TOURO COLLEGE
JACOB D. FUCHSBERG LAW CENTER
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Touro Law Review

Volume 29 | Number 3 Article 8

2012

# A Criminal Quartet: The Supreme Court's Resolution of Four Critical Issues in the Criminal Justice System

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# A CRIMINAL QUARTET: THE SUPREME COURT'S RESOLUTION OF FOUR CRITICAL ISSUES IN THE CRIMINAL JUSTICE SYSTEM

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## I. INTRODUCTION

The most recent Supreme Court term was one in which the Court tackled several of the most critical issues that arise in our criminal justice system. Perhaps most importantly, as the 50th Anniversary of the Court's decision in *Gideon v. Wainwright*[1] approached, the Court addressed the problems presented by counsel who had not provided the effective assistance of counsel during the plea bargaining process. Whereas it was common knowledge that the vast majority of cases in the criminal courts of this country are resolved by plea bargaining, the Court had never required that court-appointed counsel provide competent advice when recommending rejection of a plea offer by the prosecution. It had not even been constitutionally required that counsel communicate to his client the existence of an offer that entailed a reduced sentence were the defendant to plead guilty. The Court also addressed the matter of what action by counsel would constitute abandonment of the client in the post-conviction phase of a case where the client had received the death penalty. And, finally, the Court considered what had remained an unresolved issue: was it constitutional to impose a sentence of life without parole for a juvenile who had been convicted of murder.

## II. CONSTITUTIONAL PROTECTION FOR REJECTION OF PLEA OFFERS

Claims of ineffective assistance of counsel are often raised by criminal defendants who have either accepted or rejected a plea offer based on counsel's advice or actions.[2] The Supreme Court had previously applied a *Strickland*[3] analysis to claims of ineffective assistance of counsel that arose from a defendant's *acceptance* of a plea bargain,[4] but until recently, had not yet provided an absolute declara-

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[1] 372 U.S. 335 (1963).

[2] *See, e.g.*, Hill v. Lockhart, 474 U.S. 52 (1985).

[3] 466 U.S. 668, 686 (1984) ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.").

[4] Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010) (finding that counsel's failure to advise his client of the immigration consequences of accepting a plea offer is constitutionally

tion that criminal defendants are entitled to effective assistance of counsel when *rejecting* a plea offer. This issue is of great importance because, as the Court noted, the overwhelming majority of criminal cases are resolved through the plea bargaining process.[5]

### A. The *Strickland* Analysis

The Sixth Amendment provides certain protections for criminal defendants, among them the right to "have the Assistance of Counsel for his defence."[6] In *Strickland v. Washington*,[7] the Supreme Court determined that the standard for actual ineffectiveness is that the "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[8] The Court utilized a two-part test in order to determine whether this standard is met.[9] Each part of the test is interpreted in a narrow manner, creating a high-bar for a criminal defendant to overcome.[10]

The first part of the analysis requires that the defendant demonstrate that his "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment."[11] The Court stated that in performing this part of the analysis, the courts should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," thus encouraging a highly deferential review.[12] A criminal defendant is not guaranteed the right to flawless assistance of counsel, but only that level of counsel that is reasonable under the circumstances.[13]

The second part of the analysis requires that the defendant

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deficient assistance of counsel); *Hill*, 474 U.S. at 57 (holding that the *Strickland* test applies to a claim of ineffective assistance of counsel arising from a defendant's acceptance of a plea offer).

5 Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").

6 U.S. CONST. amend. VI.

7 466 U.S. 668 (1984).

8 *Id.* at 686.

9 *Id.* at 687.

10 *See* Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433 (1999).

11 *Strickland*, 466 U.S. at 687.

12 *Id.* at 689.

13 *Id.* at 687.

demonstrate that counsel's unreasonable performance led to actual prejudice.[14] In certain cases, such as attorney conflict of interest, the courts may deem there to be a "limited[] presumption of prejudice."[15] However, absent the use of such a presumption, the defendant must show actual prejudice.[16] This typically requires more than "some conceivable effect on the outcome of the proceeding."[17] Rather, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[18] "A reasonable probability is a probability sufficient to undermine confidence in the outcome."[19] Therefore, the touchstone of a *Strickland* analysis is not an absolute entitlement to high-quality counsel, but rather protection of the integrity of the trial process.[20]

### B. *Strickland* Analysis and Acceptance of a Plea Offer

In *Hill v. Lockhart*,[21] a criminal defendant asserted a claim for ineffective assistance of counsel based on his acceptance of a plea offer and subsequent guilty plea.[22] The defendant claimed that his counsel incorrectly advised him that he would only need to serve one-third of his sentence before becoming eligible for parole, when, in fact, he was not eligible for parole until he had served one-half of his sentence.[23] The Court held that the *Strickland* analysis should be applied in such circumstances in order to determine whether the defendant had been deprived of effective assistance of counsel.[24]

The Court in *Lockhart* had determined that in the context of an accepted guilty plea, the first part of the *Strickland* test turns on

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[14] *Id.* The Court stated that a showing of prejudice is made only where the defendant shows that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

[15] *Strickland*, 466 U.S. at 692; *see* United States v. Cronic, 466 U.S. 648 (1984) (such a conflict creates a circumstance where prejudice is so likely that it is not worth the cost of litigating every particular case).

[16] *Strickland*, 466 U.S. at 693.

[17] *Id.*

[18] *Id.* at 694.

[19] *Id.*

[20] *Id.* at 686.

[21] 474 U.S. 52 (1985).

[22] *Id.* at 53.

[23] *Id.* at 54-55.

[24] *Id.* at 57.

whether "counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.' "[25] The Court did not address whether this part of the test had been met in *Lockhart*, but rather determined that the ineffectiveness claim failed on the prejudice requirement.[26] The Court concluded that the defendant's parole eligibility would have been different than his counsel had advised whether he had taken the guilty plea or had proceeded to trial.[27] Therefore, counsel's error caused no prejudice because the defendant had not demonstrated that there was a reasonable probability that the outcome would have been different had his counsel had advised him correctly.[28]

More recently, in *Padilla v. Kentucky*,[29] the Court applied a *Strickland* analysis to the situation where a defendant had suffered significant consequences as a result of a guilty plea.[30] In *Padilla*, a criminal defendant had pled guilty to drug charges based on the advice of his counsel.[31] The defendant was a lawful permanent resident, and his guilty plea subjected him to automatic deportation.[32] The deficiency in representation alleged by the defendant was that his attorney had incorrectly informed him that his immigration status would not be affected by the guilty plea.[33] It was alleged that, but for this error, the defendant would not have pled guilty and instead would have gone to trial.[34] The Court agreed, and found that this erroneous advice fell below the standard of a reasonably competent attorney, therefore the first part of the *Strickland* test was met.[35] The

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[25] *Id.* at 56 (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

[26] *Hill*, 474 U.S. at 60.

[27] *Id.* ("Indeed, petitioner's mistaken belief that he would become eligible for parole after serving one-third of his sentence would seem to have affected not only his calculation of the time he likely would serve if sentenced pursuant to the proposed plea agreement, but also his calculation of the time he likely would serve if he went to trial and were convicted.").

[28] *Id.*

[29] 130 S. Ct. 1473 (2010).

[30] *Id.* at 1478.

[31] *Id.*

[32] *Id.* at 1477-78.

[33] *Id.* at 1478.

[34] *Padilla*, 130 S. Ct. at 1478.

[35] *Id.* at 1483. *Padilla* was the first time that the Court had applied *Strickland* to the issue of whether the misadvice by counsel on an uncategorized consequence of a plea of guilty could constitute a Sixth Amendment violation. *Id.* at 1482. Previous decision of the Court had only required that counsel advise a client appropriately regarding the direct consequences of a guilty plea. *Id.* at 1487 (Alito, J., concurring).

Court remanded the case to the state court for a determination as to whether the defendant had been prejudiced as a result of his counsel's error.[36]

On remand, the Court of Appeals of Kentucky determined that the defendant was, in fact, prejudiced by his counsel's error; but for that error, the defendant would have proceeded to trial.[37] Interestingly, it was not required that the defendant demonstrate that he would have been *acquitted* at trial in order to show prejudice; it was enough that the defendant was deprived of the opportunity to *go to* trial.[38] The prejudice suffered was the loss of the opportunity to force the State to show his guilt beyond a reasonable doubt, and also the loss of the possibility of accepting a different plea offer, which may not have included provisions requiring mandatory deportation.[39] The conviction, therefore, was vacated.[40]

### C. Recognizing Constitutional Protections for Rejecting a Plea Bargain

The Court has only recently addressed the issue of whether a defendant's rejection of a plea offer can create the basis of a claim for ineffective assistance of counsel. In this context, the Court once again turned to a *Strickland* analysis.[41] In the first of two companion cases dealing with this issue, the Court applied the first prong of the *Strickland* test, that is, what level of attorney performance is guaranteed by the Sixth Amendment when advising a defendant to reject a plea offer.[42] In the second of the companion cases, the Court dealt with the second prong of the *Strickland* analysis, that is, what qualifies as "prejudice" when a defendant rejects a plea offer.[43]

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36 *Id.* at 1487 (majority opinion).

37 Padilla v. Commonwealth, 381 S.W.3d 322, 330 (Ky. Ct. App. 2012).

38 *Id.* at 330.

39 *Id.*

40 *Id.* at 330-31. The Supreme Court recently revisited its holding in *Padilla* in a very different context. *See* Chaidez v. United States, 133 S. Ct. 1103, 1105 (2013) (determining that the rule announced in *Padilla* does not apply retroactively).

41 *Frye*, 132 S. Ct. 1399 (2012); Lafler v. Cooper, 132 S. Ct. 1376 (2012).

42 *Frye*, 132 S. Ct. 1399.

43 *Lafler*, 132 S. Ct. 1376.

### *1.* Missouri v. Frye: *Did Counsel Act as a Reasonably Competent Counsel Regarding Communication of Plea Offers?*

In *Missouri v. Frye*,[44] Galin Frye was charged with a Class D felony for driving with a revoked license following three prior convictions for the same crime.[45] The charged crime carried a maximum sentence of four years in prison.[46] Prior to the trial, the prosecutor sent a letter to Frye's counsel offering a choice of two plea bargains which would expire just before Frye's preliminary hearing.[47] Neither offer was communicated to the defendant prior to his preliminary hearing; the offers expired without Frye ever being aware of their existence.[48] After the expiration of the offers and just prior to Frye's preliminary hearing, Frye was again arrested for driving with a revoked license.[49] Frye pled guilty at his arraignment and, without the benefit of any plea agreement, was sentenced to three years in prison.[50]

The defendant filed a motion for post-conviction relief, which was denied by the trial court, but granted by the Missouri Court of Appeals.[51] The trial court had reasoned that Frye's basis for claiming prejudice was his deprivation of the opportunity to plead guilty to a lesser charge.[52] The court distinguished this from the *Lockhart* line of cases based on the type of prejudice alleged by Frye.[53] Frye's complaint alleged that, but for counsel's error, he would have taken the plea offer; the defendant in *Lockhart* had alleged that but for

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[44] 132 S. Ct. 1399 (2012).

[45] *Id.* at 1404.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Frye*, 132 S. Ct. at 1404.

[50] *Id.* at 1404-05. Ironically, the Prosecutor recommended the same sentence as he would have pursuant to one of the plea offers, and the Court's sentence followed along the lines of the Prosecutor's recommendation. *Id.*

[51] *Id.* at 1405. The Missouri Court of Appeals applied a *Strickland* analysis in reaching the conclusion that counsel had been constitutionally inefficient. *Id.*

[52] Frye v. State, No. 08BA-CV03050, 2008 WL 8185677 (Mo. Cir. Nov. 18, 2008), *rev'd*, Frye v. State, 311 S.W.3d 350 (Mo. Ct. App. 2010), *vacated*, *Frye*, 132 S. Ct. 1399.

[53] *Id.*

counsel's error, he would have opted to go to trial.[54] The trial court reasoned that this distinction was significant because, while there is a constitutional entitlement to a full and fair trial, there is no entitlement to receive a plea offer.[55] Furthermore, the prosecutor had withdrawn the plea offer, and the court could not force the prosecutor to reinstate the offer.[56] Therefore, defendant failed to allege prejudice rising to level sufficient to meet the *Strickland* test.[57]

The Missouri Court of Appeals reversed the trial court, finding that both parts of the *Strickland* test were met.[58] The Court reasoned that failure to communicate a plea offer could not be justified by any conceivable trial strategy, and, therefore, representation fell below that of a reasonably competent attorney.[59] Further, the Court reasoned that Frye was, in fact, prejudiced, because but for counsel's error, Frye would have pled guilty to a much lesser charge.[60] The Court determined that this was enough to create prejudice sufficient to satisfy the second part of the *Strickland* test.[61]

On appeal to the Supreme Court, the State's argument hinged on the theory that a criminal defendant "has no right to plea bargain, and a plea bargain standing alone has no constitutional significance."[62] Therefore, even though the defendant was not informed of the plea offer, he was not deprived of any constitutional substantive or procedural right.[63] The Court was asked to adopt the view that in order to make a showing of prejudice sufficient to satisfy the *Strickland* test, the defendant must suffer more than just a less favorable outcome; rather, the defendant must suffer the loss of a "substantive or procedural right."[64]

In support of the prosecution, the Attorneys General from twenty-nine states joined together to submit an amicus brief.[65] The

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54 *Id.*

55 *Id.*

56 *Id.*

57 *Frye*, 2008 WL 8185677.

58 Frye v. State, 311 S.W.3d 350, 356-57 (Mo. Ct. App. 2010), *vacated*, *Frye*, 132 S. Ct. 1399.

59 *Id.* at 354.

60 *Id.* at 360.

61 *Id.*

62 Brief for Petitioner at 9, Missouri v. Frye, 132 S. Ct. 1399 (2012) (No. 10-444).

63 *Id.* at 10.

64 *Id.*

65 Brief of Amici Curiae Connecticut and 28 Other States in Support of Petitioner at 4, Missouri v. Frye, 132 S. Ct. 1399 (2012) (No. 10-444).

states argued that the touchstone of the analysis of a claim of ineffective assistance of counsel is fairness of the trial process.[66] The failure to communicate the plea offer did not undermine the adversarial process or interfere with "the State's obligation to provide a fair and reliable process for adjudication," and, therefore, there was no constitutional violation.[67] Additionally, the United States submitted an amicus brief in support of the prosecution.[68] The United States argued that counsel's "failure to communicate a plea offer does not prejudice a defendant under *Strickland* because it does not render the defendant's subsequent conviction or sentence unreliable or deprive the defendant of a right that he would have been entitled to assert in his defense."[69]

In support of *Frye*, the Constitution Project submitted an amicus brief arguing that the plea bargaining process is entitled to the protections of the Sixth Amendment.[70] The Constitution Project emphasized the prevalence of plea bargaining in the criminal justice system, and urged the Court to apply the Sixth Amendment protections to all parts of the adversarial process (not just the trial itself).[71] The Constitution Project argued that counsel's failure to communicate the plea offer to defendant caused a breakdown in the adversarial process that was not cured by defendant's later guilty plea.[72] The defendant had maintained that he entered into a guilty plea without being aware of the earlier plea offer, and "[t]his lack of awareness undermine[d] the reliability of the plea and render[ed] it fundamentally unfair."[73]

Justice Kennedy wrote the opinion of the five-justice majority, holding that the plea bargaining process is entitled to Sixth Amendment protection.[74] The majority recognized that plea bargaining is "not some adjunct to the criminal justice system; it *is* the criminal justice system."[75] The Court set out a general rule that "defense

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66 *Id.*

67 *Id.* at 6.

68 Brief for the United States as Amicus Curiae Supporting Petitioner, Missouri v. Frye, 132 S. Ct. 1399 (2012) (No. 10-444).

69 *Id.* at 12-13.

70 Brief for the Constitution Project as Amicus Curiae in Support of Respondents at 5, Missouri v. Frye, 132 S. Ct. 1399 (2012) (No. 10-444) *and* Lafler v. Cooper, 132 S. Ct. 1376 (2012) (No. 10-209).

71 *Id.* at 5-6.

72 *Id.*

73 Brief for Respondent at 7, Missouri v. Frye, 132 S. Ct. 1399 (2012) (No. 10-444).

74 *Frye*, 132 S. Ct. at 1408.

75 *Id.* at 1407 (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as a Con-*

counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."[76] By failing to even communicate the offer to the defendant, the attorney's conduct fell below that of the reasonably competent attorney guaranteed by the Constitution.[77] The Court referred to the standards of professional practice set forth by the American Bar Association which require defense counsel to communicate all plea offers in a prompt manner.[78]

The Supreme Court, however, disagreed with the finding of prejudice of the Court of Appeals.[79] The Court recognized that although the defendant likely would have accepted the plea offer, in order to make a showing of prejudice under *Strickland*, the defendant must demonstrate that the prosecution would have adhered to the offer, and that the court would have accepted the terms of the offer.[80] The Court recognized that these are state-law issues, and therefore remanded to the state court for further determination as to the prejudice requirement under *Strickland*.[81]

The four-justice dissent, led by Justice Scalia, disagreed with the protections given to the plea bargaining process and instead reasoned that "[c]ounsel's mistake did not deprive Frye of any substantive or procedural right; only of the opportunity to accept a plea bargain to which he had no entitlement in the first place."[82] Additionally, the dissent noted that the process leading to the defendant's conviction was fair and, through his own guilty plea, "the defendant acknowledged the correctness of his conviction."[83] Therefore, although the dissent agreed that defense counsel did not act as a reasonably competent attorney, the dissent concluded that the errors made by defense counsel did not cause prejudice within the meaning

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*tract*, 101 YALE L.J. 1909, 1912 (1992)).

[76] *Id.* at 1408.

[77] *Id.* The Court had noted in *McMann* that it was the responsibility of the Court that no criminal defendant be left to "the mercies of incompetent counsel." 397 U.S. 759, 771 (1970).

[78] *Frye*, 132 S. Ct. at 1408; *see also* ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(a) (3d ed. 1999) (imposing on counsel a duty to "promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney").

[79] *Frye*, 132 S. Ct. at 1410.

[80] *Id.* at 1410-11.

[81] *Id.* at 1411.

[82] *Id.* at 1412 (Scalia, J., dissenting).

[83] *Id.*

of *Strickland*.[84]

### *2.* Lafler v. Cooper: *Can a Guilty Verdict After Trial Constitute* Strickland *Prejudice?*

In the second companion case, *Lafler v. Cooper*,[85] the Court expanded on the *Frye* holding by further examining the relationship between the rejection of a plea offer and *Strickland* prejudice.[86] *Frye* and *Lafler* are distinguishable on one critical fact: Frye plead guilty to the underlying charge after rejecting the plea offer,[87] while Cooper (the defendant in *Lafler*) was found guilty following a full trial after rejecting the plea offer.[88] Therefore, the State's argument relied heavily on the theory that any constitutional deficiency at the plea bargaining stage was cured by the completion of the trial process.[89]

Cooper was charged with "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."[90] The charges arose following an incident where Cooper aimed a gun at a woman's head, fired once and missed, and then chased her and fired multiple shots at her as she fled from him.[91] It is unclear why Cooper engaged in this conduct, but at trial there were suggestions of self-defense or defense of others.[92] The charges carried a mandatory minimum sentence of 185 to 360 months' imprisonment.[93]

Cooper was offered a fifty-one month sentence in exchange for pleading guilty to the charge of assault with a deadly weapon.[94] Cooper's counsel discouraged Cooper from taking the plea, and instead advised Cooper that because of the location of the gunshot wounds on the victim (all below the waist) the prosecution would not

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84 *Frye*, 132 S. Ct. at 1413 (Scalia, J., dissenting).
85 132 S. Ct. 1376 (2012).
86 *Id.*
87 *Frye*, 132 S. Ct. at 1404.
88 *Lafler*, 132 S. Ct. at 1383.
89 *Id.* at 1385.
90 *Id.* at 1383.
91 *Id.*
92 *Id.*
93 *Lafler*, 132 S. Ct. at 1383.
94 *Id.*

be able to prove that Cooper had acted with intent to murder.[95] The case proceeded to trial and the necessary level of intent was found despite the location of the gunshot wounds.[96]

Cooper was sentenced to a mandatory minimum sentence of 185 months in prison, more than 3.5 times what he would have received if he had instead accepted the prosecution's plea offer.[97] Cooper later filed a federal habeas petition claiming ineffective assistance of counsel.[98] The district court and the Sixth Circuit determined that the incorrect legal advice of the attorney had rendered counsel's performance constitutionally ineffective.[99] At the Supreme Court level, the state conceded that defense counsel had acted in a deficient manner by advising the client that there was no chance he could be found guilty of the crime.[100] Therefore, the only question left for the Court was whether Cooper suffered prejudice within the meaning of *Strickland* as a result of his rejection of the plea offer.[101]

The state argued that Cooper did not suffer any prejudice because "he received a fair and constitutional trial."[102] Therefore, the integrity of the adversarial process remained intact and the Sixth Amendment was not violated.[103] Furthermore, Cooper failed to make a showing that "counsel's conduct deprived him of any substantive or procedural right."[104] In support of Lafler, the Warden of a Michigan Correctional Facility, the United States filed an amicus brief,[105] as did Wayne County, Michigan,[106] and twenty-seven states.[107] Additional-

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95 *Id.*

96 *Id.*

97 *Id.* at 1383, 1386.

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

99 *See* Cooper v. Lafler, 376 F. App'x 563, 564 (6th Cir. 2010), *vacated by Lafler*, 132 S. Ct. 1376 (2012).

100 *Lafler*, 132 S. Ct. at 1384 ("In this case all parties agree the performance of respondent's counsel was deficient when he advised respondent to reject the plea offer on the grounds he could not be convicted at trial.").

101 *Id.* at 1385 ("Having to stand trial, not choosing to waive it, is the prejudice alleged.").

102 Brief for the Petitioner at 10-11, Lafler v. Cooper, 132 S. Ct. 1376 (2012) (No. 10-209).

103 *Id.*

104 *Id.* at 11.

105 Brief for the United States as Amicus Curiae Supporting Petitioner, Lafler v. Cooper, 132 S. Ct. 1376 (2012) (No. 10-209).

106 Brief of Wayne County, Michigan as Amicus Curiae in Support of Petitioner, Lafler v. Cooper, 132 S. Ct. 1376 (2012) (No. 10-209).

107 Brief of Amici Curiae Connecticut and 26 Other States in Support of Petitioner,

ly, the Criminal Justice Legal Foundation joined with the National District Attorneys Association echoing the arguments of the state that there was no entitlement to a plea bargain and contending that to "afford the right to a more favorable outcome via the right to effective assistance of counsel is to grant defendants a windfall the Sixth Amendment does not require."[108] Additionally, these amici maintained that the procedures (either a subsequent trial or admission of guilt) following a rejection of a plea offer "should be reviewed for reliability and fairness," in essence, shifting the inquiry from the fairness of the rejection of the plea offer, to the fairness of the subsequent process leading to the ultimate guilty verdict. [109]

Cooper claimed that the protections of the Sixth Amendment apply to all "critical stages of a criminal prosecution," and not just to the trial itself.[110] Cooper maintained that he was, in fact, prejudiced by the unreasonable conduct of his counsel because, but for this conduct, Cooper would have accepted the favorable plea.[111] Therefore, he has been deprived of "the right to make an informed choice regarding the State's offered plea bargain," a deprivation that was not cured by his subsequent trial.[112] Four amicus briefs were submitted by various organizations in support of Cooper.[113] The American Bar Association emphasized that since nearly 95% of criminal trials are resolved by plea bargaining, it was crucial to ensure effective assistance of counsel during the plea bargaining phase.[114] The National

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Lafler v. Cooper, 132 S. Ct. 1376 (2012) (No. 10-209).

[108] Brief Amici Curiae of the Criminal Justice Legal Foundation and the National District Attorneys Association in Support of Petitioners at 6, Lafler v. Cooper, 132 S. Ct. 1376 (2012) (No. 10-209) *and* Missouri v. Frye, 132 S. Ct. 1399 (2012) (No. 10-444).

[109] *Id.*

[110] Brief of Respondent Anthony Cooper at 9, Lafler v. Cooper, 132 S. Ct. 1376 (2012) (No. 10-209).

[111] *Id.* at 9-10.

[112] *Id.* at 10.

[113] Brief of Amicus Curiae Center on the Administration of Criminal Law, New York University School of Law, Supporting Respondents, Lafler v. Cooper, 132 S. Ct. 1376 (2012) (No. 10-209) *and* Missouri v. Frye, 132 S. Ct. 1399 (2012) (No. 10-444); Brief of the Nat'l Ass'n of Criminal Def. Lawyers et al. as Amici Curiae in Support of Respondents, Lafler v. Cooper, 132 S. Ct. 1376 (2012) (No. 10-209) *and* Missouri v. Frye, 132 S. Ct. 1399 (2012) (No. 10-444) [hereinafter *Respondents NACDL Brief*]; Brief of the American Bar Association as Amicus Curiae in Support of Respondents, Lafler v. Cooper, 132 S. Ct. 1376 (2012) (No. 10-209) *and* Missouri v. Frye, 132 S. Ct. 1399 (2012) (No. 10-444) [hereinafter *ABA Brief*]; Brief for the Constitution Project as Amicus Curiae in Support of Respondents, Lafler v. Cooper, 132 S. Ct. 1376 (2012) (No. 10-209) *and* Missouri v. Frye, 132 S. Ct. 1399 (2012) (No. 10-444).

[114] *ABA Brief*, *supra* note 113, at 4-5.

Association of Criminal Defense Lawyers, the Connecticut Criminal Defense Lawyers Association, and the American Civil Liberties Union Foundation argued that a subsequent trial or less favorable plea does not cure the constitutional violation that occurs when a criminal defendant rejects a plea offer due to attorney incompetence and then becomes the recipient of a harsher sentence.[115]

Justice Kennedy wrote for the five-justice majority which held that when a criminal defendant rejects a plea offer as a result of his counsel's deficient performance, the defendant would be prejudiced only if four additional elements are met: (1) the prosecution would not have withdrawn the offer; (2) the defendant would have accepted the offer; (3) the court would have accepted the defendant's guilty plea; and (4) the rejected plea offer was more favorable for the defendant than was the sentence imposed after trial.[116] These additional elements are required in order to confirm that the outcome of the plea process would have been different if the defendant had had reasonably competent counsel.[117] Furthermore, the Court determined that the proper remedy is not specific performance of the missed plea opportunity, but rather to "order the State to reoffer the plea agreement."[118] If the defendant should accept the plea offer, it is then left to the discretion of the trial court to determine whether and to what extent the terms of the plea should be accepted by the court.[119]

The first dissenting opinion, authored by Justice Scalia who was joined by Justice Thomas and Chief Justice Roberts, disagreed with the constitutionalization of the plea-bargaining process as well as the remedy proposed by the Court.[120] These Justices maintained that any result which follows a full and fair trial cannot be deemed a prejudicial outcome.[121] Justice Alito authored a separate dissent which highlighted his concerns about the remedy set forth by the Court, as well as stating concerns that the majority holding "misap-

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115 *Respondents NACDL Brief*, *supra* note 113, at 2.

116 Lafler v. Cooper, 132 S. Ct. 1376, 1385 (2012).

117 *Id.* at 1384-85.

118 *Id.* at 1391.

119 *Id.*

120 *Id.* (Scalia, J., dissenting).

121 *Lafler*, 132 S. Ct. at 1392 (Scalia, J., dissenting) ("Anthony Cooper received a full and fair trial, was found guilty of all charges by a unanimous jury, and was given the sentence that the law prescribed. The Court nonetheless concludes that Cooper is entitled to some sort of habeas corpus relief (perhaps) because his attorney's allegedly incompetent advice regarding a plea offer *caused* him to receive a full and fair trial.").

plies our ineffective-assistance-of-counsel case law and violates the requirements of the Antiterrorism and Effective Death Penalty Act of 1996."[122] Alito opposed the propriety of finding prejudice when a defendant has received a full trial that had been free of any identifiable constitutional error.[123]

### D. Implications of *Frye* and *Lafler*

Both *Frye* and *Lafler* demonstrate that a criminal defendant can successfully assert a Sixth Amendment claim if counsel either recommends or causes a defendant to reject a plea offer, provided that both prongs of the *Strickland* test are met.[124] *Frye* takes the initial step by acknowledging that the plea bargaining process is entitled to the protections of the Sixth Amendment,[125] while *Lafler* provides some guidance as to how to determine whether a defendant is prejudiced by his failure to accept a plea offer.[126] As a result of *Frye* and *Lafler*, some courts have started to insist that plea offers be made in writing.[127] Some judges also question the defendant before trial and on the record in order to establish that the defendant knows of the plea offer and understands the consequences of refusing that offer.[128] However, this formal emphasis on the harsh consequence of not accepting the plea offer may place a certain level of coercion on the defendant.[129] It is not entirely clear that greater judicial involvement in plea bargaining is to be desired.[130] Often, the plea bargaining process is an informal "meet them and plead them" process resulting from a quick conversation that occurs without any prior investigation on the part of the defense attorney. And any plea of guilty that is entered entails the defendant's waiving the right to confront witnesses,[131] the

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122 *Id.* at 1398 (Alito, J., dissenting).

123 *Id.* at 1398-99.

124 *Id.* at 1390-91 (majority opinion); *Frye*, 132 S. Ct. 1399, 1411 (2012).

125 *Frye*, 132 S. Ct. at 1411.

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

127 *A Broader Right to Counsel*, N. Y. TIMES, Mar. 22, 2012, http://www.nytimes.com/2012/03/23/opinion/a-broader-right-to-counsel.html?_r=0.

128 *Id.*

129 Jed S. Rakoff, Frye *and* Lafler*: Bearers of Mixed Messages*, 122 YALE L.J 25, 26 (2012), *available at* http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/supreme-court/frye-and-lafler:-bearers-of-mixed-messages/.

130 Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349, 1423 (2004).

131 Boykin v. Alabama, 395 U.S. 238, 243 (1969).

right to challenge the introduction of evidence that can be used against him,[132] and the right to have a trial before a jury of his peers.[133]

The American Bar Association Standards for Criminal Justice warn defense counsel that "[u]nder no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial."[134] In order to properly reach an informed decision to recommend acceptance of a plea, investigation is needed to accurately ascertain the strength of the prosecutor's case and the likelihood of conviction. Ideally, the effective counsel will contact witnesses, investigate any possible defenses, and analyze any police misconduct which might lead to a successful motion to suppress evidence that is required to convict the defendant. The information that a competent counsel may obtain from a thorough investigation which reveals weaknesses in the prosecution's case may then be used as part of the plea negotiations to obtain a more favorable plea than might otherwise have been the case. To be sure, the decision to enter a plea of guilty is for the defendant, and not counsel, to make;[135] one can hope that the *Lafler* and *Frye* holdings will lead more counsel to recognize and honor their obligation to provide competent assistance during the plea bargaining process.

A potentially significant result that may be forthcoming from *Frye* and *Lafler* is the impact on systemic public defense litigation. Insufficient time available for defenders to act competently due to excessively high and unmanageable caseloads create the precise problems that the Court had addressed. In recent years, the recession has impacted the providers of indigent defense services with full force as states find themselves with diminished resources.[136] Legislatures have proven themselves unwilling and unable to provide adequate funding, and the courts' expansion of the rights afforded indi-

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132 McMann v. Richardson, 397 U.S. 759, 770-71 (1970).

133 Brady v. United States, 397 U.S. 742, 748 (1970).

134 STANDARDS FOR CRIMINAL JUSTICE 4-6.1(b) (3d ed.1993).

135 *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2012) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered . . . .").

136 *See* Richard Klein, *The Role of Defense Counsel in Ensuring a Fair Justice System*, THE CHAMPION, June 2012, at 38, *available at* http://www.nacdl.org/Champion.aspx?id=24996#.USj4QVchWZQ.

viduals under the Sixth Amendment can prove to be of critical assistance. Cases such as *Hurrell-Harring v. State*,[137] *Duncan v. State*,[138] and the ongoing litigation in Florida[139] may find new strength from *Lafler* and *Frye* in challenging in the inadequacy of funding which leads to ineffective representation during the plea bargaining process.

## III. ABANDONMENT OF CLIENT SEVERS PRINCIPAL-AGENT RELATIONSHIP IN THE POST CONVICTION PHASE OF A DEATH PENALTY CASE

In another recent case, the Supreme Court found cause to excuse a procedural default stemming from attorney error in the post-conviction phase of a criminal case.[140] The defendant, Maples, had received the death penalty when he was convicted of murdering two individuals with whom he had been out on the town, drinking.[141] Maples had filed a petition for post-conviction relief claiming ineffective assistance of counsel and various other deficiencies which had occurred throughout the trial.[142] Sullivan & Cromwell, a large law firm whose partners are known to charge legal fees in excess of $1000 per hour, represented Maples *pro bono* during the post-conviction phase of his case.[143]

The Sullivan & Cromwell associates that represented Maples during the post-conviction phase left the firm without notifying Maples or the Alabama court handling Maples' case.[144] These attorneys took positions at firms which precluded them from continuing to represent Maples.[145] Sullivan & Cromwell maintained that there was some understanding that there would be new representation for Maples within the firm; however no new attorney sought admission to the Alabama bar, and the original attorneys failed to formally with-

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[137] 930 N.E.2d 217 (N.Y. 2010) (presenting a claim for the constructive denial of the Sixth Amendment right to counsel).

[138] 488 Mich. 957 (2010).

[139] *See* Wayne A. Logan, *Litigating the Ghost of Gideon in Florida: Separation of Powers as a Tool to Achieve Indigent Defense Reform*, 75 MO. L. REV. 885, 891-97 (2010).

[140] Maples v. Thomas, 132 S. Ct. 912, 927 (2012).

[141] Adam Liptak, *A Mailroom Mix-Up that Could Cost a Life*, N.Y. TIMES, Aug. 2, 2010, http://www.nytimes.com/2010/08/03/us/03bar.html?_r=0.

[142] *Maples*, 132 S. Ct. at 916.

[143] Liptak, *supra* note 141.

[144] *Maples*, 132 S. Ct. at 919.

[145] Lance J. Rogers, *Blown Deadline Doesn't Sink Habeas Review Where Pro Bono Lawyers Abandoned Client*, CRIMINAL LAW REPORTER, Jan. 25, 2012.

draw from the case.[146]

The Alabama court sent two copies of an order denying Maples' petition for post-conviction relief to the attorneys of record at the Sullivan & Cromwell office; these letters were returned unopened with notations on the outside of the envelope stating, "Return to Sender—Attempted Unknown," and "Return to Sender—Left Firm."[147] The statutory timeframe for filing an appeal lapsed, and no appeal was filed on Maples' behalf.[148] Maples turned to the federal courts for relief after his request for "an out of time" appeal was denied by the State courts.[149]

The federal district court denied Maples' petition for writ of habeas corpus, and the Eleventh Circuit affirmed the denial.[150] The Eleventh Circuit reasoned that the statutory timeframe for filing an appeal represented a procedural bar that was "firmly established and regularly followed by the Alabama courts and [was] not applied in an unprecedented or arbitrary fashion."[151] Therefore, Maples' federal habeas claim was barred because the denial of the out-of-time appeal rested on "adequate, independent state law procedural rules" that were applied in a consistent and non-arbitrary fashion.[152] The Eleventh Circuit rationalized this harsh decision by shifting the blame for the procedural default to Maples, stating that "Maples relied exclusively on his counsel and made no attempt to deal directly with the state trial court or its clerk, or to keep himself apprised directly of the developments in his case."[153]

The Eleventh Circuit further determined that Maples' procedural default was inexcusable.[154] The Eleventh Circuit reasoned that

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146 *Id.*

147 Liptak, *supra* note 141; *see also* Maples v. Allen, 586 F.3d 879, 884 (11th Cir. 2009) (stating that it was undisputed that the clerk sent copies of the order denying defendant's petition for post-conviction relief to Sullivan & Cromwell and that the order was received by Sullivan & Cromwell and returned, unopened, to the court), *rev'd sub nom.* Maples v. Thomas, 132 S. Ct. 912 (2012).

148 *Maples*, 586 F.3d at 884 ("Neither Maples nor any of his three attorneys filed a notice of appeal from the dismissal of Maples's Rule 32 petition within the 42 days required by Alabama Rule of Appellate Procedure 4(b)(1).").

149 *Id.* at 887.

150 *Id.* at 895.

151 *Id.* at 888.

152 *Id.* at 890.

153 *Maples*, 586 F.3d at 890.

154 *Id.* at 891 ("Here, the factor that resulted in Maples's default—namely, counsel's failure to file a timely notice of appeal . . . cannot establish cause for his default because there is no right to post-conviction counsel.").

the procedural default could be excused only if Maples could demonstrate either "a fundamental miscarriage of justice" or "cause for and actual prejudice [resulting] from the default."[155] The Eleventh Circuit concluded that a deficiency in counsel's performance in the post-conviction phase does not establish cause to excuse the procedural default because the constitutional right to effective assistance of counsel does not extend to the post-conviction phase.[156] To reach this conclusion, the Eleventh Circuit relied on Supreme Court precedent which seemingly barred a finding of "cause" in the circumstances presented in *Maples*.[157] It was this portion of the decision that comprised the issue for appeal before the Supreme Court.[158]

Numerous amici briefs were filed with the Court in support of Maples.[159] These amici contended that the procedural default was the fault of Sullivan & Cromwell and of the Alabama court clerk, and was certainly not the fault of Maples.[160] The combination of Maples' apparent blamelessness for the default and the severity of the punishment (deprivation of federal review of a death sentence conviction) created a unique situation before the Court—one that required a departure from earlier jurisprudence of the Court requiring the client to suffer the consequence of his attorney's mistakes.[161]

Only two amicus briefs were filed in support of the prosecu-

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155 *Id.* at 890.

156 *Id.* at 891.

157 *Id.* (citing Coleman v. Thompson, 501 U.S. 722, 752 (1991)).

158 Maples v. Thomas, 132 S. Ct. 912, 922 (2012) ("We granted certiorari to decide whether the uncommon facts presented here establish cause adequate to excuse Maples' procedural default.").

159 *See* Brief of Amicus Curiae Alabama Criminal Defense Lawyers Association in Support of Petitioner, Maples v. Thomas, 132 S. Ct. 912 (2012) (No. 10-63); Brief of Amica Curiae Deborah A. Demott in Support of Petitioner, Maples v. Thomas, 132 S. Ct. 912 (2012) (No. 10-63); Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Petitioner, Maples v. Thomas, 132 S. Ct. 912 (2012) (No. 10-63) [hereinafter *NAACP Brief*]; Brief for the National Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Petitioner, Maples v. Thomas, 132 S. Ct. 912 (2012) (No. 10-63) [hereinafter *Petitioner's NACDL Brief*]; Brief of Legal Ethics Professors and Practitioners and the Ethics Bureau at Yale as Amici Curiae in Support of Petitioner, Maples v. Thomas, 132 S. Ct. 912 (2012) (No. 10-63); Brief of Amici Curiae Alabama Appellate Court Justices and Bar Presidents in Support of Petitioner, Maples v. Thomas, 132 S. Ct. 912 (2012) (No. 10-63); Brief for Amici Curiae the Constitution Project and Cato Institute in Support of Petitioner, Maples v. Thomas, 132 S. Ct. 912 (2012) (No. 10-63).

160 *Petitioner's NACDL Brief*, *supra* note 159, at 3-4 ("Alabama seeks to execute petitioner without any federal court review of serious constitutional errors because of a missed filing deadline that everyone agrees was not his fault.").

161 *NAACP Brief*, *supra* note 159, at 1-3.

tion.[162] These organizations argued that habeas review is meant to be a limited review, rather than a mechanism of "extensive relitigation of state criminal cases."[163] Therefore, the procedural default should not be excused because there has not been a miscarriage of justice.[164] Additionally, the Attorneys General of multiple states argued that this case is indistinguishable from earlier cases where the Court created the bright-line rule that "no cause exists to excuse a procedural default when a petitioner's state habeas counsel errs."[165]

The Supreme Court reversed the decision of the Eleventh Circuit and determined that there was, in fact, cause to excuse the procedural default.[166] The Court characterized the conduct leading to the procedural default in harsh terms, noting that when the letters arrived at Sullivan & Cromwell, they were sent back to the court rather than "forwarded to another Sullivan & Cromwell attorney."[167] The Court also noted that the Alabama court clerk "took no further action" when he received the returned, unopened letters from Sullivan & Cromwell, and that no attempts were made to contact the counsel of record "at the personal telephone numbers or home addresses they had provided in their *pro hac vice* applications."[168] Further, the Court observed that the clerk made no other efforts to contact Sullivan & Cromwell, or the Alabama attorney overseeing the *pro hac vice* work of the New York based Sullivan & Cromwell attorneys.[169] Additionally, the Alabama attorney overseeing the *pro hac vice* work took no action, despite receiving his copy of the letter.[170] It was only when Maples himself was prompted to contact his mother, after receiving a letter directly from the Alabama Assistant Attorney General notifying him that he had missed the deadline to file an appeal, that any action was taken on behalf of Maples.[171]

As the Eleventh Circuit observed, the Supreme Court has his-

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162 *See* Brief Amicus Curiae of the Criminal Justice Legal Foundation in Support of Respondent, Maples v. Thomas, 132 S. Ct. 912 (2012) (No. 10-63) [hereinafter *CJLF Brief*]; Brief of Texas et. al as Amici Curiae In Support of Respondent, Maples v. Thomas, 132 S. Ct. 912 (2012) (No. 10-63) [hereinafter *States Brief*].

163 *CJLF Brief*, *supra* note 162, at 4-5.

164 *Id.*

165 *States Brief*, *supra* note 162, at 1.

166 Maples v. Thomas, 132 S. Ct. 912, 917 (2012).

167 *Id.* at 920.

168 *Id.*

169 *Id.*

170 *Id.*

171 *Maples*, 132 S. Ct. at 920.

torically treated the attorney as the client's agent during the post-conviction phase; therefore, under basic theories of agency law, the defendant (principal) generally is left to suffer the negative consequences associated with his agent's negligence.[172] For example, in *Coleman v. Thompson*,[173] Coleman had been convicted under Virginia state law for rape and capital murder and was sentenced to death.[174] Coleman's appeal to the Virginia Supreme Court was dismissed because it was filed outside of the statutory timeframe for filing an appeal.[175] Coleman sought federal habeas relief following the procedural default.[176] The district court and the Fourth Circuit determined that Coleman's claim for federal relief was barred because the procedural bar (the timeframe for filing for an appeal) was an adequate and independent state law rule which was fairly applied by the State, and that Coleman had failed to show cause to excuse the procedural default.[177]

At the Supreme Court level, Coleman argued that there was cause to excuse the procedural default because the default was the result of attorney error.[178] The Court disagreed, and instead determined Coleman's argument was "contrary to well-settled principles of agency law."[179] The Court stated that "the attorney is the [client's] agent when acting or failing to act, in furtherance of the litigation, and the [client] must 'bear the risk of attorney error.' "[180] The Court acknowledged that there is an exception to this rule if the attorney error violates a constitutional right of the defendant; however, there is no constitutional right to effective assistance of counsel during the post-conviction phase.[181] The Court determined that, absent a constitutional right to effective assistance of counsel, agency law governs

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172 *Coleman*, 501 U.S. at 757 (1991) ("Because Coleman had no right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of Coleman's claims in state court cannot constitute cause to excuse the default in federal habeas.").

173 501 U.S. 722 (1991).

174 *Id.* at 726-27.

175 *Id.* at 727-28.

176 *Id.* at 728.

177 *Id.* at 728-29.

178 *Coleman*, 501 U.S. at 752 ("Coleman maintains that there was cause for his default. The late filing was, he contends, the result of attorney error of sufficient magnitude to excuse the default in federal habeas.").

179 *Id.* at 754.

180 *Id.* at 753 (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)).

181 *Id.* at 752-54. The Court stated in unequivocal terms that "[t]here is no constitutional right to an attorney in state post-conviction proceedings." *Id.* at 752.

claims of error during the post-conviction phase; therefore, the client "bear[s] the risk of attorney error that results in procedural default."[182]

The facts of *Maples* differed from the facts of *Coleman* in one important respect—the late-filing in *Maples* was due to complete abandonment of the client, rather than simple attorney error.[183] This distinction allowed the Court to find cause to excuse Maples' procedural default, despite the Court's longstanding history of refusal to find cause to excuse procedural defaults resulting from attorney error in the post-conviction phase.[184] In *Maples*, the Court reasoned that the abandonment of Maples severed the principal-agent relationship.[185] Therefore, at the time of the procedural default, the attorney was not the agent of Maples, and Maples could not be left to suffer the consequences of the attorney's failures or omissions.[186] Although the outcome in *Maples* was different than the outcome in *Coleman*, in both cases the Court relied on basic agency law, rather than the recognition of a constitutional right of the defendant, in order to determine whether there was cause to excuse a procedural default at the post-conviction phase.[187] Accordingly, *Maples* represents a new application of a long-standing rule, and the holding is sufficiently narrowed to apply only in cases of client abandonment at the post-conviction phase.[188]

Justice Scalia and Justice Thomas wrote separately, not to dissent from the underlying reasoning of the court, but rather because they did not believe the principal-agent relationship in this case to

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[182] *Coleman*, 501 U.S. at 752-53.

[183] *Compare Coleman*, 501 U.S. 722 (1991) (showing post-conviction federal habeas proceeding where procedural default resulted from late filing of appeal with no mention of client abandonment), *with Maples*, 132 S. Ct. 912 (2012) (showing post-conviction federal habeas proceeding where procedural default resulted from late filing of appeal as a result of abandonment of client by attorney).

[184] *Maples*, 132 S. Ct. at 922 ("A markedly different situation is presented, however, when an attorney abandons his client without notice, and thereby occasions the default.").

[185] *Id.* at 922-23 ("Having severed the principal-agent relationship, an attorney no longer acts, or fails to act, as the client's representative.").

[186] *Id.* at 923.

[187] *See id.* (finding cause to excuse a procedural default based on severance of the principal-agent relationship); *Coleman*, 501 U.S. at 753-54 (finding no cause to excuse procedural default because attorney acts as agent for client-principal).

[188] *Maples*, 132 S. Ct. at 927 ("*In the unusual circumstances of this case*, principles of agency law and fundamental fairness point to the same conclusion: There was indeed cause to excuse Maples' procedural default." (emphasis added)).

have been effectively severed.[189] The dissent reasoned that Maples was represented by *the firm* of Sullivan & Cromwell, rather than the two individual associates in charge of Maples' case.[190] Therefore, despite the departure of the two associates in charge of Maples' case, Sullivan & Cromwell still remained the agent of Maples, and Maples should, therefore, carry the burden of his agent's errors.[191] Further, the dissent acknowledged the ongoing involvement of John Butler (the local counsel who was responsible for oversight of the New York-based Sullivan & Cromwell attorneys).[192] Although Butler was not meant to have "substantive involvement" with the case, the dissent believed Butler's involvement "would surely include, *at a minimum*, keeping track of local court orders and advising 'substantive' counsel of impending deadlines."[193] Despite the dissent's reservations as to whether the principal-agent relationship had been severed, there was basic agreement with the reasoning of the majority that if the relationship had been severed, the client would not bear the burden of the attorney's mistakes.[194]

## IV. DOES THE MANDATORY IMPOSITION OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE FOR JUVENILES CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT?

In *Graham v. Florida*,[195] the Supreme Court held that it was unconstitutional to sentence a juvenile to life without parole for a non-homicide crime,[196] but left open the question of whether life

189 *Id.* at 930 (Scalia, J., dissenting).

190 *Id.*

191 *Id.* at 931.

192 *Id.* at 932.

193 *Maples*, 132 S. Ct. at 932 (Scalia, J., dissenting).

194 *Id.* at 930 ("[T]he Court is correct to conclude that a habeas petitioner's procedural default may be excused when it is attributable to abandonment by his attorney. In such a case, *Coleman*'s rationale for attributing the attorney's acts and omissions to the client breaks down; for once the attorney has ceased acting as the client's agent, 'well-settled principles of agency law,' no longer support charging the client with his lawyer's mistakes." (quoting *Coleman*, 501 U.S. at 754)).

195 130 S. Ct. 2011 (2010).

196 *Id.* at 2034. The actual sentence imposed on Graham was life in prison, but because Florida has no parole, there was no possibility that Graham would be released. *Id.* at 2020. The trial court's sentence was imposed in spite of the recommendation of the Florida Department in corrections that Graham could be sentenced to a prison term of four years. *Id.* at 2019. The prosecutor had sought a sentence of thirty years. *Id.*

without parole could be imposed on a juvenile for a homicide crime. The Supreme Court addressed this issue in *Miller v. Alabama*,[197] which was a consolidated appeal of two cases involving juveniles who had been sentenced to life without parole for homicide.[198] In the first case, fourteen-year-old Jackson had received a mandatory sentence of life without parole when he was convicted of felony murder and aggravated robbery.[199] In the second case, fourteen-year-old Miller received a mandatory sentence of life without parole after he was convicted of a murder which had taken place during the course of arson.[200]

The sentences at issue for both Jackson and Miller were mandatory, meaning that once the juvenile was found guilty of the crime, the sentence had to be imposed—the judge could not use age as a factor to mitigate the sentence.[201] In each case, the state courts had determined that the sentences were not unconstitutional.[202] The Supreme Court, in a 5-4 opinion written by Justice Kagan, held that a mandatory sentence of life without parole is unconstitutional when imposed on a juvenile, even when the juvenile has been convicted of a homicide crime.[203]

The Court first turned to scientific evidence that indicated that the minds of juveniles are fundamentally different from the minds of adults.[204] The Court pointed out five distinctions that it found particularly relevant on the issue of culpability: (1) juveniles have an undeveloped sense of responsibility; (2) juveniles are more subject to peer influence; (3) juveniles act impulsively and engage in reckless conduct; (4) juvenile personalities are less fixed than adults; and (5) juveniles are less likely to be irretrievably evil.[205] The sentencing judge is not free to consider any of these factors within the confines of a

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197 132 S. Ct. 2455 (2012).

198 *Id.* at 2460.

199 *Id.* at 2461.

200 *Id.* at 2462-63.

201 *Id.*

202 *Miller*, 132 S. Ct. at 2461 (noting that the Arkansas Supreme Court upheld defendant's mandatory sentence of life without parole since "*Roper* and *Graham* were 'narrowly tailored' to their contexts."); *id.* at 2463 ("The Alabama Court of Criminal Appeals affirmed, ruling that life without parole was 'not overly harsh when compared to the crime' and that the mandatory nature of the sentencing scheme was permissible under the Eighth Amendment.").

203 *Id.* at 2460.

204 *Id.* at 2464.

205 *Id.*

mandatory sentencing scheme.[206]

Next, the Court questioned which, if any, penological justifications for punishment (retribution, deterrence, incapacitation, and rehabilitation) could be served by the imposition of a mandatory sentence of life without parole for a juvenile.[207] The Court concluded that none of the penological justifications were met by such a sentence because of the differences between juvenile and adult minds.[208] Retribution was not served because juveniles are less culpable than adults.[209] Deterrence was not served because juveniles are impulsive and not likely to calculate and weigh the potential punishment associated with their actions before acting.[210] Incapacitation was not served because it cannot be concluded that a juvenile who commits a crime will forever remain a risk and danger to society.[211] Rehabilitation can never be one of the goals served by a sentence of life without parole since there is no hope that a rehabilitated defendant will ever be able to rejoin society.[212]

Therefore, the majority concluded that based on the differences between adult and juvenile minds, as well as the lack of any penological justification for the punishment, the mandatory sentence of life without parole as applied to juvenile offenders is unconstitutional.[213] Justices Breyer and Sotomayor wrote separately to express their concern as to the appropriateness of any life without parole sentence, even when discretionary, applied to a juvenile who is convicted of a non-intentional homicide.[214] Breyer and Sotomayor opined that defendant Jackson had the same "twice diminished moral culpability" which formed the basis for the Court's holding in *Graham*, because Jackson had been convicted of felony murder, a crime in which he neither "kill[ed] nor intend[ed] to kill the victim."[215] The notion of "twice diminished moral culpability" is based on an understanding that "a juvenile offender who did not kill or intend to kill" is less culpable than an adult murderer by virtue of two significant fac-

206 *Miller*, 132 S. Ct. at 2466.
207 *Id.* at 2465.
208 *Id.*
209 *Id.*
210 *Id.*
211 *Miller*, 132 S. Ct. at 2465.
212 *Id.*
213 *Id.* at 2469.
214 *Id.* at 2475 (Breyer, J., concurring).
215 *Id.*

tors: (1) the age of the offender; and (2) the "nature of the crime," including the lack of murderous intent.[216] As to the first factor, the age of the offender, the *Graham* court quoted *Roper v. Simmons*:[217] "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."[218] As to the second factor, the type of crime, the Court concluded that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious form of punishment than are murderers."[219] Breyer and Sotomayor applied this concept to Jackson's felony murder conviction, and determined that "this type of 'transferred intent' was not sufficient to satisfy the intent to murder that could subject a juvenile to a sentence of life without parole."[220]

Justices Roberts, Scalia, Thomas and Alito authored the first dissent, which maintained that the Court has acted as a legislature by using the Eighth Amendment as a justification to ban punishment that is not unusual.[221] Indeed, the Court in two crucially important cases in 2003 had illustrated the historic unwillingness of the Court to interfere with the rights of individual states to determine what ought to be the appropriate sentences for crimes.[222] These four dissenting Justices in *Miller* believe that questions of "science and policy" may indicate that juveniles should not receive such a harsh sentence; however they do not believe the punishment in question to be cruel or unusual, and therefore would hold that it is not within the power of the judiciary to ban such punishments.[223] Justices Thomas and Scalia authored a separate dissent, stating that the majority's opinion is founded in morality and policy, rather than constitutionality.[224] Fi-

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[216] *Miller*, 132 S. Ct. at 2475 (Breyer, J., concurring) (discussing Graham v. Florida, 130 S. Ct. 2027 (2010)).

[217] 543 U.S. 551 (2005).

[218] *Graham*, 130 S. Ct. at 2026-27 (quoting *Roper*, 543 U.S. at 570 (alteration in original)).

[219] *Id.* at 2027.

[220] *Miller*, 132 S. Ct. at 2476 (Breyer, J., concurring).

[221] *Id.* at 2477 (Roberts, J., dissenting) ("Determining the appropriate sentence for a teenager convicted of murder presents grave and challenging questions of morality and social policy. Our role, however, is to apply the law, not to answer such questions.").

[222] *See* Lockyer v. Andrade, 538 U.S. 63 (2003); Ewing v. California, 538 U.S. 11 (2003).

[223] *Miller*, 132 S. Ct. at 2482 (Roberts, J., dissenting).

[224] *Id.* at 2486-87 (Thomas, J., dissenting).

nally, Alito and Scalia authored a third dissent, which similarly notes that the Court has overstepped its authority by improperly infringing upon the prerogatives of the legislature.[225]

The *Miller* decision is line with a recent string of cases expanding the breadth of the definition of cruel and unusual punishment and thereby limiting the scope of harsh sentences.[226] The Court has taken the rare step of overturning its earlier decisions where it had held that it was not cruel and unusual punishment to execute those who were suffering from mental retardation[227] or who were juveniles at the time the murder had been committed.[228] In 2009, the Court in *Kennedy v. Louisiana*[229] held that it did constitute cruel and unusual punishment to impose a death sentence for the crime of rape of a child.[230] The *Miller* holding also is consistent with the Court's decision in *Woodson v. North Carolina*,[231] which had questioned the appropriateness of mandatory sentencing because of the need to engage in individualized sentencing that is based on the offender as well as the offense.[232] The *Miller* opinion was a huge victory for the 2,000 juveniles who are facing charges for crimes that carry mandatory sentences of life without parole.[233]

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225 *Id.* at 2487 (Alito, J., dissenting).

226 *See, e.g.*, *Graham*, 130 S. Ct. at 2034 (holding that a sentence of life without parol to a juvenile for a non-homicide crime was cruel and unusual punishment); *Roper*, 543 U.S. at 578 (holding that imposition of the death penalty on juvenile offenders is unconstitutional); Atkins v. Virginia, 536 U.S. 304, 320 (2002) (holding that imposition of the death sentence on a mentally retarded individual was cruel and unusual punishment).

227 Penry v. Lynaugh, 492 U.S. 302 (1989), *abrogated by Atkins*, 536 U.S. 304.

228 Stanford v. Kentucky, 492 U.S. 361 (1989), *abrogated by Roper*, 543 U.S. at 578. The prior year, the Court in Thompson v. Oklahoma had overturned a death sentence for a fifteen year old, but had not ruled on the validity of the death penalty for sixteen and seventeen year olds. 487 U.S. 815, 838 (1988). In his concurring opinion in *Graham*, Justice Stevens wrote that, "Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes." 130 C. Ct. at 2036 (Stevens, J., concurring).

229 554 U.S. 407 (2008).

230 *Id.* at 447. The Court emphasized that for crimes against individuals, as distinct from crimes punishment treason or terrorism, the death penalty will be permissible only for the crime of murder. *Id.* at 437. The Court had previously held the death penalty for the crime of rape in general was unconstitutional because it was disproportionate and excessive. *Id.* at 437-38 (citing Coker v. Georgia, 433 U.S. 584 (1977)).

231 428 U.S. 280 (1976).

232 *Id.* at 304 (prohibiting mandatory death penalty sentence because of the need to engage in individualized sentencing).

233 *Miller*, 132 S. Ct. at 2477 (Roberts, J., dissenting).

## V. CONCLUSION

The quartet of concerns that the Court recently addressed can have a significant impact on the administration of criminal justice. The expansion of Sixth Amendment right to counsel to cover most situations that arise in plea bargaining is most notable. Some Circuit Courts of Appeal had previously recognized that when a lawyer fails to convey a plea offer to a defendant and the client is prejudiced as a result, that there has not been the effective assistance of counsel. It was not until *Missouri v. Frye*,[234] however, that the Supreme Court acknowledged that the Sixth Amendment is violated in such a circumstance. Whereas it might be clear that an individual with court-appointed counsel had the constitutional right to expect that counsel would provide correct information regarding the elements of the crime with which is charged and a reasonable assessment of the likelihood of conviction were there to be a trial, it was not until *Lafler v. Cooper*[235] that the Court acknowledged such to be the case.

The Court also considered the appropriate remedy for a defendant who had been sentenced to death but whose pro bono counsel had scandalously abandoned him. Historically, the negligence of an attorney who was providing representation during post conviction proceeding and who failed to comply with the requisite timeframe for filing an appeal with the court, would be attributable to the defendant whatever the consequences. The Eleventh Circuit in the *Maples v. Thomas* matter had determined that the deficiency in counsel's performance during post-conviction proceedings did not constitute cause to excuse the procedural default that had occurred, because the Sixth Amendment right to counsel does not extend to the post-conviction phase.[236] The Supreme Court, however, concluded that in this instance, the white-glove and generally highly regarded corporate law firm of Sullivan & Cromwell had in fact abandoned its client, and, therefore, the Court found cause to excuse the procedural default.

The Court's expansion of the concept of cruel and unusual punishment to death penalty cases has been rather extraordinary in recent years. Whereas the Court had held in 2005 that the death penalty for those under eighteen years of age at the time they committed

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234 *See supra* notes 44-84 and accompanying text.

235 *See supra* notes 85-123 and accompanying text.

236 *See supra* notes 140-194 and accompanying text.

the crime was unconstitutional,[237] it had left open the issue of whether a sentence of life without parole for a juvenile convicted of murder would be constitutional. The Court had, in 2010, concluded that the Eight Amendment was violated when a juvenile was sentenced to life without parole for a non-homicide offense.[238] But it was not until 2012 that the Court determined that even were the crime to have been one of murder, it is cruel and unusual punishment to sentence a juvenile to a term of life with no possibility of parole.[239]

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237 *Roper*, 543 U.S.at 578.

238 *Graham*, 130 S. Ct. at 2034.

239 *Miller*, 132 S. Ct. at 2460. The *Miller* decision is the third major Court ruling in three years to have declared that juveniles need to be treated differently in our criminal justice system than adults. In J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011), the Court held that a juvenile's age must be taken into consideration when determining whether a reasonable person would have believed he was in custody for Miranda purposes. *Id.* at 2408.