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ARTICLE

LAFLETER'S REMEDIAL UNCERTAINTY: WHY PROSECUTORS CAN REST EASY

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In his article *Being Honest About Chance: Mitigating Lafler v. Cooper's Costs*,¹ Graham C. Polando provides valuable insight into the perspective of a state court prosecutor regarding plea bargaining generally and the U.S. Supreme Court's decision in *Lafler v. Cooper*² in particular. Prosecutors are vexed, he writes, both about the unfairness of the Court's holding in *Lafler* and by the temptation it creates (though these are not Polando's words) for deeply cynical and unprofessional tactics by defense attorneys to exploit the *Lafler* doctrine. His worries, in my view, are almost certainly unfounded, and his predictions about *Lafler*'s effects are highly implausible. I will briefly explain why I believe this to be so, and then demonstrate my confidence in this view with a monetary offer to prosecutors who can prove it wrong.

Lafler held that a defendant's right to effective assistance of counsel can be violated when his lawyer gives objectively unreasonable advice regarding a plea bargain that a prosecutor has presented to the defendant through his attorney.³ It was clear long before *Lafler* that the right to effective counsel extended to the plea bargaining process, but the Court previously had addressed the reasonableness of the attorney's performance when the defendant had opted to plead guilty.⁴ *Lafler* made clear that effective representation regarding a plea bargain is required even when the defendant declines a prosecutor's plea offer and

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1. Graham C. Polando, *Being Honest About Chance: Mitigating Lafler v. Cooper's Costs*, 3 HLRE 61 (2013).

2. *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

3. *Id.* at 1384, 1391 (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

4. *Hill v. Lockhart*, 474 U.S. 52, 56–60 (1985).

opts for trial due to his attorney’s objectively unreasonable advice regarding that offer. That was what happened in Anthony Cooper’s case. Based on his lawyer’s advice, which prosecutors in his case conceded was objectively unreasonable,⁵ Cooper went to trial and was convicted. *Lafler* held that, in such circumstances, the state must reoffer the same plea agreement, giving the defendant another chance to accept it.⁶

Importantly, however, *Lafler* is clear that the trial court need not accept this proposed agreement—as is true with every plea agreement. Nor must a court even vacate the defendant’s trial conviction. *Lafler* overturned the district court’s conclusion that the remedy must be “specific performance of the original plea agreement.” On remand, the trial court instead has broad discretion to choose any remedy—from accepting the original offer’s terms, “to leav[ing] the convictions and sentence from trial undisturbed.”⁷ This discretion is necessary, *Lafler* reasoned, because the Constitution does not require judges “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.”⁸

Polando seems to overlook this uncertainty faced by any defendant with a successful *Lafler* claim, yet it goes to the heart of the unfair advantage that he perceives defendants to be reaping from *Lafler* and the troubling consequences he expects to follow from that advantage. To Polando, *Lafler* means that a defendant “will get to have his cake and eat it too.”⁹ He gets “a shot at acquittal” by going to trial, but if he is convicted—and *his counsel’s constitutionally unreasonable advice convinced him to opt for trial* over a plea offer—the defendant, in Polando’s words, “*will get* the original plea offer.”¹⁰ That is technically true, but only half the story. It is not at all certain that a defendant will have his trial conviction vacated and *be sentenced* in accord with that original offer. Thus Polando’s other characterization of the remedy is inaccurate: a defendant who “proceed[s] to trial with [a] plea offer in his pocket” will *not* be able simply to “forc[e] specific performance when counsel’s advice to proceed turns out

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

6. *Id.* at 1391.

7. *Id.*

8. *Id.* at 1389.

9. Polando, *supra* note 1, at 64.

10. *Id.* (emphasis added).

to be incorrect.”¹¹

That remedial uncertainty alone makes strategic exploitation of *Lafler* by defendants and their attorneys quite hazardous, but it would be a high stakes gamble even if the remedy were as certain as Polando seems to believe. Diced enough, surely, to dissuade any sentient defendant or defender from trying to game the *Lafler* doctrine into a tactic for one free trial before accepting the bargain.

The biggest hurdle 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.¹² 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.¹³ Because Cooper's prosecutors conceded that Cooper's lawyer was ineffective, the *Strickland* performance analysis was not at issue in his case. That will be true for few other defendants.

This gamble that one has a successful *Strickland* claim should be sufficient discouragement. Yet consider also the stakes of the gamble. The magnitude of the differential between the plea-agreement sentence and a trial-conviction sentence will vary across cases. But the difference is almost by definition substantial because prosecutors create a disparity large enough to induce defendants to opt for the plea. In Cooper's case, the plea offer was for a sentence of 51–85 months on two charges; at trial he was convicted of four charges and received a mandatory minimum of 185 to 360 months incarceration—a minimum at least three-and-a-half times greater than the plea offer.¹⁴ One has to be quite a gambler to risk paying that price for the uncertain prospect of winning a *Strickland* claim. Moreover,

11. *Id.*

12. On the *Strickland* standard, see *Lafler*, 132 S. Ct. at 1384. For a survey of egregious defense representation analyzed under *Strickland*, see Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); Stephen B. Bright, *Fifty Years of Defiance and Resistance: Gideon v. Wainwright*, 122 YALE L.J. 2150, 2170 n.104 (2013) (citing cases and sources on ineffective counsel). See, e.g., *Haney v. State*, 603 So. 2d 368, 377–78 (Ala. Crim. App. 1991) (intoxicated lawyer jailed for contempt of court while representing a capital defendant in trial).

13. Polando, on the other hand, seems to think that hindsight will make a defendant's *Strickland/Lafler* claim a lock. He worries that defendants get the benefit of the bargain “when counsel's advice to proceed [to trial] turns out to be incorrect, as it must have been—he was, after all, convicted!” Polando, *supra* note 1, at 64.

14. *Lafler*, 132 S. Ct. at 1383, 1391.

because many states do not allow defendants to raise *Strickland* claims on direct appeal and permit them only on collateral review, a defendant will have to wait anywhere from one or two years to several before such a claim could be vindicated. Perhaps it is worth the wait for those who face four years or more even on the terms of a plea deal, but it was not in Anthony Cooper's case. It took Cooper six years after his trial conviction before he won a federal district court judgment on his *Strickland* claim (which was then followed by six more years of appeals).¹⁵ This delay certainly precludes the option for those facing felony sentences at the lower end of the spectrum, should defendants otherwise be foolhardy enough to try it.

If all this does not make defendants' exploitation of *Lafler* implausible enough, consider that this calculus must in reality be carried out by the defense attorney rather than the defendant. For a *defendant* personally to manipulate *Lafler*—to have his cake and eat it too—one of two inconceivable scenarios must play out. In the first, the defendant gets “lucky” enough to have an attorney who incompetently advises him to decline a plea offer. Then, with rare gifts of legal acumen, he spots what his counsel does not—that the lawyer's advice is not only wrong but so bad that it will almost certainly fail *Strickland's* standard of objective unreasonableness. Thus he sees his ticket to a trial without losing the plea offer (though he will have to wait some years for it). This is so implausible that surely the second scenario must be a more realistic one: collusion between the defense attorney and his client. In this version, the attorney provides incompetent advice on the plea offer, then *explains to his client* that this advice is so bad that it violates *Strickland* and will thereby provide the client a shot at the plea bargain if he loses at trial. All they both have to do is pretend that defendant doesn't realize this, and pretend that he made his trial decision on the bad advice without knowing any better.¹⁶

15. Anthony Cooper did not file a direct appeal from his conviction. He subsequently pursued habeas claims first in state court, but they were denied by the Michigan Court of Appeals nearly two years after his trial. *People v. Cooper*, No. 250583, 2005 WL 599740 (Mich. Ct. App. Mar. 15, 2005). Cooper then filed a habeas challenge to his conviction in federal court and won a district court judgment in 2009, *Cooper v. Lafler*, No. 06-11068, 2009 WL 817712 (E.D. Mich. Mar. 26, 2009), which was affirmed by the Sixth Circuit in May 2010, *Cooper v. Lafler*, 376 F. App'x 563 (6th Cir. 2010), and then by the U.S. Supreme Court in 2012—nine years after his trial conviction.

16. The implausibility of defendants being in on a strategic exploitation of *Lafler* reveals the inaptness of Polando's analogy of defendants to insureds who seek to up their coverage once they realize they will incur a loss. Polando, *supra* note 1, at 65. Insureds are fully capable of assessing all the relevant risks and benefits in making decisions about insurance coverage. The premise of the right to counsel is that defendants are not capable of doing so without *effective* assistance from counsel.

Although his descriptions at times imply that *defendants* are the ones who exploit *Lafler*, Polando likely doesn't mean this. Elsewhere he makes clear that it is defense *attorneys* he is worried about, as Chief Justice Roberts was during the *Lafler* oral argument. "[T]he best thing for you to do" for your client as defense counsel, Roberts speculated, would be provide ineffective assistance that leads your client into trial, "and then if your client is found guilty, then you go back and say, oh by the way, I didn't tell you about this."¹⁷ In this account, a boldly paternalistic defender deliberately ill serves his client without the client's awareness, manipulating him into a trial on the assumption that he can still reap the plea bargain if the jury convicts—after waiting out appellate review, and assuming the attorney has guessed correctly that his advice was so unreasonable as to fail *Strickland* analysis. Even if the deceitful lawyer gets that right, the uncertainty remains as to what remedy a court will provide for that violation—something no attorney can know in advance. Specific performance of the original offer, *Lafler* makes clear, is far from certain.¹⁸

Polando is frustrated that defendants gain information from going to trial—they lift the "veil of uncertainty" and learn that they will be convicted, and then they use that information to accept, retrospectively, the original plea terms.¹⁹ But the Court preserved as one "remedy" for the *Strickland* violation an affirmance of the trial sentence precisely because information revealed at trial can cut *against* defendants as well as for them. Trial evidence may well reveal more to the judge about the defendant's crimes than she would have known from a plea hearing (and more perhaps to prosecutors as well, who don't always know the facts of their cases as thoroughly at the time of plea agreements as they do later at trial). Trial information might convince a judge that the original plea terms were too lenient and the trial sentence is fully justified. Other things may change as well, as they did in *Frye v. Missouri*, the companion

17. Polando, *supra* note 1, at 64 (quoting Transcript of Oral Argument at 39, *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) (No. 10–209)).

18. One hopes that few of us are so cynical about defense attorneys as to expect that more than a very few of them would *deliberately* violate their professional obligations to provide effective representation (as opposed to Cooper's lawyer, who surely didn't offer his bad advice knowing it to be wrong and intending it to mislead his client). And few should expect that any lawyer, practicing with the same group of prosecutors and judges over time (as most do), could pull this scam off for long without judges and prosecutors catching on. But if such cynical lawyering ever took place, the fact would remain that the lawyer *did provide ineffective assistance* to his client. That the defense lawyer did so deliberately—and risks bar discipline and other consequences if exposed—doesn't change that fact.

19. Polando, *supra* note 1, at 64.

case to *Lafler*. After his original plea offer expired but before his scheduled court date, Frye was arrested for committing the same offense once again—a development that made the prospect of the judge accepting a guilty plea on the original offer’s terms (or of the prosecutor standing by them) unlikely.

In conclusion, I am confident that Polando and other prosecutors can rest easy about *Lafler*. Odds are exceedingly slim that any defendant or defense attorney will successfully exploit *Lafler* as a way to take a shot at trial before taking up a plea offer, or even conclude that it is appealing to try. I am so confident, in fact, that I will make this offer. If Mr. Polando or any of his colleagues among Indiana prosecutors can identify a case in the next two years in which Mr. Polando’s predictions seem to have come true—a defendant or his attorney has deliberately manipulated *Lafler* to go to trial while preserving a plea offer through the attorney’s bad advice about that plea—I will donate \$100 to the Association of Indiana Prosecuting Attorneys or the National District Attorneys Association.

Granted, this sort of thing can be hard to prove; one can have strong suspicions that incompetent representation was deliberate without proof that holds up in court. But I will give Polando and his colleagues the benefit of the doubt. If an Indiana prosecutor identifies a case in which he is convinced that *Lafler* was exploited in the way Polando fears, that’s good enough for me; we won’t wait for post-conviction litigation to play out. All you have to do is explain what convinces you that you have identified such a case, even if the explanation rests heavily on inferences of a prosecutor’s intuition about a defendant who declined a plea, went to trial, and whom we have some evidence, or reason to believe, was given objectively unreasonable representation by his attorney. We will post this case description and explanation on a law blog or similar website so that others can assess it (concealing real names as needed), but I will pay up regardless of others’ assessments. (Or, to make it really convincing, a prosecutor could enlist an outside reviewer to confirm his conclusion—perhaps a dean of University of Houston, Notre Dame, Valparaiso or Indiana University law school.)

Notice, however, that winning this bet would be the lesser victory. The real victory, for prosecutors and defendants alike, will be confirming that no such exploitation of *Lafler* occurs. All should likewise take as a victory that defendants who have been deprived of their constitutional right to effective assistance of counsel have a greater chance after *Lafler*—though no guarantee—that their sentence will be the same as it would have been had they received competent counsel in the first place.