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REMEDYING THE REMEDY: *JOHNSON v. URIBE* AND DETERMINING PREJUDICE FOR SIXTH AMENDMENT CLAIMS

KEITH KESSINGER *

Abstract: On November 5, 2012, the Ninth Circuit Court of Appeals declined to rehear Kennard G. Johnson's habeas petition en banc, thus upholding the appellate panel's decision to vacate his guilty plea for want of effective assistance of counsel, which overturned the district court's resentencing remedy. The panel worked within the standard of review to establish prejudice during the plea negotiations, which provided not only an appropriate remedy but also a pragmatic framework for lower courts to assess similar claims of ineffective assistance of counsel. In dissent to the denial of rehearing en banc, Chief Judge Alex Kozinski reasoned that the appellate panel abused its own discretion by not showing the proper deference to the district court's findings and misapplying the test for ineffective assistance of counsel. Ultimately, the Ninth Circuit panel provided a workable Sixth Amendment framework for the lower courts to follow. This framework diminishes the chance that future indigent defendants, like Johnson, will have to suffer the injustice of receiving ineffective assistance of counsel with an inadequate remedy on appeal.

INTRODUCTION

In September 2006, Kennard G. Johnson was in custody and awaiting trial in California for theft-related felonies pertaining to defrauding an auto dealership.¹ To witness the birth of his child, Johnson entered into a *Vargas* waiver, which allowed for Johnson to be released on his own recognizance in exchange for a guilty plea to all of the charges and enhancements as well as a prison sentence of fourteen years and four months.² If Johnson complied with the conditions of his release and returned for resentencing, the prosecutor would consent to a reduced sentence of six years.³ After Johnson failed to ap-

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¹ See *Johnson v. Uribe (Johnson III)*, 700 F.3d 413, 420–21 (9th Cir. 2012), *cert. denied*, 134 S. Ct. 617 (2013); *People v. Johnson (Johnson I)*, No. E045514, 2009 WL 1365764 (Cal. Ct. App. June 17, 2009).

² See *Johnson III*, 700 F.3d at 421–22; *People v. Vargas*, 273 Cal. Rptr. 48, 52 (1990) (upholding a structured plea, in which defendant receives a longer sentence for failing to appear at a future hearing).

³ *Johnson III*, 700 F.3d at 422.

pear for resentencing, which violated his *Vargas* waiver, the state court imposed the sentence of fourteen years and four months.⁴

Johnson later learned that his sentence exceeded the California statutory maximum because some of the enhancements were not compliant with the California Penal Code.⁵ Johnson's attorney, Deputy Public Defender David Durdines, did not notice this error when negotiating the *Vargas* waiver because he failed to research possible sentencing options for the charges and enhancements.⁶

After exhausting his state appeals, Johnson filed a habeas corpus petition in the United States District Court for the Central District of California.⁷ Johnson alleged ineffective assistance of counsel, a Sixth Amendment violation, because Durdines failed to adequately advise him prior to the *Vargas* plea agreement or object to his sentence in court.⁸ The district court agreed and ordered the state court to either resentence Johnson within one hundred and twenty days to a lawful sentence or release him.⁹ On appeal, a three-judge panel for the Ninth Circuit Court of Appeals affirmed the district court's decision but vacated the remedy.¹⁰ The panel reasoned that the ineffective assistance of counsel tainted the entire plea negotiations and vacating the guilty plea was the only way to return Johnson to the position he would have been in had no Sixth Amendment violation occurred.¹¹ On its own motion, the Ninth Circuit ultimately declined to rehear Johnson's case en banc.¹² In dissent, Chief Judge Alex Kozinski argued that the Ninth Circuit panel did not afford the district court the proper deference and abused its own discretion in vacating the district court's remedy.¹³

Part I of this Comment summarizes the factual and procedural history of Johnson's criminal case. Part II then examines how the Ninth Circuit panel applied the abuse-of-discretion standard to the district court's decision, leading to a stronger finding of prejudice and a divergent habeas remedy. Finally, Part

⁴ *Id.*

⁵ See *id.* at 421–22; *Johnson v. Uribe (Johnson II)*, No. EDCV 10-0164-GW (RC), 2010 WL 5671780, at *5 (C.D. Cal. Nov. 12, 2010), *aff'd in part, vacated in part*, 700 F.3d 413 (9th Cir. 2013) (noting that the prosecution improperly added three prior crime enhancements to Johnson's amended charges); see also CAL. PENAL CODE § 667.5 (West 2012) (describing which enhancements may add to a defendant's felony prison term).

⁶ See *Johnson III*, 700 F.3d at 421–22, 425–26.

⁷ See *id.* at 422–23. In his state appeals, Johnson argued Durdines improperly advised him to accept a plea agreement that violated both California's penal code and appellate case law. *Johnson I*, 2009 WL 1365764, at *2.

⁸ *Johnson III*, 700 F.3d at 423; see *Johnson II*, 2010 WL 5671780, at *2; see also U.S. CONST. amend. VI.

⁹ See *Johnson III*, 700 F.3d at 423; *Johnson II*, 2010 WL 5671780, at *18.

¹⁰ *Johnson III*, 700 F.3d at 420.

¹¹ See *id.* at 427.

¹² See *id.* at 415.

¹³ See *id.* at 416–17 (Kozinski, C.J., dissenting).

III argues that the panel established a pragmatic framework to assess Sixth Amendment challenges in the context of plea negotiations and provided clear guidance for prisoners to vindicate their constitutional rights.

I. FROM ARREST TO HABEAS APPEAL

On August 16, 2005, Kennard G. Johnson was charged with three felonies and various criminal history enhancements, in relation to submitting a fraudulent check to a car dealership and providing false information on a credit application in order to steal a car.¹⁴ Johnson pled not guilty and was initially released on conditional own-recognizance status, pending a preliminary hearing.¹⁵

At the preliminary hearing on April 10, 2006, Johnson met his defense counsel, Deputy Public Defender David Durdines, for the first time.¹⁶ That day, Johnson and Durdines spoke only briefly in the courtroom and their subsequent communication over the next five months was limited to when Johnson appeared in court, with each conversation lasting only a couple of minutes.¹⁷ Durdines did not ask Johnson about his criminal background or about the events leading to the arrest.¹⁸

On April 19, 2006, Johnson pled not guilty at his arraignment, where he faced the same charges as well as two prior strikes and prison terms.¹⁹ On May 26, 2006, the prosecution amended the charges, adding a count for forgery and three additional prison terms as enhancements to Johnson's sentence.²⁰ Although the additional prison terms were not proper under California Penal Code § 667.5(b), they were included as enhancements.²¹ With Durdines as counsel, Johnson pled not guilty, but they did not discuss the amended charges or enhancements.²²

After failing to appear at his June 16, 2006 hearing, the court revoked Johnson's bail.²³ At a pretrial hearing on September 8, 2006, Johnson told

¹⁴ Johnson v. Uribe (*Johnson III*), 700 F.3d 413, 420 (9th Cir. 2012), *cert. denied*, 134 S. Ct. 617 (U.S. Nov. 12, 2013).

¹⁵ *Id.* at 420–21.

¹⁶ *Id.* at 421.

¹⁷ *Id.*

¹⁸ *Id.* Following his preliminary hearing, Johnson was held to answer for every felony charge. *Id.*

¹⁹ *Id.*; Johnson v. Uribe (*Johnson II*), No. EDCV 10-0164-GW (RC), 2010 WL 5671780, at *6 (C.D. Cal. Nov. 12, 2010).

²⁰ *Johnson III*, 700 F.3d at 421.

²¹ *Id.* at 421, 423; *Johnson II*, 2010 WL 5671780, at *13; *see* CAL. PENAL CODE § 667.5 (West 2012).

²² *Johnson III*, 700 F.3d at 421. Prior to May 30, 2006, Johnson rejected a plea offer of five years and a strike. *Id.* Johnson had discussed the potential plea with Durdines for two or three minutes but was not advised by Durdines whether to accept the deal. *Id.*

²³ *Johnson II*, 2010 WL 5671780, at *7.

Durdines that he wanted to be released to witness the birth of his child.²⁴ The prosecutor would only agree to a release, however, if Johnson entered into a *Vargas* waiver, which required a guilty plea to all the charges and enhancements.²⁵ If Johnson agreed to these terms and complied with the conditions of his release, the prosecutor would recommend a sentence of six years at resentencing and would not file new charges against Johnson for failing to appear at his hearing on June 16, 2006.²⁶ If Johnson failed to comply with the conditions of the release, the prosecutor would recommend a sentence of fourteen years and four months.²⁷

Before relaying the plea offer to Johnson, Durdines failed to discover that the sentence of fourteen years and four months exceeded the maximum statutory sentence that Johnson could receive.²⁸ Nevertheless, Johnson agreed to the *Vargas* waiver, and the court accepted the agreement.²⁹ After his release, Johnson appeared at Superior Court for resentencing on September 22, 2006.³⁰ The district court rescheduled the resentencing to September 29, 2006, and Johnson failed to appear for that hearing.³¹ On March 21, 2008, the California Superior Court held that Johnson violated the terms of his *Vargas* waiver and imposed a prison sentence of fourteen years and four months.³²

On February 2, 2010, after exhausting his state appeals, Johnson filed a habeas petition in the United States District Court for the Central District of California to vacate his unlawful sentence.³³ Johnson argued that Durdines provided ineffective assistance of counsel, a Sixth Amendment violation, because he failed to adequately advise him during the plea process or object to the sentence.³⁴

Magistrate Judge Rosalyn Chapman of the United States District Court for the Central District of California agreed that Johnson received ineffective assistance of counsel and recommended that the district court grant the habeas petition.³⁵ As for the remedy, she concluded that Johnson would have accepted the *Vargas* waiver if Durdines ensured that the maximum sentence fell within

²⁴ *Johnson III*, 700 F.3d at 421

²⁵ *Id.* at 421–22 (citing *People v. Vargas*, 273 Cal. Rptr. 48 (1990)).

²⁶ *Id.* at 422.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 423.

³⁴ *Id.*; see also U.S. CONST. amend. VI; *Lafler v. Cooper*, 132 S. Ct. 1376, 1390–91 (2012) (holding that ineffective assistance of counsel led to defendant not accepting favorable plea deal, resulting in harsher sentence after trial).

³⁵ *Johnson III*, 700 F.3d at 423; *Johnson II*, 2010 WL 5671780, at *18.

the statutory limits.³⁶ The district court accepted the magistrate judge's recommendations and ordered for Johnson to be released within one hundred twenty days, unless the San Bernardino County Superior Court properly resentenced Johnson within that timeframe.³⁷ On March 4, 2011, the San Bernardino County Superior Court reduced Johnson's maximum sentence to eleven years and four months, which was within California's statutory limits.³⁸

On January 31, 2011, Johnson appealed the district court's ruling, arguing that the court should vacate his entire conviction.³⁹ A three-judge panel for the Ninth Circuit Court of Appeals affirmed the district court's grant of habeas relief but vacated the remedy.⁴⁰ The panel reasoned that Durdines's ineffective assistance tainted the entire plea negotiations, not just the sentence calculation.⁴¹ As a result, the panel held that vacating the guilty plea was the only way to place Johnson in his original position, before the Sixth Amendment violation occurred.⁴²

Concerned about a potential abuse of discretion by the panel, the Ninth Circuit then considered on its own motion whether to rehear Johnson's case en banc.⁴³ Ultimately, the Ninth Circuit declined to rehear the case, over the dissent of Chief Judge Kozinski.⁴⁴ Among the objections, Kozinski argued that the panel abused its discretion because it did not afford the district court the proper deference and misapplied the test for ineffective assistance of counsel.⁴⁵

II. REMEDYING AN INADEQUATE REMEDY

The Ninth Circuit panel acknowledged that Johnson received ineffective assistance of counsel but rejected the district court's remedy as an abuse of discretion.⁴⁶ Relying on the magistrate judge's findings, the panel determined that Durdines prejudiced Johnson's defense at an earlier stage and crafted a remedy that cured the entire Sixth Amendment violation.⁴⁷ In dissent, Chief Judge Kozinski argued that it was Johnson's burden to demonstrate, with a

³⁶ *Johnson III*, 700 F.3d at 423; *Johnson II*, 2010 WL 5671780, at *17.

³⁷ *Johnson III*, 700 F.3d at 423; see 28 U.S.C. § 636(b)(1)(B) (2006) (allowing a magistrate judge to convene a habeas hearing as well as issue findings and recommendations to the district court for post-conviction relief).

³⁸ *Johnson III*, 700 F.3d at 423.

³⁹ *Id.* at 420, 423.

⁴⁰ See *id.* at 420.

⁴¹ See *id.* at 420, 426–27.

⁴² See *id.* at 427.

⁴³ See *id.* at 415 (denying the petition to rehear the case en banc); *id.* at 416–18 (Kozinski, C.J., dissenting).

⁴⁴ See *id.* at 415 (majority order denying rehearing); *id.* at 416 (Kozinski, C.J., dissenting).

⁴⁵ See *id.* at 416–18 (Kozinski, C.J., dissenting).

⁴⁶ See *Johnson v. Uribe (Johnson III)*, 700 F.3d 413, 420, 426 (9th Cir. 2012), cert. denied, 134 S. Ct. 617 (2013).

⁴⁷ See *id.* at 427–28.

greater level of certainty, that Durdines prejudiced the defense during the plea negotiations.⁴⁸ Chief Judge Kozinski stated that resentencing was the proper remedy because the district court was unable to determine with certainty any prejudice to Johnson before the miscalculated plea.⁴⁹

A. The Ninth Circuit Panel Determines Prejudice and Vacates the Remedy

The Ninth Circuit panel vacated Johnson's guilty plea after determining that the district court's remedy was an abuse of discretion.⁵⁰ Within the Ninth Circuit, a court abuses its discretion when it makes an error of law, rests its decision on clearly erroneous findings of facts, or commits a clear error of judgment.⁵¹ To reach that determination, the panel followed the Ninth Circuit's two-pronged test and considered (1) whether the district court identified the correct legal standard for its decision, and (2) whether the district court's findings and application of facts to the correct legal standard were "illogical, implausible or without support in inferences that may be drawn from facts in the record."⁵²

Relying on the magistrate judge's findings and Sixth Amendment principles from recent Supreme Court decisions, the panel implied that the district court identified ineffective assistance of counsel as the correct legal standard.⁵³ Nevertheless, the panel rejected the lower court's assumption that Johnson would have accepted a legal *Vargas* waiver with effective counsel.⁵⁴ Such an assumption, the panel suggested, was an illogical abuse of discretion because it did not recognize that Johnson was prejudiced throughout the plea-bargaining process.⁵⁵

As the panel noted, to remedy a Sixth Amendment violation, courts are required to neutralize the taint of the constitutional violation and return the defendant back to the position before the violation occurred.⁵⁶ In determining the proper remedy, the panel relied on the Supreme Court's framework for ineffective assistance of counsel, established in *Strickland v. Washington*.⁵⁷ Fol-

⁴⁸ See *id.* at 418 (Kozinski, C.J., dissenting). Because *Johnson III* was amending a previous decision and denying a rehearing en banc, Chief Judge Kozinski's dissenting opinion preceded the majority opinion. See *id.* at 416–19; see also *Johnson v. Uribe*, 682 F.3d 1238, *amended and superseded by* 700 F.3d 413 (2012).

⁴⁹ See *Johnson III*, 700 F.3d at 417 (Kozinski, C.J., dissenting).

⁵⁰ *Id.* at 420, 426. (majority opinion).

⁵¹ *Id.* at 424 (citing *United States v. Ressay*, 679 F.3d 1069, 1086 (9th Cir. 2012)).

⁵² See *id.* at 424 n.5; *United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009).

⁵³ See *Johnson III*, 700 F.3d at 424–25.

⁵⁴ See *id.* at 426–27.

⁵⁵ See *id.*

⁵⁶ See *id.* at 425.

⁵⁷ See *id.* at 424–25, 427; *id.* at 417–18 (Kozinski, C.J., dissenting) (arguing that the panel misapplied the *Strickland v. Washington* framework); see also *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (establishing the test for ineffective assistance of counsel).

lowing *Strickland*, the petitioner must demonstrate that (1) counsel's deficient performance fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense.⁵⁸

The panel then relied on principles established in recent Supreme Court cases, *Missouri v. Frye* and *Lafler v. Cooper*.⁵⁹ In *Frye*, the Court emphasized that the Sixth Amendment applies to "all 'critical' stages of the criminal proceedings" and "that defense counsel have responsibilities in the plea bargain process . . . that must be met to render the adequate assistance of counsel."⁶⁰ Furthermore, in *Lafler*, the Supreme Court concluded that "[i]f a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it."⁶¹

In applying these principles to the magistrate judge's findings, the panel traced Durdines's deficient performance to when the prosecution amended the charges with the erroneous sentencing calculation.⁶² The panel reasoned that Durdines's lack of investigation into the sentencing enhancements as well as his misunderstanding of California Penal Code § 667.5(b) fell below an objective standard of reasonableness, satisfying the first prong of *Strickland*.⁶³ The panel also reasoned that Durdines's failure to object to the illegal sentencing enhancements fundamentally weakened Johnson's bargaining position and tainted the plea negotiations, which in turn constituted prejudice and satisfied the second prong of *Strickland*.⁶⁴ The panel stated that if Durdines properly objected to the illegal enhancements, Johnson may have received more favorable plea offers.⁶⁵

As a result, the panel vacated the guilty plea because the district court's remedy "[did] not go far enough" to account for the prejudice that occurred during the plea negotiations.⁶⁶ The panel therefore implied that the district court's inadequate resentencing remedy was an abuse of discretion because it was illogical.⁶⁷ According to the panel, vacating the guilty plea was the only logical remedy that cured the entire Sixth Amendment violation and restored Johnson to the position before the constitutional violation.⁶⁸

⁵⁸ See *Strickland*, 466 U.S. at 687.

⁵⁹ See *Johnson III*, 700 F.3d at 424, 426; see also *Missouri v. Frye*, 132 S. Ct. 1399, 1405, 1407 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376, 1387 (2012).

⁶⁰ *Frye*, 132 S. Ct. at 1405, 1407; see *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009).

⁶¹ *Lafler*, 132 S. Ct. at 1387.

⁶² See *Johnson III*, 700 F.3d at 427.

⁶³ See *id.* at 424–25, 427.

⁶⁴ See *id.* at 426–27.

⁶⁵ See *id.* at 427.

⁶⁶ See *id.* at 426–27.

⁶⁷ See *id.*

⁶⁸ See *id.*; see also *Lafler*, 132 S. Ct. at 1389 (emphasizing resentencing is inadequate remedy for all Constitutional violations); see also U.S. CONST. amend. VI.

B. In Dissent: Requiring Certainty to Establish Prejudice

Chief Judge Kozinski's application of the *Strickland* test differed from the panel's, attaching prejudice only to the miscalculated sentence.⁶⁹ Chief Judge Kozinski conceded that Durdines provided lackluster representation, but he noted that the panel only found a "mere suspicion of prejudice" in the plea negotiations, implying that the panel's findings did not satisfy *Strickland's* second prong or warrant a habeas remedy.⁷⁰

Chief Judge Kozinski stated that it was Johnson's burden to demonstrate with a greater certainty that Durdines's deficient performance prior to the plea prejudiced Johnson's defense.⁷¹ Instead, he noted the panel engaged in "untethered speculation" to find prejudice during the plea negotiations.⁷²

Chief Judge Kozinski concluded that the district court could only find, with any measure of certainty, that Durdines prejudiced Johnson's defense during the miscalculated plea.⁷³ As a result, Chief Judge Kozinski reasoned that the district court's resentencing remedy was not an abuse of discretion because it cured the concrete constitutional violation in the only logical way that was permitted.⁷⁴

III. THE CASE AGAINST AN APPELLATE RUBBERSTAMP

The Ninth Circuit panel's analysis in *Johnson v. Uribe* is a boon for both district courts and prisoners, as it provides a workable framework for Sixth Amendment challenges involving plea negotiations, an area that the Supreme Court has acknowledged but has provided little guidance.⁷⁵ Contrary to Chief

⁶⁹ See *Johnson III*, 700 F.3d at 417 (Kozinski, C.J., dissenting).

⁷⁰ See *id.* at 417–18.

⁷¹ See *id.*

⁷² See *id.* at 418. Chief Judge Kozinski stated the "untethered speculation" took the form of the panel's inability to predict the outcome of the hypothetical plea negotiations with effective assistance of counsel. See *id.* As a result, the panel did not want Johnson "'prejudiced by that uncertainty,'" which conflicts with the *Strickland* standard, according to Chief Judge Kozinski. See *id.* at 418 (quoting the majority opinion).

⁷³ See *id.* at 417–18.

⁷⁴ See *id.*

⁷⁵ See *Johnson v. Uribe (Johnson III)*, 700 F.3d 413, 426–28 (9th Cir. 2012), *cert. denied*, 134 S. Ct. 617 (2013); Richard E. Myers II, *The Future of Effective Assistance of Counsel: Rereading Cronin and Strickland in Light of Padilla, Frye, and Lafler*, 45 TEX. TECH L. REV. 229, 238 (2012) (highlighting the Supreme Court's recent willingness to entertain Sixth Amendment challenges involving pre-trial conduct, but noting that the Court has narrowly tailored its decisions, leaving litigators with little guidance and many unanswered questions); see also *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012) (holding that a defendant has a valid ineffective assistance of counsel claim if the defendant rejected a plea due to counsel's error and received a more severe sentence than offered in the rejected plea); *Missouri v. Frye*, 132 S. Ct. 1399, 1405, 1409 (2012) (holding that defendants may have a Sixth Amendment claim when counsel does not communicate formal plea offers); *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (holding that defendants receive ineffective assistance of counsel when they are not informed by counsel that a plea carries risk of deportation).

Judge Kozinski's fears, this decision does not upend federal habeas review for ineffective assistance of counsel claims.⁷⁶ Rather, the panel respected the precepts of appellate review, as it made rational inferences from the record to establish prejudice during the plea negotiations.⁷⁷ To fashion an appropriate Sixth Amendment remedy, the panel relied on recent Supreme Court decisions—unavailable to the district court—mandating that defendants are entitled to effective assistance of counsel throughout the plea bargaining process.⁷⁸

In particular, Chief Judge Kozinski's dissent, if adopted, would severely curtail the abuse-of-discretion standard, inhibiting an important check on habeas remedies.⁷⁹ By requiring the magistrate judge to expressly find ineffective assistance of counsel during the plea negotiation process, Chief Judge Kozinski's position would prevent appellate courts from reviewing how the lower courts apply facts to the law, thereby eliminating the second-prong of the abuse-of-discretion test.⁸⁰ As a result, Chief Judge Kozinski's dissent would turn the abuse-of-discretion standard into a rubberstamp, where appellate courts could overturn decisions only when the district court incorrectly identifies the legal standard.⁸¹

⁷⁶ See *Johnson III*, 700 F.3d at 427–28; *id.* at 416–18 (Kozinski, C.J., dissenting) (arguing that the panel's decision both contradicts the Supreme Court's instructions to leave the choice of habeas remedies with the district court and disregards the Ninth Circuit's own abuse of discretion standard).

⁷⁷ See *id.* at 425–28 (majority opinion) (holding that the district court's remedy was an abuse of discretion because it did not fully consider the rational inferences from the magistrate judge's findings); see also *United States v. Hickson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (noting that the Ninth Circuit's abuse of discretion test requires the appellate court to examine whether the lower court rationally applied the correct legal standard to the findings of facts); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147–48 (1803) (acknowledging that appellate tribunals are meant to review lower court decisions for “fact as well as law”).

⁷⁸ See *Johnson III*, 700 F.3d at 424–25 (relying on *Frye* and *Lafler* to fashion a remedy and noting that Johnson appealed the district court's decision to the panel in 2011—more than a year before the Supreme Court decided *Lafler* and *Frye*); see also *Lafler*, 132 S. Ct. at 1388 (explaining that “the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences”); *Frye*, 132 S. Ct. at 1407 (explaining that “[t]he reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires”).

⁷⁹ See *Johnson III*, 700 F.3d at 416–18 (Kozinski, C.J., dissenting); *Hill v. Humphrey*, 662 F.3d 1335, 1385 (11th Cir. 2001) (Martin, J., dissenting) (acknowledging that while federal courts must accord state criminal convictions substantial deference in habeas proceedings, federal courts must also “be vigilant to ‘guard against extreme malfunctions in the state criminal justice systems’” (quoting *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011))); Nathaniel Koslof, Comment, *Insurmountable Hill: How Undue AEDPA Deference Has Undermined the Atkins Ban on Executing the Intellectually Disabled*, 54 B.C.L. REV. E. SUPP. 189, 194 (2013) (explaining that an overly deferential standard of review of habeas petitions will preclude legitimate constitutional challenges).

⁸⁰ See *Johnson III*, 700 F.3d at 416 (Kozinski, C.J., dissenting); see also *id.* at 424 n.5 (majority opinion) (discussing the Ninth Circuit's two-pronged abuse of discretion test).

⁸¹ See *id.* at 416 (Kozinski, C.J., dissenting); see also *id.* at 424 n.5 (majority opinion) (noting that the first prong only requires the district court to identify the correct legal standard).

Moreover, Chief Judge Kozinski proposed an exceedingly strict prejudice requirement under the *Strickland* test that would sharply depart from recent Supreme Court jurisprudence and practically hollow the Sixth Amendment's guarantee of effective assistance of counsel.⁸² By failing to provide adequate counsel during the plea negotiation process, Durdines indisputably violated his fundamental Sixth Amendment responsibilities to Johnson.⁸³ Nonetheless, Chief Judge Kozinski argued that if Johnson received a lawful sentence, Durdines would have provided constitutionally adequate counsel—despite the lack of communication with Johnson or research into sentencing alternatives.⁸⁴ To justify this untenable position, Chief Judge Kozinski reasoned that the miscalculated sentence was the only error that satisfied *Strickland's* prejudice requirement, and he dismissed the panel's other prejudice determination as "untethered speculation."⁸⁵ Hence, his view effectively bars defendants from Sixth Amendment challenges after they pled guilty to a lawful sentence.⁸⁶

Such an exacting prejudice finding, as Chief Judge Kozinski advocated, would destroy any accountability for defense attorneys during the plea bargaining process.⁸⁷ The panel's remedy relied on the magistrate judge's conclusions, which stated that Durdines conducted the plea negotiations with an incorrect and incomplete understanding of the law and facts of the case, and that John-

⁸² Compare *id.* at 416–18 (Kozinski, C.J. dissenting) (arguing there is no prejudice so long as the accepted plea was lawful), with *Lafler*, 132 S. Ct. at 1385 (noting that a showing of prejudice only requires the defendant to show a reasonable probability that a different plea offer, with less strict terms, would have been offered to a defendant with adequate assistance of counsel), and *Frye*, 132 S. Ct. at 1409 (holding that defendants may show *Strickland* prejudice by demonstrating a reasonable probability that they would have accepted an earlier plea offer had they received effective assistance of counsel) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)), and *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (holding that, to satisfy *Strickland*, defendants must show reasonable probability that, with adequate assistance of counsel, they would not have accepted a valid plea and instead would have insisted on trial) (citing *Strickland*, 466 U.S. at 687).

⁸³ See *Johnson III*, 700 F.3d at 425–26. In particular, Durdines failed to conduct an adequate investigation, which led to his incorrect and incomplete understanding of the law and facts of the case. See *Johnson v. Uribe (Johnson II)*, No. EDCV 10-0164-GW, 2010 WL 5671780, at *13 (C.D. Cal. Nov. 12, 2010) (finding that Durdines did not perform an adequate investigation into the facts of Johnson's case before entering the guilty plea); see also *Strickland*, 466 U.S. at 690–91 (holding that counsel has a duty to investigate the facts of the case and must understand the relevant law to be able to provide adequate counsel). As a result, Johnson received ineffective assistance of counsel when he was not competently advised about the *Vargas* waiver. See *Johnson II*, 2010 WL 5671780, at *13; *Lafler*, 132 S. Ct. at 1387 (holding that defendant's have a right to effective assistance of counsel when considering whether to accept a plea agreement).

⁸⁴ See *Johnson III*, 700 F.3d at 417 (Kozinski, C.J., dissenting).

⁸⁵ See *id.* at 417–18.

⁸⁶ See *id.*

⁸⁷ See *id.* at 416–18; see also *Frye*, 132 S. Ct. at 1408 (discussing the problems with requiring certain showings of prejudice when determining a counsel's ineffective assistance); *Strickland*, 466 U.S. at 686 (reasoning that the Sixth Amendment holds defense counsel accountable by requiring counsel not to "undermine[] the proper functioning of the adversarial process").

son was not competently advised about the *Vargas* waiver.⁸⁸ Even so, Chief Judge Kozinski argued that these findings only demonstrated a “mere suspicion” of prejudice and the *Strickland* test’s prejudice prong requires a stronger showing of certainty.⁸⁹ As the Supreme Court recognized in *Frye*, because the art of negotiating a plea deal is so nuanced and individualized, it is impractical to set detailed standards that predict with certainty the adequacy of counsel during plea negotiations.⁹⁰ In other words, by requiring a strong and certain showing of prejudice, Chief Judge Kozinski’s position fails to acknowledge the inherent difficulties in determining when exactly the ineffective assistance of counsel occurred, thus preventing courts from holding defense counsel accountable.⁹¹

By extension, allowing for greater accountability is a boon for indigent criminal defendants like Johnson.⁹² More specifically, the panel’s decision helps alleviate an untenable position that many indigent defenders face: public defender’s offices, when they are available at all, are typically underfunded.⁹³ Additionally, many state judges either appoint inexperienced lawyers or deny funding for cases that require defense experts and investigations.⁹⁴ The panel’s decision therefore diminishes the inequities that indigent defendants face by providing district courts with a clear and pragmatic framework for assessing Sixth Amendment challenges involving plea bargains.⁹⁵ In addition, by delivering an attainable Sixth Amendment standard that increases accountability for all defense attorneys, the panel’s decision diminishes the chance that both an appointed counsel and the federal court will prejudice an indigent defendant.⁹⁶

⁸⁸ See *Johnson III*, 700 F.3d at 424–27; *Johnson II*, 2010 WL 5671780, at *13 (detailing the findings of the magistrate judge).

⁸⁹ See *Johnson III*, 700 F.3d at 416–18 (Kozinski, C.J. dissenting).

⁹⁰ See *Frye*, 132 S. Ct. at 1408.

⁹¹ See *id.* at 1407–08 (implying that defense counsel must be held accountable for its responsibilities to provide effective assistance of counsel during the plea bargaining process); *Johnson III*, 700 F.3d at 416–18 (Kozinski, C.J., dissenting).

⁹² See *Frye*, 132 S. Ct. at 1407–08; see also 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, 1844 (1994) (explaining the problematic realities that indigent defendants face when receiving appointed counsel)

⁹³ See Bright, *supra* note 92, at 1844; see also *Johnson III*, 700 F.3d at 421 (noting that Johnson received representation from his public defender for a few minutes before he was required to appear in court).

⁹⁴ See Bright, *supra* note 92, at 1844.

⁹⁵ See *Johnson III*, 700 F.3d at 426–28 (demonstrating that a court can determine when a defendant is prejudiced under the *Strickland* test); Bright, *supra* note 92, at 1844 (discussing that the minimal standards required to provide effective counsel offer little protection for indigent defendants).

⁹⁶ See *Johnson III*, 700 F.3d at 426–28; Bright, *supra* note 92, at 1844.

CONCLUSION

The United States Ninth Circuit Court of Appeals upheld the district court's finding that Johnson received ineffective assistance of counsel but disagreed with the habeas remedy. Instead of resentencing, the panel vacated the guilty plea because Johnson's counsel provided ineffective assistance throughout the plea negotiation process, leading to Johnson's unconstitutional guilty plea. Chief Judge Kozinski's objections are unfounded because the panel worked within the established standard of review to find prejudice at an earlier stage, which provided a just outcome for a defendant who never enjoyed the benefits of effective counsel. As a result, future indigent defenders like Johnson may not have to suffer the injustice of ineffective assistance of counsel to such an extent, nor receive an inadequate remedy that adds insult to injury.