

# LAFLETER V. COOPER'S REMEDY: A WEAK RESPONSE TO A CONSTITUTIONAL VIOLATION

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## INTRODUCTION

The Sixth Amendment's Counsel Clause preserves an accused's right to counsel.<sup>1</sup> The mere fact, however, that "a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command."<sup>2</sup> Rather, defendants have a right to the *effective* assistance of counsel. This right is protected by *Strickland v. Washington*'s two-prong ineffective assistance of counsel test.<sup>3</sup>

The United States Supreme Court recognizes that an accused enjoys this right before accepting a plea deal.<sup>4</sup> Only recently, however, has the Supreme Court addressed the issue of effective assistance of counsel when an accused *rejects* (or, at least, does not accept) a plea deal, in the sister decisions of *Lafler v. Cooper*<sup>5</sup> and *Missouri v. Frye*.<sup>6</sup> While *Frye* addressed the situation in which defense counsel failed to inform the defendant of plea offers before they lapsed,<sup>7</sup> the Court in *Lafler* turned its focus to counsel deficiently advising the defendant to reject a favorable plea deal.<sup>8</sup>

In *Lafler*, defendant Anthony Cooper's attorney informed him of a "favorable plea offer," but deficiently advised him to reject it.<sup>9</sup> Cooper pled not guilty, and received "a full and fair trial before a jury."<sup>10</sup> Cooper

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1 U.S. CONST. amend. VI.

2 *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

3 *See id.* at 687–88 (holding that defendant making an ineffective assistance of counsel claim must first "show that counsel's representation fell below an objective standard of reasonableness"); *id.* at 694–95 (holding that defendant must also meet prejudice prong, showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

4 *See, e.g., McMann v. Richardson*, 397 U.S. 759, 771 (1970) (stating that defendants pleading guilty are still "entitled to the effective assistance of competent counsel"); *id.* at 771 n.14 (collecting cases); *see also Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (applying *Strickland* test to guilty pleas); *Hill v. Lockhart*, 474 U.S. 52, 57 (1985) ("[T]he same [*Strickland*] two-part standard seems to us applicable to ineffective-assistance claims arising out of the plea process.").

5 132 S. Ct. 1376 (2012).

6 132 S. Ct. 1399 (2012).

7 *See id.* at 1404–05.

8 *See Lafler*, 132 S. Ct. at 1383–84.

9 *Id.* at 1383.

10 *Id.*

then “received a sentence harsher than that offered in the rejected plea bargain.”<sup>11</sup> Taking as a given that Cooper’s “counsel’s advice with respect to the plea offer fell below the standard of adequate assistance of counsel guaranteed by the Sixth Amendment,”<sup>12</sup> the Supreme Court set out to apply the familiar *Strickland* analysis to the situation in which “ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial.”<sup>13</sup> Finding that both of *Strickland*’s prongs—deficient performance and prejudice<sup>14</sup>—were met,<sup>15</sup> the Court crafted a novel remedy: the State was ordered to “reoffer the plea agreement,” and, assuming that Cooper accepted the offer, “the state trial court c[ould] then exercise its discretion in determining whether to vacate the convictions and resentence [Cooper] pursuant to the plea agreement, to vacate only some of the convictions and resentence [Cooper] accordingly, or to leave the convictions and sentence from trial undisturbed.”<sup>16</sup>

Thus, the *Lafler* Court simultaneously proclaimed that the defendant’s receipt of deficient counsel during the plea bargaining phase was unconstitutional, while creating a sentencing remedy that was, in effect, optional.<sup>17</sup> Trial courts, in crafting remedial sentences after a finding of a *Lafler* violation, have discretion to *decline* to remedy the ineffective assistance at all, and may instead refuse to vacate the trial’s convictions and sentence<sup>18</sup>—which would not have existed had the defendant had effective counsel and thus accepted the pretrial plea bargain to begin with.

This Essay argues that the *Lafler* Court should have instead chosen the remedy of specific performance of the original plea bargain. The specific performance remedy, long implemented by federal courts in *Lafler*-like scenarios,<sup>19</sup> and ordered by the district court in *Lafler*,<sup>20</sup> precisely cures the *Lafler* injury—the accused regains the ability to accept the original plea

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11 *Id.*

12 *Id.*

13 *Id.* at 1384.

14 *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

15 *Lafler*, 132 S. Ct. at 1390.

16 *Id.* at 1391 (citation omitted).

17 *See id.*

18 *See id.*

19 *See, e.g., United States v. Blaylock*, 20 F.3d 1458, 1469 (9th Cir. 1994) (holding that if successful, a defendant bringing an ineffective assistance claim arising from an undisclosed plea offer should have the choice to accept the original plea offer); *Lewandowski v. Makel*, 949 F.2d 884, 885–87 (6th Cir. 1991) (granting the specific performance remedy to a defendant whose counsel withheld a plea offer); *Satterlee v. Wolfenbarger*, 374 F. Supp. 2d 562, 569 (E.D. Mich. 2005) (finding a grant of habeas corpus writ conditioned upon the State allowing a defendant to plead guilty to a lesser offense the appropriate remedy); *see also infra* note 116 and accompanying text.

20 *Cooper v. Lafler*, No. 06-11068, 2009 WL 817712, at \*9 (E.D. Mich. Mar. 26, 2009), *aff’d*, 376 F. App’x 563 (6th Cir. 2010), *vacated*, 132 S. Ct. 1376 (2012).

offer, except he now has the benefit of effective assistance of counsel. The specific performance remedy, when coupled with the safeguards of the *Strickland* prongs,<sup>21</sup> poses little risk of abuse, and gives heft to the Sixth Amendment's guarantee of effective assistance of counsel in the plea bargaining context. If the Court gives constitutional weight to a *Lafler* violation, it should prescribe an equally weighty remedy.

### I. *LAFLE*R'S REMEDY IN THE LOWER COURTS

Because the Supreme Court left intact the trial court's discretion in resentencing after a successful *Lafler* claim—indeed, the trial court may reject outright a reoffered plea<sup>22</sup>—*Lafler* remedies are inherently nonuniform: trial courts across the country can wield their remedial discretion in various ways. This Part divides *Lafler* claim trial court resolutions into four categories<sup>23</sup>: (1) those in which the trial court accepts the reoffered plea deal and sentences the defendant accordingly; (2) those in which the trial court accepts the reoffered plea deal and gives the defendant a sentencing penalty; (3) those in which the trial court orders the plea deal reoffered and subsequently rejects it, leaving the conviction and sentence undisturbed; and (4) those in which the parties come to an alternative remedy, similar to a civil settlement. This Part offers a representative case for each category.

#### A. *The Trial Court Accepts the Reoffered Plea Deal and Sentences the Defendant Accordingly*

In this category of case, a defendant has (1) been counseled to reject a favorable plea deal; (2) been subsequently convicted at trial, typically either on more severe charges than in the plea deal or to a longer sentence than in the plea deal; (3) then filed a *Lafler* claim; and (4) prevailed. The court has then ordered the prosecutor to reoffer the original plea deal on the grounds that the advice to reject the plea deal constituted ineffective assistance of counsel. After the defendant has accepted the reoffered plea deal, the court sentences in accordance with the deal.

Take, for instance, *Soto-Lopez v. United States*.<sup>24</sup> Carlos Soto-Lopez,<sup>25</sup> an alien, was deported and then illegally reentered the country.<sup>26</sup>

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21 See *infra* notes 119–24 and accompanying text.

22 See *Lafler*, 132 S. Ct. at 1389 (“[T]he judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed.”).

23 Of course, other categories could exist, such as those cases in which a defendant rejects a reoffered plea deal after a successful *Lafler* claim. However, no such cases were found.

24 *Soto-Lopez v. United States (Soto-Lopez III)*, No. 3:07-cr-3475, 2012 WL 3134253 (S.D. Cal. Aug. 1, 2012). The case has multiple dispositions and docket numbers due to,

After being arrested by local police on a domestic assault matter, customs agents learned of his reentry, and the federal government initiated criminal charges.<sup>27</sup> Federal prosecutors offered Soto-Lopez a “fast-track plea deal” that would “require [him] to waive indictment and enter a guilty plea” in exchange for “a ‘charge bargain,’ meaning he would plead guilty to an information charging him with three counts of illegal entry”—instead of a charge of being a deported alien found in the United States—and the Government “would recommend . . . a sentence of no greater than 48 months.”<sup>28</sup> The court-appointed defense counsel in the case advised Soto-Lopez “that she believed the 48-month deal was the best offer the Government would give him and that if he did not accept this offer, he would face higher penalties.”<sup>29</sup> Thus, Soto-Lopez “agreed to accept the fast track plea offer.”<sup>30</sup>

However, Soto-Lopez soon thereafter heard from another inmate that another attorney could get him another deal.<sup>31</sup> He met with this second attorney, who told him “that he was agreeing to a lot of time in custody” and that the attorney could get him “a 24-month offer or at most a 30-month offer from the Government,” despite Soto-Lopez’s prior state court conviction, which the attorney said “would not count in federal court.”<sup>32</sup> Subsequently, Soto-Lopez dismissed his first attorney in favor of the second and quickly rejected the fast-track plea offer.<sup>33</sup> This led the Government to dismiss the charges of illegal entry and indict Soto-Lopez on a “single count of being a deported alien found in the United States,” a more serious offense.<sup>34</sup>

What Soto-Lopez did not know, however, was that the second attorney had just been suspended from the practice of law for, *inter alia*, “making false statements, and conduct that ‘plac[ed his] financial motivations above the interests of his client and expos[ed] his client to prejudice and delay.’”<sup>35</sup> Although the attorney was required to inform his

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*inter alia*, appeals and the subsequent *Lafler* claim. This citation is to the ultimate Order disposing of the *Lafler* claim.

25 Also known as Carlos Mendoza-Camacho. See Complaint at 2, United States v. Mendoza-Camacho, No. 3:07-cr-3119 (S.D. Cal. Oct. 17, 2007), ECF No. 1.

26 *Soto-Lopez III*, 2012 WL 3134253, at \*2.

27 Complaint, *supra* note 25, at 2.

28 *Soto-Lopez III*, 2012 WL 3134253, at \*1.

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.* at \*2.

34 *Id.* Compare 8 U.S.C. § 1325(a) (2012) (illegal entry), with *id.* § 1326(a)–(b) (deported alien found in the United States).

35 United States v. Soto-Lopez (*Soto-Lopez II*), 475 F. App’x 144, 146 (9th Cir. 2012) (alterations in original) (citation omitted).

clients of this suspension, he never informed Soto-Lopez, and instead withdrew as the attorney of record.<sup>36</sup>

Soto-Lopez eventually pled guilty to the higher charge without a plea agreement.<sup>37</sup> At sentencing, the government recommended that Soto-Lopez be sentenced to seventy-seven months, and the court so sentenced.<sup>38</sup>

Subsequently, in 2010,<sup>39</sup> Soto-Lopez filed an ineffective assistance of counsel claim, alleging that he stood “prepared to accept the fast-track plea deal” until the second attorney “promised he could obtain a 24 or 30-month deal from the government,” and that this attorney “knew or should have known there was no chance the Government would make such an offer,” but made the promise in order to “fleece [Soto-Lopez] out of a fee.”<sup>40</sup>

Citing the proposition that “uncertainty is inherent in predicting court decisions,” and that counsel must only “give the defendant the tools he needs to make an intelligent decision,”<sup>41</sup> the district court denied Soto-Lopez’s ineffective assistance of counsel claim, stating that he indeed “had the tools he needed to make an informed decision.”<sup>42</sup> The district court elaborated, stating that although “[h]indsight demonstrates [the second attorney’s] prediction—that he could get [Soto-Lopez] a better deal—was inaccurate,” there was no evidence that the second attorney “made any affirmative misrepresentations of law or fact or that he interfered with [Soto-Lopez’s] previous understanding of the potential consequences of failing to obtain a new plea deal.”<sup>43</sup>

After the Supreme Court’s decision in *Lafler*, the Ninth Circuit reversed the district court’s denial of Soto-Lopez’s ineffective assistance of counsel claim.<sup>44</sup> Detailing the second attorney’s misconduct, the Ninth Circuit found that the second attorney met both prongs of the *Strickland* test, stating:

When the serious doubts about [the second attorney’s] professionalism and honesty occasioned by his contemporaneous conduct are combined with the facts of his representation of Soto-Lopez, the record supports Soto-Lopez’s claim that [the second attorney] provided him ineffective assistance of counsel.

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36 *Soto-Lopez v. United States (Soto-Lopez I)*, No. 07-cr-3475, 2011 WL 176026, at \*1 (S.D. Cal. Jan. 19, 2011), *rev’d*, 475 F. App’x 144 (9th Cir. 2012).

37 *Soto-Lopez III*, 2012 WL 3134253, at \*2.

38 *Id.* at \*3.

39 The district court rendered judgment on the claim in 2011, more than a year before *Lafler* was decided.

40 *Soto-Lopez I*, 2011 WL 176026, at \*3 (citations omitted).

41 *Id.* at \*4 (quoting *Turner v. Calderon*, 281 F.3d 851, 881 (9th Cir. 2002)).

42 *Id.*

43 *Id.*

44 *United States v. Soto-Lopez (Soto-Lopez II)*, 475 F. App’x 144, 148 (9th Cir. 2012).

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[Likewise,] Soto-Lopez has alleged sufficient facts to show prejudice . . . . If Soto-Lopez had not abruptly changed course once he encountered [the second attorney], he would then have received the benefit of the 48-month plea offer, and in any event could have received no more than the statutory maximum of 54 months for the three counts of illegal entry.<sup>45</sup>

The Ninth Circuit remanded the case, instructing the district court to conduct an evidentiary hearing on the matter.<sup>46</sup>

On remand, the district court found that the second attorney's "advice and representations were not based on any sincere trial strategy," and, in fact, the attorney "appears to have had no basis at all for giving that advice and making those representations."<sup>47</sup> Accordingly, the court ordered the government to "reoffer the original 48-month fast track plea agreement."<sup>48</sup> The government did so, and Soto-Lopez accepted the plea agreement.<sup>49</sup> The court sentenced Soto-Lopez to forty-eight months time served.<sup>50</sup>

*Soto-Lopez* surely stands as an example for what *Lafler* remedies "ideally" look like. The defendant rejected a favorable plea offer based on unconstitutionally deficient advice, and paid the price in the form of a thirty-three-month sentencing penalty. Applying *Lafler*, the court ordered the government to reoffer the favorable plea deal, and thereafter sentenced the defendant accordingly. The parties received what they originally bargained for: a forty-eight-month sentence. This remedy adequately protected Soto-Lopez's Sixth Amendment right: had he received constitutionally adequate representation from the start, he would have received a forty-eight-month sentence. Thus, the remedy for deficient representation also led to a forty-eight-month sentence. However, such a straightforward and just application of *Lafler*'s remedy does not always occur.

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<sup>45</sup> *Id.* at 147.

<sup>46</sup> *Id.* at 147–48.

<sup>47</sup> *Soto-Lopez v. United States (Soto-Lopez III)*, No. 3:07-cr-3475, 2012 WL 3134253, at \*5 (S.D. Cal. Aug. 1, 2012).

<sup>48</sup> *Id.* at \*8.

<sup>49</sup> See Superseding Information, *Soto-Lopez III*, 2012 WL 3134253 (No. 3:07-cr-3475), ECF No. 72; Amended Judgment in a Criminal Case, *Soto-Lopez III*, 2012 WL 3134253 (No. 3:07-cr-3475), ECF No. 76.

<sup>50</sup> See Minute Entry of Aug. 6, 2012, *Soto-Lopez III*, 2012 WL 3134253 (No. 3:07-cr-3475), ECF No. 74; Amended Judgment in a Criminal Case, *supra* note 49.

*B. The Trial Court Accepts the Reoffered Plea Deal and Gives the Defendant a Sentencing Penalty*

The second category of cases are those in which the defendant makes a successful *Lafler* claim, as in the first category, but the court in resentencing imposes a sentence higher than in the plea deal. Under *Lafler*, the trial court has the discretion to resentence the defendant in this manner, just as the court would have under normal circumstances.<sup>51</sup> *Lafler* itself is representative of this category of cases. In *Lafler*, defendant Anthony Cooper shot a victim repeatedly below the waist.<sup>52</sup> Faced with charges of “assault with intent to murder, possession of a firearm by a felon, possession of a firearm in the commission of a felony, misdemeanor possession of marijuana, and for being a habitual offender,” Cooper’s sentence, if he were to be found guilty on all counts, would be a mandatory minimum of 185 to 360 months, or 15 to 30 years.<sup>53</sup>

The prosecution in the case twice offered Cooper a plea deal in which he would plead guilty to two of the charges, the others would be dropped, and the State would recommend a sentence of 51 to 85 months, or 4 to 7 years.<sup>54</sup> However, Cooper’s attorney advised him to reject this favorable deal, allegedly stating that “the prosecution would be unable to establish [Cooper’s] intent to murder [the victim] because she had been shot below the waist.”<sup>55</sup> The attorney, McClain, went so far as to lambast the plea offer in front of the State:

[A] week before trial was to begin, the prosecution provided petitioner and his counsel a written plea agreement of 51 to 85 months. McClain indicated on the record that the prosecutor’s offered deal was “not reasonable,” that there “is insufficient evidence” and that the “Prosecution does not have the evidence to try to [sic] this case.” The prosecutor, offended by McClain’s comment that the offer was unreasonable, then stated “I withdraw this offer.” Undeterred, McClain then said, “We’re just rejecting the offer.” Petitioner, who was present at the conference, was reading the plea offer he had just received. He was not asked about the plea agreement, and did not offer any comment on it.<sup>56</sup>

Cooper stood trial on all charges, was convicted on all counts, and was sentenced to 185 to 360 months, or 15 to 30 years.<sup>57</sup>

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51 See *Lafler v. Cooper*, 132 S. Ct. 1376, 1391 (2012).

52 *Id.* at 1383.

53 *Id.*

54 *Id.*

55 *Id.*

56 *Cooper v. Lafler*, 376 F. App’x 563, 566 (6th Cir. 2010), *vacated*, 132 S. Ct. 1376 (2012) (second alteration in original) (footnote omitted) (internal citations omitted).

57 *Lafler*, 132 S. Ct. at 1383.

Cooper raised an ineffective assistance of counsel claim, which the trial court rejected.<sup>58</sup> The Michigan Court of Appeals affirmed, reasoning that “the record shows that defendant knowingly and intelligently rejected two plea offers and chose to go to trial.”<sup>59</sup> After the Michigan Supreme Court denied Cooper’s motion for leave to file an appeal,<sup>60</sup> Cooper was conditionally granted a writ of habeas corpus, as the United States District Court for the Eastern District of Michigan found that defense counsel had acted unreasonably.<sup>61</sup> The Sixth Circuit affirmed,<sup>62</sup> and the Supreme Court granted certiorari, requesting briefing on the question of remedy.<sup>63</sup>

Agreeing that Cooper’s attorney provided unconstitutionally deficient counsel, and deciding to fashion its own remedy, the Supreme Court vacated the judgments below and remanded the case.<sup>64</sup> The Court ordered “the State to reoffer the plea agreement,” and provided: “[T]he state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed.”<sup>65</sup>

On remand, the State reoffered the original plea agreement, and moved to dismiss all but two of Cooper’s charges.<sup>66</sup> Although the State originally agreed to recommend a sentence of 51 to 85 months, or 4 to 7 years, and presumably did so on remand, the trial court did not so

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58 See *People v. Cooper*, No. 250583, 2005 WL 599740, at \*1 (Mich. Ct. App. Mar. 15, 2005) (per curiam) (“Defendant challenges the trial court’s finding after a . . . hearing that defense counsel provided effective assistance to defendant during the plea bargaining process.”).

59 *Id.*

60 See *People v. Cooper*, 705 N.W.2d 118 (Mich. 2005).

61 *Cooper v. Lafler*, No. 06-11068, 2009 WL 817712, at \*8–9 (E.D. Mich. Mar. 26, 2009), *aff’d*, 376 F. App’x 563 (6th Cir. 2010), *vacated*, 132 S. Ct. 1376 (2012).

62 *Cooper v. Lafler*, 376 F. App’x 563 (6th Cir. 2010), *vacated*, 132 S. Ct. 1376.

63 *Lafler v. Cooper*, 131 S. Ct. 856 (2011) (mem.) (granting certiorari) (“In addition to the question presented by the petition the parties are directed to brief and argue the following question: ‘What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?’”).

64 *Lafler*, 132 S. Ct. at 1391.

65 *Id.*

66 See *Register of Actions for Case No. 03-004617-01-FC*, THIRD JUDICIAL CIRCUIT OF MICH.: ODYSSEY WEB ACCESS, <https://www.3rdcc.org/OPA.aspx> (last visited Apr. 13, 2017) (follow “Criminal Case Records,” then search for “Cooper, Anthony,” then select “Case No. 03-004617-01-FC”).

sentence.<sup>67</sup> Instead, the court resentenced Cooper to 60 to 130 months, or 5 to 11 years.<sup>68</sup>

Although this plea deal resulted in a significantly lighter sentence than Cooper's original fifteen to thirty years, it is still longer than the sentence for which the parties had originally bargained. Of course, we do not and cannot know what sentence the trial court would have imposed had the plea deal been accepted at the outset. Perhaps Cooper would have received this sentence either way—at the outset or after the ineffective assistance of counsel claim. However, it is also possible that the trial court added additional months or years to Cooper's sentence to "punish" him for almost ten years of post-sentencing litigation.<sup>69</sup>

*C. The Trial Court Orders the Plea Deal Reoffered and Subsequently Rejects It, Leaving the Conviction and Sentence Undisturbed*

The third category of cases are those in which the defendant makes a successful *Lafler* claim, as in the first two categories, but the court leaves the convictions and sentence imposed at trial intact even after the original plea deal is reoffered and signed by both parties. The *Lafler* court appears to have left this option open to trial courts, stating that after a successful *Lafler* claim, the trial court has discretion to "leave the convictions and sentence from trial undisturbed."<sup>70</sup> It is not readily apparent that any

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Of course, a trial judge would never attribute the enhanced penalty to this motivation, as it would be an unconstitutional violation of the defendant's due process. See *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969), *overruled in part by Alabama v. Smith*, 490 U.S. 794 (1989) ("Due process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial . . . . [D]ue process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge."). However, a trial judge *may* constitutionally give a harsher sentence in our scenario if he has determined such a sentence is warranted "in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.'" *Id.* at 723 (quoting *Williams v. New York*, 337 U.S. 241, 245 (1949)); see *Lafler*, 132 S. Ct. at 1389 ("[A] judge is [not] required to prescind (that is to say disregard) any information concerning the crime that was discovered after the plea offer was made. The time continuum makes it difficult to restore the defendant and the prosecution to the precise positions they occupied prior to the rejection of the plea offer . . ."). Further, the *Pearce* presumption of vindictiveness does not apply when "a second sentence imposed after a trial is heavier than a first sentence imposed after a guilty plea." *Smith*, 490 U.S. at 803. In short, it is entirely possible that trial judges add this sentencing penalty without explicitly calling it that. See also Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 163 (2012) ("[J]udges are unlikely to err on the side of leniency . . . . Judges may take into account the substantial resources that courts and prosecutors have had to expend to try a case . . .").

<sup>70</sup> *Lafler*, 132 S. Ct. at 1391 (citation omitted).

district court has utilized this option in the four years since *Lafler*. However, one district court did appear to at least contemplate this option.

In *Lespier v. United States*, defendant James Lespier shot his child's mother in the back of the head, killing her.<sup>71</sup> Upon police officers' arrival at the scene, Lespier was covered in blood and hysterical.<sup>72</sup> An array of physical evidence pointed to Lespier's culpability in the crime.<sup>73</sup> As this occurred on a Cherokee Indian reservation, Lespier was indicted in federal court on charges of second-degree murder and the use of a firearm during a crime of violence.<sup>74</sup>

Having been assigned a federal public defender, Lespier signed a plea agreement in which he agreed to plead guilty to second-degree murder and the government agreed to dismiss the gun charge.<sup>75</sup> Subsequently, however, Lespier retained private counsel, Mr. McLean.<sup>76</sup> After hearing the facts of the case, attorney McLean advised defendant Lespier and his family

that "he could win the case," and . . . "They ain't got nothing on him." Mr. McLean further opined that "there was no way the prosecution could convict [the Petitioner] of murder," as the prosecution could not prove that the Petitioner had even fired the gun. Finally, Mr. McLean opined . . . that the Petitioner "should not plead guilty to second degree murder as he intended in his plea agreement."<sup>77</sup>

McLean further advised the defendant's family that the federal public defender "had lied" and that McLean would be "bringing [their] boy home."<sup>78</sup> Additionally, McLean told Lespier that he would "likely serve a full 18 years" if he took the plea deal, but if he went to trial, "there was 'no way' the Government could convict him for second-degree murder."<sup>79</sup> Thereafter, Lespier withdrew his agreement to the plea proposal.<sup>80</sup>

The Government sought and received a superseding indictment on first-degree murder and the gun charge; significantly, however, "the Government's previous plea offer of a plea to second-degree murder and dismissal of the [gun charge] count remained on the table and was never rescinded."<sup>81</sup> At trial, the jury found Lespier guilty of first-degree murder

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71 No. 2:10-cr-9, 2016 WL 3406247, at \*1 (W.D.N.C. June 17, 2016).

72 *Id.*

73 *See id.* at \*1-2.

74 *Id.* at \*2 (noting federal jurisdiction for crimes in Indian territory).

75 *Id.*

76 *Id.*

77 *Id.* at \*4 (second alteration in original) (citations omitted).

78 *Id.* (citation omitted).

79 *Id.* at \*5 (citation omitted).

80 *Id.* at \*3.

81 *Id.* (citation omitted).

and the gun charge, and the court sentenced him to two consecutive life sentences.<sup>82</sup>

Lespier filed a *Lafler* claim, alleging that McLean provided ineffective assistance of counsel in advising him to reject the second-degree murder plea agreement.<sup>83</sup> Citing the fact that Lespier had “made a critical decision—the withdrawal of his assent to an executed Plea Agreement—based on advice that was given without meaningful investigation or study of the evidence or of the applicable Guidelines,” the court found that “the accumulation of counsel’s errors resulted in [Lespier] receiving assistance that was clearly deficient.”<sup>84</sup> Thus—as the district court also found that it was reasonably likely that the plea agreement would have remained available and would have been accepted by the district court—Lespier made a successful *Lafler* showing.<sup>85</sup>

The court accordingly ordered the Government to reoffer the original plea agreement of second-degree murder and drop the gun charge.<sup>86</sup> The Government did so, and Lespier accepted the plea deal.<sup>87</sup> Interestingly, however, the judge appears to have contemplated an approach outside of the first two categories of cases: he ordered briefing on “whether or not the Court should leave the defendant’s sentence undisturbed or, now that the defendant has pled guilty to second degree murder pursuant to the original plea arrangement[,] which the Court required the government to re-offer, should proceed to a sentencing hearing.”<sup>88</sup>

The Government’s brief highlighted the court’s “right to reject plea proposals” and also asserted that the Government had the right to rescind the plea offer if Lespier did not “acknowledg[e] his guilt to second-degree murder.”<sup>89</sup> Since Lespier already had done so, the Government declined to withdraw its plea proposal.<sup>90</sup> The government expressly claimed, however, that the court “still reserves the right to reject a plea agreement, for example, if it deems the agreement to be too lenient, or if a defendant fails

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82 *Id.*

83 *Id.* at \*8.

84 *Id.* at \*11.

85 *Id.* at \*12.

86 *Id.* at \*14.

87 See Rule 11 Inquiry and Order Accepting Guilty Plea, *Lespier*, 2016 WL 3406247 (No. 2:10-cr-9), ECF No. 147.

88 Lespier’s Memorandum Regarding *Lafler* Discretion at 1, *Lespier*, 2016 WL 3406247 (No. 2:10-cr-9), ECF No. 151. The Government characterized the briefing order as a “request for briefing regarding whether or not the Court has the discretion to leave the Defendant’s sentence undisturbed.” Government’s Memorandum Regarding *Lafler* Discretion at 1, *Lespier*, 2016 WL 3406247 (No. 2:10-cr-9), ECF No. 149. The order for briefing is sealed and thus unavailable. See Minute Entry for Document No. 148, *Lespier*, 2016 WL 3406247 (No. 2:10-cr-9).

89 Government’s Memorandum, *supra* note 88, at 3.

90 *Id.*

to admit his guilt.”<sup>91</sup> Notably, the Government’s brief did *not* advocate for the judge to retain the post-trial sentence.<sup>92</sup>

Lespier’s brief first noted that “the [G]overnment has given no reason why this court should reject the plea agreement.”<sup>93</sup> In a nod to the novelty of the situation, the brief went on to state:

The defendant is unaware of any post-*Lafler* cases that suggest the circumstances wherein a court should refuse to vacate the conviction after the defendant has accepted the plea agreement that the court had ordered to be offered again. If any such circumstances exist in some other case, they certainly do not exist in the context of this case.<sup>94</sup>

Lespier further noted that there was no reason to believe that the court “would have rejected the plea agreement if the defendant had continued with his guilty plea as initially filed,” and that the court likely would have accepted the plea.<sup>95</sup>

The trial court, in the end, accepted Lespier’s plea and sentenced him to 348 months.<sup>96</sup> However, the judge’s apparent contemplation of letting the original sentence of two consecutive life sentences stand shows the real possibility of a *Lafler* category three case. Although Lespier pled guilty to second-degree murder, and despite the fact that the Government expressly had not advocated for such a harsh remedy, the court here could have left his conviction and sentence for first-degree murder intact. This scenario was, of course, contemplated by the Supreme Court in *Lafler*,<sup>97</sup> but seems to be rarely, if ever, faced. This is likely due to the fact that, at this stage in the litigation, the court has already found that the defendant was given the unconstitutionally deficient advice to reject a generous plea offer, and instead unwisely chose to stand trial. Reinstating the harsh penalty imposed after such a trial likely does not sit well with many trial court judges. However, the mere fact that this purported remedy remains a possibility after such a finding of unconstitutionally deficient advice highlights the issue with making a constitutional remedy in effect optional.

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91 *Id.*

92 *Id.*

93 Lespier’s Memorandum, *supra* note 88, at 1–2.

94 *Id.* at 2.

95 *Id.* at 2–3 (citing *Lespier v. United States*, No. 2:10-cr-9, 2016 WL 3406247, at \*12 (W.D.N.C. June 17, 2016)).

96 Amended Judgment in a Criminal Case at 1–2, *Lespier*, 2016 WL 3406247 (No. 2:10-cr-9), ECF No. 160.

97 *See Lafler v. Cooper*, 132 S. Ct. 1376, 1391 (2012) (stating that a trial court may “leave the convictions and sentence from trial undisturbed”).

*D. The Parties Come to an Alternative Remedy*

A fourth category of cases feature the parties coming to an alternative arrangement. The parties presumably do this to avoid prolonging litigation, to avoid uncertainty, and to find a “middle ground” sentence that will be acceptable to both parties.

For example, in *McNeill v. United States*, DEA agents found “more than one kilogram of heroin, in addition to approximately 2,800 glassine envelopes containing heroin, a loaded 9mm Smith and Wesson handgun with an obliterated serial number and ammunition” in defendant McNeill’s motel room and “a loaded Walther PPK .380 caliber handgun, bearing an obliterated serial number, [and] approximately ten glassine envelopes containing an off-white powdered substance” in a car used by McNeill.<sup>98</sup>

The Government made McNeill a plea offer consisting of gun and drug charges carrying a minimum of ten years.<sup>99</sup> McNeill rejected this offer, and proceeded to trial.<sup>100</sup> McNeill was convicted and received a sentence of forty years.<sup>101</sup> The trial court found that McNeill’s counsel’s advice regarding the rejection of the plea offer had been both deficient and prejudicial, therefore meeting both of *Strickland*’s prongs.<sup>102</sup>

After this finding, the trial court ordered that the Government reoffer the ten-year plea agreement.<sup>103</sup> The Government appealed this order to the Third Circuit.<sup>104</sup> However, soon thereafter, the Government and defendant McNeill came to an agreement in which the Government would drop its appeal and would dismiss one of the gun charges that carried a twenty-five-year mandatory minimum.<sup>105</sup> In exchange, McNeill would accept the remainder of his sentence as it stood.<sup>106</sup> Because this twenty-five-year gun charge had run consecutively to the remainder of McNeill’s sentences, this agreement effectively reduced his sentence from forty years to fifteen years.<sup>107</sup>

Because McNeill’s litigation had run for over twelve years, the parties’ eagerness to avoid continuing the case is understandable. Instead

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<sup>98</sup> *United States v. McNeill*, No. 04-514, 2006 WL 2000519, at \*1 (D.N.J. July 17, 2006) (citations omitted).

<sup>99</sup> *McNeill v. United States*, No. 09-5983, 2016 WL 830764, at \*5 (D.N.J. Mar. 3, 2016).

<sup>100</sup> *Id.* at \*8–9.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at \*9.

<sup>104</sup> See Notice of Appeal, *McNeill*, 2016 WL 830764 (No. 09-5983), ECF No. 64.

<sup>105</sup> Consent Order to Correct Sentence and Amend Judgment of Conviction, *McNeill*, 2016 WL 830764 (No. 09-5983), ECF No. 66.

<sup>106</sup> *Id.*

<sup>107</sup> See Judgment in a Criminal Case at 2, *United States v. McNeill*, No. 04-514, 2006 WL 2000519 (D.N.J. July 17, 2006), ECF No. 61.

of litigating the merits of McNeill's *Lafler* claim and the district court's remedy, the Government and McNeill seem to have agreed on a bargain: McNeill received a sentence that was five years longer than the one he had originally been offered. This settlement outside of court also had the advantage of certainty: due to *Lafler*'s allowance for nearly unbridled discretion in the district court, had the Government lost its appeal and been forced to reoffer the ten-year plea, neither side would have known what sentence the district court would have handed down, or if the district court would have imposed a category three solution and declined to accept the plea bargain. A civil litigation-style settlement avoided this uncertainty for both parties.

## II. WHAT WOULD BE A BETTER REMEDY?

As shown by the above four categories, *Lafler*, by its terms, allows for a wide variety of remedies for the same constitutional violation. The Supreme Court described the trial court's remedial discretion in one sentence: "[T]he judge can . . . exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed."<sup>108</sup> Noting that "[p]rinciples 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," the Court outlined only two factors serving to limit a trial judge's discretion:

First, a court may take account of a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions. Second, it is not necessary here to decide as a constitutional rule that a judge is required to prescind (that is to say disregard) any information concerning the crime that was discovered after the plea offer was made. The time continuum makes it difficult to restore the defendant and the 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 that does not require the prosecution to incur the expense of conducting a new trial.<sup>109</sup>

As illustrated by the preceding Part, this vast discretion leads to incongruent results, and, in the extreme category three case, can lead to a trial judge affirming a sentence obtained after an admittedly unconstitutional plea process—rendering moot the entire subsequent *Lafler*

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108 *Lafler v. Cooper*, 132 S. Ct. 1376, 1389 (2012). The Court alternatively expressed this as follows: "[T]he state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed." *Id.* at 1391 (citation omitted).

109 *Id.* at 1389.

litigation. In so crafting a Sixth Amendment remedy replete with trial court discretion, the Supreme Court effectively failed to protect defendants' Sixth Amendment rights.

Justice Scalia, in dissent, clearly identified this issue. In apparent amazement, he lamented the fact that the majority in *Lafler* created a “‘discretionary’ specification of a remedy for an unconstitutional criminal conviction.”<sup>110</sup> Continuing, he wrote, “I find it extraordinary that ‘statutes and rules’ can specify the remedy for a criminal defendant’s unconstitutional conviction. Or that the remedy for an unconstitutional conviction should *ever* be subject *at all* to a trial judge’s discretion. Or, finally, that the remedy could *ever* include no remedy at all.”<sup>111</sup>

This strangely discretionary<sup>112</sup> remedy for a violation of constitutional proportions could be solved by curtailing a trial judge’s discretion by requiring specific performance of the original plea bargain. This approach would offer a much stronger and more consistent remedy to properly safeguard the defendant’s Sixth Amendment rights. However, the Supreme Court expressly and summarily rejected such a remedy in *Lafler*, as it was the one the district court employed.<sup>113</sup>

The *Lafler* district court noted that in habeas cases that require as a remedy something less than a full retrial, “conditional writs must be tailored to ensure that all constitutional defects will be cured by the satisfaction of that condition.”<sup>114</sup> The court further noted that “[c]ases involving deprivations of the Sixth Amendment right to the assistance of

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110 *Id.* at 1397 (Scalia, J., dissenting).

111 *Id.* Of course, Justice Scalia did not think that the *Lafler* scenario prompted any constitutional violation at all, as “[t]he defendant has been fairly tried, lawfully convicted, and properly sentenced, and *any* ‘remedy’ provided for this will do nothing but undo the just results of a fair adversarial process.” *Id.*

112 Compare, for example, the Fourth Amendment exclusionary rule, which states that “all evidence obtained by an unconstitutional search and seizure [is] inadmissible in a . . . court regardless of its source.” *Mapp v. Ohio*, 367 U.S. 643, 654 (1961). Although the Supreme Court subsequently weakened this rule by creating various exceptions to it, *see, e.g.*, *Murray v. United States*, 487 U.S. 533 (1988) (independent source doctrine); *Nix v. Williams*, 467 U.S. 431 (1984) (inevitable discovery rule); *Wong Sun v. United States*, 371 U.S. 471 (1963) (attenuation doctrine), these exceptions negate the application of the exclusionary rule itself. They do *not* make the exclusionary rule’s remedy discretionary—once a court determines that the exclusionary rule applies, it must exclude the tainted evidence.

113 *See Lafler*, 132 S. Ct. at 1391 (“As a remedy, the District Court ordered specific performance of the original plea agreement. The correct remedy in these circumstances, however, is to order the State to reoffer the plea agreement.”).

114 *Cooper v. Lafler*, No. 06-11068, 2009 WL 817712, at \*9 (E.D. Mich. Mar. 26, 2009), *aff’d*, 376 F. App’x 563 (6th Cir. 2010), *vacated*, 132 S. Ct. 1376 (2012) (citing *Henderson v. Frank*, 155 F.3d 159, 168 (3d Cir. 1998)).

counsel are likewise subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation.”<sup>115</sup>

By requiring specific performance, the district court tailored a remedy that would have truly and exactly cured Cooper's constitutional injury: he would have received the same plea agreement that he originally was offered.<sup>116</sup> Clearly, this would have made no difference in Cooper's specific case. Even under the specific performance model, category two remedies—as in *Lafler*—could still exist. The court still retains sentencing authority under a specific performance regime. However, category three remedies, in which the court leaves the post-trial conviction and sentence intact, are all but banned with a specific performance remedy.

However, the specific performance remedy has its detractors. Some prosecutors, for instance, protest that a defendant, such as Cooper in *Lafler*, “will get to have his cake and eat it too—he got a shot at acquittal, then, that having failed he will get the original plea offer the prosecutor designed, at least in part, to avoid that contingency.”<sup>117</sup> In essence, these prosecutors argue, after *Lafler*, “a defendant will be able to proceed to trial with the plea offer in his pocket, forcing specific performance when counsel's advice to proceed turns out to be incorrect, as it must have been—he was, after all, convicted!”<sup>118</sup>

Such a concern is misplaced, if not unfounded. It does not properly take into account the first *Strickland* prong—the objective reasonableness test. “The biggest hurdle” to such a concern coming to fruition, writes one commentator

is simply that a convicted defendant must convince a court on post-conviction review that his counsel's performance was objectively unreasonable under *Strickland v. Washington*. *Strickland* is a famously lax standard that succeeds for defendants in only a small minority of cases. This was the intention of the *Strickland* Court, which stressed that the standard of objective reasonableness should be applied deferentially to defense counsel's performance in order to avoid any hindsight bias. Because Cooper's prosecutors conceded that Cooper's

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115 *Id.* (citing *United States v. Morrison*, 449 U.S. 361, 364 (1981)).

116 Requiring specific performance of the foregone plea bargain in *Lafler* situations had been a remedy in several earlier federal cases. The district court in *Lafler* cited three specific examples. *See id.* (first citing *United States v. Blaylock*, 20 F.3d 1458 (9th Cir. 1994); then citing *Lewandowski v. Makel*, 949 F.2d 884 (6th Cir. 1991); and then citing *Satterlee v. Wolfenbarger*, 374 F. Supp. 2d 562 (E.D. Mich. 2005)).

117 Graham C. Polando, *Being Honest About Chance: Mitigating Lafler v. Cooper's Costs*, 3 HOUSTON L. REV.: OFF THE RECORD 61, 64 (2013).

118 *Id.*

lawyer was ineffective, the *Strickland* performance analysis was not at issue in his case. That will be true for few other defendants.<sup>119</sup>

Thus, the stringent *Strickland* test—which was retained in and clarified by *Lafler*<sup>120</sup>—provides the ultimate safeguard to this type of concern. Further, a defendant wishing to “play this game” would need to be willing to stand trial on whatever enhanced charges the prosecution brought to trial—for example, the first-degree murder charge added at trial in lieu of second-degree murder in *Lespier*<sup>121</sup>—and risk, after a failed *Lafler* claim, living with the consequences of these enhanced charges.<sup>122</sup>

Another barrier to abuse of the specific performance remedy is *Strickland*’s prejudice prong. Defendants asserting a *Lafler* claim must show

that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed.<sup>123</sup>

This limitation provides a safeguard against abuse of the specific performance remedy without resorting to the unfettered discretion employed by the Supreme Court in *Lafler*. One court expressed this safeguard in a *Lafler*-type scenario as allowing the government to “seek 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.”<sup>124</sup> Thus, through the *Strickland* prejudice analysis, the judicial system is further protected from manipulation by savvy defendants, as the government may make a showing that it would have retracted the plea offer if the facts so indicate—detering and defeating any gamesmanship in the plea bargaining process.

In sum, a specific performance remedy—coupled with the safeguard of *Strickland*’s two prongs<sup>125</sup>—would have been the most precise solution

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119 Darryl K. Brown, *Lafler’s Remedial Uncertainty: Why Prosecutors Can Rest Easy*, 3 HOUSTON L. REV.: OFF THE RECORD 9, 11 (2013) (footnotes omitted).

120 See *Lafler v. Cooper*, 132 S. Ct. 1376, 1384–85 (2012) (applying *Strickland*); see also, *e.g.*, *In re Perez*, 682 F.3d 930, 932–33 (11th Cir. 2012) (*per curiam*) (“*Lafler* and *Frye* are not new rules because they were dictated by *Strickland*.” (citation omitted)).

121 See *Lespier v. United States*, No. 2:10-cr-9, 2016 WL 3406247, at \*3 (W.D.N.C. June 17, 2016).

122 See Brown, *supra* note 119, at 12.

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

124 *United States v. Blaylock*, 20 F.3d 1458, 1468–69 (9th Cir. 1994).

125 See *supra* notes 119–24 and accompanying text.

to the unconstitutionally deficient performance of counsel in *Lafler* situations. The specific performance remedy squarely and fully addresses the constitutional violation. By instead creating a malleable remedy with few, if any, parameters of when discretion is appropriate, the Supreme Court tacitly dismissed the importance of an accused's Sixth Amendment right to the effective assistance of counsel during plea bargaining. This has led to disparate and unequal application of the *Lafler* remedy in lower courts. If the Supreme Court wishes to preserve the *Lafler* line of cases as constitutionally mandated, it should couple the violations with a strong specific performance remedy, thereby championing defendants' Sixth Amendment rights. Instead, the Court has allowed trial courts to disregard *Lafler* violations—as could have happened in *Lespier*<sup>126</sup> and other category three cases.

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126 See generally *Lespier*, 2016 WL 3406247.