
Opportunity Lost?—The Ineffective Assistance Doctrine’s Applicability to Foregone Plea Bargains

Imagine a criminal defendant accused of a serious felony. His defense counsel arrives woefully unprepared for the first day of trial. There is little hope of receiving a continuance as the presiding judge denied all previous requests. The charges carry the potential for a life sentence, but there is a plea bargain offer on the table that will allow the defendant to serve considerably less time. What is such a defendant to do—take the plea with certain results or risk going to trial with an attorney unprepared for the task? Later, the same defendant who accepted the plea bargain files a petition for a writ of habeas corpus claiming that ineffective assistance of counsel rendered his decision to accept the plea involuntary. Will the court grant the defendant’s petition?¹

Now imagine a similar scenario; however, the attorney arrives ready for trial. She recommends that the defendant reject the plea bargain because the prosecution will not be able to establish a key element of the crime. Ultimately, it turns out that the attorney is incorrect, but an otherwise fair and valid trial takes place. The court sentences the defendant to thirty years in prison; twenty more than would have been served if the defendant had accepted the plea bargain. As in the first scenario, the defendant files a habeas petition, this time claiming that ineffective assistance of counsel caused him to reject his plea bargain. Will the court grant this petition?²

I. INTRODUCTION

The Constitution’s Sixth Amendment promises that “[i]n all criminal prosecutions, the accused shall . . . have the assistance of counsel for his

1. See generally *United States v. Bliss*, 84 Fed. App’x 820 (9th Cir. 2003) (granting relief due to ineffective assistance of counsel). Bliss accepted a plea bargain and pleaded guilty when his attorney was unprepared to proceed on the first day of trial and the judge refused to grant a continuance. *Id.* at 821-22. The court held that Bliss’s guilty plea was involuntary due to ineffective assistance of counsel and remanded his case for a new trial. *Id.* at 822.

2. See generally *Massachusetts v. Mahar*, 809 N.E.2d 989 (Mass. 2004) (holding assistance of counsel must fall below standard of “ordinary fallible lawyer”). After rejecting a plea bargain following advice of counsel, a jury convicted Mahar for a violation of the Massachusetts home invasion statute. *Id.* at 991. Mahar’s attorney ultimately was incorrect in believing that Mahar would prevail at trial, and Mahar filed a habeas petition claiming that ineffective assistance of counsel caused him to forego a favorable plea bargain agreement. *Id.* at 991-92. The Massachusetts Supreme Judicial Court (SJC) affirmed the lower court’s decision to deny Mahar’s petition on the merits. *Id.* at 996. The SJC did, however, state that the doctrine of ineffective assistance of counsel applies in situations involving a foregone plea bargain. *Id.* at 992-93.

defense.”³ In order to protect the defendant’s liberties in the adversarial system contemplated by the Sixth Amendment the mere presence of an attorney on behalf of the accused is not sufficient.⁴ The Sixth Amendment promises that an attorney for the accused will be qualified to play an active role in meeting the demands of the prosecution’s case.⁵ As such, the Supreme Court recognized that the right to counsel is the “right to the effective assistance of counsel.”⁶

For years, the states and the federal circuits handled the issue of what qualified as ineffective assistance of counsel.⁷ In 1984, the Supreme Court established a test to measure all ineffective assistance claims with its decision in *Strickland v. Washington*.⁸ The test consists of two prongs: the attorney’s performance must have been deficient and this deficiency must have materially prejudiced the defense.⁹

A year after deciding *Strickland*, the Supreme Court in *Hill v. Lockhart* addressed the question of whether the *Strickland* test covered pretrial proceedings.¹⁰ The Court specifically stated that a defendant who accepted a plea bargain under an attorney’s advice could prove ineffective assistance by demonstrating attorney error and prejudicial effect.¹¹ Despite requests for certiorari, the Supreme Court has not yet rendered a decision relating to a habeas petition based on ineffective assistance arising from a foregone plea bargain.¹²

3. U.S. CONST. amend. VI (establishing criminal defendant’s right to counsel).

4. See *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (defining constitutional meaning of right to counsel in criminal proceedings).

5. See *id.* at 685-86 (stipulating attorney qualifications in criminal trials).

6. See *id.* at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)) (announcing effective assistance doctrine).

7. See *id.* at 713 (Marshall, J., dissenting) (describing history of ineffective assistance jurisprudence). Prior to the Court’s *Strickland* decision in 1984, other courts had developed different standards for what constituted effective assistance. *Id.* Some courts adopted the “farce-and-mockery” standard, while others adopted various versions of the “reasonable competence” standard. *Id.* at 713-14. Regarding the degree of prejudice necessary to require a new trial, courts followed a number of standards ranging from the strict “outcome determinative” standard to the permissive standard that any degree of defense counsel incompetence compelled a new trial. *Id.*

8. 466 U.S. 668, 690-96 (1984) (characterizing uniform standard to determine cases of ineffective counsel assistance).

9. See *id.* at 697 (establishing two-prong test for ineffective assistance).

10. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (describing *Strickland* test’s application to plea bargains). Justice Rehnquist discussed the test’s applicability of the *Strickland* test only in the context of a plea bargain that the petitioner had accepted. *Id.* at 58-60.

11. *Id.* (examining elements of *Strickland* test applicable to accepted plea bargain). Justice Rehnquist suggested that, in its applicability to accepted plea bargains, the attorney error prong of the *Strickland* test is the same as in other contexts. *Id.* In addition, he determined that the prejudice prong requires showing that the defendant likely would have rejected the plea bargain but for the attorney error. *Id.* He noted that such a determination will largely turn on the defense’s likelihood of success at trial. *Id.*

12. See *Johnson v. Duckworth*, 793 F.2d 898 (7th Cir. 1986), *cert. denied*, 479 U.S. 937 (1986) (providing example of denial of certiorari in case involving foregone plea bargain). Defendant Johnson, convicted of murdering his brother, filed a habeas petition claiming ineffective assistance of counsel because he was not able to make a final determination regarding the rejection of an offered plea bargain. *Johnson*, 793

This Note will address the ineffective assistance doctrine as it applies to plea bargaining, with a focus on the limitations of the *Strickland* test and federal habeas corpus provisions.¹³ Part II will discuss the historical foundation of the ineffective assistance doctrine, its application to both accepted and rejected plea bargains, criticism of the *Strickland* test, and federal habeas corpus legislation.¹⁴ Part III will analyze Supreme Court jurisprudence as it applies to the ineffective assistance doctrine, demonstrate the different approaches state and federal courts use to apply the doctrine to foregone plea bargains, and consider the effect that the *Strickland* test and federal habeas corpus procedures may play in the differing approaches' settlement.¹⁵ Part IV concludes that without Supreme Court intervention, the federal circuits will be unable to address directly the doctrinal split within their own jurisdictions.¹⁶

II. HISTORY

A. *The Writ of Habeas Corpus*

A prisoner convicted in a state court may seek to challenge the constitutionality of his or her incarceration by petitioning for a federal writ of habeas corpus.¹⁷ A prisoner seeking habeas relief will commonly assert ineffective assistance of counsel.¹⁸ Congress granted the federal district courts, circuit courts, and the Supreme Court jurisdiction over habeas cases.¹⁹ Prisoners incarcerated by the federal courts are likewise able to petition for habeas corpus relief.²⁰ A successful pleading for a writ of habeas corpus may result in release from incarceration, although the indictment that led to the conviction may remain intact.²¹

F.2d at 899. The Seventh Circuit upheld a denial of Johnson's habeas petition. *Id.* at 902. *But see* Nunes v. Mueller, 350 F.3d 1045 (9th Cir. 2003), *cert. denied*, 543 U.S. 1038 (2004) (overturning murder conviction following habeas petition claiming ineffective assistance at plea bargain). Defendant Nunes, convicted of murder, filed a habeas petition claiming that his attorney failed to communicate accurately the terms of a plea bargain that Nunes claimed he otherwise would have accepted. *Nunes*, 350 F.3d at 1049-50. The state court denied the petition, but the federal district court found the state court's ruling erroneous and the Ninth Circuit Court of Appeals affirmed, requiring either a reinstatement of the original plea offer or Nunes's release. *Id.* at 1057.

13. *See infra* Parts II-IV.

14. *See infra* Part II.

15. *See infra* Part III.

16. *See infra* Part IV.

17. *See* 28 U.S.C. § 2254 (2006) (granting right to writ of habeas corpus to state prisoners). Federal courts may entertain a state prisoner's petition for a writ of habeas corpus "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." *Id.* § 2254(a).

18. *See infra* note 55 and accompanying text (discussing common assertion of ineffective assistance in habeas petitions).

19. *See* 28 U.S.C. § 2241(a) (2006) (granting federal courts jurisdiction over habeas corpus petitions).

20. *See* 28 U.S.C. § 2255 (2006) (granting right to writ of habeas corpus to federal prisoners).

21. *See infra* note 75 and accompanying text (discussing proper remedy in granting writ of habeas

B. Plea Bargaining

Plea bargains resolve the overwhelming majority of criminal cases in the United States.²² The Constitution does not guarantee a person accused of a crime the right to a plea bargain.²³ Nonetheless, prosecutors must observe the principles of equal protection when engaged in plea bargaining.²⁴ A defendant who agrees to a plea bargain admits guilt to every element of the criminal charge.²⁵ As a result, the defendant waives a number of constitutional rights and protections, including the right to trial by jury and the right against self incrimination.²⁶ A defendant must enter into a plea bargain voluntarily and the advice of counsel must be competent.²⁷

C. Ineffective Assistance of Counsel

The history of the ineffective assistance of counsel doctrine begins with the Sixth Amendment's promise of the right to counsel at criminal proceedings.²⁸ In *Johnson v. Zerbst*,²⁹ the Supreme Court announced that defendants have a right to both retained and appointed counsel in federal criminal trials.³⁰ While Congress's ratification of the Fourteenth Amendment in 1868 paved the way for an individual's right to assistance of counsel in state proceedings, it was not until *Powell v. Alabama*³¹ that the Supreme Court determined that states should observe the Sixth Amendment right to counsel in certain criminal proceedings.³² The *Powell* Court specifically limited its ruling to capital cases,

corpus).

22. See Stephen P. Grossman, *An Honest Approach to Plea Bargaining*, 29 AM. J. TRIAL ADVOC. 101, 101 (2005) (asserting plea bargaining disposes "overwhelming" number of cases). Approximately 90 percent of all criminal cases settle through plea bargaining. *Id.* at 101 n.2.

23. See *Preliminary Proceedings: Guilty Pleas*, 32 GEO. L.J. 362, 362 (2003) (recognizing no constitutional right to plea bargain).

24. See *id.* (noting applicability of equal protection in conducting plea bargains).

25. *Id.* at 372-73 (emphasizing defendant's admission of guilt when accepting plea bargain).

26. *Id.* at 374 (discussing waiver of constitutional rights related to plea bargaining).

27. *Preliminary Proceedings: Guilty Pleas*, *supra* note 23, at 373-74 (summarizing requirements for bona fide plea bargain). For a court to consider a plea voluntary, it must be clear that a defendant was neither coerced nor threatened and received no promises other than the plea agreement in exchange for the guilty plea. *Id.* at 388. There is a strong presumption that a defendant's plea is voluntary. *Id.* at 391-92.

28. See U.S. CONST. amend. VI (guaranteeing right to counsel in criminal trials).

29. 304 U.S. 458 (1938).

30. *Id.* at 467-68 (announcing right to retained or appointed counsel in all federal criminal trials); see also JAMES J. TOMKOVICZ, *THE RIGHT TO THE ASSISTANCE OF COUNSEL* 27 (Jack Stark ed., Greenwood Press 2002) (discussing holding of *Zerbst* decision). In *Zerbst*, the Court concluded that the Sixth Amendment provided a generous right for indigent defendants to receive appointed counsel in federal criminal proceedings. TOMKOVICZ, *supra*, at 25-26.

31. 287 U.S. 45 (1932).

32. See U.S. CONST. amend. XIV § 1 (establishing due process). "No state shall . . . deprive any person of life, liberty, or property, without due process of law." *Id.*; *Powell*, 287 U.S. at 71 (applying Sixth Amendment right to state criminal proceeding). *Powell* also foreshadowed the constitutional right to the effective assistance

stating that it was unnecessary to make a determination regarding other circumstances.³³ Approximately ten years later in *Betts v. Brady*,³⁴ the Supreme Court held that the Due Process Clause only guarantees defendants in state criminal proceedings the right to counsel when denial of such is “offensive to the common and fundamental ideas of fairness and right.”³⁵

Criticism of the Court’s opinion in *Betts* was swift—beginning with Justice Black’s dissenting opinion joined by Justices Douglas and Murphy.³⁶ Justice Black stated his opinion that the Fourteenth Amendment made the Sixth Amendment guarantee of right to counsel applicable to the states.³⁷ In the years that followed, the criticism of *Betts* continued, culminating in a 1961 concurring opinion with Justice Douglas, joined by Justice Brennan, calling for the Court to overturn *Betts*.³⁸ Finally, in the landmark decision *Gideon v. Wainwright*,³⁹ the Court overturned *Betts* and guaranteed all criminal defendants in either state or federal proceedings an absolute right to the

of counsel by stating that the duty to provide counsel is “not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.” 287 U.S. at 71; see also TOMKOVICZ, *supra* note 30, at 21-22 (explaining importance of Fourteenth Amendment’s Due Process Clause to defendant’s right to counsel). “It is not overstatement . . . to regard the adoption of the Fourteenth Amendment as a watershed event in the historical expansion of our constitutional right to counsel.” TOMKOVICZ, *supra* note 30, at 21-22.

33. *Powell*, 287 U.S. at 71 (limiting holding to capital cases).

34. 316 U.S. 455 (1942).

35. *Id.* at 471-73 (holding Fourteenth Amendment does not guarantee all criminal defendants right to counsel). Decided only four years after *Zerbst*, the *Betts* Court could have applied the same standard to both state and federal cases. Rather, the *Betts* Court based its inconsistent holding, in part, on the perceived experimental nature of state criminal courts and the substantial cost that states would face in providing counsel for all criminal defendants in need of assistance, regardless of the nature or severity of the charge. See TOMKOVICZ, *supra* note 30, at 30 (discussing *Betts* decision as limiting grant of appointed counsel).

36. See ANTHONY LEWIS, GIDEON’S TRUMPET 117-22 (1964) (chronicling criticism of *Betts v. Brady* decision).

37. See *Betts v. Brady*, 316 U.S. 455, 474 (1942) (Black, J., dissenting) (concluding Sixth Amendment right to counsel applicable to states through Fourteenth Amendment). The *Betts* Court stated,

If this case had come to us from a federal court, it is clear we should have to reverse it, because the Sixth Amendment makes the right to counsel in criminal cases inviolable by the federal government. I believe that the Fourteenth Amendment made the sixth applicable to the states.

Id.

38. See *McNeal v. Culver*, 365 U.S. 109, 117 (1961) (Douglas, J., concurring) (concurring with Court’s holding but calling for overturning of *Betts*). Justice Douglas noted:

Betts v. Brady requires the indigent, when convicted in a trial where he has no counsel, to show that there was fundamental unfairness . . . [T]his is a heavy burden to carry . . . It is a burden placed on an accused solely by reason of his poverty. Its only sanction is *Betts v. Brady* which is so at war with our concept of equal justice under law that it should be overruled.

Id. at 119; see also *supra* LEWIS, note 36, at 117-22 (discussing criticism of *Brady* and noting Justice Douglas’s call for its reversal).

39. 372 U.S. 335 (1963).

assistance of counsel.⁴⁰

The effective assistance doctrine first appeared within constitutional jurisprudence in 1932.⁴¹ In the years that followed, the Supreme Court referred to the doctrine, but did not establish a particular standard or test for several decades.⁴² In 1970, the Court alluded, in dicta, to a single standard for judging the effectiveness of counsel that proved instructive for many jurisdictions.⁴³ Nonetheless, the federal circuits adhered to a number of different standards to deal with the ineffective assistance of defense counsel issue during criminal proceedings.⁴⁴

In 1984, through its decision in *Strickland v. Washington*, the Supreme Court finally settled the issue by developing an official test for judging whether defense counsel rendered ineffective assistance.⁴⁵ The test consists of two

40. *Id.* at 342-45 (holding right to counsel in criminal proceedings fundamental). While *Gideon* was a landmark decision, Mr. Gideon is also a perfect example of its holding's promise as Gideon's court appointed attorney was able to overturn his conviction by developing reasonable doubt during the retrial. See ALFREDO GARCIA, *THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE – A CRITICAL PERSPECTIVE* 10 (Greenwood Press 1992) (describing Mr. Gideon's new trial).

41. See *Powell v. Alabama*, 287 U.S. 45, 71-72 (1932) (determining trial court's failure to make effective appointment violates due process). Despite requiring effective assistance of counsel, the *Powell* Court limited its holding to the facts of the case at hand and thus did not create a standard test or absolute requirement for effective assistance. *Id.*; see also Barbara A. Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1168 (1982) (describing *Powell* as "ovular" case in effective assistance jurisprudence).

42. See Babcock, *supra* note 41, at 1164 (noting lack of Supreme Court guidance). Despite a number of requests for certiorari seeking to implement a standard to determine what constitutes ineffective assistance, the Court quickly dispatched the Sixth Amendment issues that arose. *Id.*; see also *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011, 1011-13 (1978) (White, J., dissenting) (describing need for effective assistance standards). Justice White noted the varied approaches taken by several circuits and described the federal courts of appeals as being in "disarray." 435 U.S. at 1011-12; see also, e.g., *United States v. Agurs*, 427 U.S. 97, 102 n.5 (1976) (determining counsel's representation effective); *Reece v. Georgia*, 350 U.S. 85, 90 (1955) (holding petitioner denied effective assistance of counsel); *Glasser v. United States*, 315 U.S. 60, 76 (1942) (holding petitioner denied effective assistance of counsel but not expounding on evaluative process).

43. See *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (articulating "range of competence" as means to judge effective assistance of defense counsel); see also Babcock, *supra* note 41, at 1164 (describing effect of *McMann* decision on federal circuits). The issue of "range of competence" raised in *McMann* was merely dicta and tangentially related to ineffective assistance, but many circuits seized upon it as a means to judge the ineffective assistance of defense counsel. Babcock, *supra* note 41, at 1164.

44. See *supra* note 7 and accompanying text (describing different approaches to ineffective assistance claims). By 1978, three federal circuits—the First, Second, and Tenth—employed the "farce and mockery" standard that held a criminal defense adequate unless it was "such as to make a mockery, a sham or a farce of the trial." *Marzullo*, 435 U.S. at 1011 (describing standard employed in First, Second, and Tenth Circuits). Four circuits—the Fifth, Sixth, Eighth, and D.C.—utilized a standard requiring defense counsel to be "reasonably competent." *Id.* (describing use of reasonably competent standard). The Third and Seventh Circuits developed their own standards, and the district courts of the Ninth Circuit were divided between the "farce and mockery" and "reasonably competent" standards. *Id.* at 1011-12 (setting forth standards utilized by circuit courts).

45. See *Strickland v. Washington*, 466 U.S. 668, 690-96 (1984) (announcing test for determining whether counsel's assistance was ineffective).

prongs.⁴⁶ The first prong addresses an attorney's performance; it requires a reviewing court to determine whether defense counsel has acted in a deficient manner.⁴⁷ The second prong addresses the outcome; it requires a reviewing court to determine whether defense counsel's deficiencies resulted in prejudice that materially affected the trial's outcome.⁴⁸ Despite the creation of a standard for judging ineffective assistance of defense counsel, *Strickland* provides no specific guidelines to evaluate a lawyer's performance.⁴⁹

United States v. Cronin,⁵⁰ argued and decided on the same day as *Strickland*, serves as an exception to the prejudice prong of the *Strickland* test.⁵¹ The *Cronin* decision stands for the proposition that there are certain circumstances in which a court can presume prejudice.⁵² The *Cronin* Court defined what circumstances would render effective assistance by competent counsel all but

46. See *supra* note 9 and accompanying text (describing *Strickland*'s two-prong test).

47. See *Strickland*, 466 U.S. at 690 (explaining first prong of *Strickland* test). A court evaluating a defense counsel's competence, based on the facts of the particular case in question, must determine the reasonableness of the attorney's conduct in light of the "wide range of professionally competent assistance." *Id.* The standard of review for defense counsel's performance is highly deferential, and a court is to analyze it from the attorney's point of view at the time that the defendant alleges the deficient performance occurred. See *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986) (summarizing standard of review for *Strickland* test). When evaluating an attorney's performance, a court must be cautious not to limit the wide range of acceptable conduct under the Sixth Amendment. See *Nix v. Whiteside*, 475 U.S. 157, 165 (1986) (clarifying scope of attorney performance review). In particular, a court must be careful not to "constitutionalize" certain practices, thus limiting state autonomy in determining what practices are permissible for those admitted to practice in its courts. *Id.*

48. See *Strickland*, 466 U.S. at 690-96 (stating standard of review for prejudicial effect of attorney error). The standard is not merely the presence of prejudice or error, but whether a reasonable probability exists that the fact finder, absent the error, would have had a reasonable doubt. *Id.* at 695. Nonetheless, a court is not to base its decision regarding the prejudice of an attorney's error solely on whether the outcome would have been different, but must take into account the fairness or reliability of the outcome to avoid awarding a defendant an undeserved windfall. See *Lockhart v. Fretwell*, 506 U.S. 364, 369-70 (1993) (describing need to consider entire context when evaluating prejudice of ineffective assistance).

49. See TOMKOVICZ, *supra* note 30, at 157 (discussing lack of guidelines to determine deficient performance by defense counsel); see also Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 655-56 (1986) (analyzing lack of particularized standards in *Strickland* test). The majority of the *Strickland* court opposed establishing specific guidelines for assessing the sufficiency of defense counsel; nonetheless, some jurists and practitioners believe such guidelines would assist counsel and perhaps diminish the number of ineffective assistance claims. See *Strickland*, 397 U.S. at 688 (stating specific guidelines not appropriate).

50. 466 U.S. 648 (1984).

51. See Keith Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of Cronin's Call to Presume Prejudice from Representational Absence*, 76 TEMP. L. REV. 827, 842 (2003) (discussing *Cronin*'s exception to *Strickland* test); see also *Cronin*, 466 U.S. at 648 (providing date argued as January 10, 1984, and date decided as May 14, 1984); *Strickland v. Washington*, 466 U.S. 668 (1984) (providing date argued as Jan. 10, 1984, and date decided as May 14, 1984).

52. See Cunningham-Parmeter, *supra* note 51, at 842 (describing presumption of prejudice in limited circumstances). The *Cronin* court defined three such circumstances—when a court has denied a defendant counsel at some point during a "critical stage" of a trial, when counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," and when circumstances of a trial indicate that even a competent attorney would be unable to provide effective assistance. *Cronin*, 466 U.S. at 658-60 (describing circumstances not requiring litigation for determination of prejudice).

impossible, pointing to its decision in *Powell v. Alabama*.⁵³ The Court held that the law presumes a defense attorney is competent and that the burden of proving a Sixth Amendment violation belongs to the accused.⁵⁴

On appeal, ineffective assistance of counsel is perhaps the claim most often asserted by convicted criminals.⁵⁵ Despite the frequency with which convicted criminals bring such claims, it is uncommon for ineffective assistance to be the basis for the reversal of a criminal conviction.⁵⁶ In the years following the *Strickland* decision there has been significant criticism of the degree to which ineffective assistance jurisprudence protects the constitutional rights of criminal defendants.⁵⁷

The criticism of the *Strickland* standard begins with Justice Marshall's dissent from the Court's majority decision.⁵⁸ Justice Marshall disagreed with both prongs of the test for ineffective assistance.⁵⁹ In objecting to the attorney performance prong of the test, Justice Marshall criticized the Court, speculating that the provision would provide little or no guidance for courts or attorneys.⁶⁰ He also expressed concern that the standard as expressed by the majority could lead to discrepancies in the quality of representation afforded to indigent defendants in comparison to those who could afford to pay for counsel.⁶¹ He agreed that it was necessary to permit attorneys a certain degree of latitude in shaping their defense, but suggested that the Court could nonetheless determine specific objective standards for a number of the responsibilities of defense

53. *Id.* at 659-60 (citing *Powell v. Alabama* as effective example of circumstantial prejudice). The *Cronic* Court demonstrated that in *Powell*, a hostile environment surrounding the capital case of young, illiterate defendants who received counsel only as the trial was to begin was a circumstance that would compromise any representation to the point of ineffectiveness. *Id.* at 659-61 (describing *Powell* Court's reasoning).

54. *Id.* at 658 (stating presumption that defense counsel is competent).

55. John M. Burkoff & Nancy M. Burkoff, *Judicial Reluctance to Find Ineffective Assistance*, available at INASCNSL § 1:2 (2007) (Westlaw) (describing ineffective assistance as common grounds for criminal appeal). "Ineffective assistance of counsel is one of the most—if not *the* most—common appeal grounds asserted by convicted criminal defendants as appellants." *Id.*

56. *See id.* (indicating ineffective assistance rarely basis for reversal of criminal conviction).

57. *See, e.g.*, *McFarland v. Collins*, 8 F.3d 256 (5th Cir. 1993), *cert. denied*, 512 U.S. 1256, 1259 (1994) (Blackmun, J., dissenting) (criticizing *Strickland* standard); Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1445-79 (1999) (listing numerous criticized decisions arising from application of *Strickland* test); Martin C. Calhoun, Note, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 427-37 (1988) (critiquing *Strickland* test).

58. *See Strickland v. Washington*, 466 U.S. 668, 706-19 (1984) (Marshall, J., dissenting) (criticizing majority opinion and ineffective assistance test provided therein).

59. *See id.* at 707 (stating disagreement with Court's ruling on both prongs of *Strickland* test).

60. *See id.* at 707-09 (criticizing imprecise nature of attorney performance standard). Justice Marshall described the attorney performance standard as "malleable" and expressed concern that it would either have no reasonable effect or lead to "excessive variation." *Id.*

61. *See id.* at 708 (expressing concern over difference in representation of paid and appointed counsel). Justice Marshall expressed concern over the lack of guidance in the majority's opinion regarding paid and appointed counsel, inquiring, "Is a 'reasonably competent attorney' a reasonably competent adequately paid retained lawyer or a reasonably competent appointed attorney?" *Id.*

counsel.⁶²

Justice Marshall provided two reasons for dissenting from the Court's adoption of the prejudice standard.⁶³ He suggested that the ability of a reviewing court to determine prejudice from a trial record might be too difficult.⁶⁴ Secondly, he asserted that it violates due process whenever a defendant does not receive effective counsel, regardless of the existence of prejudice.⁶⁵ Lastly, beyond the issues of the two-prong test, Justice Marshall argued that the Court erred in affording defense attorneys a "presumption of reasonableness."⁶⁶

In a later dissenting opinion, Justice Blackmun further criticized the *Strickland* test.⁶⁷ Moreover, critics have referred to the test as an "almost insurmountable hurdle for defendants claiming ineffective assistance" and a doctrine meant to provide assistance to the "factually innocent."⁶⁸ The most damning criticism, however, seems to arise from the "sleeping attorney" cases in which the conduct of defense counsel at trial is clearly so deficient that findings of no harm by ineffective assistance under the *Strickland* test boggles the minds of many commentators.⁶⁹

62. See *Strickland*, 466 U.S. at 708-09 (Marshall, J., dissenting) (suggesting determination of objective criteria for attorney). Recognizing that defense counsel deserves "wide latitude" in making "tactical decisions," Justice Marshall suggested subjecting other aspects of providing a defense, including trial preparation, bail proceedings, client conferences, and filing appeals, among others, to uniform standards. *Id.*

63. See *id.* at 710 (stating objection to prejudice standard).

64. See *Strickland v. Washington*, 466 U.S. 668, 710 (1984) (discussing difficulty of determining prejudice for reviewing court). In addition to speculating that it may be impossible for a court to determine prejudice from a "cold record," he further suggested that evidence of such prejudice may be absent from the record precisely because of the ineffectiveness of defense counsel. *Id.*

65. See *id.* at 711-12 (stating lack of competent assistance is sufficient to produce constitutional harm). "A proceeding in which the defendant does not receive meaningful assistance in meeting the forces of the State does not, in my opinion, constitute due process." *Id.* at 712.

66. See *id.* at 712-15 (Marshall, J., dissenting) (objecting to majority opinion's presumption of defense counsel's reasonableness). Justice Marshall voiced concern that providing such strong deference to the presumption of competency of defense counsel could impose an "unusually weighty burden of persuasion" on defendants. *Id.* at 713.

67. See *McFarland v. Scott*, 512 U.S. 1256, 1259 (1994) (Blackmun, J., dissenting) (criticizing *Strickland* standard). Justice Blackmun described the *Strickland* standard as failing to provide more than representation by someone who "happens to be a lawyer." *Id.*; see also Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 438-39 (1996) (discussing Justice Blackmun's criticism of *Strickland*).

68. See Calhoun, *supra* note 57, at 427-37 (critiquing *Strickland* test).

69. See Klein, *supra* note 57, at 1446-49 (describing cases finding sleeping or intoxicated defense counsel an effective advocate). Klein also notes a case in California where the defense attorney was intoxicated during a trial that resulted in a death sentence, yet the court hearing the ineffective assistance claim found that, under *Strickland*, the defendant did not suffer constitutional harm. *Id.*; see also Jo Anna Chancellor Parker, *What a Poor Defense! Exploring the Ineffectiveness of Counsel for the Poor and Searching for a Solution*, 7 JONES L. REV. 63, 72-75 (2003) (criticizing "sleeping lawyer" style cases where severely impaired counsel's performance held effective under *Strickland*).

D. Ineffective Assistance and Plea Bargains

Soon after it established the test for assessing the effectiveness of defense counsel during criminal proceedings, the Supreme Court considered whether the ineffective assistance doctrine was applicable to plea bargains.⁷⁰ The Court concluded that the test announced in *Strickland* could apply to a plea bargain that a defendant had accepted as a result of ineffective assistance.⁷¹ While the prong related to the deficiency of counsel remains the same in assessing ineffective assistance related to a guilty plea, the prejudice prong was altered to require a showing of reasonable probability that, but for counsel's error, the defendant would have insisted on proceeding to trial.⁷²

Federal circuits and the majority of states have also applied the ineffective assistance doctrine in scenarios where a defendant has foregone a plea bargain and proceeded to trial.⁷³ The Supreme Court has yet to make a determination regarding the constitutionality of such decisions despite requests for certiorari.⁷⁴ The situations may not seem similar, but the relief for a plea bargain accepted due to ineffective assistance is equivalent to the relief generally provided for claims of ineffective assistance at trial—vacating the plea with an opportunity for authorities to pursue a new trial.⁷⁵ After completion of a trial following a foregone plea bargain, a new trial is not necessarily the best or even a reasonable option for granting relief to a convict now serving a sentence harsher than the one that would have been received had the plea bargain been accepted.⁷⁶

70. See *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (applying *Strickland* test to plea bargaining). *Lockhart*, decided the year after *Strickland*, supported the application of the ineffective assistance doctrine to guilty pleas. *Id.*

71. *Id.*

72. *Id.* at 58-59.

73. See Tara Harrison, Note, *The Pendulum of Justice: Analyzing the Indigent Defendant's Right to the Effective Assistance of Counsel When Pleading Not Guilty at the Plea Bargaining Stage*, 2006 UTAH L. REV. 1185, 1193 (2006) (highlighting federal circuits' and majority of states' position regarding ineffective assistance and foregone plea bargains).

74. See *Boria v. Keane*, 99 F.3d 492 (2d Cir. 1996), *cert. denied*, 521 U.S. 1118 (1997) (denying certiorari petition for case involving application of ineffective assistance doctrine to foregone plea bargain). The defendant in *Boria*, convicted of selling cocaine, successfully petitioned for a writ of habeas corpus based on defense counsel's ineffective assistance in not offering advice regarding a plea offer. *Id.* at 494-96, 499; see also *Coulter v. Herring*, 60 F.3d 1499 (11th Cir. 1995), *cert. denied sub nom. Coulter v. Jones*, 516 U.S. 1122 (1996). In *Coulter*, the defendant filed a petition for writ of habeas corpus asserting that his attorney provided ineffective assistance related to a foregone plea bargain opportunity. 60 F.3d at 1502; *Johnson v. Duckworth*, 793 F.2d 898 (7th Cir. 1986), *cert. denied*, 479 U.S. 937 (1986) (seeking habeas relief due to ineffective assistance and foregone plea bargain). The defendant in *Johnson v. Duckworth* filed a petition for writ of habeas corpus alleging that his defense counsel rendered ineffective assistance in not allowing him to make the final decision in regards to rejecting a plea offer. 793 F.2d at 898.

75. See *United States v. Morrison*, 449 U.S. 361, 364-65 (1981) (discussing appropriate relief for granting habeas corpus relief). Generally, when granting relief for Sixth Amendment violations, the appropriate remedy is to reverse a conviction, leaving the indictment intact with the authorities reserving the right to pursue a new trial. *Id.*

76. See 28 U.S.C. § 2225 (2000) (defining relief for successful habeas petitioners). The federal statute

Despite holdings in the majority of jurisdictions that an otherwise fair trial does not cure the constitutional harm of ineffective assistance in connection with a lost plea opportunity, there are state jurisdictions that hold otherwise—specifically, Louisiana, Utah, and Missouri.⁷⁷ The Louisiana Court of Appeals held that an individual who rejects a plea offer, for whatever reason, has not suffered a constitutional deficiency because they had the opportunity to proceed to trial.⁷⁸ This court also compared the plea bargain to a contract, noting that until a contract's completion, no rights have accrued.⁷⁹ Similarly, the Supreme Court of Utah held that the United States Constitution and the Utah Constitution both guarantee fair trials but not plea bargains.⁸⁰ The Court of Appeals for the Southern District of Missouri also held that a foregone plea bargain does not rise to the level of a constitutional violation if the defendant has received a fair trial.⁸¹

provides that a court granting habeas relief “shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.” *Id.*; see also *Magana v. Hofbauer*, 263 F.3d 542, 553 (6th Cir. 2001) (examining appropriate remedy for ineffective assistance related to foregone plea bargain). The *Magana* court held that a new trial was not sufficient to “neutralize” the constitutional harm suffered by an individual who missed a plea bargain opportunity due to ineffective assistance of defense counsel. 263 F.3d at 553. As a result, the *Magana* court ordered a reinstatement of the original plea offer unless authorities could rebut a presumption of vindictiveness in offering a less favorable bargain. *Id.* Similarly, the *Boria* court determined that the possibility of being able to conduct a new trial for the petitioner was uncertain at best and ordered the release of the petitioner, who had already served twice as much time as he would have under the original plea bargain offer. See *Boria*, 99 F.3d at 499 (reducing conviction to time served). But see *United States v. Gordon*, 156 F.3d 376, 381-82 (2d Cir. 1998) (ordering new trial for petitioner). The *Gordon* court distinguished its holding from the Second Circuit's previous holding in *Boria*, stating that granting a new trial was an appropriate remedy for a successful habeas petitioner who successfully argues ineffective assistance related to a foregone plea bargain. *Id.* at 381-82. The *Gordon* court relied on the highly deferential nature of the federal statute giving judges authority to grant relief for unconstitutional imprisonment. *Id.* at 382.

77. See *Louisiana v. Monroe*, 757 So. 2d 895 (La. Ct. App. 2000) (holding failure to accept plea bargain due to error does not render subsequent trial unfair); *Massachusetts v. Mahar*, 809 N.E.2d 989, 993 n.5 (Mass. 2004) (noting that Louisiana and Utah hold contrary positions); *Bryan v. Missouri*, 134 S.W.3d 795, 802-03 (Mo. Ct. App. 2004) (holding that failure to obtain plea bargain did not interfere with right to fair trial).

78. *Monroe*, 757 So. 2d at 898 (holding petitioner not eligible for relief based on plea bargain rejection). The *Monroe* court contrasted the harm suffered by an individual who accepted a plea bargain due to ineffective assistance, specifically the inability to proceed to trial with potential for a not guilty verdict, with the result in the present case and determined that having received a trial preserved the petitioner's legal protections. *Id.* The court further stated that a party who rejects a plea bargain has no constitutionally vested interest in the rejected plea because the defendant has not entered into an agreement with the state. *Id.*

79. See *id.* (comparing plea bargains to contracts).

80. See *Utah v. Geary*, 707 P.2d 645, 646 (Utah 1985) (holding petitioner not entitled to constitutional relief for lack of plea-bargain). The *Geary* court, quoting *Strickland*, stated that the issue was not whether the defendant would have received a plea bargain offer, but whether the outcome at trial would be different. *Id.* The *Geary* court based its decision on the petitioner's contention that more effective assistance would have resulted in a plea bargain offer. *Id.* However, in a separate, subsequent proceeding, the Supreme Court of Utah cited its holding in *Geary* when it refused to grant habeas relief based on a claim of ineffective assistance during an actual plea negotiation that resulted in a rejection of the offer. See *Utah v. Knight*, 734 P.2d 913, 919 n.7 (Utah 1987) (dismissing request for habeas relief based on rejected plea bargain).

81. See *Bryan*, 134 S.W.3d at 802-03 (holding foregone plea bargains resulting from attorney error irrelevant to ineffective assistance of counsel analysis). The court in *Bryan*, stating its position, noted:

E. The Antiterrorism and Effective Death Penalty Act

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA) in the wake of the Oklahoma City bombings.⁸² The AEDPA provided significant changes to the criminal code as a means to combat terror.⁸³ The AEDPA also contained provisions which altered the federal habeas statutes.⁸⁴ Despite the presence of the habeas provisions, President Clinton issued a statement upon signing the AEDPA in which he emphasized a need for the federal judiciary to maintain independent judgment on habeas corpus matters.⁸⁵

The AEDPA nonetheless affected the adjudication of habeas petitions claiming ineffective assistance due to the constraints it placed on the federal judiciary.⁸⁶ In particular, one provision of the AEDPA affects the federal review of decisions arising from state proceedings pursuant to writs of habeas corpus.⁸⁷ In such circumstances, federal courts are now limited as to when they

Bryan's second point concerns an alleged error, which, on its face, did not deprive him of a fair trial. The absence of this alleged "error" would not have caused the jury in Bryan's case to have a reasonable doubt about his guilt. Instead, the complaint that he was deprived of an opportunity to plead guilty tends to support the jury's determination that he was guilty of the offenses charged.

Absent a factual allegation by Bryan articulating how the trial he received was rendered unfair by trial counsel's conduct, this aspect of his ineffective assistance claim presents nothing for us to review. The law is clear that negotiations that do not result in a guilty plea, and a resultant embodiment of that plea in the court's judgment, do not implicate any constitutionally protected rights or liberty interests.

Id.

82. See Jordon T. Stanley, Comment, "Deference Does Not Imply Abandonment or Abdication of Judicial Review": *The Evolution of Habeas Jurisprudence Under AEDPA and the Rehnquist Court*, 72 UMKC L. REV. 739, 744 (detailing events surrounding AEDPA's passing).

83. *Id.* (discussing changes to criminal code in AEDPA).

84. *Id.* (discussing changes to federal habeas corpus statutes).

85. *Id.* (referring to President Clinton's signing statement). The statement read, "I have signed this bill because I am confident that the federal courts will interpret these provisions to preserve independent review of federal legal claims and the bedrock constitutional principle of an independent judiciary." Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32, Weekly Comp. Pres. Doc. 719 (Apr. 24, 1996).

86. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104-108, 110 Stat. 1214, 1218-26 (1996) (detailing amendment of federal habeas statute); see also Williams v. Taylor, 529 U.S. 362, 412 (2000) (describing AEDPA provision as placing new constraint on federal review of state habeas decisions); Melissa M. Berry, *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes "Clearly Established" Law Under The Antiterrorism and Effective Death Penalty Act*, 54 CATH. U. L. REV. 747, 747 (2005) (considering AEDPA as dramatic alteration to federal writ of habeas corpus); Adam N. Steinman, *Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA's Standard of Review Operate After Williams v. Taylor?*, 2001 WIS. L. REV. 1493, 1507-08 (2001) (analyzing how AEDPA altered federal review of state habeas petitions); Stanley, *supra* note 82, at 744 (criticizing effect of AEDPA on habeas process).

87. See 28 U.S.C. § 2254(d) (2006) (outlining limitation of federal courts ability to grant review of state

may grant a state prisoner's habeas petition.⁸⁸ As set forth in the statute, when considering a state prisoner's habeas petition related to a claim adjudicated on the merits in a state court, the federal bench may only grant an application when the state decision "was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States" or when the state court reached a decision "based on an unreasonable determination of the facts in light of the evidence presented."⁸⁹

One issue that may arise regarding the first prong of this provision is when there is a lack of Supreme Court precedent for the petitioner's claim.⁹⁰ The Court has described this provision as a "threshold issue," which lower courts have interpreted to mean that lack of a Supreme Court decision on point means that they must deny a habeas petition from a state prisoner.⁹¹ The effect of such interpretation prevents federal district courts from relying on circuit precedent.⁹² In addition, state prisoners are denied an opportunity for habeas relief, even if the Supreme Court decides a particular issue at a later date, as the AEDPA precludes retroactive application of new precedent.⁹³

There is also interplay between the AEDPA and the Supremacy Clause of

habeas decisions); *see also* Steinman, *supra* note 86, at 1502-03 (describing how AEDPA restrains federal jurisdiction in reviewing state habeas decisions).

88. *See* Berry, *supra* note 86, at 748 (describing federal limitation in reviewing state prisoners' habeas petitions).

89. *See* 28 U.S.C. § 2254(d) (2006) (stating specific limitation of federal review of state habeas claims). This portion of the statute, in its entirety, states:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id.

90. *See* Berry, *supra* note 86, at 789-90 (detailing issues caused by lack of Supreme Court precedent).

91. *See id.* (noting lower courts regarded AEDPA as bar to claims not related to prior Supreme Court decision). Although the Supreme Court has yet to hold that lack of Supreme Court precedent on an issue related to a habeas appeal requires denial by a district court, lower federal courts have reached this conclusion.

Id.

92. *See id.* (explaining AEDPA's interference with circuit court precedent). The AEDPA effectively binds a lower court from applying its own precedent in a case where there is no Supreme Court precedent to apply to a state prisoner's habeas petition. *Id.*

93. *See* Williams v. Taylor, 529 U.S. 362, 379-82 (2000) (holding AEDPA bars retroactive application of new Supreme Court precedent). AEDPA bars a federal court from applying new Supreme Court precedent to a state proceeding concluded before the new precedent's creation. *Id.*; *see also* Stanley, *supra* note 82, at 744-45 (discussing anti-retroactivity rule of AEDPA). The Court has determined that AEDPA effectively codifies its own precedent by barring retroactive application of new precedent. Stanley, *supra* note 82, at 744-45.

the United States Constitution.⁹⁴ Legal scholars have questioned the constitutionality of the AEDPA in relation to the Supremacy Clause, suggesting that the AEDPA impermissibly constrains federal courts from adjudicating federal issues.⁹⁵ Nonetheless, the Fourth Circuit Court of Appeals has held that the AEDPA does not violate the Supremacy Clause, and the Supreme Court has yet to rule on this question.⁹⁶

III. ANALYSIS

The federal circuits and state courts have generally accepted the ineffective assistance doctrine as applicable to a defendant's foregone plea bargain opportunity.⁹⁷ Nonetheless, there remains a small minority of state jurisdictions that reject the application of this doctrine to foregone plea bargains.⁹⁸ The Supreme Court can resolve this split, but has so far refused directly to address the issue.⁹⁹ In the meantime, the *Strickland* standard and the habeas corpus provisions of the AEDPA, both criticized for their negative impact on defendants seeking review of convictions, affect the adjudication of ineffective assistance claims related to foregone plea bargains.¹⁰⁰

94. See U.S. CONST. art. VI, cl. 2 (declaring supremacy of federal law). "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby." *Id.*; see also James S. Liebman & William F. Ryan, "Some Effectual Power": *The Quantity and Quality of Decisionmaking Required Under Article III Courts*, 98 COLUM. L. REV. 696, 850-51 (1998) (analyzing AEDPA in relation to supremacy of federal courts); Dan Poulson, Note, *Suspension for Beginners: Ex Parte Bollman and the Unconstitutionality of the 1996 Antiterrorism and Effective Death Penalty Act*, 35 HASTINGS CONST. L.Q. 373, 389-95 (2008) (evaluating the constitutionality of AEDPA in light of Supremacy Clause).

95. See Liebman & Ryan, *supra* note 94, at 851 (describing federal court "prestige and authority" as dependant on supremacy); see also Poulson, *supra* note 94, at 389-90 (considering body of legal scholarship criticizing AEDPA under Supremacy Clause).

96. See *Mueller v. Angelone*, 181 F.3d 557, 572-73 (4th Cir. 1999), *cert. denied*, 527 U.S. 1065 (1999) (holding AEDPA not violative of Supremacy Clause). The *Mueller* court dismissed the Supremacy Clause argument, stating that the petitioner's real argument related not to the Supremacy Clause, but rather to the Suspension Clause, and that federal circuit and Supreme Court precedent already held that AEDPA does not violate the Suspension Clause. *Id.*; see also Poulson *supra* note 94, at 389 (describing lack of Supreme Court authority regarding AEDPA and Supremacy Clause).

97. See Harrison, *supra* note 73, at 1193 (noting federal circuits and majority of states apply ineffective assistance to foregone plea bargains).

98. See *id.* (acknowledging minority of states unresponsive of ineffective assistance applicable to foregone plea bargains).

99. See *id.* at 1203 (pointing out lack of Supreme Court precedent); *supra* note 74 and accompanying text (considering lack of Supreme Court decision regarding ineffective assistance and foregone plea bargains).

100. See *Goldberg v. Tracy*, 247 F.R.D. 360, 394-400 (E.D.N.Y. 2008) (applying *Strickland* and AEDPA to habeas petition involving foregone plea bargain). The *Goldberg* court demonstrated the nexus between *Strickland* and the AEDPA in finding that the state court properly applied the *Strickland* standard in denying petitioner habeas relief in relation to a foregone plea opportunity and that the AEDPA prevented further review by the federal district court. *Id.*; see *supra* notes 58-69 and accompanying text (examining criticism of *Strickland* standard); *supra* notes 88-96 and accompanying text (discussing AEDPA and accompanying criticism).

While it is true that the Constitution does not guarantee a criminal defendant the right to a plea bargain, other constitutional guarantees do apply to the plea bargaining process.¹⁰¹ These include the right to effective assistance of counsel during the plea bargaining stage of the criminal process.¹⁰² In light of current federal law, specifically the habeas corpus provisions of AEDPA and the *Strickland* rule, the minority jurisdictions that do not apply the ineffective assistance doctrine may remain isolated from review by the federal courts on this issue.¹⁰³

The *Strickland* standard sets an extremely high burden for a criminal defendant to meet.¹⁰⁴ As cases involving sleeping or intoxicated defense counsel have demonstrated, at times in capital cases where the death penalty has been meted out, even performance by an attorney so poor as to shock the conscience can pass the test.¹⁰⁵ The *Strickland* standard is United States law as determined by the Supreme Court, so misapplication by a state court could be subject to review in a federal court under the AEDPA.¹⁰⁶ This test, however, is so difficult to pass that petitioners rarely successfully overcome it.¹⁰⁷ As such, even though reviewable under the AEDPA, a habeas petition involving ineffective assistance applicable to a foregone plea bargain that a state court has denied under *Strickland* may not expose that court's underlying doctrinal approach to ineffective assistance and foregone plea bargains to federal review as it is very unlikely that the state court's application of the *Strickland* standard will be overruled.¹⁰⁸

101. See *supra* notes 23-28 and accompanying text (discussing constitutional posture of plea bargaining and applicability of equal protection to plea bargains).

102. See *Hill v. Lockhart*, 474 U.S. 52, 58-60 (1985) (holding *Strickland* test applies in context of plea bargains).

103. See *Berry*, *supra* note 86, at 789-90 (analyzing issue of Supreme Court's lack of precedent when AEDPA applies). Lower federal courts routinely decline to consider habeas petitions when there is a dearth of Supreme Court precedent related to the petitioner's assertion of the issue. *Id.*; see also *supra* note 74 and accompanying text (establishing lack of Supreme Court precedent related to foregone plea bargains and ineffective assistance).

104. See *supra* note 56 and accompanying text (highlighting rarity of successful claim for ineffective assistance of counsel).

105. See *supra* note 69 and accompanying text (discussing "sleeping attorney" cases and *Strickland* standard).

106. See *supra* note 45 and accompanying text (explaining *Strickland* standard as Supreme Court doctrine); *supra* notes 90-93 (discussing AEDPA's provision limiting federal review of state habeas petitions to settled Supreme Court law).

107. See *supra* note 56 and accompanying text (noting petitioners rarely overcome *Strickland* standard).

108. See *Utah v. Geary* 707 P.2d 645, 646-47 (Utah 1985) (holding petitioner failed to meet *Strickland* standard); *supra* note 56 and accompanying text (highlighting difficulty in successfully arguing ineffective assistance). The *Geary* court denied the petitioner habeas relief, holding that he had not met the *Strickland* burden and, further, that there was no constitutional right to apply the ineffective assistance doctrine to a foregone plea bargain. *Geary*, 707 P.2d at 646-47. If a federal court were to sit in review of the *Geary* decision, or one similar thereto, under the AEDPA, its review would be limited to the *Strickland* determination upon which the *Geary* court reached its holding. See *supra* notes 89-92 (discussing AEDPA's limitation of review by federal courts to state decisions based on Supreme Court precedent).

Even if a federal court sitting in review of a state decision denying a habeas petition were inclined to set aside a decision from a minority jurisdiction, the AEDPA may still prevent a reversal of the state court's ruling.¹⁰⁹ There is currently no Supreme Court ruling regarding applicability of the ineffective assistance doctrine to foregone plea bargains and, as such, a federal court is not free to provide habeas relief to a petitioner denied relief by a state court's holding that there is no constitutional guarantee of effective assistance in rejecting a plea bargain.¹¹⁰ Notwithstanding its inability to grant relief to the petitioner, a federal court may be free to disagree with a decision of the state court, essentially declaring the rights of the petitioner without being able to fulfill them.¹¹¹ As such, the AEDPA effectively prevents the federal courts from reaching the states in their jurisdiction on characteristically federal matters.¹¹² The minority states are free to interpret the Sixth Amendment while the *Strickland* test and the AEDPA, working in tandem, create a legal catch-22 that prevents federal intervention, except by the Supreme Court.¹¹³

While not directly related to the issues of ineffective assistance or plea bargains, the constitutionality of the AEDPA may have collateral impact.¹¹⁴ Currently, the major difference in opinion regarding the applicability of the ineffective assistance doctrine to foregone plea bargains is not between the federal circuits.¹¹⁵ Rather, the discrepancy lies between certain states and the federal circuits.¹¹⁶

109. See *supra* notes 89-92 and accompanying text (describing AEDPA's limitation of federal court review of state habeas petitions).

110. See *supra* note 74 and accompanying text (discussing lack of Supreme Court decisions regarding ineffective assistance and foregone plea bargains).

111. See *Berry, supra* note 86, at 790 (describing limitations imposed upon federal courts by AEDPA). The AEDPA limits federal courts such that they cannot apply their own precedent and grant relief to a petitioner seeking relief, after a state ruling on the merits, if there is no Supreme Court decision controlling the issue. *Id.*

112. *Id.* (discussing AEDPA limitation on federal courts).

113. See *supra* notes 104-112 and accompanying text (analyzing limitations of habeas review resulting from AEDPA and *Strickland* standard).

114. See *Liebman & Ryan, supra* note 94, at 851 (analyzing Supremacy Clause's applicability to AEDPA). The Supremacy Clause stands for the proposition that the federal judiciary under Article III of the United States Constitution shall have control over the adjudication of constitutional questions. *Id.*; see also *Poulson, supra* note 94, at 389-90 (discussing role of Supremacy Clause and AEDPA). Ultimately, the AEDPA may function less to curtail federal courts in their ability to address constitutional imperfections in state convictions, but may nonetheless ultimately prevent the federal judiciary from crafting remedies to correct the problems identified.

115. See *supra* note 73 and accompanying text (describing concurrence among federal circuits regarding ineffective assistance and foregone plea bargains).

116. See *Louisiana v. Monroe*, 757 So. 2d 895, 899 (La. Ct. App. 2000) (holding petitioner not eligible for relief). The Louisiana court held that a subsequent effective trial delivered the constitutional protections guaranteed to the defendant who argued that an error that caused him to reject a plea bargain violated his rights. *Id.* at 897-98; see also *Utah v. Knight*, 734 P.2d 913, 919 n.7 (Utah 1987) (dismissing request for habeas release based on rejected plea bargain). Quoting its decision in *Utah v. Geary*, the *Knight* court dismissed the habeas petition, stating that although the Constitution guarantees a fair trial with effective assistance of counsel, a defendant has no constitutional right to a plea bargain. *Knight*, 734 P.2d at 919 n.7.

If the Supreme Court were to void the AEDPA because it violated a provision of the federal Constitution, such as the Supremacy Clause, lower federal courts could return to considering habeas petitions from state convicts under the de novo standard that was in place before enactment of the AEDPA.¹¹⁷ However, one should note that since its inception the AEDPA has been consistently applied and upheld by the Supreme Court.¹¹⁸ While there may be a consensus among some scholars that the AEDPA circumvents constitutional protections, the Supreme Court continues to uphold and apply it.¹¹⁹

The AEDPA may nonetheless allow for states to maintain and apply rules of federal constitutionality in a manner inconsistent with the federal circuit in which they lie.¹²⁰ Consistency in the application of federal law throughout the whole of the United States is the aim and promise of the Supremacy Clause.¹²¹ The Court may need to address any divergence allowed by the AEDPA in order to maintain the consistency of constitutional jurisprudence.¹²²

117. See Berry, *supra* note 86, at 748-49 (analyzing standard of review under AEDPA). Before the habeas corpus provisions of the AEDPA went into effect, the federal courts reviewed habeas petitions of state convicts under a de novo standard. *Id.* The AEDPA changed the standard of review to one deferential to state court decisions. *Id.*; see also Steinman, *supra* note 86, at 1496-510 (analyzing historical standard of review of state habeas decisions by federal courts). In 1953, the Supreme Court held that federal courts reviewing habeas petitions for state convicts should review the merits using a de novo standard. *Brown v. Allen*, 344 U.S. 443, 506 (1953) (holding state decisions as non-binding for federal habeas purposes); see also Steinman, *supra* note 86, at 1496-97. In 1989, the Court held in *Teague v. Lane* that a heightened but not strictly deferential standard of review was applicable and then held in 2000 in *Williams v. Taylor* that under the AEDPA the standard of review was to be strictly deferential to state court decisions reached on the merits. See Steinman, *supra* note 86, at 1496-97.

118. See Stanley, *supra* note 82, at 746-47 (noting Supreme Court review and approval of AEDPA habeas provisions). In comparison to the federal district and circuit courts, the Supreme Court has released relatively few decisions regarding the AEDPA and habeas review, but nonetheless has examined and upheld several aspects of the AEDPA habeas provisions. *Id.*

119. See Poulson, *supra* note 94, at 388-99 (analyzing constitutionality of AEDPA). Several legal scholars criticize the constitutionality of the AEDPA, specifically under the Supremacy Clause. *Id.* at 389-95. Additionally, scholars question whether habeas modifications under the AEDPA are a constitutional exercise of Congress's powers in light of the Suspension Clause. *Id.* at 395-400; see also *supra* note 118 and accompanying text (discussing Supreme Court's application and approval of AEDPA habeas provisions).

120. See *Louisiana v. Monroe*, 757 So. 2d 895, 897-98 (La. Ct. App. 2000) (holding ineffective assistance doctrine inapplicable to foregone plea bargains). In *Monroe*, the Louisiana Court of Appeals, located in the Fifth Circuit, held that a criminal defendant has no vested interest in a by-passed plea bargain and suffers no harm when their case proceeds to trial, notwithstanding possible error at the plea bargaining stage. *Id.* The Fifth Circuit, however, has held that the error of ineffective assistance of counsel applies to a foregone plea bargain. See *United States v. Ridgeway*, 321 F.3d 512, 514 (5th Cir. 2003) (confirming applicability of ineffective assistance to foregone plea bargains). Although the *Ridgeway* court rejected the petitioner's claim of ineffective assistance, holding that it failed to meet the *Strickland* standard, the court nonetheless acknowledged that a habeas remedy might be available to a convict claiming ineffective assistance in relation to a rejected plea bargain offer. *Id.* at 515.

121. See U.S. CONST. art. VI, cl. 2; Liebman & Ryan, *supra* note 94, at 763 (noting intent behind Supremacy Clause). One of the aims of the Supremacy Clause was to achieve consistency in state courts in the application of federal law. See Liebman & Ryan, *supra* note 94, at 763.

122. See *supra* note 92 and accompanying text (discussing AEDPA's bar to federal courts applying circuit precedent to state habeas petitions).

The AEDPA also raises the issue of retroactivity of Supreme Court decisions.¹²³ In 1985, *Lockhart* applied the ineffective assistance doctrine to plea bargains accepted by a criminal defendant.¹²⁴ If the Supreme Court were to rule that *Lockhart* stands for the proposition that the ineffective assistance doctrine applied to plea bargains generally, whether accepted or rejected, there could be a significant effect on when the rule regarding foregone plea bargains went into effect, calling into question how to apply the anti-retroactivity provisions of the AEDPA.¹²⁵

Another issue that we must consider is the proper remedy courts should grant to successful habeas petitioners who have foregone plea bargains, because currently there are differing opinions in the federal circuits regarding the proper remedy.¹²⁶ For example, the Sixth Circuit held that reinstatement of the original plea bargain offer is the proper remedy while the Second Circuit held that a new trial may be an appropriate remedy.¹²⁷ The federal statute controlling the remedies available to successful habeas petitioners is highly discretionary, and the Supreme Court may be reluctant to supersede it by declaring a specific remedy applicable in all circumstances.¹²⁸

If the Supreme Court holds that the ineffective assistance doctrine applies to

123. See Steinman, *supra* note 86, at 1538-39 (analyzing issues of retroactivity relating to AEDPA). In *Teague v. Lane*, the Supreme Court held that new rules of constitutional law were not retroactively applicable in habeas petitions when the rules were not in place at the time of conviction. *Id.* at 1498-99. See generally *Teague v. Lane*, 489 U.S. 288 (1989) (establishing anti-retroactivity doctrine). Though the AEDPA may either incorporate or abrogate the anti-retroactivity rules established by the *Teague* Court, the anti-retroactivity doctrine nevertheless persists in some manner under the AEDPA. See Steinman, *supra* note 86, at 1538-39.

124. See *supra* notes 70-71 (describing holding of *Lockhart* as relating to ineffective assistance and plea bargains).

125. See *Hill v. Lockhart*, 474 U.S. 52, 58-59 (applying *Strickland* test to plea bargains). The *Lockhart* Court considered the issue of the applicability of the ineffective assistance doctrine to a case where the petitioner had accepted a plea bargain and waived the right to a trial. *Id.* at 54. At no point in its decision does the *Lockhart* Court contemplate the *Strickland* test's applicability to a situation where the petitioner has bypassed a plea offer due to ineffective assistance. *Id.* Applying the ineffective assistance doctrine to foregone plea bargains, federal appeals and state courts have applied *Lockhart* to determine that habeas relief is an appropriate remedy. See, e.g., *Magana v. Hofbauer*, 263 F.3d 542, 547 (6th Cir. 2001) (applying *Lockhart* to ineffective assistance and foregone plea bargain); *Johnson v. Duckworth*, 793 F.2d 898, 899 (7th Cir. 1986); *Massachusetts v. Mahar*, 809 N.E.2d 989, 992 (Mass. 2004) (citing *Lockhart* in cases of ineffective assistance related to foregone plea bargains); see also *supra* note 123 and accompanying text (analyzing anti-retroactivity doctrine and applicability under AEDPA).

126. See *supra* note 76 (contrasting different remedies crafted by circuit courts for successful foregone plea bargain habeas petitions).

127. See *Magana*, 263 F.3d at 553 (holding new trial insufficient remedy for missed plea bargain). The *Magana* court determined that an appropriate remedy for a convict who had missed a plea bargain opportunity due to the ineffective assistance of counsel was to reinstate the original plea bargain. *Id.*; cf. *United States v. Gordon*, 156 F.3d 376, 381-82 (2d Cir. 1998) (ordering new trial for petitioner). The Second Circuit held that an appropriate remedy for ineffective assistance in the plea bargain stage that resulted in a subsequent trial might be the imposition of another trial. *Gordon*, 156 F.3d at 381-82.

128. See *Gordon* 156 F.3d at 382 (describing federal habeas statute as deferential to judge granting relief). The *Gordon* court held that 28 U.S.C. § 2255 leaves the determination of the proper remedy for a successful habeas petitioner "to the sound discretion" of the granting judge. *Id.*

foregone plea bargains, it also likely will need to address the application of the *Strickland* standard.¹²⁹ In *Lockhart*, the Court altered the prejudice component of the *Strickland* test, requiring that the petitioner prove that “but for the ineffective assistance of counsel” the petitioner would not have accepted the plea bargain.¹³⁰ In regard to foregone plea bargains, a similar alteration to *Strickland* might require that the petitioner demonstrate that “but for the ineffective assistance” they would have accepted the plea bargain that was offered.¹³¹

IV. CONCLUSION

The *Strickland* standard and the AEDPA allow a minority of state jurisdictions to refuse to apply the ineffective assistance doctrine to foregone plea bargains without review by the federal circuits, which are in general harmony regarding this issue. As such, it seems important for the Supreme Court to render a resolving verdict. History relates, however, that the Court has moved slowly regarding the right to counsel and the ineffective assistance doctrine. Considering that the Court has refused certiorari on multiple cases involving this issue, it seems unlikely that it will provide clarification in the near future.

In the meantime, the power of the federal circuit and district courts to apply federal precedent remains curtailed. As a result the supremacy of federal law is drawn into question. A minority of states have created a small pocket of constitutional jurisprudence, free from federal review, except by the Supreme Court. While Congress drafted the AEDPA, in part, to guarantee that state death penalty sentences would be carried out free from excessive federal intervention, could Congress have intended to allow an execution to be carried out by a state free from federal review on a federal issue? Perhaps it will be a death penalty case involving a minority state’s refusal to recognize the defendant’s right to effective assistance in rejecting a plea bargain that will finally bring review of this issue before the Supreme Court.

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129. See *supra* notes 47-48 and accompanying text (describing two-prong *Strickland* test).

130. See *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (altering *Strickland* test’s prejudice prong to apply to plea bargain accepted because of ineffective assistance). The *Lockhart* Court held that “in order to satisfy the ‘prejudice’ requirement, the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Id.*

131. See *Magana v. Hofbauer*, 263 F.3d 542, 547-48 (6th Cir. 2001) (applying modified *Strickland* prejudice prong to foregone plea bargain). The *Magana* court applied the *Strickland* prejudice prong in determining that the petitioner had suffered from ineffective assistance of counsel, but in so doing necessarily altered the *Lockhart* application stating that the petitioner must show “but for his counsel’s advice, there is a reasonable probability that he would have pleaded guilty.” *Id.*; see also *supra* note 125 (discussing *Lockhart* decision).