38 Am. J. Trial Advoc. 121

American Journal of Trial Advocacy
Summer, 2014

Article

*121 AFTER FRYE AND LAFLER: THE CONSTITUTIONAL RIGHT TO DEFENSE COUNSEL WHO PLEA BARGAINS

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Abstract

In Missouri v. Frye and Lafler v. Cooper, the United States Supreme Court dramatically altered the landscape of the Sixth Amendment guarantee of effective assistance of counsel in the plea bargaining context by extending that right into the plea bargaining process itself. This Article establishes that after Frye and Lafler the failure to participate in the plea bargaining process violates the Sixth Amendment's guarantee of effective assistance of counsel and sets forth the appropriate analytical framework under which such claims should be analyzed.

*122 Introduction

On January 17, 2004, in the City of Philadelphia, Tyrone Lewis was sitting in his car talking on his cell phone when a man named Ronald Smith approached him.[1] Smith pointed a gun at Lewis's head, instructed him to start the car, and demanded that he get out.[2] A few minutes later, Philadelphia Police observed Smith driving Lewis's car.[3] After a short chase, during which Smith was observed discarding a loaded handgun, he was arrested.[4] Smith was indicted on federal charges of carjacking, ***123** carrying a firearm during and in relation to a crime of violence, and being a felon in possession of a firearm.[5] He was then appointed counsel.[6]

The prosecutor never offered a plea bargain, and defense counsel, in turn, never affirmatively initiated any plea bargaining discussions with the prosecutor.[7] At this point, Smith had two options. One option was to enter a guilty plea to all of the charges, without the benefit of a plea bargain. A plea bargain could have resulted in either the dismissal of some charges, an agreed upon sentence, or both. Entering a guilty plea to all of the charges would have left his sentence entirely to the discretion of the judge, with the aid of the Federal Sentencing Guidelines.[8] The second option was to risk it all and proceed to trial.[9] Smith proceeded to trial by jury, and he was found guilty on all counts and sentenced to thirty years of incarceration.[10]

Following his conviction, Smith claimed that a third option should have been pursued: trial counsel should have sought a plea bargain on ***124** his behalf.[11] Smith's contention was that his lawyer's failure to pursue a plea bargain essentially left him with two bad choices. Plead guilty to all of the charges, without getting any benefit from the prosecutor for doing so, or risk it all with a jury.[12] A plea bargain may have resulted in a better sentence than what he would have received after a non-negotiated guilty plea to all of the charges and would have likewise eliminated the risk of a thirty-year jail sentence after trial.[13] The specific legal claim Smith made was that his trial counsel's failure to affirmatively pursue a beneficial plea bargain on his behalf deprived him of the Sixth Amendment's guarantee of effective assistance of counsel.[14]

***125** The prevalence of plea bargaining in the American system of criminal justice has made cliché the often cited observation that plea bargaining "is not some adjunct to the criminal justice system; it is the criminal justice system."[15] Indeed, recent statistics demonstrate that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."[16] Some researchers estimate between ninety and ninety-five percent of federal and state cases ending in guilty pleas have been resolved through the plea bargaining process.[17]

However, despite the prevalence of plea bargaining and the potential benefits it may afford defendants such as Ronald Smith, some criminal defense attorneys have failed to pursue a plea bargain on behalf of their clients. The reasons for failing to pursue a plea bargain are varied, ranging from having no explanation at all,[18] to being politically or ideologically opposed to negotiating with the government,[19] to wanting to enhance an attorney's personal reputation as someone who will not plea bargain unless the prosecutor offers extremely favorable terms.[20]

Claims asserting that a failure to pursue plea negotiations represents a violation of the criminal defendant's Sixth Amendment guarantee of ***126** effective assistance of counsel have been advanced by criminal defendants who entered guilty pleas, as

well as by defendants who have been found guilty after a trial. These claims have been made in both state and federal courts since the early 1970s. Although these claims have produced a range of divergent holdings,[21] no court has granted the ***127** defendant relief when counsel has failed to pursue a plea bargain since the United States Supreme Court's 1985 decision in Strickland v. Washington, which created the current legal framework under which ineffective assistance of counsel claims are analyzed.[22] The Supreme Court has not yet addressed this issue.

***128** These results are not surprising. Despite the prevalence of plea bargaining from the 1970s throughout the 2000s, the Supreme Court adopted a decidedly hands off approach to regulating plea bargaining from the perspective of the Sixth Amendment right to effective assistance of counsel.[23] To the extent that the Court did regulate plea bargaining from this perspective, the Court largely focused on the amount of knowledge a defendant had prior to the entry of the guilty plea and the subsequent waiver of procedural trial rights.[24] As a result, when the Court reviewed claims of ineffective assistance of counsel relating to plea bargains, the Court limited its focus to those instances in which the defendant actually accepted a plea bargain on the advice of counsel.[25]

***129** However, in two recent Supreme Court decisions, Missouri v. Frye[26] and Lafler v. Cooper,[27] both of which were decided the same day, the Court dramatically reshaped the landscape of effective assistance of counsel claims raised in the context of defense counsel's performance during the plea bargaining process. In Frye, the Court found that defense counsel was ineffective for failing to convey a plea offer, despite the fact that the defendant then entered what the Court considered a constitutionally valid plea to terms less favorable than the unconveyed plea offer.[28] In Lafler, the Court found defense counsel ineffective when counsel's ***130** incompetent advice caused the defendant to reject a guilty plea and proceed to trial, where he was convicted and received a sentence more severe than the rejected offer.[29]

The Supreme Court's decisions in Frye and Lafler are extremely impactful for two reasons. First, the Court expanded the Sixth Amendment guarantee of effective assistance of counsel beyond the narrow circumstances in which the defendant simply enters a guilty plea on the advice of counsel.[30] Instead, Frye and Lafler stand for the broader proposition that the Court is willing to extend the Sixth Amendment's guarantee of effective assistance of counsel to the regulation of a defense ***131** attorney's conduct during the plea bargaining process itself.[31] Second, the Court effectively caused "a seismic shift in Sixth Amendment jurisprudence" by declaring that the underlying reliability and fairness of the guilty plea or trial verdict did not inoculate defense counsel from claims of ineffective assistance during the plea bargaining process.[32]

The most important question that must be answered after Frye and Lafler is "how to define the duty and responsibilities of defense counsel in the plea bargaining process."[33] In the immediate aftermath of Frye and Lafler, scholars have attempted to delineate the exact duty and responsibilities that the Court's decisions may have imposed on defense counsel in the context of plea bargaining.[34] However, thus far, despite the fact that "Frye and Lafler establish that a defendant has the right to effective assistance during plea bargaining,"[35] the existing scholarly literature has largely failed to address perhaps the most fundamental question raised by the Court's newfound willingness to regulate the plea bargaining process: whether the Sixth Amendment's guarantee of effective assistance of counsel imposes upon defense attorneys an obligation to actually pursue a plea bargain in the first place?[36]

***132** Moreover, no scholarly focus has thus far been directed at answering the equally important and related question of what, if any, remedy is the defendant entitled to if counsel failed to plea bargain, but the defendant nevertheless entered a constitutionally valid guilty plea or received a constitutionally fair trial.[37]

This Article attempts to fill this existing void in the scholarly literature. In doing so, this work ultimately posits that in the aftermath of Frye and Lafler, the Sixth Amendment's guarantee of effective assistance of counsel imposes upon defense attorneys an obligation to pursue a beneficial plea bargain, when doing so is in the defendant's best interest.[38] It further argues that when defense counsel has failed to pursue a plea bargain in such a situation, the defendant is likewise entitled to a remedy. This Article explores the constitutional dimensions of an attorney's obligation to plea bargain from the perspective of Strickland v. Washington's two-pronged test for analyzing Sixth Amendment claims of ineffective assistance of counsel.[39]

***133** Part I explores the validity of the claim that a failure to pursue plea negotiations represents a violation of the Sixth Amendment's guarantee of effective assistance of counsel, within the contours of the first prong of Strickland, the performance prong.[40] This question is answered by looking to contemporary criminal defense standards and the potential benefits that defendants can gain through the plea bargaining process.

Part I also explores this question from the perspective of Padilla v. Kentucky,[41] a case pre-dating Frye and Lafler, in which the Supreme Court held that defense counsel must inform non-citizen defendants of the possible deportation consequences of a guilty plea.[42] This Article argues that while the issue addressed in Padilla was ultimately not the same issue being addressed in this work, the reasoning employed by the Padilla Court represents an implicit endorsement of defense counsel's responsibility to affirmatively pursue a plea bargain when doing so is in the defendant's best interests. Part II addresses the frequently cited argument that the Supreme Court's 1977 pronouncement in Weatherford v. Bursey[43] that "there is no constitutional right to plea bargain"[44] means a defendant cannot prevail on a claim that counsel's performance was constitutionally deficient for failing to seek a plea bargain. This Article suggests that the right being claimed is not the right to receive a plea bargain as indicated in Weatherford. Instead, the right being claimed is the right to constitutionally effective counsel who at least explores the possibility of a plea bargain when doing so is consistent with the client's wishes and best interests. Moreover, this Article maintains that the Court's decisions in Frye and Lafler have rendered Weatherford no longer operative. Part III focuses on the second prong of Strickland, referred to as the prejudice prong, and its application to instances where defense counsel ***134** failed to pursue a beneficial plea bargain on his client's behalf.[45] When such a claim is made, a proper analysis of counsel's deficiencies should look only to Strickland's performance prong, and the prejudice prong should be abandoned. This work demonstrates that when defense counsel fails to affirmatively initiate plea bargaining discussions with the prosecution, it is extremely difficult, if not impossible, to conclude that the defendant was not prejudiced by counsel's failing to seek a plea bargain. As a result, the application of Strickland's prejudice prong in the unique context of defense counsel failing to plea bargain is simply unworkable. Part IV proposes that the only appropriate remedy to the constitutional failings discussed in this work is to place the defendant back in the position he was in before he entered a guilty plea or proceeded to trial. Relying heavily on the Court's holdings in Frye and Lafler, this Article suggests that an otherwise constitutionally valid guilty plea or trial does not cure the constitutional deprivation of the effective assistance of counsel that preceded it, in this instance, defense counsel's failure to plea bargain. Moreover, this Article recognizes that vacating an otherwise constitutionally valid guilty plea or trial verdict may run contrary to notions of judicial economy and may give the criminal defendant a second bite at the proverbial apple. However, by viewing this particular problem through the lens of the dominant theoretical model articulated by numerous scholars, that the plea bargaining process operates similar to a traditional economic marketplace, this Article concludes this is unlikely to be the practical result of granting the defendant such a remedy.[46]

The most likely result is that the parties, behaving as rational actors, will recognize that the pursuit of a plea bargain is mutually advantageous. ***135** As a result, the most likely outcome is that the parties will enter into a plea bargain even after the guilty plea or trial verdict, in the process producing a fair remedy. Therefore, returning the defendant to the position he was in prior to the constitutional violation is the remedy best tailored to address the constitutional injury at hand.

I. Strickland Requires Defense Counsel to Affirmatively Initiate Plea Bargaining

In 1984, the Supreme Court articulated in Strickland what has been referred to as both the "well-worn" [47] and now "famous" [48] two-prong test used by courts when reviewing Sixth Amendment claims of ineffective assistance of counsel. [49] At its most basic, the test formulated in Strickland requires: (1) attorney error (referred to as the performance prong) and (2) prejudice (referred to as the prejudice prong) flowing from that error. [50] However, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." [51] Thus, courts may dispose of claims of ineffective assistance of counsel by resolving the prejudice prong, thereby avoiding an evaluation of defense counsel's performance. [52] Almost thirty years have passed since Strickland's holding, but it remains governing law today. [53]

***136** Strickland itself involved a capital sentencing proceeding. [54] However, the Court stated that such proceedings are "sufficiently like a trial in its adversarial format and in the existence of standards for decision . . . that counsel's role in the proceeding is comparable to counsel's role at trial." [55] This passage made clear that both prongs of the Strickland test were to be employed not just during the sentencing phase of a criminal proceeding, but during the trial phase as well. [56]

In Hill v. Lockhart, [57] decided one year after Strickland, the Supreme Court held that the Strickland test was to be applied to circumstances, where the defendant alleges he received flawed legal advice that resulted in the acceptance of a guilty plea. [58] As noted previously, in Missouri v. Frye and Lafler v. Cooper, the Supreme Court further extended the reach of the Strickland test to the plea bargaining process itself. [59] In doing so, the Court held that defense counsel was ineffective for failing to convey a plea offer [60] and for defense counsel's faulty advice causing the defendant to reject a favorable plea bargain and proceed to trial. [61]

From trial, to sentencing, to the guilty plea, to attorney performance during the plea bargaining process, the Supreme Court has broadened Strickland's reach to almost every phase of a criminal proceeding. [62] This ***137** should not be surprising in light of the Supreme Court's 2000 declaration in Williams v. Taylor [63] that the two-prong Strickland test "provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims." [64]

A. A Legal Overview of Strickland's Performance Prong

For a criminal defendant to prevail on a Sixth Amendment claim of ineffective assistance of counsel, the first prong of the test articulated in Strickland, the performance prong, requires the defendant to overcome a "strong presumption" of competence and show that "counsel's performance was deficient . . . [with] errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." [65] Counsel performance will be deemed constitutionally deficient, if it is deemed to fall "below an objective standard of reasonableness," [66] which "is necessarily linked to the practice and expectations of the legal community." [67]

Further, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." [68] In order to properly assess what constitutes "prevailing professional norms," the Supreme Court "long ha[s] recognized that '[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable.'" [69]

The Court has also noted that "[a]lthough they are 'only guides,' and not 'inexorable commands,' these standards may be valuable measures ***138** of the prevailing professional norms of effective representation."[70] In addition, reviewing courts will look at criminal defense and public defender organizations, authoritative treatises, and state and city bar publications to assess what is considered standard practice.[71]

However, no post-Strickland court addressing the issue of defense counsel's obligation to affirmatively initiate plea discussions has done so from the perspective of Strickland's performance prong.[72] As Sections II and III of this Article detail, almost every post-Strickland decision has found against the defendant on the basis of Strickland's prejudice prong or the Supreme Court's decision in Weatherford v. Bursey.[73] As a result, the proceeding discussion relating to whether defense counsel has an obligation under Strickland's performance prong to pursue a beneficial plea bargain has yet to be undertaken by reviewing courts.

B. The Benefits of Plea Bargaining

There are numerous benefits defendants may gain through the plea bargaining process. Many of these benefits can only be realized, or alternatively, may be lost, based on whether defense counsel affirmatively initiated the plea bargaining process as opposed to waiting passively for an offer from the prosecution. For example, the early initiation of plea discussions may benefit the defendant by preventing the filing of formal charges before the case is presented to the grand jury, avoiding continued detention in pretrial custody, or preventing the accumulation of substantial legal fees.[74]

Further, the prompt initiation of plea discussions may allow the defendant to receive a benefit for providing information to prosecutors that might soon become stale or un-useful.[75] By seeking a plea bargain, ***139** the defense attorney may also be able to prevent a defendant from having to plead guilty or proceed to trial when charged with certain types of offenses.[76] For example, the pursuit of a negotiated guilty plea may allow the defendant to plead guilty to an offense that does not trigger automatic deportation.[77]

An additional benefit is the potential dismissal of a charge that carries with it the stigma of a certain type of criminal conviction.[78] For example, the commission of a crime that results in one having to register as a convicted sex offender.[79] In such a circumstance, the defendant may be willing to plead to a different charge carrying an equivalent penalty but does not give rise to the societal stigma or onerous registration requirements.[80]

Another advantage defendants can expect to receive through the pursuit of a plea bargain is avoidance of the "trial tax."[81] The trial tax refers to the harsher punishment meted out to a defendant who goes to trial as compared to a similarly situated defendant who pleads guilty.[82] Indeed, many researchers have found that "those who go to trial are more likely to receive harsher sentences than those who accept a plea when comparable offenses are considered."[83]

In fact, commentators have noted that some defendants "who do take their cases to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences ***140** exist on the books largely for bargaining purposes."[84] This observation has prompted the Supreme Court to cite with approval the proposition that "[t]o a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is."[85] Because of the disparity in sentences that can be expected between the plea bargain and after a guilty verdict, the defense attorney who forgoes an opportunity to trade horses with the prosecutor has forgone an important opportunity to minimize the harshness of the sentence his client may likely receive if the defense does not prevail at trial.

C. Criminal Defense Standards and Guidelines in the Plea Bargaining Process

In light of the benefits that a defendant may gain from participation in the plea bargaining process, it is unsurprising that a review of contemporary criminal justice guidelines and standards have at their "core," the duty to affirmatively pursue a plea bargain in appropriate circumstances. [86]

The American Bar Association Criminal Justice Standards, which reviewing courts frequently cite to when evaluating defense counsel's representation in the context of Strickland's performance prong, [87] address the responsibilities of defense counsel to pursue plea negotiations in Criminal Justice Standard 4-6.1. [88] This standard is titled "Duty to Explore Disposition without Trial." [89] The standard reads in relevant part that "[d]efense counsel may engage in plea discussions with the prosecutor." ***141** [90] While the language of the standard uses the word "may" and does not strictly impose the duty to engage in plea discussions, commentators have suggested this is largely to account for circumstances where defense counsel may forgo plea discussions for strategic reasons. [91] The non-mandatory language of the standard also accounts for circumstances where the defendant indicates that he does not wish to pursue a possible plea bargain and instead wishes to proceed to trial. [92]

However, the commentary to standard 4-6.1 makes clear that "[s]ince disposition by plea is mutually advantageous in many circumstances, involvement in plea discussions is a significant part of the duty of defense counsel." [93] The commentary further states, "[p]lea discussions should be considered the norm and failure to seek such discussions an exception unless defense counsel concludes that sound reasons exist for not doing so." [94]

The National Legal Aid and Defender Association's Performance Guidelines also address the criminal defense lawyer's responsibilities in the plea bargaining context. [95] Guideline 6.1 makes it clear that defense counsel should discuss with his client the option of resolving his case through the plea bargaining process. [96] The guideline states in relevant part that [c]ounsel should explore with the client the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to ***142** a trial and in doing so should fully explain the rights that would be waived by a decision to enter a plea and not to proceed to trial. [97]

Further, Guideline 6.2 calls on defense counsel to develop an "overall negotiation plan," [98] as well as a "negotiation strategy" [99] and "to become familiar with the practices and policies of the particular jurisdiction, judge and prosecuting authority which may affect the content and likely results of negotiated plea bargains." [100] These mandates, which are designed to ensure effectiveness during plea discussions, make defense counsel's duty to pursue plea discussions obvious. There simply would be no need to be an effective negotiator, nor could one actually reach a "negotiated disposition," [101] unless defense counsel was required to pursue plea negotiations once the desire to do so is expressed by the client.

Moreover, numerous local criminal defense practice manuals and training materials enunciate the criminal defense attorney's obligation to initiate plea bargain discussions on their client's behalf. For example, the North Carolina Defender Manual states that "[a]n attorney has a duty to explore alternatives to trial, including the possibility of a plea bargain." [102] Likewise, criminal performance standards in Massachusetts provide that "[a]fter interviewing the client and developing a thorough knowledge of the law and facts of the case, the attorney should explore all alternatives to trial, including the possible resolution of the case through a negotiated plea or admission to sufficient facts." [103]

In materials developed for the general public, the Cook County Public Defender Office has noted the following:

> If you do not wish to contest the charges against you and wish to plead guilty, inform your attorney of your decision as soon as possible. Your ***143** attorney will talk with the prosecutor about ways to resolve your case and will try to obtain the sentence most favorable to you. [104]

Washington State Defender Standards note that, in the context of persistent felony offender representation, "the goal in these cases is often settlement, rather than trial." [105]

Other commentators have expressed the defense attorney's obligation to pursue a beneficial plea bargain in starkly more practical terms, suggesting "the attorney must be ever alert for the propitious moment to approach the prosecutor with an offer or to run with the client and a prosecutor's offer directly into the courtroom of a sympathetic judge who is filling in for the Honorable Attila the Hun." [106]

D. Padilla v. Kentucky Implicitly Endorses Counsel's Obligation to Initiate Plea Bargaining

The argument advanced above, that both the benefits of plea bargaining and the prevailing norms of professional conduct dictate that a defense attorney may have a Sixth Amendment obligation to initiate plea bargaining, is reflected in the reasoning employed by the Supreme Court in Padilla v. Kentucky. [107] In Padilla, the Court specifically held that the performance prong of Strickland v. Washington [108] requires that where the deportation consequences of a criminal conviction are "succinct, clear, and explicit" defense counsel has a Sixth Amendment obligation to correctly inform his client of this consequence. [109]

***144** In reaching this conclusion, the Court implicitly endorsed defense counsel's duty to initiate plea bargain discussions. After looking to "[a] uthorities of every stripe--including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications," the Padilla Court reasoned that the failure to advise a defendant of possible deportation consequences was inconsistent with prevailing professional norms. [110]

Additionally, while not couched specifically in terms of prevailing professional norms, the Court was in part influenced by the fact that plea bargaining could be mutually advantageous for both the prosecution and the defense. [111] The Padilla Court noted that "informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process." [112] The Court expanded on this particular notion by reasoning that:

> Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. [113]

Although this language does not expressly impose upon defense lawyers the obligation to initiate plea bargaining, the Court clearly recognizes the ***145** importance of plea bargaining to the defendant. [114] In fact, defense counsel's ability "to plea bargain creatively" may be the only thing that saves the defendant from deportation. [115] This recognition implies a duty to pursue a plea bargain when doing so is consistent with a client's goals. If defense counsel fails to pursue a plea bargain, the defendant cannot possibly recognize the "benefit" that may come to "noncitizen defendants during the plea-bargaining process." [116]

It certainly must be acknowledged that the Court's holding in Padilla relates only to the narrow context of deportation and that deportation is indeed a harsh penalty.[117] However, deportation is not the only harsh penalty that effective plea bargaining may avoid.[118] As previously discussed, there are many benefits a defendant may gain through the plea bargaining process including, but not limited to, avoidance of incarceration or becoming a registered sex offender.[119] Put another way, while avoiding deportation may be an important reason to pursue a plea bargain, the possibility of deportation should not be the only consequence significant enough to trigger an affirmative obligation to seek a beneficial plea bargain on a client's behalf.

In light of the possible benefits a defendant may lose if defense counsel does not engage in plea bargaining, as well as the numerous professional standards that impose a duty to explore a negotiated resolution, "[w]hen a client wishes to plead guilty, or when there is a strong likelihood of conviction after trial, it is difficult to imagine effective representation that does not include affirmatively seeking the best plea bargain possible given the circumstances of the case and defendant."[120]

***146** Regardless of whether an attorney's decision not to plea bargain is the result of incompetence, ideology, or an attempt to enhance his professional reputation, the only justifications that exist for defense counsel's failure to initiate plea bargaining in the absence of an offer from the prosecution are when the client wishes to proceed to trial or when the decision is made for well thought-out strategic reasons.[121] In the absence of such justifications, if a client believes a plea bargain may be in his best interest, then counsel must affirmatively seek from the prosecution a beneficial plea bargain on the client's behalf.[122]

II. Weatherford v. Bursey Carries Little Weight When Reviewing Sixth Amendment Claims of Ineffectiveness Assistance of Counsel

A. A Legal Overview of Weatherford

As demonstrated above, the performance prong of Strickland requires defense attorneys to pursue a favorable negotiated resolution when appropriate circumstances demand.[123] Nevertheless, in denying such claims, courts have relied heavily on the Supreme Court's 1977 pronouncement in Weatherford v. Bursey that "there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to ***147** trial."[124] Further, the Court stated that "[i]t is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty."[125] The logical force of Weatherford's pronouncement rests on the notion that a constitutional failing that occurs during the plea bargain process is not a legally cognizable claim because the defendant "was not deprived of any legal benefit to which he was entitled."[126]

***148** B. The Defendant's Right Is to Be Represented During Plea Bargaining, Not to Receive a Plea Bargain

The application of Weatherford's holding that "there is no constitutional right to plea bargain" has been misapplied to claims where defense counsel was ineffective in failing to seek out a plea agreement.[127] It is not contested that the decision whether to engage in plea bargaining at all is entirely within the discretion of the prosecution.[128] The Weatherford decision undoubtedly stands for this proposition.[129]

However, when defense counsel fails to seek a favorable plea bargain without justification, the exact nature of the defendant's complaint is not the same as the issue being addressed in Weatherford.[130] The defendant is not claiming that he has a right to have the prosecutor engage in plea discussions. Rather, the defendant is claiming that the Sixth Amendment's guarantee of effective assistance of counsel requires not that the prosecutor offer the defendant a plea, but that when it is in the defendant's

best interests and he wishes to plead guilty, defense counsel affirmatively attempts to obtain a beneficial plea agreement from the prosecutor. In this regard, while the defendant has no right to receive a plea offer from the prosecution, the Sixth Amendment certainly entitles him to an attorney who will at least ask for a plea bargain if doing so is to the defendant's benefit.

*149 C. Lafler and Frye Significantly Minimized the Influence of Weatherford

Extending the right to effective assistance of counsel to the plea bargaining process in Lafler v. Cooper and Missouri v. Frye, the Supreme Court found the force of Weatherford's declaration that there is no constitutional right to plea bargain unpersuasive. [131]

1. Lafler's Treatment of Weatherford

In Lafler, the Court conceded that "defendants have 'no right to be offered a plea'" but nevertheless found that a defendant was in fact entitled to a remedy when he chose to reject a favorable plea offer based on the poor advice of trial counsel. [132] While not expressly overruling Weatherford, the Lafler Court rejected its application by fashioning a counter legal argument. [133] The Court reasoned that the extension of the Sixth Amendment's right to effective assistance of counsel during the plea bargaining process is the same as "cases that find criminal defendants have a right to effective assistance of counsel in direct appeals even though the Constitution does not require States to provide a system of appellate review at all. As in those cases, "[w]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution." [134]

Certainly, there are jurisdictions that have banned the entire practice of plea bargaining; however, this is not the norm. [135] If plea bargaining ***150** is forbidden in the jurisdiction in which the defendant is being tried, then the issue addressed in this Article simply does not arise. However, in jurisdictions that do permit plea bargaining, as detailed in Part I, prevailing professional norms demonstrate that defense attorneys may have a Sixth Amendment obligation to initiate plea bargaining discussions. [136]

When plea bargaining is allowed in a particular jurisdiction, a defense attorney's failure to use that process without justification cannot be excused simply because there is no general constitutional right to receive a plea bargain. The reasoning of the Lafler Court makes it clear that if the state chooses to extend the right to plea bargain, the protections afforded by the Sixth Amendment must go along with it. [137]

2. Frye's Treatment of Weatherford

In finding that the attorney's conduct was constitutionally deficient for failing to convey a plea offer, the Court in Frye, once again, rejected the Government's argument, based explicitly on Weatherford, that because the defendant had no right to plea bargain, he was not deprived of effective assistance of counsel. [138]

What is noteworthy about the Frye Court's treatment of Weatherford is that even after noting that "[t]he State's contentions are neither illogical nor without some persuasive force," [139] the Court proceeded to essentially overrule the Weatherford argument, if not this particular aspect of Weatherford itself, on the basis of shear practicality and fairness. [140]

***151** As in Padilla v. Kentucky, [141] the Court noted close to ninety-five percent of all cases are disposed of by way of guilty plea and the plea bargaining process was mutually beneficial to both the government and defendants. [142] As a result, the Court reasoned that excluding plea bargaining from the ambit of the Sixth Amendment's guarantee of effective assistance of counsel

would essentially "deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'" [143]

Unlike Lafler, the Frye Court's treatment of Weatherford was not rooted in a legal argument per se. [144] Instead, it was rooted in the Court's perception of basic fairness in the modern American criminal justice system. [145] Even in accepting Weatherford's logic, the Frye Court found that the result Weatherford compels is fundamentally unfair in light of the Court's recognition that "[i]n today's criminal justice system . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." [146]

The Frye Court's rejection of Weatherford's logic is illuminating with respect to whether defense counsel may have a Sixth Amendment obligation to solicit a plea bargain. [147] Indeed, the basis of the Frye Court's rejection of Weatherford appears to be that a rigid application of Weatherford to Sixth Amendment claims of ineffectiveness during the plea bargaining process is simply unfair. [148] This reasoning is especially true in light of the importance of plea bargaining in the modern criminal justice system.

Moving forward, it would be difficult to imagine the Supreme Court putting much stock in Weatherford's pronouncements when defense counsel fails to pursue a plea bargain without justification. This is quite ***152** evident because the Frye Court's rejection of Weatherford's application to the plea bargaining process was based on the grounds that doing so has the effect of denying "a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'" [149]

Both of the Supreme Court's decisions in Lafler and Frye demonstrate that the importance of Weatherford in the context of the Sixth Amendment's regulation of the plea bargaining process has been significantly minimized. Twice, and on the same day no less, the Court refused to follow Weatherford. Whether through the use of the legal argument presented in Lafler or the basic refusal to follow Weatherford on the grounds of simple fairness alluded to in Frye, Weatherford's pronouncement that "there is no constitutional right to plea bargain" [150] should carry little weight when evaluating future Sixth Amendment claims.

III. Strickland's Prejudice Prong and Claims that Counsel Failed to Pursue a Plea Bargain

A. A Legal Overview of Strickland's Prejudice Prong

Once the defendant has proven that defense counsel's conduct was constitutionally deficient under Strickland v. Washington's performance prong, the defendant must then satisfy Strickland's prejudice prong. [151] Strickland's prejudice prong requires a defendant to demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." [152]

***153** Commentators have noted that "[c]riticism of Strickland appeared as soon as the ink of the opinion dried and continues today," almost three decades after the Supreme Court handed down the decision. [153] Although much criticism has been directed at the performance prong, [154] neither has the prejudice prong been spared. [155] In what has now been described as his "prophetic" dissent in Strickland, Justice Marshall predicted that very few defendants would be able to satisfy the burden of proving prejudice. [156] In fact, in the ensuing decades since Strickland's inception, most claims of ineffective assistance of counsel failed because of an application of the prejudice prong. [157] Rather than require that the ***154** defendant prove prejudice, Justice Marshall advocated that once a demonstration of ineffective assistance of counsel was made, an automatic reversal was

required. [158] Justice Marshall's most pointed objection to Strickland's prejudice prong, stated within the specific context of a trial, was:

[I]t is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. [159]

Further compounding the difficulty of accurately assessing prejudice when conducting an after the fact review is "the possibility that evidence ***155** of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel." [160] Essentially, Justice Marshall's contention is a simple, yet powerful one: good defense lawyers can make a difference in the outcome of a case. Moreover, in a system in which well over 94% of cases are disposed of by guilty plea and not by trial, a good defense attorney will in all likelihood make a difference not at trial, but instead, during the plea bargaining process. [161]

To that end, it is essential to note that while assessing prejudice in the trial context may be extremely difficult, assessing prejudice in the context of the plea bargaining process is even more so. As the preceding discussion demonstrates, the difficulty in accurately assessing prejudice in the plea bargaining process is more difficult than at trial because plea bargaining involves substantial elements of client counseling and informal negotiating often takes place without the benefit of a formal record being produced and is beyond direct judicial supervision. [162]

In that sense, an after the fact review of the prejudice a defendant suffers by counsel's failings during the plea bargaining process may be even more difficult to detect than at trial, because the skills the defense attorney uses during plea bargaining are not reflected in a trial record. [163] For example, during the plea bargaining stage of a proceeding, good defense counsel may establish rapport with the client and the client's family, which "may lead to cooperation and the disclosure of compelling mitigating evidence that might not be found by a less skillful attorney." [164] ***156** Even more to the point, "[g]ood negotiating skills may bring about a plea offer to resolve the case with a [better] sentence . . ." than could be expected in a non-negotiated guilty plea or after trial, and "a good relationship with the client may result in acceptance of an offer that might otherwise be rejected." [165]

In the context of defense counsel's failure to affirmatively pursue a plea bargain, lower federal courts have held that Strickland's prejudice prong requires the defendant to show that if defense counsel had sought a plea agreement: "(1) the government would have offered one, and (2) he would have accepted such an offer." [166] Although no post-Strickland courts have specifically stated such, after Frye and Lafler, it would also appear that in order for a defendant to prove that he was prejudiced by counsel's failure to plea bargain, he must also show that: (3) had the government given the defendant a plea deal, it would have been less severe either in terms of the charge or sentence the defendant ultimately received. [167] The remainder of this section addresses the inherent difficulty ***157** defendants face when attempting to satisfy the three requirements referenced above, as well as the resulting unfairness encountered by defendants tasked with showing that prejudice resulted from counsel's failure to plea bargain.

B. Proving the Prosecution Would Have Offered a Plea Bargain

In order for the defendant to prove he was prejudiced by counsel's failure to pursue a plea agreement, the defendant must show that the prosecution would have been willing to offer him a plea bargain in the first place. [168] However, it is virtually impossible

to know whether the prosecution would have done so. Perhaps the prosecutor would have had no reluctance in offering a plea bargain. It is possible the only reason the prosecutor never offered to plea bargain is because he was not approached by the defense and assumed the defense was not interested.

Further, even if the prosecutor initially did not want to plea bargain, perhaps competent counsel who sought out a plea bargain would have been able to convince the prosecution to offer one. Of course, if defense counsel never pursues a plea bargain in the first place, it is impossible to know whether the prosecution was initially unwilling to enter into discussions, or how that position may have changed through effective negotiation.

Such a scenario demonstrates the validity of Justice Marshall's contention that it is extremely difficult to know whether a defendant "would have fared better" if represented by competent defense counsel.[169] Therefore, a court cannot accurately conclude that the defendant suffered no prejudice as a result of defense counsel's deficient performance in failing to pursue a possible plea agreement.

Additionally, some courts have suggested that the absence of the government offering a plea bargain is reason to assume that the government ***158** was not interested in plea bargaining.[170] For the reasons noted above, it is simply impossible to assess if the government would have agreed to a plea bargain if approached by competent defense counsel. In this sense, the reasoning of such courts reflects Justice Marshall's other concern that there is "the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel."[171]

C. Proving the Prosecution Would Have Offered a Deal Less Severe than the Sentence

Even if the prosecution would have given the defendant an offer, Strickland's prejudice prong requires the defendant to show a "reasonable probability" that the charge he was convicted of or the sentence he received was in fact more severe than what he could have expected by way of a plea bargain.[172]

Some may suggest it is possible to ascertain through expert testimony or statistics the length of the sentence that the defendant would have likely received following a negotiated guilty plea compared to the sentence likely received after a trial or a non-negotiated guilty plea.[173] Presumably, if such statistics showed the defendant received a longer ***159** sentence after a trial or non-negotiated guilty plea than what typically results from a plea bargain based on the same charges, then a defendant could prove prejudice.

Despite the appeal of the above argument, particularly from the defense perspective, Strickland's prejudice prong is simply unworkable in terms of assessing the likely outcome of a possible plea bargain. This is true for three important reasons: (1) charge bargaining; (2) sentence bargaining; and (3) prosecutorial discretion in the plea bargaining process. First, because plea bargaining can involve both sentence and charge bargaining[174] before determining prejudice based on the length of a sentence, a court would first have to determine if the defendant was actually convicted of the same charge that would have formed the basis of the hypothetical guilty plea because the charge the prosecutor chooses to move forward on may ultimately determine the parameters and length of the sentence that the defendant receives.[175] In order to accurately determine whether the defendant was prejudiced by counsel's failure to plea bargain, the defendant would have to show that plea bargaining would have resulted in the conviction of a different, less serious charge. If this could be done, the defendant successfully demonstrated prejudice based on counsel's failure to plea bargain.

If the court determines that had the plea bargaining taken place the defendant would have still been convicted of the exact same charge, the court's prejudice inquiry would still not be completed because once the prosecutor determines the charge he wishes to proceed on that decision forms the parameters, in which plea bargaining regarding sentence length will occur. [176] Thus, once the charge bargaining has ended, in most jurisdictions, the sentence bargaining will just be beginning. [177]

Furthermore, an after the fact prejudice analysis cannot accurately determine the possible outcome of defense counsel's plea bargaining ***160** given the significant amount of prosecutorial discretion in both charge and sentence bargaining. [178] One legal commentator has noted that "[i]t is very clear that prosecutors control the criminal justice system through their charging and plea bargaining powers." [179] Why a particular prosecutor insists on a conviction for a particular crime or makes a given sentence recommendation is largely dependent upon a myriad of complicated and uniquely individual factors that do not lend themselves to accurate after the fact appellate review.

The following example based on the sentencing scheme employed by the Commonwealth of Pennsylvania demonstrates the importance of both charge bargaining and sentencing bargaining: an offender is arrested for being involved in a physical altercation with a police officer in which it is alleged he attempted to cause bodily injury to the officer. The prosecution has the option of choosing to charge the defendant with simple assault as a misdemeanor or aggravated assault as a felony. [180]

Assume that based on Pennsylvania's sentencing guidelines the defendant has a criminal history that makes his prior criminal record score a four. [181] The offense gravity score (seriousness of the offense) assigned to the Simple Assault by the Pennsylvania Sentencing Commission is a three, while the offense gravity score for the Aggravated Assault is a six. [182]

In Pennsylvania, all sentences must have a minimum and a maximum, with the maximum being at least twice the minimum sentence imposed. [183] ***161** The sentencing range imposed by the guidelines for the Simple Assault ranges from the low end of probation to the high end of seventeen to thirty-four months of incarceration. [184] The applicable sentencing range for the Aggravated Assault is nine to eighteen months at the low end, and as high as twenty-seven to fifty-four months at the high end. [185]

This example demonstrates the importance of charge bargaining to the defendant because the charge selected sets the likely sentencing range. The defendant will suffer prejudice if defense counsel does not seek a plea bargain to the charge of Simple Assault, and instead, the defendant pleads guilty, or is convicted after trial of Aggravated Assault, a felony conviction with a lengthier sentence.

In terms of sentence bargaining, once an agreement has been reached regarding the charge, the importance of prosecutorial discretion will be reflected in terms of where along the sentencing continuum the prosecutor chooses to make a particular sentencing recommendation. Indeed, an agreed upon sentencing recommendation may then determine the sentence the trial judge ultimately imposes. [186] Although a trial court can reject a mutually agreed upon plea bargain, "as practical matter . . . this rarely occurs." [187]

In this particular example, assume the prosecutor proceeds on the Aggravated Assault charge and no plea bargaining occurs. After a trial, the defendant is convicted of the lesser offense of Simple Assault. Assume that a reviewing court were to conclude that had plea bargaining ***162** taken place, the prosecutor would have offered a plea to the Simple Assault. In this regard, the defendant has not suffered prejudice because of a lack of charge bargaining.

Even if defendant did not suffer prejudice regarding the charge selected, the defendant may still suffer prejudice regarding the sentence if the sentence imposed after trial or a non-negotiated guilty plea is higher than what could be expected had plea bargaining taken place. On the other hand, if the sentence imposed is lenient or the same sentence handed down to the majority of those who plea bargained (with a percentage receiving a better sentence and smaller percentage receiving a worse sentence) presumably, the defendant would have suffered no prejudice.

However, even this conclusion should not be so easily drawn. Perhaps a plea bargain, in which the focus of the negotiation is on the sentence length, would have resulted in the prosecutor making a recommendation for probation or for a less severe jail sentence. Had meaningful sentence bargaining taken place, the defendant may have become part of the percentage that received a sentence better than the average sentence produced through the plea bargaining process.

Lastly, it should be noted that the example above is based on the use of sentencing guidelines; however, since sentencing guidelines make criminal sentences more predictable, [188] the expected range of both bargained for sentencing recommendations and expected post-trial sentences may be even harder to predict in jurisdictions without sentencing guidelines. Importantly, how an individual prosecutor chooses to wield discretion in terms of charge and sentence bargaining can in large part depend on a range of complicated and unique factors that are personal to each prosecutor and do not lend themselves to accurate after the fact appellate review. Indeed, several researchers have noted that "prosecutorial biases can influence the plea bargaining process." [189] Commentators have recognized that if a prosecutor has an overloaded ***163** docket, he or she may offer discounts another prosecutor would not, in order to avoid a large number of trials. [190] An individual prosecutor "can pick the types of offenses over which to bargain and the levels at which to charge, as long as the number of guilty pleas induced is sufficient to hold the volume of trials to manageable levels." [191]

The decision over what charge or sentence to offer may be influenced by the prosecutor's individual values, as well as his individual assessment of community sentiment toward certain types of crimes. [192] New prosecutors may generally offer much harsher plea bargains, while veteran prosecutors "may mellow with time." [193] Studies indicate that prosecutors are likely to give the most generous offers in the weakest cases. [194] However, not all prosecutors view the strength of each case the same way. Indeed, the decision whether and how to plea bargain may in large part depend on an individual prosecutor's assessment of the "adequacy of the state's evidence," or the "probable defense attorney." [195]

Additionally, in deciding whether to reduce charges or what sentence recommendation to make, "the prosecutor can make further personal choices." [196] Defendants who the prosecutor views as being uncooperative with the police, having unpopular lawyers, being unemployed, or being wealthy "can be offered less than the going discount or none at all." [197] A prosecutor who has lost a series of trials and is now on his supervisor's radar, or a prosecutor who wishes to avoid being on his supervisor's radar, may be more inclined to give a generous offer in order to guarantee a conviction. [198]

***164** A particular prosecutor at any given point in his life may have a more pressing case that is going to trial or important family obligations making him more inclined to dispose of a case quickly through a generous plea bargain. [199] A defendant may benefit from having his case assigned to a lazy prosecutor, who gives great offers in order to quickly dispose of cases and go home early. [200] Conversely, the defendant may encounter a hard working prosecutor, who looks forward to going to trial and is far less interested in a plea bargain.

A further complication is the reviewing court's inability to accurately gauge the effect competent defense counsel could have on the negotiation process. Commentators have noted that in a criminal justice system that largely consists of guilty pleas, the

defense attorney's most useful skill set may be his ability to effectively negotiate with opposing counsel.[201] In this regard, a prosecutor may give a more favorable offer to a client who is represented by an effective negotiator and a less favorable offer to a client who is represented by an ineffective negotiator. A prosecutor may be more inclined to give a favorable offer to an attorney who is regarded as a great trial attorney and may give an unfavorable offer to an attorney whom the prosecutor is simply unimpressed with as an adversary. Additionally, a prosecutor may give a more favorable offer to a defense attorney who is far more likely to take cases to trial than an attorney who is regarded as afraid of trial and willing to encourage defendants to accept guilty pleas.[202]

Although the above reflects rational, if idiosyncratic, reasons for a prosecutor's charging or sentencing recommendations, whether charges are reduced or what sentence a prosecutor seeks can have no rational basis at all.[203] To that end, United States District Judge Mark Bennett recently explored prosecutors' use of drug sentencing enhancements pursuant to Section 851 of the National Drug Import and Export Act in ***165** federal courts across the nation's ninety-four United States Attorney's offices.[204]

Section 851 enhancements require that the mandatory-minimum sentence be doubled if the offender has a prior qualifying drug conviction and "may also raise the maximum possible sentence . . . from forty years to life."[205] In light of this, some prosecutors use the Section 851 enhancement to induce defendants to plead guilty by promising that the enhancement will be withdrawn if the defendant does plead.[206] However, this is not always the case. Based on data supplied by the United States Sentencing Commission, Judge Bennett concluded that the manner in which federal prosecutors sought drug sentencing enhancements revealed a "jaw-dropping, shocking disparity" in how those enhancements are applied.[207] Perhaps most revealing is that Bennett could discern no guiding principle as to why prosecutors sought the sentencing enhancement in any particular district or across the country.[208] Bennett noted:

I have never been able to discern a pattern or policy of when or why a defendant receives a § 851 enhancement in my nearly 20 years as a U.S. district court judge who has sentenced over 3,500 defendants, mostly on drug charges. I asked one of our district's most respected supervisors of probation officers to inquire among all of this district's probation officers who write pre-sentence reports if any could discern a pattern. I received the following response: "I had a chance to talk with each of the writers and the consensus is that there really is no rhyme or reason to when the §851 [enhancement] is filed and when it is not."[209]

As a result, Judge Bennett concluded that "similarly-situated defendants in the same district, before the same sentencing judge, sometimes received a doubling of their mandatory minimum sentences and sometimes did not. The same was true for similarly-situated defendants in the same district, before different judges, and similarly-situated defendants ***166** spanning the ninety-four districts."[210] Judge Bennett described this predicament as the "wheel of misfortune" because a defendant's chances of receiving the sentencing enhancement were akin to essentially spinning a wheel of chance, with potentially disastrous results.[211]

In sum, it is impossible to presume that had plea bargaining taken place, any particular result was likely to occur. Therefore, in light of the above, it is almost impossible for a defendant to demonstrate or a reviewing court to conclude, with any reasonable degree of certainty, what offer the prosecution would have made, both with respect to charge and sentencing bargaining, had competent counsel pursued meaningful plea discussions. Indeed, attempting to do so looks much like "a process of retrospective crystal-ball gazing posing as legal analysis."[212]

D. Proving the Defendant Would Have Accepted a Plea Bargain

In addition to finding that the prosecution would have offered a plea agreement, in order to demonstrate prejudice, a defendant must show that he would have in fact accepted the government's offer.[213] Courts have primarily relied on two specific arguments when finding that a defendant has failed to show that he would have accepted a plea bargain.

First, courts have found that the defendant's assertion that he would have accepted a plea offer is simply a "self-serving statement" and not "objective evidence."[214] However, requiring the defendant who proceeded ***167** to trial to produce evidence that he would have accepted a plea bargain places an unfair burden on the defendant. It is possible that a defense attorney spoke to his client about the possibility of a plea bargain, the defendant indicated his willingness to accept a plea bargain, but defense counsel failed to follow through and then the case proceeded to trial.

It is even far more likely that a defense counsel who fails to affirmatively seek out a beneficial plea bargain on his client's behalf has likewise failed to have a meaningful discussion with his client about this possibility. In this sense, a lack of "objective evidence" that the defendant would have agreed to a plea bargain may not exist precisely because of defense counsel's constitutionally deficient performance.[215]

Second, courts have found that even if defense counsel failed to seek out a plea bargain, the defendant's continued assertion of innocence after being found guilty at trial demonstrates that the defendant suffered no prejudice, reasoning that the defendant would have never pled guilty to begin with.[216] This argument once again fails to take into account the role of a competent defense counsel, particularly with respect to effective client counseling.[217]

***168** For example, a defense attorney may recognize the significant likelihood of the defendant being found guilty after a trial, despite the defendant's claim of innocence. However, a skilled defense attorney may be able to impress upon the client the trial's likely outcome and the sentence he will likely receive. After effectively negotiating with the prosecutor to secure a beneficial plea bargain, defense counsel may be able to prevail upon his client to enter into what is commonly termed an Alford plea. An Alford plea refers to the Supreme Court's holding in North Carolina v. Alford[218] that a trial judge may accept a guilty plea from a defendant who maintains his innocence as long as there is a "strong factual basis" for the plea.[219] In this regard, defense counsel's ability to engage in effective negotiation with the prosecutor, as well as effective counseling of his own client, would indeed lead to the acceptance of a plea bargain despite the defendant's continued proclamations of innocence.[220]

Effective client counseling during the plea bargaining stage may also convince the defendant that accepting a plea bargain is in his best interest, despite his stated reluctance.[221] Criminal defendants maintain their innocence for a host of reasons, even though they may not be innocent. Some of these reasons include: a basic misunderstanding of the law; a belief that their court appointed defense attorney will not work hard for them if they are actually guilty; or, conversely, a belief that their attorney possesses enough skill that they are assured of a not-guilty verdict.[222]

Further, many criminal defendants will initially resist a plea bargain because they have insisted to family and friends that they are innocent; ***169** they may be embarrassed by the charges they face; they may be covering up for others; they may not recall the events because of drugs, alcohol, or mental health issues; they do not want to disappoint loved ones; or they feel that a sentence of any length is too long.[223]

However, effective client counseling can certainly impress upon the defendant that, in light of the possibility of conviction and the likely sentence after trial, an admission of guilt is in the client's best interest.[224] To that end, Anthony Amsterdam's Trial Manual 5 for the Defense of Criminal Cases, referred to by one legal commentator as "probably the best criminal trial manual ever written"[225] notes:

[C]ounsel may and must give the client the benefit of counsel's professional advice on this crucial decision; and often counsel can protect the client from disaster only by using a considerable amount of persuasion to convince the client that a plea which the client instinctively disfavors is, in fact, in his or her best interest. This persuasion is most often needed to convince the client that s/he should plead guilty in a case in which a not guilty plea would be destructive. The limits of allowable persuasion are fixed by the lawyer's conscience.[226]

Although there are defendants who assert their innocence and never deviate from that position, it is clear that competent representation during the plea bargaining stage of a proceeding may result in a defendant deciding to cut his losses and attempt to plea bargain, despite the fact that at one point he was opposed to doing so.[227] Indeed, one commentator noted that

[m]ost experienced criminal defense lawyers have had grueling sessions during which they urge recalcitrant clients to plead guilty. These intense ***170** and often unpleasant encounters can ultimately be enlightening and even redemptive for the client. Sometimes there is enormous relief in accepting the reality of a situation, putting an end to the uncertainty, and admitting guilt.[228]

Therefore, once again, it is almost impossible for a reviewing court to accurately assess how the result of the proceeding would be different if the defendant was represented by competent counsel, who sought a plea bargain in the first place. Defense counsel, who was competent enough to recognize the importance of pursuing a plea bargain in a particular case, may also be successful in convincing the defendant to forgo a resolute assertion of his innocence.

E. Strickland's Prejudice Prong Should Be Abandoned When Evaluating Whether Counsel Failed to Plea Bargain

Whether at trial, or in the context of the plea bargaining process, Strickland v. Washington's prejudice prong represents a substantial and ***171** often insurmountable obstacle for defendants to overcome.[229] This Article does not call for the complete elimination of Strickland's prejudice prong. Instead, this Article posits only that due to the unique skill set used during plea bargaining,[230] the untold number of variables that can affect the outcome of plea negotiations,[231] the informal and unregulated nature of the plea bargaining process,[232] and the lack of a formal record,[233] it is unfair to apply Strickland's prejudice prong in the specific context of defense counsel's failure to affirmatively pursue a plea agreement. Although the excising of Strickland's prejudice prong in the limited circumstances addressed in this Article may strike some as extreme, it should be noted that going so far as to call for its complete elimination is not an unprecedented or radical proposition. Various commentators have previously called for Strickland's prejudice prong to be jettisoned in whole, or made inapplicable to certain factual scenarios.[234]

In fact, calling for the complete elimination of Strickland's prejudice requirement mirrors the earliest criticism of Strickland itself, expressed by Justice Marshall in his Strickland dissent.[235] Further, while the vast majority of states have implemented the prejudice requirement articulated in Strickland, not all have chosen to do so.[236] To accept the proposition ***172** advanced in this Article, one is not required to embrace the complete elimination of Strickland's prejudice requirement. One need only accept the far more limited suggestion that Strickland's prejudice prong should be removed from the relevant analytical framework in a very unique and specific circumstance: when defense counsel fails to affirmatively initiate plea bargaining.

*173 IV. The Appropriate Remedy When Counsel Fails to Pursue a Plea Bargain Is to Return the Parties to Their Pre-Trial Position

Pre-Strickland, the various federal and state courts that found the failure to pursue a plea bargain was one of a constitutional dimension also found that defense counsel's performance was deficient in other regards as well.[237] Therefore, the remedy imposed by these courts often reflected the course of action the court considered necessary to redress all of counsel's failings, not just counsel's failure to pursue a plea bargain.[238]

Further, because of the hurdles posed by Weatherford v. Bursey[239] and Strickland's prejudice prong no post-Strickland court has found that counsel's failure to seek a plea agreement alone constituted ineffective assistance of counsel.[240] As a result, if a court were to find that a defense attorney's failure to pursue a plea bargain constituted ineffective assistance of counsel (which the preceding paragraphs argue that in spite of the reasoning of these post-Strickland courts, they clearly should), there is no available template to follow with respect to what remedy should be imposed. This Article makes it plain that the only constitutionally acceptable remedy is to vacate the guilty verdict or guilty plea and return the parties to the position they occupied prior to defense counsel's constitutional ***174** failings. At that time, the defendant should be free to seek a negotiated resolution of the matter. If the parties cannot reach an agreement, the defendant could then proceed to trial, even for a second time. However, as the preceding discussion demonstrates, because the plea bargaining process functions like an economic marketplace, the most likely result of this remedy will be that the parties agree to a plea bargain that all deem fair under the circumstances.

A. Every Constitutional Wrong Requires a Remedy

In Anglo-American jurisprudence, few legal principles are accorded more force than the proposition that "for every violation of a right, there must be a remedy."[241] The roots of this proposition can be traced at least as far back as William Blackstone, who commented on the importance of providing a fair legal remedy:

> It is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded . . . . It is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.[242]

In Marbury v. Madison, Chief Justice John Marshall, borrowing heavily from Blackstone's commentaries, further advanced this principle when he wrote:

> The very essence of civil liberty certainly consists in the right of the individual to claim protection of the laws whenever he receives an injury . . . . The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to observe this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[243]

***175** Justice Marshall further stated: "[I]t is a settled and invariable principle that every right, when withheld, must have a remedy, and every injury its proper redress."[244]

In light of the above principles, the Supreme Court has historically held that "Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." [245] The Court has further stated its "approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel," [246] "while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution." [247] Recognizing such, the Supreme Court has crafted different remedies depending upon the exact manner in which the Sixth Amendment's guarantee of effective assistance of counsel has been violated.

B. The Existing Remedies for Ineffective Assistance of Counsel

To date, the Supreme Court has provided five possible remedies, in the five different factual contexts in which it has found ineffective assistance of counsel. The imposition of these remedies assumes that both prongs of Strickland have been satisfied. The five factual circumstances are ineffectiveness at trial, [248] ineffectiveness at sentencing, [249] ineffective advice that leads the defendant to enter a guilty plea, [250] failure ***176** to convey a plea offer to the defendant, [251] and ineffectiveness that leads to the rejection of a plea agreement and the subsequent decision to proceed to trial. [252]

The first remedy created by the Court is when counsel has been found to be ineffective in the context of a criminal trial, the court vacates the conviction and provides the defendant with a new trial at which he is assisted by competent counsel. [253] The logic of this remedy is obvious because of the defense attorney's ineffective trial performance the result of the proceeding cannot "be relied on as having produced a just result." [254] Therefore, a new trial in which the defendant is assisted by competent counsel is necessary to ensure the proper functioning of the adversarial system, and by extension, the existence of a fair trial. [255]

Second, when counsel has been found ineffective in the context of a sentencing proceeding, the court vacates the sentence and orders that a new sentencing hearing be conducted. [256] The defendant is not claiming that the trial was unfair or the guilty plea invalid. [257] Instead, the defendant's complaint addresses whether he received effective assistance of counsel during the sentencing phase of the proceeding. [258] Therefore, the remedy that most clearly "neutralize[s] the taint" [259] is to simply order a new sentencing hearing in which the defendant is assisted by competent counsel. [260]

***177** Third, when counsel has been found ineffective by providing faulty advice to a defendant that leads him to accept a guilty plea, the guilty plea is vacated and the defendant can either attempt to renegotiate a guilty plea with the effective assistance of counsel or proceed to trial. [261] As previously discussed, the Court has held that the entry of a guilty plea, and, by extension, the point at which the defendant chooses to accept a plea offer, is a "critical stage" at which the right to effective assistance of counsel adheres. [262] As a result, if the defendant has been denied effective assistance of counsel at this critical stage, and but for counsel's incompetent advice he would have proceeded to trial, [263] the proper remedy is to return the defendant to the position he was in prior to the acceptance of the prosecution's offer. [264] At that point, the defendant can be represented by the competent counsel he is constitutionally entitled. [265]

Fourth, as explained previously, the Court in Missouri v. Frye held defense counsel ineffective for failing to inform the defendant of a plea offer previously extended by the prosecution. [266] Fifth, as the Court recently found in Lafler v. Cooper, defense counsel can also be found ineffective for providing faulty advice which causes the defendant to reject a plea offer and to proceed to trial. [267] The remedy to be applied in both situations is the same. [268]

***178** It is essential to note that in Frye, the defendant never claimed that his plea was not knowing, intelligent, and voluntary. In Lafler, the defendant never claimed that the trial itself was unfair. In fact, in both Frye and Lafler, the Court conceded that both the guilty plea in Frye and the trial in Lafler, by themselves, passed constitutional muster.[269] Therefore, in crafting the appropriate remedy, the Court was forced to confront a more complicated dilemma than in any of the other contexts in which it found ineffective assistance of counsel: giving the defendant any remedy at all would have the effect of disturbing an otherwise constitutionally valid guilty plea or trial verdict.[270] The Court nevertheless determined that defendants in both the factual scenarios described in Frye and Lafler were entitled to a remedy.[271]

In Lafler, the Court articulated the remedies that were applicable to both the factual scenario present in Lafler as well as Frye.[272] If a court determines that the defendant would have accepted the plea offer but for counsel's conduct (i.e. the failure to extend the plea offer, or the rejection of an otherwise beneficial plea offer based on counsel's poor advice), the Court has created the possibility of two different remedies, depending upon whether the defendant was ultimately convicted of the same or different charges.[273]

***179** If the defendant is convicted of the same charges that would have made up the plea bargain, the court may exercise discretion in determining "whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between."[274] If the defendant is convicted of a more serious charge than would have made up the plea bargain, or a mandatory sentence restricts the trial judge's ability to impose a different sentence,[275] the judge may "require the prosecution to reoffer the plea proposal."[276] Once this has occurred, the judge may then use his or her discretion in determining whether to vacate the trial conviction and require specific performance of the guilty plea, or leave the conviction.[277]

In crafting this particular remedy, the Lafler Court expressed concern that vacating an otherwise constitutionally permissible guilty plea or trial verdict and returning the defendant to his pre-trial position would entail significant societal costs.[278] This is particularly true with respect to a trial verdict.[279] Granting a new trial would force the government to spend additional funds, time, and energy, as well as ask victims to relive disturbing experiences when forced to testify again.[280]

As a result, the Court's remedy strikes a balance. The defendant is not returned to the position he was in prior to defense counsel's constitutionally flawed performance.[281] However, neither is the defendant left without possible recourse. Instead, the Court decided that the manner in which the remedy was best tailored to address counsel's ineffectiveness should be largely left to the discretion of the trial judge, subject to the trial court's consideration of what it deems relevant factors.[282]

***180 C. If Counsel Has Failed to Pursue a Plea Bargain, a Remedy Must Be Determined**

The factual circumstance in which counsel has failed to affirmatively seek a beneficial plea bargain on his client's behalf is not the same as any of the five factual circumstances identified above. Therefore, a reviewing court, as a matter of first impression, must determine what the appropriate remedy should be. The five possible remedies that currently exist to address ineffective assistance of counsel claims are not applicable to the circumstances where defense counsel has failed to seek out a plea bargain.

As a result, when defense counsel fails to pursue a plea bargain, the court cannot impose a fair remedy by comparing the sentence the defendant actually received to the sentence that was offered. Unlike the factual circumstances in Frye and Lafler, there is simply no means of comparison that would aid the court in determining the most appropriate remedy. Further, given

the difficulty in accurately assessing the role of prejudice when defense counsel has failed to plea bargain, the court cannot simply decide what charge and sentence would most likely have made up the plea offer and impose the corresponding remedy. Undoubtedly, this would seem to be an appealing option for many of the same reasons that the Lafler Court found its particular remedy to be an appealing option. This remedy would be the ultimate balancing remedy so to speak; it would allow the court to avoid vacating a valid guilty plea or trial verdict and at the same time grant the defendant relief following his counsel's failure to even attempt to secure a beneficial plea bargain on his behalf. However, as noted in Part III of this Article, a court conducting an after the fact review of what would have occurred had defense counsel sought a plea bargain cannot accurately predict with a "reasonable probability" [283] what charges or sentence recommendation a prosecutor would have made. This is largely due to the seemingly infinite and unique personal factors that impact an individual prosecutor's decision ***181** making, as well as the difficulty in ascertaining the impact that skilled defense counsel may have had on the plea bargaining process.

If a court cannot accurately predict the charge and sentence that would have formed the basis of a never offered plea agreement when attempting to determine the extent to which a defendant may have been prejudiced by counsel's failing to seek a plea bargain, a court would be unable to conduct the same analysis in attempting to ascertain what sentence the defendant would have received in the context of crafting a remedy. This would simply be a prejudice analysis in disguise.

Lastly, a court cannot order the prosecution and defense to negotiate and come to an agreement on the charges the defendant will plead guilty to, or the sentence he will receive. [284] As this Article has suggested, the importance of the Court's holding in Weatherford v. Bursey has been called into question only with respect to the contention that Weatherford limits the extension of ineffective assistance of counsel claims into the plea bargaining process. [285] It is not contested that Weatherford's pronouncement that as far as plea bargaining is concerned, "the prosecutor need not do so if he prefers to go to trial," remains good law. [286]

The position that it is the prosecutor's choice whether to offer the defendant a plea bargain is entirely consistent with the long held recognition that in the American system of criminal justice, the prosecution need not plea bargain if they prefer not to. [287] The prosecution could ***182** simply ignore the judge's order to plea bargain, as it clearly exceeds the court's constitutionally prescribed authority. [288] Additionally, even if the prosecution did attempt to plea bargain with the defendant, the defendant could not be made to accept the prosecution's offer. [289]

Clearly, none of the remedies that are currently designed to address occurrences of ineffective assistance of counsel can be made applicable to a defense attorney's failure to pursue a plea bargain. Not only is there an inherent difficulty in accurately determining what charges and sentence recommendation would have comprised the hypothetical plea bargain, there are numerous constitutional limitations placed on a court's ability to craft a remedy that requires the court to order either the prosecution or the defense to do anything at all. [290]

For these reasons, no possible remedy exists when the defense attorney fails to pursue a plea bargain other than vacating the guilty plea or trial verdict and returning the parties to their respective positions prior to the entry of the guilty plea or commencement of trial. [291] In this regard, not only is this the remedy best designed to "neutralize the taint," [292] it is the only remedy that can possibly accomplish that end.

D. Vacating a Guilty Plea or a Trial Verdict Is Consistent with Legal Precedent

The vacating of a constitutionally valid guilty plea and trial verdict may appear to some to grant the defendant a windfall. By returning the defendant to the position he was in prior to the guilty plea or trial verdict, in essence, the defendant is granted

a "do over" despite the otherwise fair guilty plea or trial. Furthermore, the vacating of a trial verdict in particular does entail substantial costs to the government. [293]

***183** However, this analysis fails to take into account the Supreme Court's recent decisions in both Lafler and Frye and the Court's treatment of both the valid guilty plea and fair trial that occurred in those cases. [294] In determining that both Lafler and Frye were entitled to a remedy based on defense counsel's ineffective performance during the plea bargaining process, the Lafler Court noted that it "has not followed a rigid rule that an otherwise fair trial remedies errors not occurring at the trial itself. It has inquired instead whether the trial cured the particular error at issue." [295]

Specifically, in determining that constitutional failings, which occur during the plea bargaining process, cannot be saved by an otherwise fair trial or guilty plea, the Lafler Court went to great pains to note the importance and prevalence of plea bargaining in the modern criminal justice system. [296] The Court noted that not only are the vast majority of cases disposed of by plea bargains, but there are also substantial benefits that defendants can expect to realize through meaningful participation in the plea bargaining process. [297]

As a result, the mere fact that a reliable trial or fair guilty plea occurred does not foreclose the possibility that the defendant may have been adversely impacted by counsel's failings during the plea bargaining stage of the proceeding. [298] The Supreme Court concluded that "[b]ecause ours 'is for the most part a system of pleas, not a system of trials,' it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process." [299]

***184** Not unlike the failings of defense counsel during the plea bargaining process in both Lafler and Frye, when defense counsel does not pursue a plea bargain on his client's behalf, this failing has occurred at a stage in the process at which effective assistance of counsel may have mattered most to the defendant. [300] Further consistent with the Court's holding in Lafler and Frye, when defense counsel has failed to pursue a plea bargain during the pretrial process, the mere fact that the failure was followed by a fair guilty plea or trial does not serve to "inoculate" the error and deprive the defendant of a remedy. [301]

Although the following discussion will demonstrate that it is highly unlikely that a defendant who is returned to his pretrial position will reap a windfall, there may be the occasional defendant who does. Any given defendant may decide to forgo an opportunity to plea bargain and roll the dice after having earlier entered a guilty plea or been convicted at trial. These defendants may end up being acquitted after a first or even second trial. In certain cases, the passage of time may make retrial more difficult, victims may not want to relive painful experiences, or the state does not wish to incur additional resources on the defendant's re-prosecution.

Obviously, the remedy proposed in this instance is not perfect, as it is impossible to completely return the parties to the position they were in during the pre-trial stage of the proceedings. [302] While remedies must be constructed in such a way as to avoid granting defendants a windfall, there also exists the possibility of constructing a remedy that falls short of redressing the wrong suffered by the defendant when a particular constitutional right has been violated. [303] Legal scholars have referred to this phenomenon as the "right-remedy gap." [304]

To that end, the United States Supreme Court acknowledged that whether one is entitled to a retrial after a finding of ineffective assistance of counsel does not turn on the reliability of an initial trial verdict or the ***185** defendant's obvious guilt. [305] Although the effect of retrial may as a practical matter prevent the state from obtaining a conviction, [306] the Court has held that, "[t]he Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel." [307]

Moreover, numerous state courts have held that the proper remedy for ineffective assistance of counsel during the plea bargaining stage, despite a reliable trial verdict, is to order a retrial regardless of the inherent difficulties that may exist in bringing the defendant to trial for a second time.[308] In this regard, courts have not prevented every defendant from ***186** obtaining a remedy in the face of clear constitutional wrong, simply because a small number of defendants may escape conviction. These courts have accepted that the inability to create a perfect remedy in some cases does not justify the denying of a remedy in every case.[309] Undoubtedly, denying a remedy on such a basis would create an intolerably expansive "right-remedy gap" in the context of the Sixth Amendment's guarantee of effective assistance of counsel.

E. The Plea Bargaining Marketplace

Importantly, the most likely result of returning the defendant to the position he was in prior to defense counsel's constitutional failing is that both types of defendants, those who entered a guilty plea without the benefit of a plea bargain and those who proceeded to trial, are likely to try to plea bargain with the prosecution, and the prosecution is likely to return the favor. This particular result is likely to occur, as numerous scholars have observed, because the criminal justice system functions in a manner that is like a traditional "well-functioning market system."[310]

First, like actors in a traditional marketplace, it is assumed that actors in the criminal justice system "act as if each person is a rational maximizer of his satisfactions."[311] It is also assumed that the actors in the marketplace are making decisions based on the same information.[312] Just ***187** like a marketplace, the various parties involved have incentives to trade with each other for the purposes of making a deal each side views as satisfying its particular goals.[313] The process of making a deal involves each side weighing numerous considerations relevant to its goals and then deciding whether the proposed trade is beneficial to its own position.[314]

The most dominant theory related to plea bargaining as a marketplace is known as "Trial Shadow Theory."[315] This theory is based on the notion that plea bargains are largely the products of each party's forecast of the expected trial outcome, thus plea bargaining takes place in the trial's shadow.[316] In its most simplified form, Trial Shadow Theory provides that there are three fundamental questions that dictate the terms of the bargained for agreement.[317] These are each side's predictions relating to: (1) "the likelihood that a trial will result in a conviction," (2) "the trial sentence anticipated if the case were tried and resulted in a conviction," and "(3) the resource costs of trying the case."[318]

In terms of a plea bargain, the defendant is willing to trade away his right to proceed to trial in exchange for guaranteeing a small punishment rather than a "chancy but large one,"[319] the anxiety of trial,[320] or the cost.[321] The prosecutor is in turn willing trade away the potential for a longer sentence or potentially more serious conviction in exchange for ***188** the guarantee of a guilty verdict of some kind.[322] If the defendant agrees to trade away his procedural rights for a less severe sanction, not only is the prosecutor guaranteed a conviction, the prosecution is also able to save resources, principally in the form of the time that can be used to prosecute additional defendants.[323] As a result, both sides are generally motivated to "make a deal."[324] Indeed, one scholar has commented on the plea bargaining process as a marketplace theory "[w]hen more than forty-seven out of every fifty dispositions are guilty pleas, it is safe to say the theory is on to something."[325]

However, in order to make a deal, each side must decide the exact point at which they are satisfied that the benefits they are a receiving are significant enough to justify what they are agreeing to give up.[326] Each side will take into account its individual

assessment of the three factors identified above.[327] The prosecutor will then formulate a minimum settlement demand, which reflects the prosecutor's assessment of the probability of conviction, the expected post-trial sentence, minus the cost of holding the trial (the cost is reflected in time, not in monetary terms).[328] The defendant, in turn, will have a maximum settlement offer, which is ***189** in large part determined by his prediction concerning the probability of conviction and the sentence the defendant expects to receive after conviction.[329]

In classic market based terms, when the prosecution and the defendant have reached a particular plea agreement, the agreement essentially represents the price of the offense.[330] When the prosecutor and defendant "substantially agree on the price of the offense, they usually should be able to avoid a trial."[331] This plea pricing mechanism employed by both sides can be expressed with the below equations:[332]

Probability of conviction = P

Expected Sentence if Convicted at Trial = ETS

Resource costs of the prosecution = Rp

Resource costs of the defendant = Rd

Rational Plea Sentence = RPS

Defendant

RPS < (P)(ETS)-(Rd)

However, though defendants do have resource costs, the vast majority of criminal defendants are indigent and so the cost of going to trial is largely "borne by the state."[333] In evaluating the quality of a plea offer from the defendant's perspective, assume the defendant only cares about the "probability of conviction (p) and the expected trial sentence (ets)."[334] For the vast majority of defendants the pricing mechanism is best expressed as:

***190** RPS < (P)(ETS)

Prosecution

RPS # (P)(ETS)-(Rp)

Assuming all parties act rationally, a deal is possible when the prosecution's offer is less than the defendant's RPS calculation. If the prosecution's offer is equal or higher to the defendant's RPS calculation, the defendant has nothing to lose by taking his chances at trial. Likewise, when the defendant's offer is equal or greater to the prosecution's RPS calculation, the prosecution should agree to a plea bargain along those terms. The price of the crime will have been established. It should be noted that not all scholars necessarily agree that the plea bargaining process is largely driven by these primary considerations and can be so easily reduced to the above equations.[335] In a highly influential 2004 work published in the Harvard Law Review, Professor Stephanos Bibas argued that Trial Shadow Theory is an "oversimplified" version of how the plea bargaining process actually

works.[336] He argued that the result of the plea bargaining process, while influenced by the above factors, does not always reflect the expected trial outcome coupled with a discount for saving resources.[337]

Professor Bibas posited that, in reality, what a plea bargain looks like is determined by additional structural, idiosyncratic, or legally irrelevant factors, from both the prosecution and defense perspective.[338] He suggested that these factors include: poor lawyering, agency costs, lawyers' self-interests, bail rules, pretrial detention, sentencing guidelines, political pressure, information deficits, the risk taking nature of the individual defendant, and even wealth, sex, age, education, intelligence, and confidence.[339]

Additionally, Bibas counters that not all actors in the plea bargaining context act rationally.[340] For the purposes of this Article it is important ***191** to note that Bibas's argument is that plea bargains diverge from expected trial outcomes partly because the plea offer a prosecutor makes will "vary depending on the case, the lawyer, and the particular prosecutor's office policies."[341] This is largely consistent with this Article's earlier discussion relating to the idiosyncratic nature of the plea bargaining process and why it is extremely difficult to predict what offer a particular prosecutor would have made, had plea bargaining taken place in the context of determining prejudice.[342]

However, when the trial court has returned the parties to their pre-trial position following the vacating of a guilty plea or trial verdict, plea bargaining in the shadow of the second trial is more likely to resemble the simplified version of Trial Shadow Theory described in the price fixing equations above.[343] This is because, after the first trial or guilty plea, both parties now actually have the same information that Trial Shadow Theory assumes they have when plea bargaining begins.[344] The information gleaned from the first trial provides each side with a greater understanding of the strength of the other side's case, as well as the likely sentencing outcome.[345] This increased information is likely to eliminate a certain degree of uncertainty that each party may have previously factored into its plea equation.[346] Because the parties are likely to feel the first proceeding was a legitimate predictor of the results of a second guilty plea or trial, both the defendant and the prosecution are likely to view the results of the first guilty plea or trial as the expected outcome.[347]

***192** Typically, when conducting negotiations "[p]eople come up with or evaluate numbers by focusing on a reference point (an anchor) and then adjusting up or down from that anchor. This anchor may come from a guess or from an analogous case."[348] Because the likely result of a second trial can be more easily predicted after the first (after all, it is not simply an analogous case, but the same case), each side will view the sentence handed down after the first trial as the obvious anchor point for future negotiations. Therefore, plea bargaining in the shadow of the second trial will more closely mirror the terms of the expected trial outcome than it may have the first time around.

That being said, plea bargaining in the shadow of the second trial is likely to occur because each party will be motivated to plea bargain. Despite the benefits of participating in the plea bargaining marketplace, "[a] defendant can 'maximize' what he has to 'sell' only if he is permitted to offer what the prosecutor is most interested in buying."[349]

In other words, the defendant can only take advantage of the market forces at play in the plea bargaining process if he actually participates in that process.[350] If a court vacates a verdict and sentence based on ***193** defense counsel's failure to plea bargain and returns the parties to the position they were in prior to the entry of a guilty plea or trial verdict, the defendant is obviously cognizant of the benefits of participating in the plea bargaining market. The prosecution is likewise familiar with the benefits of a plea bargain. Consequently, after the verdict and sentence are vacated and the case starts a new, both sides are likely properly incentivized to make a deal.

To that end, the defendant who has already entered a guilty plea has done so, in all likelihood, believing that his chances of prevailing at trial were somewhat futile. [351] This defendant is certainly willing to plead guilty again. Also, the defendant already knows the sentence he will likely receive if he were to plead guilty without the benefit of plea bargain.

If, without plea bargaining, the defendant pleads guilty a second time and receives the same sentence or a marginally shorter or a marginally longer sentence, he is in roughly the same position as he was in before. However, believing that in exchange for a guilty plea, he should receive a benefit from the government, the defendant is likely to insist on a beneficial plea bargain in exchange for not following through on his threat to force the government to move forward to trial. The government has no way of knowing if the defendant is bluffing.

Further, the defendant who proceeded to trial and was found guilty may view the results of the first trial as a reflection of the strength of the government's case, and the penalty he received after trial as the "trial tax." [352] Therefore, it stands to reason that many such defendants will look ***194** to plea bargain with the prosecution after having seen what a trial looks like and the expected post-trial sentence they are likely to receive. However, if the prosecution refuses to plea bargain, they have given the defendant little incentive not to take the case to trial again.

The prosecution may also be inclined to plea bargain even after the defendant's guilty plea or trial verdict has been vacated. In both instances, the prosecution may feel the case for guilt is strong, however, the prosecution must also surely recognize that they are not guaranteed any particular victory if a trial were to be held again. The prosecution will realize that retrial may give the defense an opportunity to conduct additional investigation, call additional witnesses, recognize potential weaknesses in the prosecution's case they previously failed to exploit, to modify the defense theory, to use testimony from the first trial as possible impeachment evidence, or to have a more defense oriented jury for the second trial.

The expected trial outcome may be more easily forecast after the first trial, but the mere fact that the prosecution obtained a conviction does not completely eliminate the prosecution's motivation to eliminate uncertainty before a second trial through a plea bargain. In this sense, while the prosecution's assessment of the probability of conviction may increase after the first trial, it can never reach the point where it can be calculated as a 100% probability of conviction.

Regardless of the likelihood of obtaining a conviction, the prosecution may not wish to expend further resources by conducting another trial. As one legal commentator has observed, "[p]rosecutors have strong self-interests and institutional interests in disposing of their cases quickly and consensually, so they can pursue other cases or lighten their own workloads." [353]

Therefore, even "in cases where both parties understand that conviction at trial is virtually certain--a description that fits many, many cases--the incentive to bargain is simple. Savings in adjudication costs represent the gains from trade." [354] However, in order to induce a defendant not to take the case to trial for the second time, the prosecution ***195** will have to offer the defendant enough of a discount from the expected post trial sentence that accepting a plea bargain is a rational choice.

The dynamic of plea bargaining in the shadow of the second trial was perhaps most succinctly summarized by the Court of Appeals for Wisconsin in State v. Lentowski. [355] There the court vacated a guilty verdict after a finding of ineffective assistance of counsel based on a defense attorney's advice to reject a favorable plea offer, and the court returned the parties to the their pre-trial positions. [356]

While we recognize that returning the parties to the pretrial point does not totally negate the fact that the prosecution has acquired the "substantial bargaining leverage" of having already obtained a conviction of the defendant, the defendant is given back the

leverage afforded by a prosecutor's "desire to avoid the time and expense of a new trial and the accompanying uncertainty as to the outcome of the proceedings." [357]

The end result will likely be that both sides will reach an agreement concerning the price of the crime, resulting in the acceptance of a plea bargain that all parties believe is fair in light of the circumstances in which they are now bargaining. In a broad sense, this is the scenario that was likely to occur if defense counsel had sought a plea bargain in the first place. As one legal observer has noted: "[t]he expected post-trial sentence is imposed in only a few percent of cases. It is like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less as a bargain." [358]

Indeed, "[t]he quasi-market forces at work encourage all parties involved to work together to achieve plea bargains that benefit all parties directly involved." [359] Therefore, the result of returning the defendant to the position he was in during the pretrial stages of the proceeding is likely to produce a fair result in the eyes of both the defense and the prosecution.

*196 F. Steps Can Be Taken to Ensure Defense Attorneys Participate in the Plea Bargaining Process

Lastly, it is essential to recognize that there is nothing about a defense attorney's Sixth Amendment responsibility to initiate plea bargaining discussions that prohibits the prosecution or the judiciary from acting prophylactically. In fact, both the prosecution and the judiciary can take affirmative steps to ensure that the defendant is not in a position to claim that his counsel was ineffective for failing to initiate plea discussions, either because of pure incompetence or because the defense attorney purposely failed to pursue negotiations in order to guarantee a reversal of the defendant's conviction.

In this regard, if the prosecution offers the defendant a plea bargain before being approached by defense counsel, or is unwilling to extend and offer to the defendant, they should clearly state such in writing and as a part of the formal trial record. This would render moot the issue of defense counsel's failure to initiate plea bargaining on the defendant's behalf. [360]

***197** If the prosecution does not make a specific offer, but is willing to offer the defendant a plea bargain, the prosecution can simply indicate to the defense its willingness to engage in plea discussions. [361] If the defense responds and negotiations begin in earnest, obviously the defendant will not be able to claim that defense counsel failed to plea bargain on his behalf. If the defendant does not respond, the best practice would be for the prosecution to inform the trial court on the record that they have attempted to pursue plea discussions with defense counsel and that defense counsel has not availed himself of this opportunity. At this point, the court can conduct whatever inquiry it deems necessary to ensure that defense counsel's conduct does not fall below that of reasonable competent counsel in the plea bargaining process.

Prior to accepting the defendant's guilty plea or moving forward to trial, the trial judge could likewise conduct an inquiry into whether or not defense counsel has availed himself of the plea bargaining process. Defense counsel need not divulge defense strategy, or the contents of conversations protected by attorney client privilege, but could nevertheless respond to the court's inquiry in such a manner as to satisfy the court that defense counsel has either participated in the plea bargaining process or that refusing to do so represents a strategic decision. To that end, a prophylactic approach to heading off defense counsel's ineffectiveness when defense counsel has failed to pursue a beneficial plea bargain is entirely consistent with some legal scholars' views that claims of ineffective assistance of counsel are best litigated pursuant to an ex-ante standard as opposed to Strickland v. Washington's ex-post facto review. [362]

In fact, if the Supreme Court were to find that defense counsel does have an affirmative obligation to initiate plea bargaining discussions, the likely result will be that prosecutors' offices, as well as judges, would put their own procedures in place to ensure

that the defendant is not be able to subsequently claim his attorney was ineffective for failing to ***198** pursue a plea bargain. This is precisely what occurred after the Supreme Court's decisions in both Padilla v. Kentucky [363] and Missouri v. Frye. [364]

Since Padilla's pronouncement that defense attorneys must inform non-citizen defendants of the deportation consequences of a particular guilty plea, prosecutors' offices began giving defendants written warnings and identifying the types of convictions giving rise to immigration consequences. [365] Further, some judges began "orally warning defendants at arraignment and at plea hearings" regarding the immigration consequences of a particular guilty plea. [366] Judges also began verifying that a defendant's lawyers had advised the defendant about various immigration consequences, or even began "inquiring into defendants' immigration status on the record." [367]

Following Frye's mandate that defense attorneys inform defendants of plea offers, prosecutors' offices have likewise taken affirmative steps to "protect the record" against the defendant's future claims of ineffectiveness. [368] For example, after Frye, one United States Attorney in the Western District of Tennessee has begun to file motions requesting
not only that the plea offer be clearly stated on the record, but also that the defense state the content of "any plea related discussions" including the "attorneys' advice to their clients." The motion recognizes that these discussions could be privileged and concedes that they should be sealed and not shown to the prosecution. [369]

***199** The notion that prosecutors and judges would put steps in place to inoculate the plea bargaining process from future claims of ineffectiveness is not surprising.

Legal commentators have recognized that both prosecutors and judges have strong incentives to not only encourage defendants to accept plea agreements, but also, "to make clean records to bulletproof their convictions on appeal and habeas review." [370] As a result, if the Sixth Amendment's guarantee of effective assistance of counsel requires defense attorneys to initiate plea bargaining discussions, it is highly unlikely that prosecutors and judges would ever allow a defendant to be in a position where he could claim that defense counsel failed to do so prior to the entry of a guilty plea or decision to proceed to trial.

Conclusion

Although plea bargaining may be the dominate means by which criminal matters are disposed of in today's criminal justice system, this was not always so. [371] It was not until the latter half of the nineteenth century that plea bargaining emerged as a common practice in American court rooms. [372] Plea bargaining's role as the primary mechanism by which criminal cases were disposed expanded throughout the twentieth century, culminating with the United States Supreme Court's 1970 decision in Brady v. United States [373] upholding the constitutionality of the practice. [374]

The net result of both the prevalence and constitutionalization of plea bargaining has been to ensure that in our plea dominated system, "the kind of justice a 'defendant receives [is] more dependent on the quality ***200** of his counsel than any other legal system in the world."' [375] In light of this observation, it is not surprising that in Missouri v. Frye [376] and Lafler v. Cooper [377] the Supreme Court expanded the right to effective assistance of counsel beyond the acceptance and entry of a guilty plea, and into the plea bargaining process itself. [378] In the aftermath of Frye and Lafler, future courts will be forced to define the exact parameters of defense counsel's responsibilities in this context. This Article makes clear that one of those responsibilities entails ascertaining if the defendant wishes to explore the possibility of a plea bargain, and if there is no strategic justification for not doing so, defense counsel must pursue a beneficial plea bargain on the defendant's behalf. [379] This Article suggests that the

failure to do so represents a violation of the performance prong of Strickland v. Washington.[380] Moreover, in order to properly adjudicate claims that defense counsel failed to plea bargain, reviewing courts should modify the Strickland test by jettisoning a prejudice analysis in this unique circumstance.[381] Additionally, the proper remedy when such a failing has taken place is to return the parties to the position they were in during the pretrial stage of the proceeding.[382] Because of the market type forces that control plea bargaining, this remedy will most likely result in the imposition of the lost plea bargain.[383]

In the post Frye and Lafler era, how reviewing courts "define the duty and responsibilities of defense counsel in the plea bargain process" will ultimately bring about the next chapter in America's plea bargaining history.[384] Defense counsel's affirmative responsibility to pursue a plea ***201** bargain on his client's behalf should undoubtedly be included in that history.

Footnotes

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The author would like to thank those who participated in the Syracuse University College of Law Faculty and Junior Faculty Workshops for their helpful comments and suggestions in reviewing this piece. Additionally, the author wishes to thank Professors Mary Helen McNeil and Gary Pieples for their thoughtful critiques of this work and Amy Armstrong for her invaluable editing and research assistance. The author also thanks Hedimay Berger for the many hours spent proofreading. Lastly, the author extends his thanks to Beverly Beaver not only for reading many drafts of this Article, but for her unyielding patience in the process.

1 United States v. Smith, No. 04-229, 2009 WL 1578058, at *1 (E.D. Pa. June 5, 2009).

2 Id.

3 Id.

4 Id.

5 Id.; see also 18 U.S.C. § 922(g)(1) (2012) ("felon in possession of a firearm"); 18 U.S.C. § 924(c) (2012) ("carrying a firearm during and in relation to a crime of violence"); 18 U.S.C. § 2119 (2012) ("carjacking").

6 Smith, 2009 WL 1578058, at *1.

7 Id. at *4; see Brady v. United States, 397 U.S. 742, 751-52 (1970) (upholding the constitutionality of plea bargaining). One author explains plea bargaining practice as the following:
The practice most commonly consists of a negotiation between the accused and the prosecution--without the participation of a judge competent to decide the case on its merits--resulting in a plea agreement. The accused either concedes certain facts or admits guilt, thus waiving the possibility of being acquitted. The accused also gives up the benefit of having the state bear the burden of proof to establish the accused's guilt at trial. In return, the prosecutor may reduce or modify the charges (charge bargaining), the sentence (sentence bargaining), or both. Charge bargaining commonly takes two forms: the prosecutor can either reduce or dismiss charges and amend the indictment accordingly. Sentence bargaining on the other hand is typically based on the promise to either recommend a sentence or sentencing range to the judge(s) or not to oppose a request by the accused for a particular sentence.
Anna Petrig, Negotiated Justice and the Goals of International Criminal Tribunals, 8 Chi.-Kent J. of Int'l & Comp. L. 1, 4-5 (2008).

8 See United States v. Booker, 543 U.S. 220, 245 (2005) (holding that federal sentencing guidelines would now be advisory and invalidated the provisions that made them mandatory).

9 Smith, 2009 WL 1578058, at *4.

10 Id. at *1.

11 Id. at *3. The opinion authored by the district court does not shed light on why defense counsel chose not to pursue a plea bargain.

12 Id. at *4.

13 Id.

14 Id. at *2. The Sixth Amendment reads: "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. In Gideon v. Wainwright, the Supreme Court held indigent defendants do have the right to appointed counsel in a state criminal proceeding. 372 U.S. 335, 343-45 (1963). The actual text of the amendment uses the British spelling of "defence" as opposed to the modern American spelling, "defense."
In McMann v. Richardson, the Supreme Court noted that in order to give meaning to the right to counsel "the right to counsel is the right to the effective assistance of counsel." 397 U.S. 759, 771 n.14 (1970). Prior to 1984, federal courts rarely granted appeals based on claims of ineffective assistance of counsel. Such appeals were granted only when the quality of representation was so poor as to constitute "a mockery of justice" or deprived the defendant of "reasonable effective assistance." See Ronald J. Allen et al., Comprehensive Criminal Procedure 169 (2d ed. 2005). In 1984, the Supreme Court set out the current two-pronged test for analyzing the adequacy of that representation. See Strickland v. Washington, 466 U.S. 668, 687 (holding that in ineffective assistance of counsel claims, the defendant must show that, first, counsel's representation was incompetent as judged by prevailing professional norms; and, second, this incompetence prejudiced the defendant), reh'g denied, 467 U.S. 1267 (1984). In Hill v. Lockhart, decided a year after Strickland, the Supreme Court held the Strickland test was to be applied to claims of ineffective legal assistance resulting in guilty pleas. 474 U.S. 52, 58 (1985).
In Smith, Ronald Smith's claim was rejected on the basis of the Supreme Court's decisions in Weatherford v. Bursey, which held that a defendant has no constitutional right to a plea bargain, and Strickland, which required a defendant show that counsel's failure to pursue a plea bargain prejudiced the defendant. Smith, 2009 WL 1578058, at *2-4 (citing Strickland, 466 U.S. at 687; Weatherford v. Bursey, 429 U.S. 545, 561 (1977)). The decision reached by the Smith Court highlights two of the most frequently cited, but by no means exhaustive, reasons why claims such as Smith's fail. However, Sections II and III of this Article address the reasoning employed by the Smith Court (and many others courts as well). This Article concludes that because such reasoning is faulty, future courts reviewing claims relating to defense counsel's failure to initiate plea bargaining should be compelled to reach the opposite conclusion.

15 Robert E. Scott & William J. Stuntz, Plea Bargaining as Contract, 101 Yale L.J. 1909, 1912 (1992).

16 Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (citations omitted).

17 See Lindsey Devers, Plea and Charge Bargaining: Research Summary, 2011 Bureau of Just. Assistance, U.S. Dep't of Just. 1, 3, available at https://bja.gov/Publications/PleaBargainingResearchSummary.pdf. No data is available reflecting the number of cases that go to trial after defense counsel failed to pursue a plea bargain.

18 See People v. Brown, 223 Cal. Rptr. 66, 74 (Cal. Ct. App. 1986) (holding that failing to pursue or perfect a plea agreement without explanation constitutes ineffective assistance of counsel); see also Pilchak v. Camper, 741 F. Supp. 782, 797 (W.D. Mo. 1990) (holding that defense counsel's failure to enter into plea negotiations was one of fourteen errors committed by defense counsel), aff'd, 935 F.2d 145 (8th Cir. 1991).

19 See Brown v. Doe, 2 F.3d 1236, 1245 (2d Cir. 1993) ("Specifically, Brown claims that his lawyer Evelyn Williams adopted a strategy of confronting the system, and abjured cooperation with law enforcement authorities or plea bargaining because she was more interested in advancing the revolutionary cause of his co-defendants than in representing his individual interests."), cert. denied, 510 U.S. 1125 (1994).

20 Rishi Batra, Lafler and Frye: A New Constitutional Standard for Negotiation, 14 Cardozo J. Conflict Resol. 309, 330 (2013); see also Frye, 132 S. Ct. at 1412-13 (Scalia, J., dissenting).

21 The following cases are representative of the range of holdings and legal justifications employed by various state and federal courts when reviewing claims that defense counsel has a Sixth Amendment obligation to pursue a possible plea bargain on their client's

behalf. For a more extensive overview of judicial decisions addressing this issue. See Gregory G. Sarno, Annotation, Adequacy of Defense Counsel's Representation of Criminal Client Regarding Plea Bargaining, 8 A.L.R. 4th 660, § 4 (1981).

The following cases found that the failure to pursue a plea bargain was an ineffective assistance of counsel: Mason v. Balcom, 531 F.2d 717, 725 (5th Cir.) (holding that the "assembly line nature" of the guilty plea process and defense counsel's failure to pursue plea negotiations violated the Sixth Amendment right to effective assistance of counsel), reh'g denied, 534 F.2d 1407 (5th Cir. 1976); Walker v. Caldwell, 476 F.2d 213, 223 (5th Cir. 1973) (same); In Hawkman v. Parratt, the Eighth Circuit vacated a guilty plea after finding that defense counsel was ineffective for failing to conduct investigation prior to the entry of the guilty plea, failing to adequately apprise the defendant of the elements of the charges filed, potential defenses, trial risks, and the consequences of a guilty plea and for failing to initiate plea bargaining in light of numerous duplicative felony counts. 661 F.2d 1161, 1164-65, 1171 (8th Cir. 1981) (noting that it was not holding that defense counsel always has this duty), cert. denied, 474 U.S. 979 (1985); Commonwealth v. Marinho, 981 N.E.2d 648, 659-63 (Mass. 2013) (finding that in the specific context of deportation, counsel's performance was constitutionally defective when he did not pursue a possible plea agreement that would have avoided deportation.) In Marinho, however, the defendant failed to show he was prejudiced by counsel's ineffectiveness because the defendant could not show that if a plea would have been given, he would have accepted it and the court would have approved of the agreement. Id.; see also Pilchak, 741 F. Supp. at 797-98 (vacating the guilty verdict returned after trial because the failure to enter into plea negotiations was one of fourteen different errors committed by defense counsel); Cole v. Slayton, 378 F. Supp. 364, 368 (W.D. Va. 1974) (vacating the defendant's guilty plea and holding that the failure to plea bargain was one of several Sixth Amendment errors committed by defense counsel. Counsel's other errors consisted of failing to explore the adequacy of the arrest and indictment and failure to conduct any independent investigation that could have uncovered mitigating factors at sentencing, and failing to request that the trial be severed from that of his codefendant.); Brown, 223 Cal. Rptr. at 77-78 (finding the failure to pursue or perfect a plea agreement did constitute ineffective assistance of counsel and a defendant can demonstrate prejudice by showing counsel's inadequate representation resulted in the "deprivation of the opportunity for the court to exercise its discretion to accept or reject a beneficial disposition by plea").

The following cases found that the failure to pursue a plea bargain was not an ineffective assistance of counsel: Aguilar v. Alexander, 125 F.3d 815, 821 (9th Cir. 1997) (refusing to overturn a guilty verdict and finding that counsel did seek plea negotiations, but holding in dicta that if counsel had not, the failure to do so might fall "below the standard of reasonable performance" and the duty to seek out a plea bargain depends on the circumstances of a given case. (citing Hawkman, 661 F.2d at 1171)); Beans v. Black, 757 F.2d 933, 936 (8th Cir.) (citations omitted) (refusing to vacate a guilty plea because a defense counsel "does not always have a duty to initiate" plea bargaining.), cert. denied, 474 U.S. 979 (1985); Gooslin v. Sepanek, No. 12-CV-90-HRW, 2012 WL 5869290, at *5 (E.D. Ky. Nov. 20, 2012) (holding that counsel was not ineffective for failing to seek a plea bargain despite repeated requests from the defendant to do so, because the defendant could not show he would have received a favorable plea offer from the prosecution and that the defendant has no constitutional right to receive a plea bargain); United States v. Smith, No. 04-229, 2009 WL 1578058, at *4 (E.D. Pa. June 5, 2009); Talley v. United States, No. 1:00-cv-74, 2006 WL 3422997, at *13 (E.D. Tenn. Nov. 27, 2006) (holding defense lawyers have "no affirmative duty under the United States Constitution or other federal law to solicit plea bargain offers from prosecutors"); United States v. Usma, No. 97 C 3135, 1997 WL 458431, at *3 (N.D. Ill. July 29, 1997) (finding no duty to initiate plea bargaining exists and that the failure to do so may be considered a strategic decision by counsel, but that the failure to pursue plea bargaining in a particular case may be unreasonable); Custodio v. United States, 945 F. Supp. 575, 579 (S.D.N.Y. 1996) (refusing to reverse a guilty conviction because the defendant was not prejudiced by defense counsel's failure to pursue a plea bargain, and holding that the defendant's continued insistence of his innocence militated against a finding that he would have in fact accepted a plea); Spavento v. United States, 939 F. Supp. 233, 237 (S.D.N.Y. 1996) (holding that, where counsel's assistance is otherwise reasonably effective at trial, the failure to plea bargain cannot form the basis of an ineffective assistance of counsel claim), aff'd, 162 F.3d 1148 (2d. Cir. 1998); United States v. Hoffman, 926 F. Supp. 659, 676 (W.D. Tenn. 1996) (refusing to vacate a guilty verdict returned after a jury trial because the defendant could not demonstrate he was prejudiced by defense counsel's failure to pursue a plea offer when the defendant had previously expressed that he was unwilling to enter a guilty plea), aff'd, 124 F.3d 200 (6th Cir. 1997), cert. denied, 522 U.S. 1063 (1998); State v. Holm, 957 P.2d 1278, 1282 (Wash. Ct. App. 1998) (declining to adopt a "per se rule requiring defense counsel to initiate plea bargaining in every case," but not ruling out the possibility that in some cases, failure to do so may constitute ineffective assistance of counsel); Harris v. State, 437 N.E.2d 44, 46 (Ind. 1982) (holding that under the ABA standards then in existence there was no absolute duty to pursue plea discussions and that not doing so was a justifiable strategy based on the facts of the particular case).

22 See Strickland v. Washington, 466 U.S. 668, 687, reh'g denied, 467 U.S. 1267 (1984); see also, e.g., supra note 14 and accompanying text. The author's research has revealed only one case since Strickland in which the court found the **failure** to pursue a **plea bargain**

constituted ineffective assistance of counsel. See Pilchak, 741 F. Supp. at 800. However, as noted above, the Pilchak court found that defense counsel's **failure** to enter into plea negotiations was one of fourteen separate errors. Id. at 797-98. No court since Strickland has found ineffective assistance of counsel solely on the basis of a defense attorney's **failure** to pursue plea negotiations.

23 Stephanos Bibas, Regulating the **Plea**-**Bargaining** Market: From Caveat Emptor to Consumer Protection, 99 Calif. L. Rev. 1117, 1119-21 (2011) (describing the Supreme Court's approach to **plea bargaining** as "hands-off" and "Laissez-faire" from roughly 1970 to 2000 and noting that "[f]rom the 1970s through the early 2000s, **plea bargains** resolved the vast majority of criminal cases in the United States"). Bibas also argued that the Supreme Court's hands-off approach to regulating the **plea bargaining** marketplace was largely motivated by the belief that the marketplace was self-regulating. Id. at 1125. Because **plea bargaining** represented a "mutuality of advantage" for both the defendant and the prosecution, the expected **plea bargain** would likely be "rational, fair, and efficient." Id. This particular paradigm was, therefore, not in need of court oversight to ensure its constitutionality. Id.

24 Id. at 1124.

25 The Supreme Court's initial approach to ineffective assistance of counsel can be summarized by the following:
Until recently, however, the Supreme Court's jurisprudence provided that if a defendant did not go to trial, then a defendant could only bring an ineffective assistance of counsel claim if his lawyer had improperly advised taking a plea rather than going to trial. Under this interpretation of the right to counsel, a defendant is entitled to an effective trial and appellate lawyer, but not an effective pretrial negotiator.
Wesley M. Oliver, The Present and Future Regulation of **Plea Bargaining**: A Look at Frye and Lafler, 2011-2012 Cato Sup. Ct Rev. 257, 265 (2012), available at http://www.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2012/9/scr-2012-oliver.pdf.
In a series of cases, the Court reasoned that the entry of a guilty plea was a "critical stage" at which the Sixth Amendment right to effective assistance of counsel adheres. See, e.g., McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (holding that "the right to counsel is the right to the effective assistance of counsel"); Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963) (detailing the defendant's right to counsel). The following cases explain how the right to counsel and the corresponding right to effective assistance of counsel relates to entry of a guilty plea. See Padilla v. Kentucky, 559 U.S. 356, 373-74 (2010) (The **failure** to inform non-citizen defendants of the possible deportation consequences of a guilty plea constituted ineffective assistance of counsel: "[W]e have long recognized that the negotiation of a **plea bargain** is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."), appeal docketed, 381 S.W.3d 322 (Ky. Ct. App. 2012); Iowa v. Tovar, 541 U.S. 77, 81 (2004) ("The entry of a guilty plea, whether to a misdemeanor or a felony charge, ranks as a 'critical stage' at which the right to counsel adheres"); Hill v. Lockhart, 474 U.S. 52, 57 (1985) (determining that the two-part test articulated in Strickland applied to guilty pleas, the court restated its concern that "the quality of counsel's performance in advising a defendant whether to plead guilty stemmed from the more general principle that all 'defendants facing felony charges are entitled to the effective assistance of competent counsel"' (citations omitted)). The Supreme Court further reasoned it follows from this proposition that the point at which the defendant actually accepts a plea offer is also a "critical stage," likewise requiring that the defendant receive effective assistance of counsel. Tovar, 541 U.S. at 81.

26 132 S. Ct. 1399 (2012).

27 132 S. Ct. 1376 (2012).

28 Frye, 132 S. Ct. at 1406. Galin Frye faced felony charges of driving with a revoked license, with a four-year prison maximum. Id. at 1404. The prosecution sent Frye's lawyer a plea offer letter with two options: a misdemeanor with a recommendation of ninety days in jail (and a statutory maximum of one year) or the charged felony with a recommendation of ten days in jail followed by probation. Id. The offer was open until shortly before Frye's next court date. Id. Frye maintained that he would have entered the plea at that court date. Id. at 1405. Counsel never told Frye about the offer, and it expired. Id. at 1404. Just before his court appearance, Frye was rearrested for the same offense. Id. Eventually, Frye, still unaware of the earlier plea offer, pled guilty to felony driving with a revoked license, and the judge sentenced him to three years in prison. Id. at 1404-05. The Frye Court held as a matter of law that defense counsel must inform their clients of plea offers made by the prosecution. Id. at 1408. The Court also found that in order to establish prejudice in such a situation the defendant must show that had the plea been extended: the plea was more favorable than the sentence ultimately handed down; the defendant would have accepted the plea; the prosecution would not have withdrawn it prior to sentencing; and the court would have accepted it. Id. at 1409. The Frye Court further ruled that the remedy to be imposed for the

failure to impose the plea agreement would be "considered in a second case decided" that day: Lafler. Id. at 1404. That remedy is discussed in much greater detail in Part III(B) of this Article.

29 Lafler, 132 S. Ct. at 1383. Anthony Cooper was charged with, among other things, assault with intent to murder. Id. The prosecution initially offered Cooper fifty-one to eighty-five months in prison and dismissal of some of the charges. Id. Cooper told the court he was guilty and expressed a willingness to accept the offer. Id. Ultimately, he rejected the offer after his attorney convinced him that "the prosecution would be unable to establish his intent to murder [the victim] because she had been shot below the waist." Id. During the trial, Cooper rejected another offer, and he was then convicted (despite where the bullet had lodged, which of course was not a defense at all) and sentenced to 185 to 360 months imprisonment. Id.
The Government conceded defense counsel's incompetence. Id. at 1384. The Lafler Court found the defendant's attorney provided clearly ineffective advice during the **plea bargaining** stage of the proceeding, which caused him to reject the plea and proceed to trial. Id. The Court further held that in order to demonstrate that the defendant was prejudiced by counsel's performance, the defendant must show that he received a sentence, a conviction, or both, that was more severe than the one offered in the plea agreement. Id. at 1385. Further, "the court may [then] conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel's failings, he would have accepted the plea agreement"; the prosecution would not have withdrawn the agreement; and the trial court would have accepted it. Id. at 1389. Subpart III(B) of this Article explains the remedy imposed by the Lafler Court in great detail.

30 Id. at 1384 (citations omitted) ("Defendants have a Sixth Amendment Right to Counsel, a right that extends to the **plea**-**bargaining** process."). In Lafler, Justice Scalia disagreed with the majority opinion and reasoned that, prior to Frye and Lafler,
[t]he Court has never held that the rule articulated in Padilla, Tovar, and Hill extends to all aspects of plea negotiations, requiring not just advice of competent counsel before the defendant accepts a **plea bargain** and pleads guilty, but also advice of competent counsel before the defendant rejects a **plea bargain** and stands on his constitutional right to a fair trial.
Id. at 1393 (Scalia, J., dissenting). Scalia further argued that, with the Court's decision to extend effective assistance of counsel claims to circumstances beyond defense counsels incompetent advice when a defendant enters a guilty plea, saying "the Court today opens a whole new field of constitutionalized criminal procedure: **plea**-**bargaining** law." Id. at 1391 (Scalia, J., dissenting).

31 Id. at 1384; see also Laurie L. Levenson, Peeking Behind the **Plea Bargaining** Process, Missouri v. Frye & Lafler v. Cooper, 46 Loy. L.A. L. Rev. 457, 459 (2013) ("There may not be a constitutional right to **plea bargain**, but for the first time the Supreme Court has recognized that there is a constitutional right to have effective assistance of counsel during the **plea bargaining** process.").

32 Justin F. Marceau, Embracing a New Era of Ineffective Assistance of Counsel, 14 U. Pa. J. Const. L. 1161, 1163 (2012).

33 Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012).

34 See Jenny Roberts, Effective **Plea Bargaining** Counsel, 122 Yale L.J. 2650 (2013) (arguing that the Court's decisions in Padilla, Frye, and Lafler "support a broad right to effective **plea bargaining** counsel."); see also Levenson, supra note 31, at 461-62. Professor Levenson posits that Frye and Lafler have left unresolved issues relating to: "What are the minimum standards for defense counsel in the **plea bargaining** process? How much investigation must defense counsel do before recommending a plea? Must they always convey a plea offer to the defendant, even when the defendant has made clear he is not interested in an offer?" Id.; Batra, supra note 20, at 326-31 (anticipating that after Frye and Lafler defendants may make five possible claims relating to ineffective assistance of counsel in the negotiation process: "(1) poor preparation; (2) trading off the interests of one client for another in a **plea bargain**; (3) taking no time for a **plea bargain** negotiation; (4) antagonizing the prosecutor; and (5) refusing to bargain").

35 Levenson, supra note 31, at 462.

36 The first scholarly work to recognize that defense counsel may have a responsibility to **plea bargain** noted such long before Frye and Lafler. See Floyd T. Curry, Ineffective Assistance of Counsel During Trial, Aug. 1986 Army Law. 52, 53 (1986) ("Because the right to effective assistance of counsel attaches during the pretrial negotiation stage, the argument can also be made that the **failure** of a defense counsel to attempt to negotiate a **plea bargain** could conceivably amount to ineffective assistance given the right fact situation."). After this proclamation in 1986, the issue addressed in this Article has not been the subject of scholarly focus until two recent post Frye and Lafler articles. See Roberts, supra note 34 (exploring the issue of defense counsel's responsibility to pursue a **plea bargain** as a part of what she argues is the broader Sixth Amendment right to effective **plea bargaining** counsel); Batra, supra

note 20, at 311 (discussing whether defense counsel must **plea bargain** as one of five post-Frye-Lafler claims that defendant might possibly raise). Although both of these excellent articles touch on the issue of effective assistance of counsel and the responsibility to pursue a **plea bargain**, they address this particular issue in a more limited way than this Article. Neither work explores the existing legal precedent on this issue; addresses Strickland's prejudice prong; or proposes a remedy.

37 See Curry, supra note 36, at 53 (noting that existing scholarly literature has failed to address the issue of what remedy the defendant is entitled to if defense counsel has failed to **plea bargain**).

38 What it means to affirmatively seek, pursue, or initiate a **plea bargain** will no doubt be a factual determination that must be made on a case-by-case basis by reviewing courts. For the purposes of this Article, it is sufficient to note that to carry out this duty defense counsel must make a reasonable effort to engage the prosecution in plea discussions.

39 Strickland v. Washington, 466 U.S. 668, 688, reh'g denied, 467 U.S. 1267 (1984); see also Richard E. Myers, The Future of Effective Assistance of Counsel: ReReading Cronic and Strickland in Light of Padilla, Frye, and Lafler, 45 Tex. Tech L. Rev. 229, 234 (2012) (referencing the first prong of the Strickland test as the "performance prong" and the second prong as the "prejudice prong"); Jenny Roberts, Proving Prejudice, Post-Padilla, 54 How. L.J. 693, 699 (2011); Scott W. Street, Comment, Schwab v. Crosby: Interpreting the Scope of the Supreme Court Tests For Ineffective Assistance of Counsel and Conflict of Interest, 33 Am. J. Trial Advoc. 651, 658 (2008).

40 See infra Part I and accompanying text; Strickland, 466 U.S. at 688.

41 559 U.S. 356 (2010), appeal docketed, 381 S.W.3d 322 (Ky. Ct. App. 2012).

42 Padilla, 559 U.S. at 374.

43 429 U.S. 545 (1997).

44 Weatherford, 429 U.S. at 561.

45 Strickland v. Washington, 466 U.S. 668, 694, reh'g denied, 467 U.S. 1267; see also Myers, supra note 39, at 234.

46 That the criminal justice system in general and **plea bargaining** in particular functions much like an economic marketplace has been a proposition advanced by numerous scholars. See generally Frank H. Easterbrook, **Plea Bargaining** as Compromise, 101 Yale L.J. 1969, 1975 (1992) [hereinafter Easterbrook, **Plea Bargaining**]; Frank H. Easterbrook, Criminal Procedure as a Market System, 12 J. Legal. Stud. 289 (1983) [hereinafter Easterbrook, Market System]; John P. Gould, The Economics of Legal Conflicts, 2 J. Legal Stud. 279, 296 (1973); William M. Landes, The Bail System: An Economic Approach, 2 J. Legal Stud. 79 (1973); Richard A. Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. Legal Stud. 399 (1973); Oren Bar-Gill & Oren Gazal Ayal, **Plea Bargains** Only for the Guilty, 49 J.L. & Econ. 353, 357-58 (2006); Scott, supra note 15, at 1912.

47 Seaton v. United States, No. C-08-0105 MHP, 2010 WL 1957398, at *2 (N.D. Cal. May 14, 2010).

48 Christopher Seeds, Strategery's Refuge, 99 J. Crim. L. & Criminology 987, 994 (2009).

49 Strickland v. Washington, 466 U.S. 668, 687, reh'g denied, 467 U.S. 1267 (1984).

50 Id.; see also Myers, supra note 39, at 234 (referring to the first prong of the Strickland test as the "performance prong" and the second prong as the "prejudice prong"); Roberts, supra note 39, at 700.

51 Strickland, 466 U.S. at 697.

52 Id.; see also United States ex rel. Cross v. DeRobertis, 811 F.2d 1008, 1014 (7th Cir. 1987) (proceeding directly to prejudice prong since performance issue requires "a particularly subtle assessment"), reh'g denied, 896 F.2d 1099 (7th Cir.), cert. denied, 498 U.S. 842 (1990).

53 Stephen F. Smith, Taking Strickland Claims Seriously, 93 Marq. L. Rev. 515, 518 (2009) ("The governing standard for constitutional claims of ineffective assistance of counsel comes from Strickland v. Washington.").

54 Strickland, 466 U.S. at 686-87.

55 Id. (citations omitted).

56 Id.; Carissa Byrne Hessick, Ineffective Assistance at Sentencing, 50 B.C. L. Rev. 1069, 1070 (2009) ("Courts have developed a substantial body of law [since Strickland] regarding ineffective assistance in the context of the guilt phase of a criminal trial and in the sentencing phase of a death penalty trial, even though such cases constitute a very small percentage of all criminal cases.").

57 474 U.S. 52 (1985).

58 Hill, 474 U.S. at 58 ("We hold, therefore, that the two-part Strickland v. Washington test applies to challenges to guilty pleas based on ineffective assistance of counsel.").

59 See supra note 30 and accompanying text.

60 Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012) ("This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.").

61 Lafler v. Cooper, 132 S. Ct. 1376, 1390-91 (2012).

62 Strickland v. Washington, 466 U.S. 668, 687 (applying Strickland test for ineffective assistance of counsel to both trial and sentencing), reh'g denied, 467 U.S. 1267 (1984); see also Hill, 474 U.S. at 58 (applying Strickland to ineffective assistance of counsel claims resulting in a guilty plea); Frye, 132 S. Ct. at 1408; Lafler, 132 S. Ct. at 1384 (applying Strickland to ineffective assistance of counsel claims during the **plea bargaining** process itself).

63 529 U.S. 362 (2000).

64 Williams, 529 U.S. at 391.

65 Strickland, 466 U.S. at 687, 689.

66 Id. at 688.

67 Padilla v. Kentucky, 559 U.S. 356, 366 (2010), appeal docketed, 381 S.W.3d 322 (Ky. Ct. App. 2012).

68 Strickland, 466 U.S. at 688.

69 Padilla, 559 U.S. at 366 (quoting Strickland, 466 U.S. at 688).

70 Id. at 367 (citing Strickland, 466 U.S. at 688; Bobby v. Van Hook, 558 U.S. 4, 8 (2009)).

71 Id. (citing Brief for Jose Padilla as Amici Curiae Supporting Petitioner, Padilla v. Kentucky, 559 U.S. 356, 367 (2010) (No. 08-651)).

72 See Brown v. Doe, 2 F.3d 1236, 1245 (2d Cir. 1993), cert. denied, 510 U.S. 1125 (1994).

73 429 U.S. 545, 550, 561 (1977) (holding that there is "no constitutional right to a **plea bargain**"); see Padilla, 559 U.S. at 366; infra Parts II-III and accompanying text.

74 G. Nicholas Herman, **Plea Bargaining** 91 (3d ed. 2012).

75 Id.

76 Gabriel J. Chin & Richard W. Holmes Jr., Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697, 713-16 (2002).

77 Id.

78 2 Crim. Prac. Manual § 45:3.

79 Id.

80 Id.

81 Josh Bowers, Punishing the Innocent, 156 U. Pa. L. Rev. 1117, 1158 (2008).

82 See Steven P. Grossman, An Honest Approach to **Plea Bargaining**, 29 Am. J. Trial Advoc. 101, 102 (2005).

83 Devers, supra note 17, at 2 ("Overall, the majority of evidence illustrates that those who accept a plea are likely to receive a lighter sentence compared with those who opt for a trial."); see also Nancy J. King et al., When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guideline States, 105 Colum. L. Rev. 959, 962 (2005) ("[A] significant plea discount--the difference between the average sentence given after a guilty verdict and the average sentence given after a guilty plea for the same offense--is evident for most offenses in all five states ....").

84 Rachel E. Barkow, Separation of Powers and the Criminal Law, 58 Stan. L. Rev. 989, 1034 (2006).

85 Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (quoting Scott, supra note 15, at 1912).

86 Indeed, this proposition has been recognized by other legal commentators. See Roberts, supra note 34, at 2652, 2666.

87 Padilla v. Kentucky, 559 U.S. 356, 366 (2010) (citing Strickland v. Washington, 466 U.S. 668, 688-89, reh'g denied, 467 U.S. 1267 (1984) (citations omitted)), appeal docketed, 381 S.W.3d 322 (Ky. Ct. App. 2012).

88 ABA Standards for Crim. Just. 4-6.1 (3d ed. 1993).

89 Id.

90 Id.

91 Id.; see also Roberts, supra note 34, at 2667 ("For example, counsel might advise a client to enter an early guilty plea to the full set of charges in order to foreclose subsequent additional charges on the same set of facts, based on information that opening the case up for plea negotiations might reveal.").

92 ABA Standards for Crim. Just. 4-6.1 (3d ed. 1993); see also Model Rules of Prof'l Conduct R. 1.2(a) (1983) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and ... shall consult with the client as to the means by which they are to be pursued.").

93 ABA Standards for Crim. Just. 4-6.1 cmt. at 204 (3d ed. 1993).

94 Id. at 205

95 Performance Guidelines for Criminal Defense Representation §§ 6.1-6.2 (Nat'l Legal Aid & Defender Ass'n 1995), available at http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines#sixone.

96 Id. § 6.1(a).

97 Id.

98 Id. § 6.2(a).

99 Id. § 6.2(b).

100 Id. § 6.2(d).

101 Id. § 6.1(a).

102 2 Julie Ramseur Lewis & John Rubin, N.C. Defender Manual 53 (2d ed. 2012), available at http:// www.ncids.org/DefenderManual/DefManualVol2Trial(2ded2012).pdf.

103 Comm'n for Pub. Couns. Servs., Assigned Couns. Manual: Policies and Procedures, Ch. IV, at 13 (Mass. Comm. for Pub. Couns. Servs. 2012), available at http://www.publiccounsel.net/private_counsel_manual/CURRENT_MANUAL_ 2012/MANUALChap4CriminalStandards.pdf.

104 Law Office of Pub. Defender, Guide to the Criminal Justice System (2011), available at http://www.cookcountyil.gov/public-defender-law-office-of/guide-to-the-criminal-justice-system.

105 Wash. Defender Ass'n, Standards for Public Defense Services 25 (Robert C. Boruchowitz et al. eds., 2006), available at http:// www.defensenet.org/resources/publications-1/wda-standards-for-indigent-defense/WDA%20Standards%20-2007.pdf. These standards further provide that when representing a client charged as a present felony offender, "counsel should prepare challenges to each potential 'strike' before the settlement negotiations." Id. at 24-25.

106 2 Crim. Prac. Manual § 45:3.

107 559 U.S. 356 (2010), appeal docketed, 381 S.W.3d 322 (Ky. Ct. App. 2012).

108 466 U.S. 668, reh'g denied, 467 U.S. 1267 (1984).

109 Padilla, 559 U.S. at 368 ("In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequences for Padilla's conviction."). In dicta, the court also held that where deportation is "unclear or uncertain," counsel has a "more limited" duty to simply "advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." Id. at 369. Jose Padilla, a Honduran native, had been a lawful permanent resident in the United States for over forty years. Id. at 359. After pleading guilty to transportation of a large amount of marijuana, Mr. Padilla faced deportation. Id. On appeal, he claimed his counsel "not only failed to advise him of this consequence prior to his entering the plea, but also told him that he 'did not have to worry about immigration status since he had been in the country so long.'" Id. Relying on this erroneous advice, Padilla pled guilty to the charges, which "made his deportation virtually mandatory." Id. He claimed that, had he not obtained inaccurate advice from his attorney, he would "have insisted on going to trial." Id.

110 Id. at 367 (citations omitted).

111 Id. at 373.

112 Id.

113 Id.

114 See Padilla, 559 U.S. at 373.

115 Id.

116 Id.; see also Commonwealth v. Marinho, 981 N.E.2d 648, 659 (Mass. 2013) (While addressing this issue in the context of possible deportation, the Massachusetts Supreme Court found that defense counsel's performance was constitutionally deficient based on counsel's **failure** to "'explore all alternatives to trial, including the possible resolution of the case through a negotiated plea or admission to sufficient facts.'" (quoting Comm'n for Pub. Couns. Servs., supra note 103, at 46)).

117 Padilla, 559 U.S. at 360.

118 Id. at 373.

119 See Chin & Holmes, supra note 76, at 716.

120 Roberts, supra note 34, at 2668.

121 See Model Rules of Prof'l Conduct R. 1.2(a) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered," and "a lawyer shall abide by the client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."); see also supra note 87 and accompanying text.

122 The author does not universally endorse the use of **plea bargaining**. However, as a practicing criminal defense attorney, the author recognizes there are many different types of successful results that can be achieved for clients. Some of those results are through **plea bargains** and others are not. This Article makes it plain that in order to meet the minimum standards of effective assistance of counsel and beyond that requirement, to provide clients with the highest quality of representation, defense attorneys must use every arrow in their quiver. Often, but not always, a **plea bargain** is that arrow.

123 Myers, supra note 39 and accompanying text.

124 Weatherford, 429 U.S. at 561.

125 Id.; see United States v. Duffaut, No. 01-008, 2006 WL 2849853, at *4 (E.D. La. Sept. 29, 2006); see also United States v. Smith, No. 04-229, 2009 WL 1578058, at *4 (E.D. Pa. June 5, 2009). Weatherford was an undercover police agent who, along with Bursey and two others, vandalized a Selective Service office in South Carolina. Weatherford, 429 U.S. at 547. To maintain his cover, Weatherford was arrested and charged along with Bursey. Id. Unaware that Weatherford was a police officer, Bursey and his lawyer invited him to participate in some strategy sessions. Id. at 547-48. Weatherford did not ask to participate and did not solicit any information from Bursey; indeed, he said that he intended to seek a severance because of Bursey's past record. Id. at 548. The prosecution did not initially intend to use Weatherford as a witness, but by the eve of trial his undercover status became attenuated, and he was called to testify. Id. at 548-49. Following his conviction, Bursey alleged that Weatherford communicated information to his superiors and thereby deprived him of the effective assistance of counsel and due process of law. Weatherford, 429 U.S. at 549. The district court entered judgment for the defendants and found, among other things, that Weatherford had not communicated to his superiors any information that he learned from Bursey. Id. at 549, 556. The Fourth Circuit Court of Appeals reversed and concluded that Bursey's rights to the effective assistance of counsel and a fair trial had been violated. Id. at 549. The thrust of the Supreme Court's opinion dealt with that issue. The Supreme Court ultimately concluded that Bursey's rights had not been violated. Id. at 558. The Court declined to adopt a per se rule prohibiting this kind of undercover operation and rejected Bursey's complaint that the Government violated his right to discover the identity of an informant. Id. at 550-51.
This case is most often cited for its principle holding: "There is no general constitutional right to discovery in a criminal case ...." Id. at 559. However, Bursey also complained that "Weatherford's continued duplicity lost Bursey the opportunity to a **plea bargain**." Id. at 560. In light of the facts of Weatherford and its principal holding, its only statement addressing this latest contention, "that there is no constitutional right to **plea bargain**" has been referred to as "brief" and a "thin strand" upon which to base such a weighty constitutional notion. Id. at 561; see Bourexis v. Carroll Cnty. Narcotics Task Force, 625 A.2d 391, 396 (Md. Ct. Spec. App.), cert. denied, 332 Md. 453 (Md. 1993), cert. denied, 510 U.S. 1195 (1994). Despite this fact, however, the validity of Weatherford's declaration that there is no constitutional right to **plea bargain** has been confirmed by two recent Supreme Court decisions. See Missouri v. Frye, 132 S. Ct. 1399, 1404, 1408 (2012); Lafler v. Cooper, 132 S. Ct. 1376, 1387 (2012).

126 Frye, 132 S. Ct. at 1406.

127 Weatherford, 429 U.S. at 561.

128 It is axiomatic that in the American system of criminal justice the decisions regarding the means by which to prosecute, i.e. by trial or plea-agreement, is a law enforcement function, the power of which is reserved to the executive branch. See United States v. Armstrong, 517 U.S. 456, 464 (1996) (citations omitted) (citing U.S. Const. art. II, § 3) ("The Attorney General and United States Attorneys retain 'broad discretion' to enforce the Nation's criminal laws. They have this latitude because they are designated by

statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'"); see also Greenlaw v. United States, 554 U.S. 237, 246 (2008) (quoting United States v. Nixon, 418 U.S. 683, 693 (1974) ("This Court has recognized that 'the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.'"); Weatherford, 429 U.S. at 561 ("[T]here is no constitutional right to **plea bargain**; the prosecutor need not do so if he prefers to go to trial.").

129 Weatherford, 429 U.S. at 561.

130 See Lafler v. Cooper, 132 S. Ct. 1376, 1387-88 (2012) (noting that the remedy issue must be addressed with regard to the ineffective assistance of counsel).

131 See Lafler, 132 S. Ct. at 1387; Frye, 132 S. Ct. at 1406-07.

132 Lafler, 132 S. Ct. at 1387-89 (citing Frye, 132 S. Ct. at 1410).

133 Id. at 1387 ("If no plea offer is made, or a plea deal is accepted by the defendant but rejected by the judge, the issue raised here simply does not arise.").

134 Id. at 1387 (citing Evitts v. Lucey, 469 U.S. 387, 401, reh'g denied, 469 U.S. 1065 (1985)); see also Douglas v. California, 372 U.S. 353, 356, reh'g denied, 373 U.S. 905 (1963).

135 See ABA Standards for Crim. Just. 3-4.1(a) (3d ed. 1993) ("The prosecutor should have and make known a general policy or willingness to consult with defense counsel concerning disposition of charges by plea."); see also 2 Crim. Prac. Manual § 45:2, (noting that "at different times and in different jurisdictions such as New Jersey, California, Alaska, and New York counties, among others, attorneys general have announced[,] or statutes have dictated, that there would be no **plea bargaining**."); but see George Fisher, **Plea Bargaining's** Triumph, 109 Yale L.J. 857, 859 (2000) ("[**P**]**lea bargaining** has triumphed. Bloodlessly and clandestinely, it has swept across the penal landscape and driven our vanquished jury into small pockets of resistance.").

136 See supra Part I and accompanying text.

137 Lafler, 132 S. Ct. at 1387-88.

138 Missouri v. Frye, 132 S. Ct. 1399, 1406-08 (2012) (citing Weatherford v. Bursey, 429 U.S. 545, 561 (1977)).

139 Id. at 1407.

140 Id. The Frye Court held that the logic of the state's Weatherford based argument did "not suffice to overcome a simple reality." Id. The Court went on to note the sheer volume of cases disposed of by guilty plea and the mutually advantageous nature of **plea bargaining**. Id.

141 559 U.S. 356 (2010), appeal docketed, 381 S.W.3d 322 (Ky. Ct. App. 2012).

142 Id.; see also Padilla, 559 U.S. at 372-73.

143 Frye, 132 S. Ct. at 1407-08 (citing Massiah v. United States, 377 U.S. 201, 204 (1964) (quoting Spano v. New York, 360 U.S. 315, 326 (1959) (Douglas, J., concurring))).

144 Id. at 1406-07.

145 Id. at 1407-08.

146 Id. at 1407.

147 See id. at 1406-07.

148 Id.

149 Id. at 1408 (citing Massiah, 377 U.S. at 204 (quoting Spano, 360 U.S. at 326 (Douglas, J., concurring))).

150 Weatherford v. Bursey, 429 U.S. 545, 561 (1977).

151 466 U.S. 668, 687, reh'g denied, 467 U.S. 1267 (1984). But see supra notes 47-48 and accompanying text (noting that courts may first dispose of claims of ineffective assistance of counsel by resolving the prejudice prong and thereby avoiding an evaluation of defense counsel's performance).

152 Strickland, 466 U.S. at 694. In deciding that "reasonable probability" was the appropriate standard, Strickland found that requiring only a showing that counsel's "errors had some conceivable effect on the outcome of the proceeding" would provide "no workable principle." Id. at 693. "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." Id. at 694. As a result, Strickland's "reasonable probability" language requires a defendant to demonstrate something more than "some conceivable effect" but something less than a "more likely than not" effect on the outcome. Id. at 693-94.

153 Kelly Green, ''There's Less in This Than Meets the Eye'': Why Wiggins Doesn't Fix Strickland and What the Court Should Do Instead, 29 Vt. L. Rev. 647 (2005).

154 See, e.g., 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, 1857-66 (1994); Robert R. Rigg, The T-Rex Without Teeth: Evolving Strickland v. Washington and the Test for Ineffective Assistance of Counsel, 35 Pepp. L. Rev. 77, 87-88 (2007); Welsh S. White, Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care, 1993 U. Ill. L. Rev. 323, 334-35 (1993).

155 See, e.g., Hessick, supra note 56, at 1070 (evaluating the attorney error and prejudice prong in the context of non-capital sentencing); 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, 473-74 (1996) (arguing that the prejudice requirement should not apply in cases where counsel was asleep or otherwise mentally impaired); Kenneth Williams, Does Strickland Prejudice Defendants on Death Row?, 43 U. Rich. L. Rev. 1459, 1461 (2009) (arguing that the prejudice prong erects too high of a burden for defendant to overcome and that it "needs to be eliminated rather than re-tooled"); Patrick S. Metze, Speaking Truth to Power: The Obligation of the Courts to Enforce the Right to Counsel at Trial, 45 Tex. Tech. L. Rev. 163, 216-18 (2012) (positing Strickland's prejudice prong is an "impossible dream" because the application of Strickland is pure results oriented appellate oversight).

156 See Strickland, 466 U.S. at 710 (Marshall, J., dissenting).

157 See Williams, supra note 155, at 1461. As indicated earlier, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland, 466 U.S. at 697. Thus, many courts have disposed of claims of ineffective assistance of counsel by resolving the prejudice prong and thereby avoiding an evaluation of defense counsel's performance. See, e.g., United States ex rel. Cross v. DeRobertis, 811 F.2d 1008, 1014 (7th Cir. 1987) (proceeding directly to prejudice prong since performance issue requires "a particularly subtle assessment."), reh'g denied, 896 F.2d 1099 (7th Cir.), cert. denied, 498 U.S. 842 (1990); supra notes 47-48 and accompanying text. To that end, the Center for Capital Litigators in Columbia, South Carolina has collected the results of every published successful ineffective assistance of counsel claim since Strickland. In December 2001, the list consisted of approximately 1200 state and federal cases. Professors Joshua Dressler and George C. Thomas III ran a Westlaw search for the same time period, which produced 37,000 entries. Joshua Dressler & George C. Thomas III, Criminal Procedure: Principles, Policies and Perspective 1025 (5th ed. 2012). Dressler and Thomas concluded that a comparison of the two databases for the relevant time period indicates that lower courts have found competent assistance in roughly 97% of the cases in which a claim of ineffective assistance of counsel has been brought. Id.

158 Strickland, 466 U.S. at 712 (Marshall, J., dissenting). Justice Marshall's criticism was also directed at the Strickland's performance prong. Id. at 708-09. Justice Marshall found the standard of "objective standard of reasonableness" articulated by the majority to be far too "malleable" to offer lower courts much guidance. Id. at 707-08. Instead, Justice Marshall urged the court to create more "particularized standards" for gauging effective assistance of counsel. Id. at 709.

159 Id. at 710. Justice Marshall's second objection to the defendant having to prove he was prejudiced by defense counsel's errors was that

the assumption on which the Court's holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted. In my view, the guarantee also functions to ensure that convictions are obtained only through fundamentally fair procedures.
Id. at 711.

160 Id. at 710.

161 Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) ("In today's criminal justice system ... the negotiation of a **plea bargain**, rather than the unfolding of a trial, is almost always the critical point for a defendant."); see also Oliver, supra note 25, at 259 ("While criminal defendants may not realize it, it is far more important that the attorneys they select be good at negotiating than at trying cases. These are, however, obviously related skills. An attorney's skill at trying cases will improve his negotiating position. Statistically, the odds of obtaining a favorable disposition are greater in a negotiation with the prosecutor than they are in a jury trial, filled with its plethora of constitutional protections.").

162 Cynthia Alkon, **Plea Bargaining**, Just as It Ever Was?, 10 Mayhew-Hite Rep. on Disp. Reg. & the Cts. (2012), http://moritzlaw.osu.edu/epub/mayhew-hite/2012/05/**plea**-**bargaining**-just-as-it-ever-was ("**Plea bargaining** is a highly informal and unregulated form of negotiation."); see also Frye, 132 S. Ct. at 1408 (citing Premo v. Moore, 131 S. Ct. 733, 741 (2011)).

163 Bright, supra note 154, at 1864.

164 Id.

165 Id. Bright analyzes this issue from the perspective of the death penalty; however, the benefits of competent defense counsel during the **plea bargaining** process are not limited to death penalty cases.

166 United States v. Usma, No. 97 C 3135, 1997 WL 458431, at *3 (N.D. Ill. July 29, 1997).

167 Lafler, 132 S. Ct. at 1385. Arguably, the Lafler Court established two additional requirements needed to prove prejudice beyond the three requirements stated above. In order to establish prejudice, after Lafler, a future defendant may also have to show the prosecution would not have withdrawn the offer and the trial court would have accepted it; in addition to showing the prosecution would have offered a deal; the terms of the deal would have been less severe than the charge or the sentence the defendant actually received; and the defendant would have accepted the offer. Id.
In these circumstances a defendant must show that but for the ineffective assistance of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence or both, under the offer's terms would have been less severe than under the judgment and sentence that were in fact imposed. Id. However, because this Article argues that it is extremely difficult to know how the threshold requirements of proving the defendant was prejudiced with respect to whether they would have received an offer, what its terms would have been, and if they would have accepted it, there is no need to further linger on the prejudice analysis by also addressing the two additional issues of whether the prosecution would have withdrawn the offer and if the trial judge would have accepted it. Additionally, prior to Lafler most court's reviewing a claim where defense counsel failed to seek a **plea bargain** focused almost exclusively on the prejudice related issues addressed in this section.

168 Usma, 1997 WL 458431, at *3.

169 Strickland v. Washington, 466 U.S. 668, 710 (1984) (Marshall, J., dissenting), reh'g denied, 467 U.S. 1267 (1984).

170 Usma, 1997 WL 458431, at *3.

171 Strickland, 466 U.S. at 710 (Marshall, J., dissenting).

172 Lafler, 132 S. Ct. at 1385.

173 It is assumed for the purposes of the above argument that the necessary data would be reliable and available. However, as one scholar has noted: "Making the determination of whether a plea exceeds the norm, of course, is difficult, as the negotiation of **plea bargains** is hidden from public view." Batra, supra note 20, at 333. In light of this fact, it may be wise to heed the call of one scholar who has proposed establishing a data base of **plea bargains**, like those that exist for civil settlements. Stephanos Bibas, **Plea Bargaining** Outside the Shadow of Trial, 117 Harv. L. Rev. 2463, 2532 (2004). Perhaps, even without this data base, prosecutors, defense attorneys and judges may have a sense of what the "going rate" may be for a particular crime. However, comparing data to determine the extent to which a defendant may be prejudiced by counsel's **failure** to **plea bargain** may not accurately capture the prejudice suffered by the defendant. As this section demonstrates, in order to compare data in the first place, the court must make assumptions regarding the likely outcome of an attempt to **plea bargain** compared to trial or a guilty plea. However, there is no accurate or meaningful way in which to predict the likely outcome of plea negotiations had they taken place.

174 See Petrig, supra note 7, at 5.

175 Jeffrey Standen, **Plea Bargaining** in the Shadow of the Guidelines, 81 Calif. L. Rev. 1471, 1514 n.153 (1993) ("With sentencing outcomes substantially a product of charging decisions, ... the selection of charges is clearly the most important aspect of the prosecutor's discretion.").

176 Id. at 1509 (noting that a prosecutor's charging decisions "define the defendant's exposure and form the parameters for any discounting that might produce a plea agreement.").

177 Id. at 1509-10.

178 James Vorenberg, Decent Restraint of Prosecutorial Power, 94 Harv. L. Rev. 1521, 1533 (1981) (noting that individual prosecutors maintain significant discretion over what charges to seek and sentences they wish to impose).

179 Natasha Lennard, Report: Nearly All Drug Defendants "Forced" to Plead Guilty, Salon (Dec. 5, 2013 9:20 AM), http://www.salon.com/2013/12/05/report_nearly_all_drug_defendants_forced_to_plead_ guilty.

180 In Pennsylvania, "simple assault" is a misdemeanor and is defined in part as when one person "attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another." 18 Pa. Cons. Stat. § 2701 (2013). For the purposes of the above example, "aggravated assault" is a felony and is defined in part as when one person "attempts to cause or intentionally, knowingly or recklessly causes bodily injury to any of the officers, agents, employees or other persons." 18 Pa. Cons. Stat. § 2702(a)(2)-(b) (2013).

181 See generally 204 Pa. Code § 303.9 (2013) (describing the basic operation of Pennsylvania's sentencing guidelines).

182 Id.; see also id. § 303.15 (providing the offense listing).

183 See 42 Pa. Cons. Stat. Ann. § 9756(a)-(b) (West 2013).

184 See 204 Pa. Code § 303.16(a) (2013) (basic sentencing matrix), available at http://www.courts.phila.gov/pdf/criminal-reports/Sentencing-Guidelines-Matrix.pdf.

185 Id.

186 Generally when it comes to the sentence recommendation practice:
[T]he prosecuting attorney promises that he will recommend to the court a sentence favorable to the defendant, will not seek the maximum penalty, or will refrain from making any recommendations. Most often the sentence recommendation involves a promise by the prosecutor to suggest to the trial judge a mutually satisfactory term of years as the appropriate punishment in return for a defendant's guilty plea. In order for the practice to have any value to defendants and prosecutors there must be a reasonable expectation of judicial acceptance of the recommendations. Where there is a judicial practice of following recommendations, the promise of a recommended sentence can be tantamount to a promise of a definite term.
See Dominick R. Vetri, Note, Guilty **Plea Bargaining**: Compromises by Prosecutors to Secure Guilty Pleas, 112 U. Pa. L. Rev. 865, 866 (1964).

187 Commonwealth v. Napper, 385 A.2d 521, 524 (Pa. Super. Ct. 1978).

188 Bibas, supra note 173, at 2466. Sentencing guidelines exist in twenty-one states, and it is not always clear that certain states' sentencing guidelines are still operational. See Neal B. Kauder & Brian J. Ostrom, State Sentencing Guidelines: Profiles and Continuum (Nat'l Ctr. for State Courts 2008), available at http://www.ncsc.org/~/media/Microsites/Files/CSI/State_ Sentencing_Guidelines.ashx.

189 Devers, supra note 17, at 2.

190 Id. at 1-2.

191 Vorenberg, supra note 178, at 1533-34.

192 Id. at 1534.

193 Bibas, supra note 173, at 2475.

194 See William F. McDonald et al., The Prosecutor's **Plea Bargaining** Decisions, in The Prosecutor 151, 158 (William F. McDonald ed., 1979) (noting most prosecutors admit to giving the most generous deals in the weakest cases).

195 J.B. Jones, Prosecutors and the Disposition of Criminal Cases: An Analysis of **Plea Bargaining** Rates, 69 J. Crim. L. & Criminology 402, 403 (1978), available at http:// scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi? article=6083&context=jclc.

196 Vorenberg, supra note 178, at 1534.

197 Id.

198 Bibas, supra note 173, at 2471.

199 Id.

200 Id. at 2474.

201 See Oliver, supra note 25, at 259.

202 Bibas, supra note 173, at 2478.

203 Vorenberg, supra note 178, at 1534 n.45 ("Studies indicate that discounts offered do often vary on irrational or illegitimate bases.").

204 See United States v. Young, No. CR 12-4107-MWB, 2013 WL 4399232, at *16-17 (W.D. Iowa Aug. 16, 2013). The data covers 14,000 cases nationally in 2006, 2008, and 2009. Id.

205 Id. at *1; see 21 U.S.C. § 841(b)(1)(B)(viii) (2012); 21 U.S.C. § 851 (2012).

206 Young, 2013 WL 4399232, at *5.

207 Id. at *1.

208 Id. at *5.

209 Id.

210 Id. at *6.

211 Id. at *6 n.10 ("The role of Pat Sajak, from the classic television game show 'Wheel of Fortune,' is played, in this instance, by the DOJ Assistant Attorney General for the Criminal Division, and the wheel is spun not by contestants, but by the more than 4,500 Assistant U.S. Attorneys nationwide.").

212 Missouri v. Frye, 132 S. Ct. 1399, 1413 (2012) (Scalia, J., dissenting).

213 See United States v. Usma, No. 97 C 3135, 1997 WL 458431, at *3 (N.D. Ill. July 29, 1997).

214 Id. at *3 (citing Toro v. Fairman, 940 F.2d 1065, 1068 (7th Cir. 1991), cert. denied, 505 U.S. 1223 (1992)). It is important to note that this particular line of reasoning would appear only to be applicable when the defendant actually proceeds to trial. A defendant who enters a guilty plea without benefit of a **plea bargain** has already demonstrated his willingness to plead guilty. Therefore, he surely would have accepted a **plea bargain** that might produce a better sentence than the one he was likely to receive after a non-negotiated guilty plea to the most serious charge he was facing.

215 Id. Once again, this scenario demonstrates the unfairness of requiring the defendant to show he was prejudiced by defense counsel's performance, when such a showing may be impossible because defense counsel was ineffective. Eleven years before Strickland, in United States v. DeCoster, Chief Judge David Bazelon argued the proper legal standard should require that, once a defendant proves they were deprived of "reasonably competent assistance of an attorney acting as his diligent conscientious advocate," the burden switches to the government to show the defendant was in fact not prejudiced by counsel's performance. 487 F.2d 1197, 1202-04 (D.C. Cir. 1973), cert. denied, 444 U.S. 944 (1979). Judge Bazelon reasoned that "proof of prejudice may well be absent from the record precisely because counsel has been ineffective. For example, when counsel fails to conduct an investigation, the record may not indicate which witnesses he could have called, or defenses he could have raised." Id. at 1204. Judge Bazelon's example is not unlike the scenario presented above. His concern, as previously noted, was largely echoed by Justice Marshall in his Strickland dissent. Strickland, 466 U.S. at 710 n.4 (Marshall, J., dissenting).

216 Custodio v. United States, 945 F. Supp. 575, 579 (S.D.N.Y. 1996) ("Indeed, in the instant petition Custodio continues to maintain his innocence. After stating, 'I ougth [sic] [to] have entered a plea of guilty,' Custodio proclaims that 'all my guilty [sic] in this case was to be in the wrong place at the wrong time.' In the face of that assertion, his belated claim that he would have pled guilty is frivolous.").

217 See Laura Cohen & Randi Mandelbaum, Kids Will Be Kids: Creating a Framework for Interviewing and Counseling Adolescent Clients, 79 Temp. L. Rev. 357, 360 (2006) ("Effective client interviewing and counseling constitute the core of legal representation and serve as the basis for the trust and rapport that are essential to a successful attorney-client relationship.").

218 400 U.S. 25 (1970).

219 Alford, 400 U.S. at 37-38. Although Alford itself involved a plea to avoid the death penalty, Alford pleas are also possible in non-capital cases. See, e.g., United States v. Cox, 923 F.2d 519, 524-25 (7th Cir. 1991); United States v. Gomez-Gomez, 822 F.2d 1008, 1011 (11th Cir.), reh'g denied, 829 F.2d 1132 (11th Cir. 1987); United States v. O'Brien, 601 F.2d 1067, 1070 (9th Cir. 1979); United States v. Bednarski, 445 F.2d 364, 365-66 (1st Cir. 1971).

220 See Alford, 400 U.S. at 37-38.

221 See Abbe Smith, Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things, 28 Hofstra L. Rev. 925, 942 (2000).

222 See id.

223 Jill Paperno, Representing the Accused: A Practical Guide to Criminal Defense 212 (2012).

224 See Abbe Smith, The Lawyer's "Conscience" and the Limits of Persuasion, 36 Hofstra L. Rev 479, 480 (2007) ("Of course, as all practicing lawyers know, interviewing and counseling are at the heart of legal representation. This is what lawyers do, even criminal trial lawyers: we talk with and advise clients. Sometimes, after considering the government's case and available defenses, we advise clients to go to trial. More often, we advise them to take a plea.").

225 Id. at 480-81.

226 1 Anthony G. Amsterdam, Trial Manual 5 for the Defense of Criminal Cases 339 (5th ed. 1988).

227 Id. at 363.

228 Smith, supra note 221, at 947; see also Paperno, supra note 223, at 226-29. In another criminal defense practice guide, Jill Paperno, currently the Second Assistant Public Defender in the Monroe County Public Defender's Office, noted that the most common responses a defense attorney is likely to hear when approaching a reluctant client with a **plea bargain**. Id. These include, "[y] ou're just working with the prosecutor," "[y]ou get paid for convictions," "I can do that time standing on my head," "I know lots of people who got less time for this charge," "ten years is the same as thirty years," and "God won't let me get convicted." Id. at 226-28. Despite these common responses, Paperno contends that once the criminal defense attorney has received what is considered a good offer from the prosecution, every effort should be made to persuade the client to accept the **plea**-**bargain**. Id. at 226.
Paperno offers detailed advice for how defense attorneys may effectively address each of the above client responses. Id. at 226-29. Perhaps the ultimate demonstration of effective client counseling when working with a client who is reluctant to accept a **plea bargain** is seen in Paperno's response to the assertion that God will not allow the client to be convicted. Id. at 228-29. Paperno recounts a story about a man who faced a flood and turned down three different offers of assistance from human beings, expecting God to save him personally. Id. When the man dies and asks God why He did not help, God lists the three offers of assistance He sent. Id. at 229. Paperno's use of the flood story answers a client's similar religious-based belief by imploring the defendant to recognize that the hand of God may manifest itself differently than the client expects. In this sense, effective client counseling entails asking the client to see the hand of God in the beneficial **plea**-**bargain** they have been offered.

229 See Strickland v. Washington, 466 U.S. 668, 703-704 (Brennan, J., concurring in part and dissenting in part), reh'g denied, 467 U.S. 1267 (1984); see also Metze, supra note 155, at 216-18 (positing that Strickland's prejudice prong is an "impossible dream" because the application of Strickland is results-oriented appellate oversight).

230 Missouri v. Frye, 132 S. Ct. 1399, 1408, 1412 (2012); Bright, supra note 154, at 1864 ("Good negotiating skills may bring about a plea offer to resolve the case with a sentence less than death, and a good relationship with the client may result in acceptance of an offer that might otherwise be rejected."); White, supra note 154, at 368-71.

231 See Bibas, supra note 173, at 2464-65; supra subparts III(B) & (C) and accompanying text.

232 See Frye, 132 S. Ct. at 1407; Bibas, supra note 173, at 2545-46; supra note 145 and accompanying text.

233 Bright, supra note 154, at 1864.

234 See supra note 137 and accompanying text (offering articles about the prejudice prong); see also McFarland v. Scott, 512 U.S. 1256, 1259 (1994) (Blackmun, J., dissenting); Bright, supra note 154, at 1864; Kirchmeier, supra note 156, at 473-75; Williams, supra note 154, at 1461; Metze, supra note 155, at 218.

235 See Strickland v. Washington, 466 U.S. 668, 710-12 (Marshall, J., dissenting), reh'g denied, 467 U.S. 1267 (1984).

236 The vast majority of state courts have chosen to apply Strickland's two-prong test to their own state constitutional provisions requiring effective assistance of counsel, but three states have expressly refused to do so. See Timothy M. Riselvato, Claims of Ineffective Assistance of Counsel: The Clash of the Federal and New York State Constitutions, 26 Touro L. Rev. 1195, 1202 (2011) ("The Federal Strickland standard for ineffective assistance of counsel has not been universally adhered to by the states."); see also State v. Smith, 712 P.2d 496, 500 n.7 (Haw. 1986). The Smith court held that the applicable test in Hawaii is whether counsel's deficient performance "resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." Id. at 500 (citing State v. Kahelewai, 501 P.2d 977 (Haw. 1972)).
One need not be a lawyer to appreciate the difficulty of meeting the prejudice requirement established by the Court. Given the inherent subjectivity of determining whether past results would probably have been different, defendants will successfully prove clear cases of prejudice only where there is evidence that they should not have been convicted.
Smith, 712 P.2d at 500 n.7 (citing William J. Genego, The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation, 22 Am. Crim. L. Rev. 181, 199 (1984)). In People v. Henry, the New York Court of Appeals stated the following with regard to ineffective assistance of counsel:
Despite our well-settled test for evaluating ineffective assistance of counsel claims, the People ask this Court to adopt the Federal standard, maintaining that it is more precise than the State's "meaningful representation" standard. This Court has previously

recognized the differences between the Federal and State tests for ineffectiveness, and has consistently adhered to the application of our "meaningful representation" test. In doing so, we have clarified 'meaningful representation' to include a prejudice component which focuses on the "fairness of the process as a whole rather than [any] particular impact on the outcome of the case." No further clarification of the standard is required.
744 N.E.2d 112, 113-14 (N.Y. 2000) (citations omitted), remanded to 281 A.D.2d 490 (N.Y. App. Div. 2001), rev'd, 409 F.3d 48 (2d Cir. 2005), cert. denied, 547 U.S. 1040 (2006).
In Ex Parte Yelder, the Supreme Court of Alabama refused to apply Strickland's prejudice prong only in the context of a claim that defense counsel was ineffective for failing to object to the removal of a juror based on the juror's race pursuant to Batson v. Kentucky. 575 So. 2d 137, 138-39 (Ala.) (citing Batson v. Kentucky, 476 U.S. 79 (1986)), cert. denied, 502 U.S. 898 (1991). Ultimately, the Court determined that "[i]f an outcome-determinative test is used, then no black appellant could prove prejudice unless he relied on the very assumption that Batson condemns." Id.

237 See Hawkman v. Parratt, 661 F.2d 1161, 1168-71 (8th Cir. 1981); Mason v. Balcom, 531 F.2d 717, 725, reh'g denied, 534 F.2d 1407 (5th Cir. 1976); Walker v. Caldwell, 476 F.2d 213, 221 (5th Cir. 1973); Cole v. Slayton, 378 F. Supp. 364, 367-68 (W.D. Va. 1974).

238 See Hawkman, 661 F.2d at 1171; Mason, 531 F.2d at 725; Walker, 476 F.2d at 224; Cole, 378 F. Supp. at 68.

239 429 U.S. 545 (1977).

240 See supra note 21 and accompanying text. The only exception to this finding revealed by the author's research is Pilchak v. Camper, in which a guilty verdict obtained after trial was vacated by the court. 741 F. Supp. 782 (W.D. Mo. 1990), aff'd, 935 F.2d 145 (8th Cir. 1991). However, the Pilchak court did not base its decision solely on the defense counsel's **failure** to pursue plea negotiations. Id. at 797. The court found this to be one of fourteen separate errors committed by defense counsel, many of them at the trial stage of the proceeding. Id. Therefore, the court spent little time delving deeply into the legal analysis concerning the Sixth Amendment implications of counsel's **failure** to pursue plea negotiations.

241 Ana Maria Gutierez, The Sixth Amendment: The Operation of **Plea** **Bargaining** in Contemporary Criminal Procedure, 87 Denv. U. L. Rev. 695, 696 (2010) (citing Marbury v. Madison, 5 U.S. 137, 147 (1803)).

242 3 William Blackstone, Commentaries on the Laws of England 23, 109 (University of Chicago Press 1979) (1768).

243 5 U.S. 137, 163 (1803).

244 Marbury, 5 U.S. at 163 (quoting Blackstone, supra note 242, at 109).

245 United States v. Morrison, 449 U.S. 361, 364 (1981); see also Justin F. Marceau, Remedying Pretrial Ineffective Assistance, 45 Tex. Tech. L. Rev 277, 288 (2012).

246 Morrison, 449 U.S. at 365.

247 Lafler v. Cooper, 132 S. Ct. 1376, 1388-89 (2012).

248 See Strickland v. Washington, 466 U.S. 668, 687 ("For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial."), reh'g denied, 467 U.S. 1267 (1984).

249 See Glover v. United States, 531 U.S. 198, 200 (2001).

250 See Hill v. Lockhart, 474 U.S. 52, 56-57 (1985).

251 See Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012).

252 See Lafler, 132 S. Ct. at 1385.

253 See Strickland, 466 U.S. at 687.

254 Id. at 686.

255 Id.

256 See Glover v. United States, 531 U.S. 198, 200 (2001). In Glover, the Court reversed a lower court sentence on the basis of ineffective assistance of counsel under Strickland, remanding the matter to lower court for a new sentencing hearing consistent with the Court's ruling. Id. It should also be noted that in the context of capital sentences, if defense counsel's performance during the sentencing phase of the proceeding is found to be constitutionally deficient, the state has the option of either seeking a new sentencing hearing in which it can seek the death penalty or the state can agree to the imposition of a life sentence. See Rompilla v. Beard, 545 U.S. 374, 393 (2005), appeal dismissed, 603 Pa. 332 (2009).

257 Glover, 531 U.S. at 201-02.

258 Id.

259 United States v. Morrison, 449 U.S. 361, 365 (1981).

260 See Morrison, 449 U.S. at 365.

261 See Hill v. Lockhart, 474 U.S. 52, 55-59 (1985); see also David A. Perez, Deal or No Deal? Remedying Ineffective Assistance of Counsel During **Plea** **Bargaining**, 120 Yale L.J. 1532, 1540 (2011) ("When a defendant, pursuant to his attorney's advice, enters a guilty plea as part of a negotiated deal with the government, he waives his right to trial and the 'full panoply' of other constitutional rights that come with it. If the attorney's advice was ineffective, the guilty plea is vacated, the process is reset, and these rights are fully restored. In fact, not a single court or jurisdiction disagrees with this remedy.").

262 See supra notes 22-23 and accompanying text.

263 Hill, 474 U.S. at 59 ("[T]he 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.").

264 See Blackstone, supra note 242; see also Strickland v. Washington, 466 U.S. 668, 687, reh'g denied, 467 U.S. 1267 (1984).

265 See Blackstone, supra note 242.

266 132 S. Ct. 1399, 1408 (2012).

267 132 S. Ct. 1376, 1385-87 (2012).

268 Frye, 132 S. Ct. at 1404-07.

269 See id. at 1406 ("In the case now before the Court the State, as petitioner, points out that the legal question presented is different from that in Hill and Padilla [v. Kentucky]. In those cases the claim was that the prisoner's plea of guilty was invalid because counsel had provided incorrect advice pertinent to the plea. In the instant case, by contrast, the guilty plea that was accepted, and the plea proceedings concerning it in court, were all based on accurate advice and information from counsel. The challenge is not to the advice pertaining to the plea that was accepted but rather to the course of legal representation that preceded it with respect to other potential pleas and plea offers."); see also Lafler v. Cooper, 132 S. Ct. 1376, 1392 (2012) (Scalia, J., dissenting) (Anthony Cooper received a full and fair trial, was found guilty of all charges by a unanimous jury, and was given the sentence that the law prescribed. The Court nonetheless concludes that Cooper is entitled to some sort of habeas corpus relief (perhaps) because his attorney's allegedly incompetent advice regarding a plea caused him to receive a full and fair trial.).

270 See Frye, 132 S. Ct. at 1407.

271 Lafler, 132 S. Ct. at 1389.

272 See Frye, 132 S. Ct. at 1404 (noting the remedy provided in both Frye and Lafler would be handed down in the Lafler opinion); see also Oliver, supra note 25.

273 Lafler, 132 S. Ct. at 1389.

274 Id.

275 Id.

276 Id.

277 Id.

278 Id. at 1388-89 (quoting United States v. Mechanik, 475 U.S. 66, 72 (1986)).

279 Id.

280 Id.

281 Id. at 1389.

282 Id.

283 Strickland v. Washington, 466 U.S. 668, 694, reh'g denied, 467 U.S. 1267 (1984).

284 Wanda Ellen Wakefield, Annotation, Judge's Participation in **Plea** **Bargaining** Negotiations as Rendering Accused's Guilty Plea Involuntary, 10 A.L.R. 4th 689, § 2[a] (1981); see also Note, Restructuring the **Plea** **Bargain**, 82 Yale L.J. 286, 287-88, 296-97 (1972).

285 See supra Part II and accompanying text (comparing Weatherford to Lafler and Frye).

286 Weatherford v. Bursey, 429 U.S. 545, 561 (1977); see also supra note 119 and accompanying text.

287 See Bryan v. State, 134 S.W.3d 795, 804 (Mo. Ct. App. 2004). In Bryan, the defendant argued that he received defective advice from trial counsel, which caused him to reject a favorable guilty plea and proceed to trial. Id. at 798. In a pre-Lafler decision, the court refused to impose any remedy at all. Id. at 803-04. The court suggested that vacating the verdict and allowing the defendant to renegotiate with the prosecution would be potentially fruitless. Id. at 804 (citing State v. Eckelkamp, 133 S.W.3d 72 (Mo. App. E.D. 2004), reh'g denied.). After refusing to impose a remedy, the Court stated: "[a]ssuming we reversed the trial court's decision and remanded the case, the State could simply refuse to offer Bryan any plea agreement, and he would have to be retried." Id. at 804.

288 Id.

289 United States v. Booker, 543 U.S. 220, 230 (2005) (citing United States v. Gaudin, 515 U.S. 506, 510-11 (1995) ("[T]he 'Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged.'")).

290 See Booker, 543 U.S. at 230, 235-36.

291 See United States v. Morrison, 449 U.S. 361, 366 (1981).

292 Morrison, 449 U.S. at 365 (1981).

293 Lafler v. Cooper, 132 S. Ct. 1376, 1389 (2012) ("The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat at trial that has already once taken place; victims may be asked to relive their disturbing experiences.") (quoting United States v. Mechanik, 475 U.S. 66, 72 (1986)).

294 See Lafler, 132 S. Ct. at 1385-88; see also Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012).

295 Lafler, 132 S. Ct. at 1386.

296 Id. at 1388 ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. As explained in Frye, 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.") (citations omitted) (citing Frye, 132 S. Ct. at 1407).

297 Frye, 132 S. Ct. at 1407-08.

298 Lafler, 132 S. Ct. at 1388 ("There are instances, furthermore, where a reliable trial does not foreclose relief when counsel has failed to assert rights that may have altered the outcome.").

299 Frye, 132 S. Ct. at 1407 (citations omitted) (citing Lafler, 132 S. Ct. at 1388).

300 Id. at 1407-08.

301 Id. at 1407.

302 See State v. Lentowski, 569 N.W.2d 758, 762 (Wis. Ct. App. 1997).

303 Lafler, 132 S. Ct. at 1388-89.

304 See Paul Gewirtz, Remedies and Resistance, 92 Yale L.J. 585, 587, 666 (1983) (calling law of remedies a "jurisprudence of deficiency, of what is lost between declaring a right and implementing a remedy").

305 See Kimmelman v. Morrison, 477 U.S. 365, 379 (1986). The Kimmelman Court rejected the suggestion that the **failure** to make a timely request for the exclusion of illegally seized evidence could not be the basis for a Sixth Amendment violation because the evidence is "'typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.'" Id. (quoting Stone v. Powell, 428 U.S. 465, 490 (1976)). "The constitutional rights of criminal defendants are granted to the innocent and the guilty alike. Consequently, we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt." Id. at 380.

306 United States v. Mechanik, 475 U.S. 66, 72 (1986) ("The 'passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible.' Thus, while reversal 'may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution,' and thereby 'cost society the right to punish admitted offenders'") (citations omitted).

307 Kimmelman, 477 U.S. at 379.

308 See People v. Curry, 687 N.E.2d 877, 883, 890 (Ill. 1997) (ordering a new trial because defense counsel did not advise the defendant of the potential mandatory-minimum sentence if he was found guilty), overruled by 996 N.E.2d 607 (Ill. 2013); Dew v. State, 843 N.E.2d 556, 571 (Ind. Ct. App. 2006) (ordering a new trial if the State did not agree to reinstate the initial plea offer); State v. Simmons, 309 S.E.2d 493, 498 (N.C. Ct. App. 1983); Larson v. State, 766 P.2d 261, 263 (Nev. 1988); Commonwealth v. Copeland, 554 A.2d 54, 61 (Pa. Super. Ct.) (granting a new trial if the defendant was able to demonstrate ineffective assistance of counsel for **failure** to disclose a plea offer), appeal denied, 523 Pa. 640 (1988); Commonwealth v. Napper, 385 A.2d 521, 524 (Pa. Super. Ct. 1978) (ordering a retrial based on counsel's deficient advice to reject an initial more favorable plea offer); State v. Williams, 83 S.W.3d 371, 375 (Tex. Crim. App. 2002) (holding that **failure** to inform the defendant of a **plea bargain** justified granting a new trial); Hanzelka v. State, 682 S.W.2d 385, 387 (Tex. Crim. App. 1984); In re McCready, 996 P.2d 658, 661 (Wash. Ct. App. 2000) (granting a new trial where defense counsel did not inform the defendant he would serve a certain mandatory minimum prison term); State v. Ludwig, 369 N.W.2d 722, 728 (Wis. 1985) State v. Lentowski, 569 N.W.2d 758, 762 (Wis. Ct. App. 1997) (ordering a retrial when defense counsel improperly advised the defendant to reject a plea offer and to pursue a defense on mistaken legal grounds). This is not to suggest every state that has addressed this issue has found the awarding of a new trial to be an appropriate remedy. See State v. Monroe, 757 So. 2d 895, 898 (La. Ct. App. 2000) ("The only purpose of the new trial in this case would be to allow the defendant to change his plea from not guilty to guilty. But there is no point in doing that when the defendant has already been found guilty."), cert. denied, 791 So.2d 109 (La. 2001); Bryan v. State, 134 S.W.3d 795, 803-04 (Mo. Ct. App. 2004) (rejecting a

new trial remedy because "[o]ne fair trial is all the Constitution requires"); State v. Taccetta, 975 A.2d 928, 937 (N.J. 2009) (holding that a defendant is not entitled to new trial if he pled guilty and now insists upon his innocence); State v. Greuber, 165 P.3d 1185, 1191 (Utah 2007) (holding the Sixth Amendment right to effective assistance of counsel does not extend to the **plea bargaining** process), overruled by 293 P.3d 259 (Utah 2012).

309 Bar-Gill & Gazal Ayal, supra note 46, at 361.

310 Easterbrook, Market System, supra note 46, at 289.

311 Id. at 291.

312 See Bar-Gill & Gazal Ayal, supra note 46, at 261("In most cases, key evidence, including the defendant's statement to the police and the identity of the main witnesses, is common knowledge. In many jurisdictions, law or prosecutorial practice guarantees that defendants receive the most significant information collected by the prosecution, thus minimizing private information the prosecution side.").

313 Easterbrook, **Plea Bargaining**, supra note 46, at 1975.

314 Id.

315 Russell D. Covey, Signaling and **Plea Bargaining's** Innocence Problem, 66 Wash & Lee L. Rev. 73, 75, 77 (2009) (describing trial shadow theory as the "economic model of **plea bargaining**"); see also Bibas, supra note 173, at 2466 ("By and large, though, scholars view the shadow of trial as the overwhelming determinant of **plea bargaining**.").

316 Covey, supra note 315, at 77; Bibas, supra note 173, at 2464 ("**Plea**-**bargaining** literature predicts that parties strike **plea bargains** in the shadow of expected trial outcomes.").

317 Lucien E. Dervan, The Surprising Lessons from **Plea Bargaining** in the Shadow of Terror, 27 Ga. St. U. L. Rev. 239, 252 n.40 (2011).

318 Id.

319 Easterbrook, **Plea Bargaining**, supra note 46, at 1975; see also supra Part I(B) and additional discussion related to the expected sentence deferential that exists between **plea bargains** and trial (the "trial tax").

320 Easterbrook, Market System, supra note 46, at 297.

321 Id.

322 Nancy Jean King, Priceless Process: Nonnegotiable Features of Criminal Litigation, 47 UCLA L. Rev. 113, 119 (1999) ("The defendant may agree to trade the opportunity he would otherwise have to obtain complete dismissal on one charge--waiving his rights to bring motions prior to trial for anticipated or existing violations of his rights--in exchange for the government's promise of a lower sentence on another charge.").

323 Easterbrook, **Plea Bargaining**, supra note 46, at 1975 ("When eight percent of defendants plead guilty, a given prosecutorial staff obtains five times the number of convictions it could achieve if all went to trial.").

324 This does not mean that in every instance a **plea bargain** occurs. There are certainly defendants who insist on going to trial regardless of the consequences. There are also prosecutors who refuse to **plea bargain** or make plea offers that are so punitive in nature that defendants have little to lose by proceeding to trial. However, as this Article has made clear, the overwhelming majority of criminal cases are disposed of by way of a **plea bargain**. See supra notes 13-14 and accompanying text. This certainly lends itself to the easy conclusion that both sides are usually not only motivated to make a deal, but usually successful in doing so. See also Covey, supra note 315, at 74.

325 Covey, supra note 315, at 74.

326 Easterbrook, Market System, supra note 46, at 296.

327 See supra notes 217-19 and accompanying text.

328 Easterbrook, Market System, supra note 46, at 296.

329 Id.

330 Id.

331 Id.

332 These equations have been adapted from the work of Professor Russell Covey. See Russell D. Covey, Longitudinal Guilt: Repeat Offenders, **Plea Bargaining**, and the Variable Standard of Proof, 63 Fla. L. Rev. 431 (2011). However, the author has modified these equations in order to expresses trial shadow theory in terms most relevant for the purposes of the instant discussion.

333 Id. at 436.

334 Id.

335 See Bibas, supra note 173, at 2464.

336 Id.

337 Id. at 2467.

338 Id. at 2468-70.

339 Id. at 2464-68.

340 See generally id. at 2496-2527.

341 Id. at 2474.

342 See supra Part III(C) and accompanying text.

343 See Covey, supra note 315.

344 See id.

345 See id.

346 Bibas, supra note 23, at 1126 (The economic model of **plea bargaining** assumes "that the parties had good information and treated uncertainty as a mere matter of rationally forecasting probabilities of conviction.").

347 It is theoretically possible that the defendant could receive a more severe sentence after overturning the initial conviction than they received after the first proceeding. In North Carolina v. Pearce, the Supreme Court held that a defendant cannot be vindictively sentenced for successfully attacking his first conviction. 395 U.S. 711, 725-26 (1969), overruled by 490 U.S. 794 (1989). Unless reasons for a more severe sentence affirmatively appear in the record, a presumption of vindictiveness arises that must be rebutted by objective information justifying the increased sentence. Id. at 726. Over the years, the Supreme Court has limited the prophylactic rule of Pearce to situations "in which there is a 'reasonable likelihood' .. . that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority. Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness." Alabama v. Smith, 490 U.S. 794, 799 (citations omitted), aff'd, 557 So.2d 20 (Ala. 1989). The Court held that vindictiveness would not be presumed where the original sentence came after a guilty plea and the later, increased sentence followed a trial. Id. at 801. The Court has also held that vindictiveness will not be presumed when the defendant is sentenced by a judge who did not impose the original sentence. See Colten v. Kentucky, 407 U.S. 104, 117-18 (1972). Therefore, depending

on the particular circumstances in which the defendant is returned to his pre-trial position, the defendant may receive an enhanced sentence absent proof of vindictiveness by the court. However, while this may be a factor the defendant takes into account, in the absence of "identifying relevant conduct or events that occurred subsequent to the original sentencing proceedings," it may be difficult for a trial judge to justify imposing an enhanced sentence. Wasman v. United States, 468 U.S. 559, 572 (1984) (citing Pearce, 395 U.S. at 726). Additionally, in jurisdictions that employ sentencing guidelines, the trial judge's ability to impose an enhanced sentence is largely constrained by the guidelines themselves.

348 Bibas, supra note 173, at 2515.

349 King, supra note 322, at 118.

350 Daniel C. Richman, Bargaining About Future Jeopardy, 49 Vand. L. Rev. 1181, 1237 (1996) ("[I]n a criminal justice system in which **plea bargaining** is the dominant mode of adjudication, the chief significance of a much-vaunted constitutional right may lie in its value as a bargaining chip ....").

351 Stephen J. Schulhofer, Is **Plea Bargaining** Inevitable?, 97 Harv. L. Rev. 1037, 1061 (1984). Professor Schulhofer thoroughly studied the Philadelphia Criminal Court System throughout 1981, interviewing judges, prosecutors, defense attorneys and defendants. Id. at 1053-54. Schulhofer concluded that Philadelphia, unlike many jurisdictions, did not provide harsher sentences for defendants who proceeded by way of bench trial rather than guilty plea. Id. at 1061. However, despite the lack of a benefit that could be realized by entering a guilty plea, Schulhofer noted that many defendants nevertheless pled guilty. Id. Schulhofer drew the following conclusion:
Unlike their attorneys, most defendants who pleaded guilty probably did not think they had gained some advantage. But even the defendants' decision to plead often seemed prompted by the futility of any other course. Our findings support the frequently made claim that most pleas occur in utterly hopeless ('dead bang') cases.
Id.

352 See Grossman, supra note 82, at 101-02, 107; Bowers, supra note 81, at 1158.

353 Stephanos Bibas, Incompetent **Plea Bargaining** and Extrajudicial Reforms, 126 Harv. L. Rev. 150, 164 (2012).

354 Scott, supra note 15, at 1935.

355 569 N.W.2d 758 (Wis. Ct. App. 2012).

356 Lentowski, 569 N.W.2d at 762.

357 Id. at 762.

358 Bibas, supra note 23, at 1138.

359 Bibas, supra note 353, at 164.

360 There may very well be scenarios in which the prosecution offers no **plea bargain** or makes an offer the defense does not deem favorable. However, as noted above, once the prosecution has made an offer, or communicated that they will not be making an offer, the issue of defense counsel's **failure** to pursue a **plea bargain** on her client's behalf has become moot. In this regard, the issue becomes the extent to which defense counsel could have attempted to persuade the prosecution to give a better offer or any offer at all. That issue squarely implicates the extent to which the Sixth Amendment's guarantee of effective assistance of counsel requires defense counsel to be an effective negotiator as opposed to simply pursuing a negotiation. The issue of what constitutes effective negotiation is beyond the scope of this Article. However, it should be noted that the Supreme Court has thus far stated its clear reluctance to extend Sixth Amendment protections into the context of effective negotiating.
"The art of negotiation is at least as nuanced as the art of trial advocacy and it presents questions farther removed from judicial supervision." Bargaining is, by its nature, defined to a substantial degree by personal style. The alternative courses and tactics in negotiation are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for proper discharge of defense counsel's participation in the process.
Missouri v. Frye, 132 S. Ct. 1399, 1408 (citing Premo v. Moore, 131 S. Ct. 733, 741, aff'd, 632 F.3d 1287 (9th Cir. 2011)).

361 See Levenson, supra note 31, at 462 (discussing what constitutes initiating plea discussions).

362 See Donald A. Dripps, Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard, 88 J. Crim. L. & Criminology 242, 244 (1997); see also Strickland v. Washington, 466 U.S. 668, reh'g denied, 467 U.S. 1267 (1984).

363 559 U.S. 356 (2010), appeal docketed, 381 S.W.3d 322 (Ky. Ct. App. 2012).

364 132 S. Ct. 1399 (2012).

365 Bibas, supra note 353, at 165 (citing Padilla, 559 U.S. at 374; Criminal Courts & Criminal Justice Operations Comms., Padilla v. Kentucky: The New York City Crim. Court Sys., One Year Later, Jun. 2011 N.Y.C. Bar Ass'n 6, available at http:// www2.nycbar.org/pdf/report/uploads/PadillaCrimCtsCJOReportFINAL6.15.11.pdf.).

366 Id. at 165-66 (citing Nikki Reisch & Sarah Rosell, Judicial Obligations After Padilla v. Kentucky: The Role of Judges in Upholding Defendants' Rights to Advice About the Immigration Consequences of Criminal Convictions, Oct. 2011 Immigrant Defense Project & N.Y. Univ. Sch. of Law Immigrant Rights Clinic, 13-14, available at http:// immigrantdefenseproject.org/wp-content/uploads/2011/11/postpadillaFINALNov2011.pdf; Danielle M. Lang, Note, Padilla v. Kentucky: The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful Padilla Claims, 121 Yale L.J. 944, 975-84 (2012)).

367 Bibas, supra note 353, at 165-66 (citing Reisch & Rosell, supra note 366).

368 Missouri v. Frye, 132 S. Ct. 1399, 1410 (2012).

369 See Alkon, supra note 161.

370 Bibas, supra note 353, at 165 ("[E]rrors in **plea bargaining** breed appeals and habeas petitions, extra work by which no prosecutor wants to be haunted long after a conviction .... Trial judges have strong incentives to clear their own dockets by encouraging defendants to accept deals and making those deals bulletproof.").

371 Albert W. Alschuler, **Plea Bargaining** and Its History, 79 Colum. L. Rev. 1, 5 (1979).

372 Id. at 6.

373 397 U.S. 742 (1970).

374 Brady, 397 U.S. at 751.

375 Albert W. Alschuler, Lafler and Frye: Two Small Band-Aids for a Festering Wound, 51 Duq. L. Rev. 673, 681-82 (2013).

376 132 S. Ct. 1399 (2012).

377 132 S. Ct. 1376 (2012).

378 Lafler, 132 S. Ct. at 1384; Frye, 132 S. Ct. at 1407.

379 See supra Part I and accompanying text.

380 466 U.S. 668, 687, reh'g denied, 467 U.S. 1267. (1984).

381 See supra Part III(E) and accompanying text.

382 See supra Part IV and accompanying text.

383 See supra Part IV(E) and accompanying text.

384 Frye, 132 S. Ct. at 1408.

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