fendants frequently fall short on the prejudice requirement, with the Court posing it as a threshold matter and failing to find how other representation could have made a significant difference.[342]

Beyond *Strickland's* "reasonable probability of a different result" starting point, there are issues of when an "outcome determinative" test alone suffices, what exceptions exist, and whether the general rule should be modified. In *Lockhart v. Fretwell*, the Court appeared to refine the *Strickland* test when it stated that an "analysis focusing solely on mere outcome determination" is "defective" unless attention is also given to whether the result was "fundamentally unfair or unreliable."[343] However, the Court subsequently characterized *Lockhart* as addressing a class of exceptions to the "outcome determinative" test, and not supplanting it. According to *Williams v. Taylor*, it would disserve justice in some circumstances to find prejudice premised on a likelihood of a different outcome.[344] An overriding interest in fundamental fairness precluded a prejudice finding in *Lockhart*, for example, because such a finding would be nothing more than a fortuitous windfall for the defendant. As

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tigation by counsel would have uncovered evidence of physical abuse, pronounced brain damage, and significantly diminished mental functioning). *See also*, *e.g.*, Glover v. United States, 531 U.S. 198 (2001) (6- to 21-month increase in prison term is sufficient "prejudice" under *Strickland* to raise issue of ineffective counsel).

[342] *E.g.*, Smith v. Spisak, 558 U.S. ___, No. 08–724, slip op. at 11–15 (2010). *See also* Hill v. Lockhart, 474 U.S. 52, 60 (1985). In Hill v. Lockhart, 474 U.S. 52 (1985), the Court applied the *Strickland* test to attorney decisions in plea bargaining, holding that a defendant must show a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty. And, prejudice may be particularly difficult to infer from a decision to plead guilty because of the many uncertainties still outstanding during plea negotiations. Premo v. Moore, 562 U.S. ___, No. 09–658, slip op. (2011).

But see Missouri v. Frye, 566 U.S. ___, No. 10–444, slip op. (2012) and Lafler v. Cooper, 566 U.S. ___, No. 10–209, slip op. (2012), in which the Court acknowledged that prejudice could arise from not accepting a plea offer from the prosecution because of inadequate counsel. When prejudice does arise from not accepting a plea offer, fashioning a remedy should neither grant the defendant a windfall (*e.g.*, automatic revival of the plea offer regardless of the defendant's subsequent conduct or conviction), nor must the government's efforts in securing a later conviction be ignored. To determine a remedy, the *Lafler* majority would leave it to the trial court's discretion in each case to sentence under the forgone plea, sentence under the subsequent conviction, or sentence in accordance with alternatives somewhere in between. The dissenting Justices pointedly criticized this "opaque" guidance.

[343] 506 U.S. 364, 368–70 (1993). Defense counsel had failed to raise a constitutional claim during sentencing that would have saved the defendant from a death sentence. The case precedent that supported the claim was itself overturned after sentencing but before defendant asserted in a habeas writ that he had received ineffective assistance. The Court held, 7–2, that even though the adequacy of counsel's representation is assessed under the standards that existed contemporaneously with the conduct, it was inappropriate in assessing prejudice to give the defendant the benefit of overturned case law. So long as the defendant was not deprived of a procedural or substantive right to which he would still be entitled, relief is not available. 506 U.S. at 372–73.

[344] 529 U.S. 362 (2000).