regardless of counsel's competence, in other words, the defendant would not be able to reap the benefits of the proposed charge bargain. As a result, the defendant would not be able to show that he was prejudiced by counsel's incompetence. Intervening circumstances have broken the chain of causation between the ineffective assistance and the unfavorable outcome for the defendant.

But in rare cases, a defendant might be able to meet the prejudice requirement even though new, aggravating facts would have emerged before the plea acceptance stage. In the charge bargain case above, the defendant might be able to show that the new facts were not so significant as to disturb the bargain and that similarly culpable defendants had comparable charge bargains accepted by the court. If the charge bargain would have been accepted by the court, the defendant can show that the reason he lost the benefit of the bargain is the ineffective assistance of his counsel. Had his counsel acted competently, the defendant would have received the charge bargain. Even if the defendant proves prejudice, however, *Lafler* allows reviewing courts, at the remedial stage, to refuse to grant the defendant the full benefit of the charge bargain based on intervening circumstances that (as the defendant has proven) would not in fact have derailed the plea bargain.[152]

---

149. Missouri v. Frye, 132 S. Ct. 1399, 1404 (2012).

150. *Id.* at 1410–11.

151. Under the Federal Rules of Criminal Procedure, a court may accept a charge bargain, reject it, or defer its decision until it has reviewed the presentence report. FED. R. CRIM. P. 11(c)(3)(A).

152. *Lafler*, 132 S. Ct. at 1389 (noting that, at the remedial stage, judges may consider "information concerning the crime . . . after the plea offer was made").

This approach conflicts with the principle that the defendant should be restored to the position he would have occupied but for the ineffective assistance. The defendant's ability to prove prejudice would seem pointless if the court can reconsider the same intervening circumstances at the remedial stage and deny relief then. Reviewing courts should instead vacate the conviction procured as a result of ineffective assistance and should restore the bargain that the defendant has proven he would have received but for his lawyer's incompetence.[153]

The same analysis would apply to plea agreements that specify what sentence would apply to the case.[154] If the court accepts such an agreement, it is bound to follow the sentence negotiated by the parties.[155] If aggravating facts arise before the plea hearing, the defendant would have difficulty proving that ineffective assistance prejudiced him. In light of the newly discovered facts, the court would likely have rejected a sentencing agreement negotiated by the parties.

But if the defendant manages to show prejudice, the intervening factor should not be counted again for purposes of curtailing the remedy. If the defendant shows that the court would have accepted the agreement, then it is only the incompetent representation of his counsel that deprived him of the agreement's benefits. Under these circumstances, despite the intervening facts, restoring the defendant to the position he would have occupied but for the incompetent representation means sentencing him pursuant to the original agreement.

In practice, the problem described in this Subpart is not likely to arise frequently. Most reviewing courts would likely conclude that if an aggravating fact had emerged before the plea hearing, the deal would have fallen apart regardless of the competence of the defendant's lawyer. They would likely find that the prosecution would have withdrawn the offer or the court would have rejected the plea agreement. Most reviewing courts would accordingly dismiss such a case at the prejudice stage and would not even reach the question of remedy. For the few that do, however, it is important to develop a coherent approach that does not consider the same aggravating fact twice to penalize a defendant for the mistakes of his counsel.

---

153. As discussed in the following Part, however, the newly emerged aggravating facts might still be able to be considered by the reviewing court for sentencing purposes—just not for purposes of denying the defendant the benefit of the original charge bargain.

154. In federal court, the parties can reach such an agreement under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. FED. R. CRIM. P. 11(c)(1)(C).

155. *Id.*

B. *Scenario 2: Aggravating Facts Emerging Before Sentencing*

A more common scenario is that in which the aggravating facts would have emerged after the plea hearing but before sentencing. Imagine the following hypothetical. A defendant proceeds to trial as a result of his attorney's failure to convey a plea offer and is found guilty. In preparing a presentencing report ("PSR"), the probation officer uncovers aggravating facts that had not emerged during the trial. Assume that the prosecution could show, by preponderance of the evidence, that the probation officer would have uncovered the same aggravating facts in preparation of the PSR even if counsel had been effective and the defendant had entered a guilty plea. While the aggravating facts discovered by the probation officer would not have affected the court's decision to accept or reject the plea bargain, they might still have influenced the ultimate sentence in cases where the underlying bargain was either a charge bargain or a nonbinding sentence recommendation.[156] In those cases, the PSR findings could affect the sentence regardless of the quality of counsel's representation during plea bargaining.

In these situations, the harsher sentence could not be attributed to ineffective assistance but merely to the intervening facts. It would therefore be consistent with the restorative approach to consider the aggravating facts when determining the remedy for ineffective assistance.[157] When placing the defendant in the position he would have occupied but for ineffective assistance, the court can still take into account factors that would have emerged independently of the ineffective assistance.

---

156. *See, e.g.*, United States v. Pizzolato, 655 F.3d 403, 406 (5th Cir. 2011); State v. Sanchez, 46 P.3d 774 (Wash. 2002).

157. The defendant bears the burden of establishing reasonable probability that the court would have accepted the proposed plea agreement, but the prosecution would bear the burden of establishing that intervening aggravating facts would have increased the sentence regardless of counsel's effectiveness. *Cf.* United States v. Blaylock, 20 F.3d 1458, 1468–69 (9th Cir. 1994) (noting that the prosecution would have "to demonstrate that intervening circumstances have so changed the factual premises of its original offer that, with just cause, it would have modified or withdrawn its offer prior to its expiration date"); United States v. Day, 969 F.2d 39, 47 (3d Cir. 1992) (determining that when fashioning an appropriate remedy, the court could consider "any legitimate (nonvindictive) reasons why the prosecution may no longer favor the plea agreement"). The allocation of the burden of proof here would be similar to that in "inevitable discovery" cases, where the government is similarly arguing that it would have uncovered relevant evidence independently of the constitutional violation that preceded the discovery of the evidence. Nix v. Williams, 467 U.S. 431, 444 (1984) (holding that to establish an exception to the exclusionary rule, the prosecution must "establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means").

This analysis would apply in a similar fashion to plea agreements that include a sentencing recommendation but leave the final sentencing decision to the court. In those cases, the court would typically approve the plea agreement but postpone the decision whether to accept the accompanying sentence recommendation.[158] If the court later learns from the PSR about facts that make the defendant's culpability seem far more serious, it is not likely to follow the sentence recommendation. The defendant can typically expect a more severe sentence reflecting the newly discovered facts.

In this scenario, once again, competent representation would not have saved the defendant from receiving the harsher sentence. A reviewing court deciding the remedy for ineffective assistance could properly consider the aggravating facts to the extent that these facts would have been considered by the original sentencing court.[159]

C. Scenario 3: Aggravating Facts Emerging at Trial

The restorative approach would yield a different result when the aggravating facts emerge thanks, at least in part, to the ineffective assistance. This could happen, for example, when new facts surface during the trial following the foregone plea offer. A witness might reveal that the defendant in fact smuggled a much larger quantity of drugs than the prosecution had previously known, that the defendant acted with malice rather than recklessly, or that the defendant committed additional, uncharged crimes that could be considered as relevant conduct at sentencing. The list of damaging facts that could emerge at trial is endless.

Under *Lafler*, lower courts may be able to take such facts into account at the remedial stage. The Court noted that judges are not required to disregard "information concerning the crime after the plea offer was made."[160] The Court implied that competing social interests may lead courts to limit the remedy for ineffective assistance. An amicus brief for Connecticut and eighteen other

158. *See* FED. R. CRIM. P. 11(c)(3)(B).

159. Ebron v. Comm'r of Corr., 53 A.3d 983, 993, 995 (Conn. 2012); *cf.* United States v. Allen, 53 F. App'x 367, 376–77 (6th Cir. 2002) (explaining that where the presentencing report would have recommended a more serious sentence than that contained in the foregone plea offer, it is likely that the judge would have followed the presentence report and not the government recommendation, so defendant could not show he was prejudiced by his counsel's ineffectiveness).

160. Lafler v. Cooper, 132 S. Ct. 1376, 1389 (2012). Commentators have read this statement by the Court to allow trial courts to consider aggravating facts revealed at trial. *See, e.g.*, Darryl K. Brown, Lafler, Frye *and Our Still-Unregulated Plea Bargaining System*, 25 FED. SENT'G REP. 131, 132 (2012).

states in a case coming to the Supreme Court next term elaborates on this point.[161] It contends that courts should be able to consider facts emerging at trial in order to accommodate the public interest in a fitting punishment—namely a punishment that serves the goals of retribution, deterrence, incapacitation, and rehabilitation.[162] Under this view, the defendant's right to a remedy should be balanced against the public's interest in a fitting punishment, and when serious aggravating facts emerge at trial, the balance would shift in favor of the public interest.

Courts should reject this argument for several reasons. First, it is peculiar to call for a "fitting punishment" in the context of remedies for ineffective assistance when our criminal justice system regularly subverts this principle by allowing plea bargaining. When prosecutors and courts resolve the vast majority of cases through plea bargaining, they routinely forfeit the opportunity to uncover all facts relevant to the defendant's culpability and to impose the most fitting punishment.[163] Invoking this aim only in *Lafler*-type cases would not truly restore the proper place of these principles in our criminal justice system but would instead unfairly punish only those defendants unlucky enough to have had incompetent counsel.[164]

More broadly, the approach advocated by the states would be inconsistent with the fundamental principle that the defendant should be restored to the position he occupied before the violation of his rights occurred. But for counsel's incompetence, the defendant would not have gone to trial and the aggravating facts would not have been uncovered.[165] The court should not decrease the

---

161. Brief of Amici Curiae Connecticut and 18 Other States in Support of Petition for Writ of Certiorari, Burt v. Titlow, No. 12-414, 2012 WL 5424727, at *12 (Nov. 5, 2012).

162. *Id.*

163. The Supreme Court itself acknowledged this point in *Lafler*: "The expected post-trial sentence is imposed in only a few percent of cases. It is like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less a bargain." *Lafler*, 132 S. Ct. at 1387 (quoting Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1138 (2011)). In *Frye*, the Court went even further, suggesting that defendants who go to trial and lose "receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes." Missouri v. Frye, 132 S. Ct. 1399, 1407 (quoting Rachel Barkow, *Separation of Powers and Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006)); *see also* Alschuler, *supra* note 9, at 685–86, 696–704.

164. *Cf.* Gabriel J. Chin, *Federalism and a Fantasy of Full Enforcement: Justice Scalia on Plea Bargaining*, 25 FED. SENT'G REP. 135, 136 (2012) (noting that "[n]o court or legislature has decided that the quality of a defendant's lawyer is a just reason to impose a higher or lower sentence").

165. The prosecution would still be free to argue, consistent with the argument in Subpart IV.B, that some of the aggravating facts that emerged at

defendant's remedy based on evidence emerging as a result of ineffective assistance, as this would be punishing the defendant for his counsel's mistakes. *Frye* and *Lafler* both held that a fair trial does not erase the constitutional injury caused by ineffective assistance at the plea bargaining stage. Were courts to use fruits of the trial to deny a remedy for ineffective assistance, the right announced in *Lafler* would be little more than a "form of words."[166]

D. Scenario 4: The Prosecution's Foregone Benefits

Perhaps the most vexing question arising under *Lafler* is whether courts should curtail the defendant's remedy to account for benefits lost by the prosecution as a result of the plea deal's collapse. The Supreme Court will consider this question in a case coming before it this fall, *Burt v. Titlow*.[167] This Subpart argues that courts may consider the defendant's willingness to cooperate at the stage of evaluating whether there is prejudice, but once the defendant has passed this threshold, he should be entitled to reap the benefits of the bargain, regardless of the benefits foregone by the prosecution.

In making plea offers, the prosecution expects to receive some consideration from the defendant in exchange for the reduction in punishment. Most commonly, the prosecution seeks to save time and resources by avoiding trial. In many cases, it also hopes to gain the defendant's cooperation in other prosecutions. Occasionally, the prosecution may offer a plea deal at least in part to spare vulnerable victims from testifying. When ineffective assistance prevents the bargain from coming into being, the prosecution loses these expected benefits. The U.S. government has therefore argued that courts should consider this loss to the prosecution in calculating the appropriate remedy. If courts were simply to restore the defendant,

---

trial would have been uncovered before sentencing (for example, in a sentencing report), even if the defendant had taken the plea offer. If the government can make this showing by a preponderance of the evidence, the court can properly consider the facts, as they would likely have emerged independently of the ineffective assistance. *See supra* Subpart IV.B.

166. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961); Ebron v. Comm'r of Corr., 53 A.3d 983, 992 n.9 (Conn. 2012) ("It would have been inconsistent for the court in *Lafler* to conclude, on the one hand, that the habeas court can consider information that never would have come to light if not for counsel's deficient performance in the interest of fairness while, on the other hand, concluding that the fact that the petitioner received a fair sentence after a fair trial does not obviate any prejudice embodied in the petitioner's failure to accept the plea offer.").

167. 680 F.3d 577 (6th Cir. 2012), *cert. granted*, 81 U.S.L.W. 3465 (U.S. Feb. 25, 2013) (No. 12-414).

but not the prosecution, to the status quo ante, this would give the defendant "a substantial *quid* for essentially no *quo*."[168]

The Supreme Court implied in *Lafler* that habeas courts may consider the advantages lost by the prosecution as a result of the ineffective assistance. Courts could refer to the original plea offer as a "baseline [that] can be consulted" but impose a more severe sentence to reflect the prosecution's lost benefits.[169] In his dissent, Justice Alito specifically suggested that courts should not restore the original plea offer where the rejection of the offer has resulted "in a substantial expenditure of scarce prosecutorial or judicial resources."[170]

Two chief concerns seem to underlie the position of those who advocate balancing in this context. First, granting the benefit of a foregone cooperation agreement would benefit some defendants who would not in fact have cooperated with the prosecution and would therefore be receiving an undeserved windfall.[171] Second, because plea bargaining entails a give-and-take from both sides, it would be unfair to restore fully the benefits of the defendant under the bargain while leaving the prosecution without redress for its losses.[172]

The first concern is adequately addressed by the prejudice analysis. The defendant must establish a reasonable probability that he would have accepted the plea bargain.[173] When an ordinary plea agreement is at issue, the defendant must show not simply that he would have said yes to the offer but also that he would have performed under it (i.e., that he would have pleaded guilty). By analogy, if the plea bargain also required cooperation by the defendant, lower courts should consider not merely whether the defendant would have agreed to cooperate but whether he would in fact have cooperated.

Like the rest of the prejudice analysis, this showing will not be automatic. It is not clear whether courts will accept the defendant's sworn statement as sufficient to establish the likelihood of cooperation. The Court may resolve this question in *Burt v. Titlow* next term, but it is likely that the defendant would have to provide some objective evidence—even if circumstantial—to prove the

168. Brief for the United States as Amicus Curiae Supporting Petitioner at 9, *Lafler*, 132 S. Ct. 1376 (2012) (No. 10-209).

169. *Lafler*, 132 S. Ct. at 1389; Titlow v. Burt, 680 F.3d 577, 592 (6th Cir. 2012) (alteration in original); United States v. Wolfe, No. 2:11-CR-33, 2012 WL 1957427, at *14 (E.D. Tenn. May 31, 2012) (alteration in original).

170. *Lafler*, 132 S. Ct. at 1398–99 (Alito, J., dissenting).

171. Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 168, at 26.

172. *Id.* at 29.

173. *Lafler*, 132 S. Ct. at 1385.

likelihood of cooperation.[174] This stringent requirement will ensure that defendants who would not have cooperated do not receive an unjustified windfall as a result of the ineffective assistance. In fact, depending on the Court's interpretation of the evidence required to support a prejudice showing, many meritorious claims may be left unrecognized.[175] In short, concerns about an undeserved windfall are misplaced in this context. If defendants demonstrate at the prejudice stage that they would have cooperated but for the ineffective assistance of their counsel, restoring them to the position before the constitutional violation requires that they receive the benefits under the cooperation agreement. A lesser remedy would underenforce the right to effective counsel.

The other argument that advocates of balancing make is that plea bargaining presupposes mutuality of advantage, so courts should not restore benefits of the bargain to the defendant while leaving the prosecution without redress. If the court cannot revive the benefits of the bargain for the prosecution, then it would be unfair to do so only for the defendant. The prosecution would never have proposed the plea bargain under the same terms if it had known that the defendant would not have been able to perform some or all of his obligations under the bargain. [176]

This argument, however, confuses the court's duty in *Lafler*-type cases. The court's task is not to enforce the bargain between the prosecution and the defense but rather to redress the violation of the defendant's Sixth Amendment rights. The prosecution is not granted rights under the Sixth Amendment and has suffered no constitutional injury that needs to be remedied. Therefore, the resentencing court does not need to adjust the remedy to the defendant (the actual right holder under the Sixth Amendment) in

---

174. Titlow v. Burt, 680 F.3d 577 (6th Cir. 2012), *cert. granted*, 81 U.S.L.W. 3465 (2013) (No. 12-414). Courts may consider any significant sentence and charge reductions accompanying a cooperation agreement as evidence that the defendant would have cooperated. *See id.* at 589–90. Additional objective evidence could include statements that the defendant made to his attorney (or to others) before trial about willingness to cooperate; previous cooperation by the defendant; and whether cooperation would have involved a less onerous obligation (such as simply providing information about other cases) or more demanding tasks (such as wearing a wire or testifying against dangerous defendants). *See id.*

175. In many *Lafler*-type cases, the defendant would not have been aware of the cooperation agreement, so it would be extremely difficult to provide objective evidence that he would have accepted it and performed under it.

176. Brief of Amici Curiae Connecticut and 18 Other States in Support of Petition for Writ of Certiorari, Burt v. Titlow, No. 12-414, 2012 WL 5424727, at *15–16 (Nov. 5, 2012).

an effort to return the prosecution more closely to the status quo ante.[177]

The same arguments apply to the prosecution's additional expenditure of time and resources when a plea bargain falls apart as a result of ineffective assistance. After foregoing a favorable plea offer, defendants typically proceed to trial, where the prosecution devotes significant additional time and effort to the case. Under the balancing approach advanced in *Lafler*, courts can consider the additional expense of resources by the prosecution at trial and balance the public interest in efficient administration of justice against the defendant's right to a remedy. This approach, however, would leave most defendants without a remedy, since in virtually every *Lafler*-type case, the prosecution expends additional resources when a defendant rejects a plea bargain as a result of his counsel's incompetence. *Lafler* held that a fair trial does not erase the constitutional injury caused by ineffective assistance during plea bargaining; eliminating the remedy to the defendant in order to compensate the government for the costs of trial would make *Lafler*'s holding seem hollow.[178] As mentioned before, an approach focusing on the benefits lost by the prosecution errs further by seeking to enforce the foregone plea bargain between the parties instead of focusing on redressing the underlying constitutional injury.

Remedies for constitutional violations are frequently awarded long after the violation has occurred, and restoring the defendant to the status quo ante will often leave the prosecution worse off. When a court orders a retrial for a defendant who has suffered ineffective assistance at his first trial, the prosecution will suffer various disadvantages as a result of the imposition of this relief. The prosecution would have expended significant resources on the first trial, whose result was invalidated. And it may have lost the

177. Indeed, the Court has held that the state has a duty to provide competent counsel and therefore it must also bear the costs of ineffective assistance and not shift them to the defendant. Coleman v. Thompson, 501 U.S. 722, 754 (1991). Increasing the defendant's sentence to offset losses to the prosecution resulting from ineffective assistance would be such an impermissible shift of costs. Kimmelman v. Morrison, 477 U.S. 365, 379 (1986). *See* United States v. Blaylock, 20 F.3d 1458, 1469 (9th Cir. 1994) ("[E]ven if one might perceive that the government's competing interests might be infringed by requiring that the original offer be reinstated, a contrary result would impermissibly shift the risk of ineffective assistance of counsel from the government to [the defendant].")

178. *See* Donald A. Dripps, *Plea Bargaining and the Supreme Court: The End of the Beginning?*, 25 FED. SENT'G REP. 141, 141 n.7 (2012) ("Since every trial involves 'a substantial expenditure of scarce . . . resources,' Justice Alito's formulation of the remedial inquiry would render the majority's analysis of the substantive claim nearly, if not entirely, nugatory.").

cooperation of valuable witnesses for the proceedings on retrial. Indeed, if the expenditure of additional resources were allowed to affect remedies in the Sixth Amendment context, it is difficult to imagine how retrial would ever be an appropriate remedy for ineffective assistance of counsel. Just as courts refuse to conduct balancing when ordering retrial for other right to counsel violations, they should also spurn balancing when ordering remedies under *Lafler*.

IV. LOWER COURTS AND REMEDIES AFTER *LAFLER*

Prior to *Lafler*, state and federal courts varied in their approaches to claims of ineffective assistance during plea bargaining. A small minority of courts refused to recognize that the defendant had been prejudiced by the ineffective assistance during plea bargaining when he had later been convicted at a fair trial.[179] This position has been squarely rejected by *Lafler*. The remaining courts recognized a right to effective assistance during plea bargaining but differed in the remedies they awarded. Some granted a new trial,[180] others ordered "specific performance,"[181] and yet others permitted consideration of intervening circumstances to influence the remedy.[182] "Specific performance" was the most

---

179. State v. Monroe, 757 So. 2d 895, 898 (La. Ct. App. 2000); State v. Greuber, 165 P.3d 1185, 1188 (Utah 2007).

180. *E.g.*, Carmichael v. People, 206 P.3d 800, 809–10 (Colo. 2009); People v. Curry, 687 N.E.2d 877, 890 (Ill. 1997); Commonwealth v. Copeland, 554 A.2d 54, 61 (Pa. Super. Ct. 1988); *In re* McCready, 996 P.2d 658, 661 (Wash. Ct. App. 2000); State v. Lentowski, 569 N.W.2d 758, 762 (Wis. Ct. App. 1997); *see also* Julian v. Bartley, 495 F.3d 487, 500 (7th Cir. 2007) (ordering retrial but suggesting that in some cases, specific performance may be more appropriate). *See generally* Perez, *supra* note 58, at 1576–77 (arguing that a new trial is the most appropriate remedy).

181. *E.g.*, United States v. Carmichael, 216 F.3d 224, 227 (2d Cir. 2000) (holding that specific performance would be appropriate if the defendant shows that he would have accepted the offer and the court would have accepted the guilty plea and sentenced pursuant to it); *Blaylock*, 20 F.3d at 1469; Wanatee v. Ault, 101 F. Supp. 2d 1189, 1214 (N.D. Iowa 2000), *aff'd*, 259 F.3d 700 (8th Cir. 2001); State v. Kraus, 397 N.W.2d 671, 676 (Iowa 1986); Osborne v. Commonwealth, 992 S.W.2d 860, 866 (Ky. Ct. App. 1998); Williams v. State, 605 A.2d 103, 110–11 (Md. 1992); Leake v. State, 737 N.W.2d 531, 542 (Minn. 2007); State v. Taccetta, 797 A.2d 884, 887–88 (N.J. Super. Ct. App. Div. 2002); Harris v. State, 875 S.W.2d 662, 667 (Tenn. 1994); *Ex parte* Lemke, 13 S.W.3d 791, 798 (Tex. Crim. App. 2000), *overruled by Ex parte* Argent, 393 S.W.3d 781 (Tex. Crim. App. 2013); *see also* Dew v. State, 843 N.E.2d 556, 571 (Ind. Ct. App. 2006) ("If the state decides not to renew its plea offer, or if the trial court decides not to accept a guilty plea, then [the defendant] shall be granted a new trial.").

182. United States v. Day, 969 F.2d 39, 47 (3d Cir. 1992); Davie v. State, 675 S.E.2d 416, 424 (S.C. 2009) ("In re-sentencing Petitioner, the circuit court judge shall take into consideration the State's prior fifteen-year plea offer. We further

common remedy, followed by the grant of a new trial. Both remedies were justified on the grounds that they placed the defendant in the position he occupied before the ineffective assistance. The new trial remedy, however, was rejected by *Lafler* on the grounds that it was not adequately tailored to repair the injury suffered by the defendant.[183] Defendants in *Lafler*-type cases had already received a fair trial, so ordering a new trial would not help cure the prejudice resulting from the ineffective assistance.[184] *Lafler* left courts with the option of ordering specific performance, as most lower courts had previously done, but it also suggested that courts could provide something less than specific performance when new facts had intervened.

In the first year following *Lafler*, lower courts reached the question of remedy in only fourteen published decisions. Many more claims were remanded to trial courts for a resolution on the merits and the remedy.[185] In light of *Lafler*, courts now routinely reject retrial as an appropriate remedy. Instead, they have used their discretion to resentence or order a reinstatement of the plea offer, producing a variety of approaches, particularly when aggravating circumstances or foregone cooperation agreements are at issue. What is clear from these early decisions is that lower courts are struggling to interpret and apply the Supreme Court's guidance on the question of remedies.

Several courts have asserted that the defendant should be restored to the position he would have occupied in the absence of ineffective assistance.[186] But they have differed on the implications

---

direct that any sentence Petitioner receives should not exceed the original twenty-seven-year sentence."); Becton v. Hun, 516 S.E.2d 762, 768–69 (W. Va. 1999) (holding that trial court should consider prior offer, but is not bound by it, and may impose any sentence up to the post-trial sentence); *see also* Magana v. Hofbauer, 263 F.3d 542, 553 (6th Cir. 2001) (holding that state can offer a less favorable plea deal to defendant than the original offer, but to do so, the state would have to rebut the presumption of vindictiveness which would attach to the new offer); State v. Donald, 10 P.3d 1193, 1205 (Ariz. Ct. App. 2000) ("Specifically, we hold that a court, without violating separation of powers, may order the prosecution to reinstate a plea offer if, after conducting a hearing and permitting the State to present all relevant considerations, the court finds reinstatement necessary to remedy a deprivation of effective counsel.").

183. Lafler v. Cooper, 132 S. Ct. 1376, 1389 (2012).

184. *See, e.g.*, State v. Kraus, 397 N.W.2d 671, 674 (Iowa 1986) (stating that "[o]ne more fair trial, or even a series of them," will not restore the "lost chance" of the plea bargain).

185. *See supra* notes 145–47 and accompanying text.

186. *E.g.*, Johnson v. Uribe, 682 F.3d 1238, 1244 (9th Cir. 2012); United States v. Polatis, No. 2:10-CR-0364, 2013 WL 1149842, at *12 (D. Utah Mar. 19, 2013); *In re* Alonzo, 147 Cal. Rptr. 3d 748, 756–57 (Cal. Ct. App. 2012); Ebron v. Comm'r of Corr., 53 A.3d 983, 996 (Conn. 2012); *see also* United States v. Wolfe, No. 2:11-CR-33, 2012 WL 1957427, at *14–15 (E.D. Tenn. May 31, 2012)

of that principle. Some have simply ordered the government to reinstate the original plea offer,[187] while others have noted that intervening circumstances—such as lost benefits to the prosecution or aggravating information occurring after the plea agreement's hypothetical acceptance—should be taken into account in fashioning a remedy.[188] Courts have not yet articulated clear principles on how intervening circumstances should affect the remedy.

Two courts have held that on resentencing, the trial court may consider the benefits that the prosecution lost as a result of the ineffective assistance and increase the defendant's sentence accordingly.[189] One court has suggested that in calculating the remedy, the trial court may consider "the defendant's willingness to accept responsibility for his actions"—seemingly reconsidering a fact that would already have been considered at the prejudice stage.[190] Courts have also said that the remedy may depend on "information concerning the crime that was discovered after the plea offer was made," without specifying whether a causal link between the ineffective assistance and the newly emerged information would have any significance.[191]

(suggesting that the remedy should attempt to restore both the defendant and the prosecution to the positions they occupied prior to the rejection of the plea offer).

187. *E.g.*, Jones v. United States, 504 F. App'x 405, 408 (6th Cir. 2012); *Polatis*, 2013 WL 1149842, at *12; Soto-Lopez v. United States, Nos. 07-cr-3475-IEG, 10-cv-1852-IEG, 2012 WL 3134253, at *8 (S.D. Cal. Aug. 1, 2012); *Alonzo*, 147 Cal. Rptr. 3d at 756–57; People v. Douglas, 817 N.W.2d 640, 653–54 (Mich. Ct. App. 2012); *see also* People v. Phillips, C067261, 2012 WL 3089359, at *4 (Cal. Ct. App. July 31, 2012) (remanding for evidentiary hearing, but concluding that if court finds ineffective assistance, proper remedy would be to order the prosecution to reinstate the original plea offer).

188. Titlow v. Burt, 680 F.3d 577, 592–93 (6th Cir. 2012); United States v. Love, No. 10 C 50285, 2012 WL 2921496, at *7 (N.D. Ill. July 17, 2012); *Wolfe*, 2012 WL 1957427, at *14–15; *Ebron*, 53 A.3d at 995; People v. McCauley, 821 N.W.2d 569, 569 (Mich. 2012); State v. Gordon, No. A-2540-10T2, 2012 WL 2890623, at *7 (N.J. Super. Ct. App. Div. July 17, 2012).

189. *Titlow*, 680 F.3d at 592–93; *Wolfe*, 2012 WL 1957427, at *14. Both *Wolfe* and *Titlow* suggested that in fashioning a remedy trial courts should consider the original plea agreement as a baseline but adjust the sentence to account for competing interests, including the prosecution's loss of cooperation benefits. In *Wolfe*, the prosecution had "potentially lost a major benefit of the bargain it sought with the defendant, that is, his cooperation in an effort to identify and prosecute the California marijuana supplier." *Wolfe*, 2012 WL 1957427, at *14. In *Titlow*, the prosecution lost the ability to use Titlow's testimony at the murder trial of her aunt, and the aunt was subsequently acquitted. The prosecution therefore "lost the major benefit that it sought from the initial plea agreement." *Titlow*, 680 F.3d at 592.

190. *McCauley*, 821 N.W.2d at 569.

191. *Id.*

So far, only the Connecticut Supreme Court appears to have considered the causal link between the ineffective assistance and subsequently emerging aggravating facts. Consistent with the approach advocated in this Article, the court held that information that was uncovered at trial (as a result, at least in part, of the ineffective assistance) should not be used to increase the defendant's sentence.[192] The same court also concluded—again consistent with the restorative approach—that the trial court could nonetheless consider "any information concerning the crime or the petitioner that would have come to light between the acceptance of the plea offer and the imposition of the sentence."[193]

CONCLUSION

The confusion among the lower courts suggests that the Supreme Court should provide more concrete guidance concerning what relief defendants must receive. The Court can do so by clarifying that an ad hoc balancing of interests is not appropriate in determining remedies for ineffective assistance. The Court should instead instruct trial courts to use the "restorative approach" that has long applied to remedies in right to counsel cases. Under this approach, courts should generally attempt to restore the defendant to the place he occupied before ineffective assistance. Reading *Lafler* narrowly, they should consider new facts only when these facts would have emerged independently of the ineffective assistance. Finally, courts should recognize that when a defendant foregoes a plea bargain as a result of his counsel's incompetence, the prosecution has not suffered a constitutional injury that demands redress.

If the Court fails to provide such guidance in *Burt v. Titlow*, lower courts should take it upon themselves to devise remedies that adequately vindicate the defendant's right to effective assistance.[194] A number of federal and state jurisdictions have already used the restorative approach proposed here to remedy ineffective assistance during plea bargaining. This has proven manageable and practical. With further refinement, it should become increasingly coherent and

192. *Ebron*, 53 A.3d at 992 n.9.

193. *Id.* at 993.

194. State courts can always choose to provide more generous remedies under state law. Danforth v. Minnesota, 552 U.S. 264, 268 (2008) (quoting Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 178–79 (1990)) (holding that federal law simply "sets certain minimum requirements that States must meet but may exceed in providing appropriate relief"). Moreover, *Lafler* left bountiful discretion to both state and federal courts in fashioning remedies for ineffective assistance of plea bargaining. This discretion includes providing remedies that restore defendants to the position they would have occupied in the absence of the constitutional violation.

predictable. Restoring the benefits foregone as a result of ineffective assistance will help ensure that the Sixth Amendment right to counsel is not reduced to a mere "form of words."[195]

195. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961).