THE YALE LAW JOURNAL ONLINE

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Lafler v. Cooper and AEDPA

The Supreme Court in *Missouri v. Frye*[1] and *Lafler v. Cooper*[2] broke new ground by holding for the first time that a defendant's right to the effective assistance of counsel under the Sixth Amendment can be violated by the loss of a favorable plea deal. Less noted, but also worthy of attention, are *Lafler*'s implications for federal habeas law. Four Justices protested that the *Lafler* decision violated the federal habeas statute. At the least, the decision expanded habeas review in unexpected ways.

Lafler presented the Supreme Court with an unusual opportunity to declare new doctrine on habeas review. First, the State had conceded that the performance of respondent Anthony Cooper's lawyer was deficient under the first prong of *Strickland v. Washington*[3]—a point not easily demonstrated in most habeas cases because of the deference afforded strategic decisions.[4] Second, the Court managed to avoid what would have been a difficult hurdle for the petitioner to clear in seeking relief under § 2254(d)(1), the provision of the habeas statute that conditions relief upon a showing that the state decision was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[5] The state court's vague wording allowed the Court to characterize the state decision as "contrary to" *Strickland* and to bypass the issue of whether it was an "unreasonable application" of *Strickland*.

1. No. 10-444 (U.S. Mar. 21, 2012), http://www.supremecourt.gov/opinions/11pdf/10-444.pdf (to be reported at 132 S. Ct. 1399).
2. No. 10-209 (U.S. Mar. 21, 2012), http://www.supremecourt.gov/opinions/11pdf/10-209.pdf (to be reported at 132 S. Ct. 1376).
3. 466 U.S. 668 (1984).
4. *See id.* at 689-91.
5. 28 U.S.C. § 2254(d)(1) (2006).

The Court's opinion in *Lafler* turned on the following two paragraphs of the state court decision:

> To establish ineffective assistance, the defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. With respect to the prejudice aspect of the test, the defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable.
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> Defendant challenges the trial court's finding . . . that defense counsel provided effective assistance to defendant during the plea bargaining process. He contends that defense counsel failed to convey the benefits of the plea offer to him and ignored his desire to plead guilty, and that these failures led him to reject a plea offer that he now wishes to accept. However, the record shows that defendant knowingly and intelligently rejected two plea offers and chose to go to trial. The record fails to support defendant's contentions that defense counsel's representation was ineffective because he rejected a defense based on [a] claim of self-defense and because he did not obtain a more favorable plea bargain for defendant.[6]

The five Justices in the *Lafler* majority concluded that this decision was "contrary to" *Strickland*, because in their view it failed entirely to apply the case: "Rather than applying *Strickland*, the state court simply found that respondent's rejection of the plea was knowing and voluntary. An inquiry into whether the rejection of a plea is knowing and voluntary, however, is not the correct means by which to address a claim of ineffective assistance of counsel."[7] The state court, in the majority's view, "applie[d] a rule that contradicts the governing law set forth in [Supreme Court] cases."[8]

By contrast, the four dissenting Justices read the second paragraph of the state court's analysis as that court's application of the *Strickland* standard. The state court's statement that "defendant knowingly and intelligently rejected

6. People v. Cooper, No. 250583, 2005 WL 599740, at *1 (Mich. Ct. App. Mar. 15, 2005) (footnote omitted) (citations omitted).

7. *Lafler*, slip op. at 14-15 (majority opinion) (citations omitted).

8. *Id.* at 14 (quoting Williams v. Taylor, 529 U.S. 362, 405 (2000) (opinion of O'Connor, J.)) (internal quotation marks omitted).

two plea offers and chose to go to trial," the dissenters explained, "can be regarded as a denial that there was anything 'fundamentally unfair' about Cooper's conviction and sentence, so that no *Strickland* prejudice had been shown."[9] Because it referenced and applied the correct test, they reasoned, the decision was not *contrary to* established federal law. Furthermore, this opinion was not an "unreasonable application[] of clearly established law," the dissenters argued, "since this Court has never held that a defendant in Cooper's position can establish *Strickland* prejudice."[10]

Had the state court used language more easily read as rejecting Cooper's claim under *Strickland*'s prejudice standard, the majority would not have had the option of characterizing the state decision as "contrary to" *Strickland*.[11] Instead, the Court would have had to explain why the state decision was an unreasonable application of *Strickland*. And under that standard, Cooper would have lost. It would have been reasonable, before *Lafler*, for a state court to decide that it was not "prejudice" under *Strickland* to end up with a fair trial and legal sentence after missing out on a more favorable plea deal because of counsel's incompetence. No decision of the Supreme Court had held that the Sixth Amendment protected defendants from losing plea deals, as opposed to fair trials, sentencing proceedings, or appeals,[12] and several of the Court's decisions had pointed in the other direction.[13]

9. *Id.* at 9 (Scalia, J., dissenting).

10. *Id.* at 10.

11. *See Williams*, 529 U.S. at 406 (opinion of O'Connor, J.) ("Assume, for example, that a state-court decision on a prisoner's ineffective-assistance claim correctly identifies *Strickland* as the controlling legal authority and, applying that framework, rejects the prisoner's claim. Quite clearly, the state-court decision would be in accord with our decision in *Strickland* as to the legal prerequisites for establishing an ineffective-assistance claim [and thus would not be "contrary to" *Strickland*] even assuming the federal court considering the prisoner's habeas application might reach a different result applying the *Strickland* framework itself.").

12. It takes a holding by the Supreme Court to clearly establish federal law under § 2254(d). *See* 28 U.S.C. § 2254(d)(1) (2006) (requiring the "clearly established federal law" be "determined by the Supreme Court of the United States"); *see also* Thaler v. Haynes, 130 S. Ct. 1171, 1175 (2010) ("[N]o decision of this Court clearly establishes the categorical rule on which the Court of Appeals appears to have relied."); Knowles v. Mirzayance, 556 U.S. 111, 122 (2009) ("With no Supreme Court precedent establishing a 'nothing to lose' standard for ineffective-assistance-of-counsel claims, habeas relief cannot be granted pursuant to § 2254(d)(1) based on such a standard."); Wright v. Van Patten, 552 U.S. 120, 125 (2008) ("No decision of this Court, however, squarely addresses the issue in this case or clearly establishes [a new standard] in this novel factual context." (citation omitted)).

13. *See Williams*, 529 U.S. at 391-93; Lockhart v. Fretwell, 506 U.S. 364, 369-372 (1993); Nix v. Whiteside, 475 U.S. 157, 186-87 (1986); Weatherford v. Bursey, 429 U.S. 545, 561 (1977).

Consider, by contrast, what would have happened had the Court decided to review a federal habeas challenge to a state decision in which the state court rejected a claim like Cooper's, but had more clearly relied on *Strickland* in its reasoning and interpreted *Strickland* as did the *Lafler* dissenters. In order to grant habeas relief in such a case, the Court first would have had to conclude that the position held by four Justices (assuming Chief Justice Roberts and Justices Alito, Scalia, and Thomas would have taken the same position on the merits of the Sixth Amendment question), a unanimous Utah Supreme Court,[14] and at least four court of appeals judges,[15] was "unreasonable" under § 2254(d)—that is, "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."[16] Not likely.

Indeed, a petitioner who had challenged a state court decision that said virtually nothing except "denied," after a bare citation of the correct Supreme Court precedent, would have had a much more difficult time than Cooper did convincing a federal court that the decision was "contrary to" established federal law, and would instead have had to meet *Richter*'s exacting "unreasonable application" standard. As the Court explained in *Richter,* "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing *there was no reasonable basis for the state court to deny relief*."[17] In short, but for the unusual combination of ambiguous reasoning by the state court and admitted incompetence in *Lafler*, the Supreme Court probably would have had to save its development of the constitutional regulation of representation during the plea process for a different case—an appeal of either a state postconviction decision (like *Frye* and

14. State v. Greuber, 165 P.3d 1185, 1189 (Utah 2007) (concluding that "a fair trial for the defendant generally negates the possibility of prejudice" under *Strickland*).

15. *See* Williams v. Jones, 583 F.3d 1254 (10th Cir. 2009) (Gorsuch, J., dissenting from denial of rehearing en banc) ("[N]o decision from the United States Supreme Court has ever held (or even hinted) that a lawyer's bad advice to reject a plea offer gives rise to a violation of the Sixth Amendment, or any other provision of federal law. Neither does a conventional *Strickland* analysis compel such a novel result."). The Seventh Circuit also appeared to anticipate that the question was a close one. *See* Kerr v. Thurmer, 639 F.3d 315 (7th Cir. 2011) ("We think it best to move forward now, recognizing that if the Court rules that the later trial erases any possible claim relating to potential plea bargains, then it is likely that Kerr's case will have to be dismissed at that time."), *vacated*, 132 S. Ct. 1791 (remanding the case for further consideration in light of *Lafler*).

16. Harrington v. Richter, 131 S. Ct. 770, 786-87 (2011).

17. *Id.* at 777 (emphasis added).

Padilla v. Kentucky[18]) or a decision under § 2255,[19] where the "unreasonable application" standard of § 2254(d) would not apply.

On its face, *Lafler*'s "contrary to" analysis leaves the daunting "unreasonable application" standard of *Richter* in place—both decisions were authored by Justice Kennedy, and the Court carefully avoided discussion of the "unreasonable application" standard. But the decision in *Lafler* appears to have loosened the "contrary to" standard a notch for future cases, encouraging petitioners to argue that the state court *never applied* the correct federal precedent (even when that precedent is cited or described), instead of arguing than that the court's application of federal law was unreasonable. The combination of *Lafler* and *Richter* also suggests that when reviewing state court criminal opinions, "less is more"—a summary state denial will not be disturbed unless all *possible* (hypothetical) applications *would have been* unreasonable, while a merits decision accompanied by an ambiguously phrased rationale that could be construed as failing to apply the correct rule is vulnerable to attack.[20]

The best news for prisoners bringing *Frye* and *Lafler* claims from now on, however, is that by announcing its interpretation of *Strickland* in a federal habeas case, the Court in *Lafler* necessarily applied that rule retroactively. Generally the habeas remedy is limited to violations of federal law that were clearly established at the time the state court denied relief to the petitioner; retroactive enforcement of new rules announced only later is prohibited.[21] This means that any controversial decision for defendants announced by the Supreme Court on appeal is inevitably followed by a battle over whether that decision was clearly established by earlier Supreme Court precedent and thus is available as a basis for relief for any habeas petitioner whose state court decision postdated that earlier Supreme Court precedent. For example, when the Court in *Padilla* announced the qualified Sixth Amendment right to competent pre-plea advice concerning deportation, it did so in an appeal from a

18. 130 S. Ct. 1473 (2010).

19. 28 U.S.C. § 2255 (2006) (governing collateral review of convictions of federal prisoners).

20. I do not mean to suggest here that *Lafler* will actually prompt more state courts to "withhold explanations for their decisions." *Richter*, 131 S. Ct. at 784. I agree with the *Richter* Court that "[o]pinion-writing practices in state courts are influenced by considerations other than avoiding scrutiny by collateral attack in federal court." *Id.*

21. *See* 28 U.S.C. § 2254(d)(1) (prohibiting relief from a state decision that rejected the merits of a federal claim unless the decision was contrary to or an unreasonable application of clearly established Supreme Court precedent); Teague v. Lane, 489 U.S. 288 (1989) (permitting no retroactive application of "new rules" of constitutional criminal procedure, with two narrow exceptions). *See generally* WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 28.6 (3d ed. 2007 & Supp. 2011).

state postconviction decision, not in a federal habeas case.[22] Lower courts soon divided over whether or not that rule was clearly established by either *Strickland* or *Hill* before the *Padilla* decision[23] and the Court has now agreed to resolve the issue in its upcoming term.[24] The same sort of litigation followed the Court's decisions in *Crawford v. Washington*[25] and *Ring v. Arizona*.[26]

By affirming the grant of habeas relief for Cooper under § 2254(d), the Court appears to have assumed that its foregone-plea doctrine was "clearly established" at least as far back as 2005, when the Michigan Court of Appeals rejected Cooper's claim of ineffective assistance. That is undoubtedly surprising news to the divided judges of the Tenth Circuit, to the justices of the Utah Supreme Court, and to those who believed that under § 2254(d), habeas corpus would "guard against extreme malfunctions in the state criminal justice systems," not "substitute for ordinary error correction through appeal."[27] But it is welcome news for any petitioner whose foregone-plea claim was rejected by a state court in the past seven years.

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Preferred citation: Nancy J. King, Lafler v. Cooper *and AEDPA*, 122 YALE L.J. ONLINE 29 (2012), http://yalelawjournal.org/2012/06/19/king.html.

22. *See Padilla*, 130 S. Ct. at 1478.

23. *See, e.g.*, Danielle M. Lang, Note, Padilla v. Kentucky*: The Effect of Plea Colloquy Warnings on Defendants' Ability To Bring Successful* Padilla *Claims*, 121 YALE L.J. 944, 965-75 (2012).

24. *See* Chaidez v. United States, 655 F.3d 684 (7th Cir. 2011), *cert. granted*, 2012 WL 1468539 (U.S. Apr. 30, 2012) (No. 11-820).

25. *See* Whorton v. Bockting, 549 U.S. 406 (2007) (holding *Crawford*, 541 U.S. 36 (2004), to not be retroactive).

26. *See* Schriro v. Summerlin, 542 U.S. 348 (2004) (refusing to find that the rule of *Ring*, 536 U.S. 584 (2002), entitling a defendant to a jury determination of facts that state law requires must be found before a death sentence may be imposed, would fit within an exception to *Teague*). The Court has yet to address whether the rule in *Blakely v. Washington*, 542 U.S. 296 (2004), applies retroactively. *See* Burton v. Stewart, 549 U.S. 147 (2007) (declining to reach the question).

27. Harrington v. Richter, 131 S. Ct. 770, 786 (2011) (quoting Jackson v. Virginia, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring)).