

**FORMALIZING THE PLEA BARGAINING PROCESS
AFTER LAFLER AND FRYE**

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I. INTRODUCTION

Ninety-seven percent of federal criminal prosecutions and ninety-four percent of state criminal prosecutions do not go to trial; instead, they are resolved by way of guilty pleas.¹ Thus, no one can deny the centrality of plea bargaining in our contemporary criminal justice system.² Recognizing this reality, the Supreme Court recently decided two cases on the same day: *Lafler v. Cooper*³ and *Missouri v. Frye*.⁴ By a 5–4 decision led by Justice Kennedy in both cases, the Supreme Court held that the Sixth Amendment right to effective assistance of counsel extends to negotiations by defense counsel during the plea bargaining process.⁵ In so holding, the Supreme Court acknowledged that plea bargaining is “not some adjunct to the criminal justice system; it *is* the criminal justice system.”⁶

Specifically, the Court held that a criminal defendant who goes to trial, rather than accept a favorable plea offer, is entitled to post-conviction relief if her refusal or failure to accept the plea offer “was the result of ineffective assistance during the plea negotiation process.”⁷ *Lafler* and *Frye* address two different plea bargaining situations that may give rise to a post-conviction ineffective assistance of counsel claim: (1) where the defense counsel provides constitutionally deficient legal advice

¹ See *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

² See *Brady v. United States*, 397 U.S. 742, 751 (1970) (insisting that plea bargaining is “inherent in the criminal law and its administration”); *Santobello v. New York*, 404 U.S. 257, 261 (1971) (stating that “[d]isposition of charges after plea discussions is not only an essential part of the [criminal] process but a highly desirable part for many reasons”).

³ 132 S. Ct. 1376, 1388 (2012) (“The reality that criminal justice today is for the most part a system of pleas, not a system of trials.”) (citations omitted).

⁴ *Frye*, 132 S. Ct. at 1407 (“In today’s criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.”).

⁵ *Lafler*, 132 S. Ct. at 1384 (“Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process.”); *Frye*, 132 S. Ct. at 1407. See generally, U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [sic].”).

⁶ *Frye*, 132 S. Ct. at 1407 (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)) (emphasis in original).

⁷ *Lafler*, 132 S. Ct. at 1386.

based on which the defendant decides not to accept a plea offer, and (2) where the defense counsel neglects to inform the defendant of a plea offer, which then lapses.⁸ Such claims are now evaluated under the standard set forth in *Strickland v. Washington*,⁹ which requires the defendant to show, first, that the defense counsel made errors falling below the constitutional standard of effective counsel, and second, that those errors prejudiced the defendant's case so as to deprive her of a fair result.¹⁰

Despite its delay, recognition of a right to effective assistance during plea bargaining, in a system that relies heavily on plea offers, is a victory in its own right.¹¹ The extent to which the Court recognizes this right, however, is not entirely clear.¹² To better understand this lack of clarity, it is helpful to first understand how the plea bargaining process works. In general, plea bargaining is a "negotiated agreement" by which a defendant agrees to plead guilty in exchange for the prosecutor's offer of a more lenient sentence or dismissal of other charges.¹³ It is a process dictated by personal style, rather than hard-and-fast rules.¹⁴ Moreover, plea bargaining is a process that takes place largely "off the record."¹⁵ Contrasting these "informal" plea offers are "formal," record-creating plea offers that some states require to be made in writing.¹⁶

The reach of the Court's holding in *Lafler* and *Frye* is uncertain because the phrase "formal offer" is sporadically used in *Frye*, even in its holding, while it is not at all present in *Lafler*.¹⁷ Consequently, it is unclear, under *Lafler* and *Frye*, whether an informal plea offer may form

⁸ *Id.* at 1383; *Frye*, 132 S. Ct. at 1404.

⁹ 466 U.S. 668 (1984).

¹⁰ *Id.* at 687.

¹¹ See Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 151 (2012) ("The Court, like Rip Van Winkle, has at last awoken from its long slumber and sees the vast field it has left all but unregulated.") (footnote omitted).

¹² See *infra* Part III.A (discussing cases both denying and accepting claims of ineffective assistance of counsel where defendant did not receive a "formal" plea offer).

¹³ See *infra* note 97 and accompanying text (defining "plea bargaining").

¹⁴ *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) (citing *Premo v. Moore*, 131 S. Ct. 733, 741 (2011)).

¹⁵ Bibas, *supra* note 11, at 150.

¹⁶ See *infra* note 129 (listing states that require plea offers to be in writing).

¹⁷ Compare *Frye*, 132 S. Ct. at 1408–10 (using the words "formal offer" six different times, including one reference made by Scalia, J., dissenting) with *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) (never using the words "formal offer").

the basis of an ineffective assistance of counsel claim, or whether, in order to assert a claim, the defendant must have received a written plea offer, implying that it was “formally” offered by the prosecution.¹⁸ This confusion presents an important issue because most states do not require a plea offer to be in writing.¹⁹ Where there is no record of ongoing plea discussions, the defendant is faced with the difficult, if not impossible, task of proving the prejudice prong of *Strickland* if she receives constitutionally deficient advice—that is, but for her counsel’s ineffective assistance of counsel, the defendant would have accepted the guilty plea.²⁰

This Note argues that after *Lafler* and *Frye*, it is still difficult for a defendant to succeed on a claim of ineffective assistance of counsel based on a plea offer that was not accepted because of: (1) lack of clarity on the reach of the *Lafler* and *Frye* holdings, and (2) lack of formal requirements regulating the plea bargaining process. Again, the prejudice prong of *Strickland* requires the defendant to show that she would have accepted the plea offer absent defense counsel’s erroneous legal advice.²¹ Courts disagree about whether the holdings in *Lafler* and *Frye* should be limited to “formal” plea offers or should extend to all plea offers.²² This Note argues that the better approach—or at least the one affording greater constitutional protection to defendants—is extending the *Lafler* and *Frye* holdings to all plea offers, rather than limiting the holdings to formal offers.²³ Such an interpretation recognizes the reality that extensive negotiations often occur between the defense counsel and prosecution, usually without the defendant present, before any plea offer is committed

¹⁸ See *infra* Part III.A (discussing cases both denying and accepting claims of ineffective assistance of counsel where defendant did not receive a “formal” plea offer).

¹⁹ See *infra* note 129 (enumerating states that require a plea bargain to be in writing).

²⁰ Bibas, *supra* note 11, at 162 (“Few defendants have documentary or other evidence that their attorneys did not tell them of a plea offer or gave them incorrect advice. Given the difficulty of proving such claims and satisfying both of *Strickland*’s prongs, few *Strickland* claims of any sort succeed, let alone fabricated ones.”) (footnote omitted); see also Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2671 (2013) (“[O]bstacles have made relief from ineffective assistance generally inaccessible to individual litigants, and *Strickland* and its progeny are deserving of the well-developed body of scholarly critique about the hurdles the doctrine has constructed.”).

²¹ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

²² See *infra* Part III (discussing cases both denying and accepting claims of ineffective assistance of counsel where defendant did not receive a “formal” plea offer).

²³ See Roberts, *supra* note 20, at 2672 (discussing the Court’s intent in *Frye* when using “formal” plea offer language).

to writing.²⁴ Moreover, this approach does not penalize the defendant for relying on a plea offer that the defense counsel and prosecution failed to put into writing.

Additional difficulties arise for defendants when attempting to satisfy the second requirement under the prejudice prong of *Strickland*, which requires a defendant to show that if she accepted the plea offer, there is a reasonable probability that the prosecution and the court would have accepted the offer to plead guilty.²⁵ The prosecution and courts generally hold broad, unregulated discretion to reject a plea bargain after the defendant accepts it, and there is no clear standard regulating the practice of courts and prosecutors in such circumstances.²⁶ This means that, regardless of whether the defendant would have accepted the plea offer, a court can easily deny the defendant's ineffective assistance of counsel claim on the sometimes baseless ground that neither the trial court nor the prosecution would have accepted the plea offer.²⁷ In order to safeguard the right afforded to defendants under *Lafler* and *Frye*, the plea bargaining process should be formalized; in addition to requiring written plea offers, there should be standardized procedures to guide how the prosecution and courts may reject plea offers.

Part II of this Note provides background on the Supreme Court's development of a standard for ineffective assistance of counsel claims during the plea bargaining process, and how that standard has changed after the most recent decisions of *Lafler* and *Frye*. Part III emphasizes the trial court splits as to whether the holdings in *Lafler* and *Frye* apply to all plea offers, or only to those plea offers that are considered "formal." Part III further analyzes the plea bargaining process and the reasons why informality in the process places defendants at a distinct disadvantage when bringing claims for ineffective assistance of counsel. Part IV examines states' statutes and court rules, as well as the American Bar

²⁴ See *id.* at 2671 ("A more powerful critique of regulating the plea bargaining process is that because bargaining happens off the record between prosecution and defense—and normally outside the defendant's presence—it is difficult to adequately examine any later claim of ineffectiveness in that process.")

²⁵ *Missouri v. Frye*, 132 S. Ct. 1399, 1409 (2012) ("Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law.")

²⁶ See *Bibas*, *supra* note 11, at 162.

²⁷ See *id.* at 162.

Association (“ABA”) Criminal Justice Standards, the Model Rules of Professional Conduct (“Model Rules”), and the Federal Rules of Criminal Procedure, to determine where formal processes are already in place and where they ought to be for the future. Finally, Part V makes specific recommendations to formalize the plea bargaining process, and considers the implications of carrying out these recommendations for the duties of the defense counsel and prosecution.

II. BACKGROUND

A. *The Standard under Hill v. Lockhart and Padilla v. Kentucky*

Prior to *Lafler* and *Frye*, the Supreme Court addressed the right to effective assistance of counsel during the plea bargaining process in two decisions: *Hill v. Lockhart*²⁸ and *Padilla v. Kentucky*.²⁹ In *Hill*, the Court held that the correct standard for courts assessing ineffective assistance of counsel claims in the plea bargaining context is the two-prong test set forth in *Strickland*.³⁰ Before *Hill*, the Court focused instead on whether the defense counsel’s advice caused the defendant to enter a plea involuntarily or unintelligently.³¹ Now, under the *Strickland* standard, in order to succeed on a claim of ineffective assistance of counsel, the defendant must satisfy two prongs:

[f]irst, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.³²

Hill involved a petitioner who pled guilty to first-degree murder and theft of property.³³ Later, the petitioner brought a habeas petition based on ineffective assistance of counsel, alleging that his counsel failed to advise him about his parole eligibility date—specifically, that he would have to serve half of his sentence before he was eligible for parole.³⁴ The

²⁸ 474 U.S. 52 (1985).

²⁹ 130 S. Ct. 1473 (2010).

³⁰ *Hill*, 474 U.S. at 58.

³¹ See *McMann v. Richardson*, 397 U.S. 759 (1970); *Brady v. United States*, 397 U.S. 742 (1970).

³² *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

³³ *Hill*, 474 U.S. at 53.

³⁴ *Id.*

Court held that the petitioner did not satisfy *Strickland*'s prejudice prong because he failed to allege in his petition that, had his counsel correctly advised him, he would have gone to trial instead of accepting the guilty plea.³⁵ *Hill*'s holding was limited; the Court stated:

[w]e find it unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because in the present case we conclude that petitioner's allegations are insufficient to satisfy the *Strickland v. Washington* requirement of 'prejudice.'³⁶

Thus, *Hill* left open the question of whether the defense counsel is under a constitutional duty to negotiate effectively during the plea bargaining process.³⁷

In *Padilla*, the defense counsel misinformed the defendant about the consequences of pleading guilty, and specifically advised him that it would not result in his deportation; this advice was plainly wrong, and the defendant faced deportation as a result of his guilty plea.³⁸ While the Court in *Hill* was reluctant to determine whether erroneous advice as to parole eligibility could constitute ineffective assistance of counsel in other cases, the Court in *Padilla* found that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel."³⁹ *Padilla* was concerned with only the first prong of *Strickland*—whether defense counsel's erroneous advice regarding the guilty plea amounted to performance falling below the reasonableness standard of effective assistance of counsel—and held that the advice did fall below the reasonableness standard.⁴⁰ Despite the fact that the Court did not reach the prejudice issue, the *Padilla* majority used strong language favoring a broadened scope of the Sixth Amendment right to effective assistance of counsel.⁴¹ Focusing its discussion on the consequences of bad advice for defendants, the Court emphasized the long recognition "that the negotiation of a plea bargain is a critical phase

³⁵ *Id.* at 60.

³⁶ *Id.*

³⁷ Wesley MacNeil Oliver, *The Indirect Potential of Lafler and Frye*, 51 DUQ. L. REV. 633, 634 (2013).

³⁸ *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478 (2010).

³⁹ *Id.* at 1476.

⁴⁰ *Id.* at 1482.

⁴¹ *Id.* at 1486 ("It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the 'mercies of incompetent counsel.'") (citing *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.⁴²

Although *Padilla* expanded defense counsel duties after *Hill*, the standard for ineffective assistance of counsel still did not require the defense counsel to obtain a favorable deal for the defendant. *Padilla* and *Hill* dealt specifically with the situation in which a defendant accepts a guilty plea and foregoes trial.⁴³ *Lafler* and *Frye* involve a significantly different situation, in that they involve defendants who reject plea offers and go to trial, alleging that they would have accepted the plea offer if they had been correctly informed by their counsel.⁴⁴ The new question that the Supreme Court in *Lafler* and *Frye* faced was whether a defendant could assert an ineffective assistance of counsel claim if she received a fair trial. Not only did the Court in *Lafler* and *Frye* hold that a defendant could bring such a claim, but it also required defense counsel to satisfy the Sixth Amendment by negotiating effectively during the plea bargaining process.⁴⁵ Now, errors in the negotiation process *may* satisfy the prejudice prong under *Strickland* and thereby constitute ineffective assistance of counsel.⁴⁶

B. *The New Standard under Lafler v. Cooper and Missouri v. Frye*

i. The Facts

In *Lafler*, Anthony Cooper pointed a gun at Kali Mundy's head, fired a shot, and missed.⁴⁷ Mundy fled, and Cooper followed while firing additional shots.⁴⁸ Mundy survived with gunshot wounds in her buttocks, hip, and abdomen.⁴⁹ Cooper was charged with assault with intent to murder, possession of a firearm in the commission of a felony,

⁴² *Id.* at 1481.

⁴³ *Hill v. Lockhart*, 474 U.S. 52, 368 (1985); *Padilla*, 130 S. Ct. at 1478.

⁴⁴ *Missouri v. Frye*, 132 S. Ct. 1399, 1406 (2012) (distinguishing the legal issue in *Hill* and *Padilla* from the one presented in *Frye*).

⁴⁵ *See Oliver supra* note 37, at 633 (“The Supreme Court’s two previous forays into this area recognized the right to the effective assistance of counsel during plea bargaining but did not recognize the right to an effective negotiator.”).

⁴⁶ *See id.* at 636.

⁴⁷ *Lafler v. Cooper*, 132 S. Ct. 1376, 1383 (2012).

⁴⁸ *Id.*

⁴⁹ *Id.*

misdemeanor possession of marijuana, and being a habitual offender.⁵⁰ The prosecution offered, twice, that in exchange for a guilty plea, it would dismiss two of the charges and recommend a prison sentence of fifty-one to eighty-five months on the remaining charges.⁵¹ Cooper rejected these offers, allegedly because his defense counsel “convinced him that the prosecution would be unable to establish his intent to murder Mundy because she was shot below the waist.”⁵² Cooper rejected a less favorable plea at trial, and was convicted on all counts; he was sentenced to a mandatory minimum jail sentence of 185 to 360 months.⁵³ Cooper appealed, claiming ineffective assistance of counsel, and the state court of appeals rejected his claim.⁵⁴ Thereafter, the United States District Court granted Cooper’s petition for habeas relief, and ordered specific performance of the original plea offer.⁵⁵ The Sixth Circuit affirmed, essentially because Cooper’s longer sentence was due to his counsel’s ineffective assistance.⁵⁶

In *Frye*, Galin Frye faced charges for driving with a revoked driver’s license.⁵⁷ He already had three previous convictions, and this fourth offense constituted a felony punishable by up to four years imprisonment.⁵⁸ The prosecutor presented Frye’s defense counsel with two offers in exchange for Frye’s guilty plea: the first offer was a recommended three-year sentence if Frye pled guilty to the felony charge; the second offer would reduce the charge to a misdemeanor, and if Frye pled guilty to the misdemeanor charge, the prosecution would recommend a ninety-day sentence and a maximum term of one-year imprisonment.⁵⁹ Frye’s defense counsel never advised him of these plea offers, and both offers eventually expired.⁶⁰ The court sentenced Frye to three years in prison after he pled guilty on the eve of trial.⁶¹ Frye then

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Lafler*, 132 S. Ct. at 1383.

⁵⁴ *Id.*

⁵⁵ *Id.* at 1383–84.

⁵⁶ *Id.*

⁵⁷ *Missouri v. Frye*, 132 S. Ct. 1399, 1404 (2012).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 1404–05.

sought state post-conviction relief, alleging that he was denied effective assistance of counsel because his counsel failed to inform him of the prosecutor's plea offer to reduce his felony charge to a misdemeanor.⁶² Although the trial court denied his motion, the Missouri Court of Appeals reversed, holding that Frye satisfied the requirements of an ineffective assistance of counsel claim under *Strickland*, and remanded the case to the trial court to either re-try the case or allow Frye to re-plead to accept the offer.⁶³

ii. The Majority and Dissenting Opinions

Lafler and *Frye* were argued and decided together. Ultimately, the Supreme Court in *Frye* held that “[t]he Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected.”⁶⁴ Similarly, the majority in *Lafler* applied the Sixth Amendment right to the plea bargaining process; it too defined the scope of the defendant's remedy resulting from a *Strickland* violation, which requires the court to “neutralize the taint” of the constitutional violation as long as it does not amount to a “windfall” or “needlessly squander” state resources.⁶⁵ Reaching this conclusion, the majority in *Lafler* disagreed with the government's argument that “[a] fair trial wipes clean any deficient performance by defense counsel during plea bargaining” because that argument “ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials.”⁶⁶ For this reason, the majorities' opinions in *Lafler* and *Frye* are premised on the notion that defendants are entitled to accurate advice on proposed plea agreements, even though there is neither a constitutional right to receive a plea offer, nor a federal right to have a judge accept the plea offer.⁶⁷

Justice Scalia dissented in *Lafler* and *Frye*, disagreeing with the majority on whether constitutional rights should attach to the plea bargaining process, and focusing most of his dissent on how plea

⁶² *Id.*

⁶³ *Frye*, 132 S. Ct. at 1405.

⁶⁴ *Id.* at 1402.

⁶⁵ *Lafler v. Cooper*, 132 S. Ct. 1376, 1381 (2012) (citations omitted).

⁶⁶ *Id.* at 1388.

⁶⁷ *Frye*, 132 S. Ct. at 1410 (finding no constitutional right to be offered a plea and no federal right for a judge to accept a plea).

bargaining is an embarrassing part of the criminal justice system.⁶⁸ In many respects, Justice Scalia does not respond to the arguments made in the majority opinions; his argument about how the system *ought* to be ignores the reality that guilty plea dispositions *in actuality* command the vast majority of state and federal criminal convictions.⁶⁹ His response to this reality, much like the government's argument, is that no injustice has been committed against the defendant who receives the "exorbitant gold standard of American justice—a full-dress criminal trial."⁷⁰ A "full-dress criminal trial," however, cannot be relied upon to protect the constitutional rights of defendants, where plea bargaining commands the criminal justice system.

Setting aside his discussion on the efficacy of the plea bargaining system, Justice Scalia sheds light on important questions that the majority opinions failed to address.⁷¹ In particular, the majority in *Frye* provides that in circumstances where the defense counsel causes a plea offer to lapse or to be rejected, defendants must show, under the prejudice prong of *Strickland*, a reasonable probability that: (1) they would have accepted the plea offer absent ineffective assistance of counsel; (2) the prosecution would not have rejected the plea offer later if they had discretion to reject it under state law; and (3) the trial court would not have refused to accept the plea offer if it had discretion to reject it under state law.⁷² The majority opinion essentially avoids the issue of how the defendant would be able to satisfy the second and third requirements under *Frye*, asserting:

[i]t can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences. So in most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain.⁷³

Thus, the majority assumes it is simple for a defendant to prove the second and third requirements under *Frye*, and fails to explain the source

⁶⁸ *Lafler*, 132 S. Ct. at 1397 (Scalia, J., dissenting) ("Today . . . the Supreme Court of the United States elevates plea bargaining from a necessary evil to a constitutional entitlement. It is no longer a somewhat embarrassing adjunct to our criminal justice system.").

⁶⁹ *Frye*, 132 S. Ct. at 1407.

⁷⁰ *Lafler*, 132 S. Ct. at 1397–98 (Scalia, J., dissenting) ("[T]he Court today opens a whole new field of constitutionalized criminal procedure: plea-bargaining law.").

⁷¹ *Id.* at 1392.

⁷² *Frye*, 132 S. Ct. at 1409.

⁷³ *Id.* at 1410.

of this assumption. Responding to the majority's opinion, Justice Scalia retorts, "[a]ssuredly it can [be assumed], just as it can be assumed that the sun rises in the west; but I know of no basis for the assumption."⁷⁴

The majority's statement is less than satisfactory for Justice Scalia, and more so for defendants, who are likely to encounter difficulties proving that prosecutors and courts would have accepted the plea offer in the absence of any standards articulating their practices.⁷⁵ Justice Scalia raises questions that demonstrate some of these difficulties:

[i]s it constitutional, for example, for the prosecution to withdraw a plea offer that has already been accepted? Or to withdraw an offer before the defense has had adequate time to consider and accept it? Or to make no plea offer at all, even though its case is weak—thereby excluding the defendant from 'the criminal justice system'?"⁷⁶

These questions indicate the need for procedural guidelines governing how the prosecution and the court may reject plea offers, and enabling defendants to prove the second prong of *Strickland*.

Courts are offered additional guidance under the first prong of *Strickland*, which requires courts to look to professional norms of attorney conduct to determine whether the defense counsel's performance meets the standard for effective assistance of counsel under the Sixth Amendment.⁷⁷ The majority decision in *Frye* extends this reference to professional norms to the plea bargaining context, suggesting that courts look to codified standards when assessing defense counsel's performance.⁷⁸ Specifically, the majority cites ABA standards and state bar professional standards, as well as state rules and state and federal case law to define the duties of defense counsel under the Sixth Amendment.⁷⁹ Such standards help defendants prove the first prong of *Strickland* and guide judges in determining whether the first prong has been met. Similar standards should be codified setting forth how the prosecution and courts

⁷⁴ *Id.* at 1413 (Scalia, J., dissenting).

⁷⁵ *See, e.g., Bibas supra* note 11, at 162 ("[D]efendants will find it hard to prove that prosecutors would have left plea offers on the table and that judges would have accepted proposed bargains, and thus that defendants would ultimately have benefited from the proposed bargains.").

⁷⁶ *Lafler*, 132 S. Ct. at 1392.

⁷⁷ *Strickland v. Washington*, 466 U.S. at 688 (1984).

⁷⁸ *Frye*, 132 S. Ct. at 1408 ("[T]hough the standard for counsel's performance is not determined solely by reference to codified standards of professional practice, these standards can be important guides.").

⁷⁹ *Id.* at 1408.

may reject plea offers to help defendants prove the second prong of *Strickland*, and to help judges reach fair results in these cases.⁸⁰

III. FORMAL VS. INFORMAL PLEA OFFERS

A. Confusion Over Whether a “Formal Offer” is Required to Prove Prejudice

According to the Court in *Frye*, “[d]efense 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.”⁸¹ Justice Kennedy clarified the meaning of “formal offer” as used in *Frye*, expressing, “the fact of a formal offer means that its terms and its processing can be documented so that what took place in the negotiation process becomes clearer if some later inquiry turns on the conduct of earlier pretrial negotiations.”⁸² As previously noted, the Supreme Court uses the word “formal” in *Frye*, but not in *Lafler*.⁸³ This inconsistent use of “formal offer” between the two decisions suggests that the Court did not intend to limit its holdings to formal offers.⁸⁴

In recent cases, however, courts have denied claims of ineffective assistance of counsel on the basis that no “formal offer” was extended to the defendant. One court even cited *Lafler* as authority for requiring the prosecution to offer a “formal” plea to the defendant, despite the lack of any “formal offer” language in the *Lafler* opinion.⁸⁵ The Eighth Circuit Court of Appeals adds to the confusion with its decision in *Kingsberry v. United States*,⁸⁶ decided prior to *Lafler* and *Frye*, which holds that a formal offer is required to establish prejudice for an ineffective assistance of counsel claim. The *Kingsberry* court stated:

⁸⁰ See *infra* Part IV (examining codified requirements of plea bargaining).

⁸¹ *Frye*, 132 S. Ct. at 1408 (emphasis added).

⁸² *Id.* at 1409.

⁸³ *Id.* at 1408–10 (using the words “formal offer” seven different times); *Lafler v. Cooper*, 132 S. Ct. 1276, 1376 (2012) (never using the words “formal offer”).

⁸⁴ See Roberts, *supra* note 20, at 2662 (“Surely, if the Court meant to limit the right to effective assistance to informing and counseling defendants about formal plea offers the prosecution has extended, it would not have repeatedly used the words ‘plea bargaining,’ ‘plea negotiations,’ and ‘negotiation of a plea bargain.’”).

⁸⁵ See DeFilippo v. United States, No. 09-CV-4153 (NGG), 2013 WL 817196, at *6 (E.D.N.Y. Mar. 5, 2013) (citing *Lafler*, 132 S. Ct. at 1385) (“Thus, the lack of a formal plea offer strongly weighs against a finding that DeFilippo would have pled guilty.”).

⁸⁶ 202 F.3d 1030 (8th Cir. 2000).

[w]e address the prejudice component, assuming *arguendo* that the performance of Kingsberry's trial counsel fell below an objective standard of reasonableness. We begin by noting that prejudice is possible, notwithstanding a subsequent fair trial, where counsel failed to provide accurate advice regarding a plea agreement offer. *Logic dictates therefore, that to establish such prejudice, the petitioner must begin by proving that a plea agreement was formally offered by the government.* Kingsberry argues that the contradictory affidavits submitted on this issue create a fact dispute, mandating an evidentiary hearing. We disagree.

The record before this Court is sufficient to show conclusively that a formal plea offer never materialized. The two parties necessarily privy to a plea offer and fundamental to resolution of this issue both deny the existence of a plea agreement offer No facts casting genuine doubt upon the veracity of [trial counsel's] affidavit were presented.⁸⁷

In *Johnson v. United States*,⁸⁸ the Northern District of Iowa interpreted *Kingsberry* as “establish[ing] the requirement of a formal plea offer from the prosecution to be a bright line test of prejudice arising from counsel's deficient performance in plea negotiations.”⁸⁹ On the basis of this interpretation, the *Johnson* court rejected the defendant's ineffective assistance of counsel claim because the prosecution did not extend him a formal offer.⁹⁰ The *Johnson* court cited the Sixth Amendment as authority for denying the defendant's claim because no formal offer was presented to the defendant.⁹¹

By contrast, in another Northern District of Iowa case, *Wanatee v. Ault*,⁹² the court found that the defendant was offered a formal plea as required under *Kingsberry*, even though the offer was not in writing.⁹³

⁸⁷ *Id.* at 1032–33 (emphasis added) (footnotes omitted) (citations omitted).

⁸⁸ 860 F. Supp. 2d 663 (N.D. Iowa 2012).

⁸⁹ *Id.* at 789.

⁹⁰ *Id.* at 790 (citing *Kingsberry*, 202 F.3d at 1032 (“Where no formal offer of a plea agreement from the prosecution ever materialized, Johnson cannot make the bright line showing necessary to prove prejudice in plea negotiations.”)).

⁹¹ *Id.* at 782. “The performance of trial counsel in plea negotiations [] was deficient [because of] their continued push for an agreement to a sentence for a term of years, once a plea to a term of years became both wholly unrealistic and wholly unreasonable as a bargaining position.” *Id.* However, it was not a valid claim for ineffective assistance of counsel because the prosecution never formally offered the defendant a plea agreement to a sentence less than death. *Id.*

⁹² 101 F. Supp. 2d 1189, 1202 (N.D. Iowa 2000), *aff'd*, 259 F.3d 700 (8th Cir. 2001).

⁹³ *Id.* at 1202–03 (“It is undisputed that there was no written offer of a plea agreement and that no written plea agreement was ever prepared or executed [T]he initial requirement of *Kingsberry*, ‘that to establish . . . prejudice, the petitioner must begin by proving that a plea agreement was formally offered by the government’ . . . has been satisfied in Wanatee's case.”).

Arriving at this conclusion, the court distinguished the facts of *Wanatee* from those in *Kingsberry*. In *Kingsberry*, the defendant initiated plea negotiations by proffering information, after which the government did not make a plea offer because it found the proffer to be inadequate, while in *Wanatee*, the defendant proffered information only after the prosecution extended a plea offer.⁹⁴ This distinction confuses the issue of what constitutes a “formal offer” because it is not based on whether or not the offer was in writing.

More recent cases rely on a combination of *Lafler*, *Frye*, and *Kingsberry* to dismiss claims of ineffective assistance of counsel for lack of prejudice when the prosecution did not extend any formal plea offer.⁹⁵ Other courts explicitly found that “[t]he absence of a formal plea offer does not necessarily mean there were no plea negotiations.”⁹⁶ Thus, the need to clarify the “formal offer” distinction used in *Frye* is evident.

B. The Plea Bargaining Process

In order to better understand the distinction between formal and informal plea offers, as well as the rules and statutes governing plea bargaining, it is worth exploring a more basic question: what exactly is the plea bargaining process and how does it work? To begin, Black’s Law Dictionary defines a “plea bargain” as “[a] negotiated agreement

⁹⁴ *Id.* at 1203.

⁹⁵ See *Williams v. United States*, No. 2:08-CR-0112 (GZS), 2013 WL 2155390, at *4 (D. Me. May 17, 2013) (“When there is no formal offer on the table, this particular duty [for defense counsel to communicate formal offers, under *Frye*] does not arise.”); *Gilchrist v. United States*, No. 08-1218, 2012 WL 4520469, at *19 (D. Md. Sept. 27, 2012) (“Petitioner clearly cannot establish the deficient performance prong under *Strickland* without showing that a formal plea offer was made.”); *Ramos v. United States*, No. 01-10369 (PBS), 2012 WL 1109081, at *5 (D. Mass. Mar. 30, 2012) (“If no plea offer is made, the issue of ineffective assistance of counsel during plea bargaining would typically not be cognizable . . . [here] [t]here is no evidence that Ramos instructed his lawyer to negotiate a plea prior to trial, or that the government made an offer to negotiate, which he rebuffed.”); *Silva v. United States*, No. 4:12-CV-0898 (DGK), 2013 WL 1628444, at *4 (W.D. Mo. Apr. 16, 2013) (“[T]he movant must prove that the alleged plea agreement was formally offered by the Government In the present case, Silva has failed to demonstrate that the Government ever offered a binding plea agreement for 63 to 78 months imprisonment”); *Ortiz v. United States*, No. 12-4092, 2013 WL 1339722, at *8 (D. S.D. Feb. 7, 2013) (citations omitted) (“Ortiz has failed to prove a plea agreement was formally offered. Ortiz does not claim a plea offer was made, and the Government and Ortiz’s counsel have explicitly denied a plea offer was made.”).

⁹⁶ *Atkinson v. Elwood*, No. 01-CIV-5462, 2004 WL 2943665, at *3 (E.D. Pa. Dec. 20, 2004) (citations omitted).

between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, [usually] a more lenient sentence or a dismissal of the other charges.”⁹⁷

This definition, characterizing a plea bargain as a “negotiated agreement,” notably describes plea bargaining as a type of negotiation. Courts look to negotiation texts for guidance in evaluating whether defense counsel is negotiating effectively during the plea bargaining process, “stress[ing] preparation as a required component of good negotiation.”⁹⁸ Also in line with this definition, courts and legal scholars have viewed the plea bargaining process as governed by contract principles.⁹⁹ Yet, if contract principles are applied to plea bargaining, why are there no uniform rules as to when offers must be in writing and whether or not the prosecution and court has discretion to reject a plea offer once it has been accepted?¹⁰⁰

These questions are important to ineffective assistance of counsel claims after *Lafler* and *Frye* because the defendant must demonstrate a reasonable probability that she would have accepted the plea and that the prosecution and court would not have rejected it once the plea was accepted.¹⁰¹ For example, the Seventh Circuit held that the defendant’s self-serving statement alone was insufficient to establish a reasonable probability that the defendant would have accepted the plea offer absent the defense counsel’s ineffective assistance; the court required “objective evidence” to corroborate the defendant’s self-serving statement.¹⁰² The Eleventh Circuit similarly required a defendant to produce objective

⁹⁷ BLACK’S LAW DICTIONARY 1270 (9th ed. 2009).

⁹⁸ Rishi Batra, *Lafler and Frye: A New Constitutional Standard for Negotiation*, 14 CARDOZO J. CONFLICT RESOL. 309, 325 (2013) (citations omitted).

⁹⁹ Rebecca Hollander-Blumoff, *Getting to “Guilty”: Plea-bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115, 119 (1997); see also Frank Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983) (characterizing the plea agreement as a bargained-for transaction); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1910 (1992) (“The courts, on the other hand, have proceeded to construct a body of contract-based law to regulate the plea bargaining process, taking for granted the efficiency and decency of the process being regulated.”).

¹⁰⁰ See discussion *infra* Part V (proposing that uniform rules on plea bargaining should be enacted).

¹⁰¹ *Missouri v. Frye*, 132 S. Ct. 1399, 1409 (2012).

¹⁰² See *Toro v. Fairman*, 940 F.2d 1065, 1068 (7th Cir. 1991).

evidence corroborating his claim that he rejected a plea offer against his wishes based on advice he received from his defense counsel.¹⁰³ The problem with requiring the defendant to present “objective evidence” corroborating an ineffective assistance of counsel claim is that the plea bargaining system is often so informal that it does not require defense counsel or prosecuting attorneys to create any evidence of plea bargaining whatsoever.

The main reason plea bargaining is informal and largely unregulated, as the court in *Frye* recognized, is that plea bargaining is “by its nature, defined to a substantial degree by personal style.”¹⁰⁴ For this reason, the court consistently hesitates to impinge upon defense counsels’ broad leeway to decide how they wish to negotiate offers with the prosecuting attorneys.¹⁰⁵ As a result, the Court has provided little guidance on the duties of defense counsel, setting forth only the bare minimum requirement that defense counsel must communicate “formal offers” to the defendant.¹⁰⁶

This is not to say that no process at all governs plea bargaining. In fact, much has been written on effective negotiating strategies.¹⁰⁷ Post-*Padilla*, the ABA issued guidance to defense counsel and prosecutors on their duties to inform defendants of immigration and other consequences that those defendants may face as a result of accepting or rejecting a guilty plea.¹⁰⁸ Still, the extent to which the right to effective assistance of counsel regulates plea bargaining is uncertain.¹⁰⁹ Other guidelines include

¹⁰³ *Diaz v. United States*, 930 F.2d 832, 835 (11th Cir. 1991).

¹⁰⁴ *Frye*, 132 S. Ct. at 1408; see also G. NICHOLAS HERMAN, PLEA-BARGAINING § 1.02 (2d ed. 1981) (discussing different plea-bargaining styles).

¹⁰⁵ *Frye*, 132 S. Ct. at 1408 (“This case presents neither the necessity nor the occasion to define the duties of defense counsel in those respects, however.”).

¹⁰⁶ *Id.*

¹⁰⁷ See, e.g., Dann Orr & Chris Guthrie, *Anchoring, Information, Expertise, and Negotiation: New Insights from Meta-Analysis*, 21 OHIO ST. J. ON DISP. RESOL. 597 (2006); see also Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73 (1995).

¹⁰⁸ Mark Walsh, *Task Force Probes Defense Lawyers’ Role After Padilla*, A.B.A. J. 60–61 (Apr. 1, 2011), http://www.abajournal.com/magazine/article/task_force_probes_defense_lawyers_role_after_padilla/.

¹⁰⁹ See, e.g., Josh Bowers, *Lafler, Frye, and the Subtle Art of Winning by Losing*, 25 FED. SENT’G REP. 41 (2012) (“It remains to be seen whether the Court in *Lafler* similarly has obliged a defense attorney to push (and how hard?) a defendant to accept a plea bargain (or,

The National Legal Aid and Defender Association's Performance Guidelines for Criminal Defense Representation, which requires counsel to be “completely familiar” with “concessions that the client might offer” and “benefits the client might obtain.”¹¹⁰ In addition, “[c]ounsel should attempt to become familiar with the practices and policies of a particular jurisdiction, judge and prosecuting authority, which may affect the content and likely results of negotiated plea bargains.”¹¹¹ The existence of such guides demonstrates that defining effective plea bargaining “is neither unrealistic nor impossible to achieve.”¹¹²

Prosecution and defense strategies used during the course of negotiating plea bargains vary widely. This again makes regulating the process more difficult. Courts take several factors into account to determine whether a plea agreement should be reached, and if so, what the plea agreement should entail.¹¹³ The factors both parties evaluate include the strength of each side's case, how the jury is likely to lean in a given location, how evidentiary issues in the case are governed by legal rules, and the best alternative to a negotiated agreement (“BATNA”) that is available to each side.¹¹⁴ For defense counsel, such evaluation is a matter of becoming familiar with “the prosecutor's personality” and how “[the] judge's reactions to specific types of crimes” will likely affect the outcome of the case.¹¹⁵ On the other hand, the prosecution's evaluation comes down to whether the evidence is strong enough against the defendant to render the case worthwhile to take to trial.¹¹⁶

The literature describing plea bargaining strategies makes clear that plea bargaining is by and large a process dictated by experience rather than hard-and-fast rules. As Professors Scott and Stuntz note:

[t]he problem is that one cannot distinguish between good and bad bargaining by looking at the *process* by which the lawyers reached their deal. A two-minute conversation with the prosecutor in the hallway with only slight advance

for that matter, to push a prosecutor to offer one).”).

¹¹⁰ GUIDELINE 6.2: THE CONTENTS OF THE NEGOTIATIONS, NLADA, *available at* http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines#sixone.

¹¹¹ *Id.*; *see also* ANTHONY AMSTERDAM, 1 TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES §§ 201–19 (5th ed. 1988).

¹¹² Roberts, *supra* note 20, at 2666.

¹¹³ *See* Hollander-Blumoff, *supra* note 99, at 121.

¹¹⁴ *See id.*

¹¹⁵ *See id.* at 122.

¹¹⁶ *See id.* at 124.

preparation may represent evidence of sloppiness and sloth. Or it may be that defense counsel, who has a great deal of experience in dealing with similar cases, knows the market price, realizes that investigation is extremely unlikely to lead anywhere, and understands how to get to the best offer expeditiously. In a context where bargaining skill depends more on knowledge of information about *other* cases than on case-specific preparation, it is hard to judge a defense attorney's performance by his behavior in any one case.¹¹⁷

Thus, evaluation of a counsel's performance during plea bargaining is difficult, for example, because less effort expended by the counsel might be indicative of more experience, rather than laziness. *Lafler* and *Frye* have the potential to encourage further discussion on plea bargaining strategies where it was previously considered taboo.¹¹⁸ Mere discussion, however, is unlikely to bring about the change needed for defendants to succeed on ineffective assistance of counsel claims arising from plea bargaining negotiations.

IV. SURVEY OF STATE AND FEDERAL RULES AND STATUTES

A. Standards of Professionally Competent Assistance

Supreme Court cases applying the *Strickland* standard have looked to the Model Rules to determine competency under the first prong.¹¹⁹ While the Model Rules do not explicitly address plea bargaining, they apply to lawyers in their capacities as negotiators.¹²⁰ Formalizing plea offers, discussed in Part B of this section, facilitates enforcement of the ABA Model Rules, specifically Rule 1.6, by ensuring that defendants are not denied access to evidence of plea negotiations by defense counsel who invoke the attorney-client privilege and duty of confidentiality.¹²¹

The ABA Standards for Criminal Justice directly address plea bargaining duties of defense counsel when negotiating with the prosecution.¹²² Standard 4-4.1(a) provides:

¹¹⁷ See Scott & Stuntz, *supra* note 99, at 1959.

¹¹⁸ See Oliver, *supra* note 37, at 637–40.

¹¹⁹ See, e.g., *Wiggins v. Smith*, 539 U.S. 510, 524 (2003).

¹²⁰ MODEL RULES OF PROF'L CONDUCT, PREAMBLE: A LAWYER'S RESPONSIBILITIES 2 (2013).

¹²¹ Laurence A. Benner, *Expanding the Right to Effective Counsel at Plea Bargaining: Opening Pandora's Box?*, 27 ABA CRIM. JUST. 4, 7 (2012) (citing MODEL RULES OF PROF'L CONDUCT R. 1.6(a)–(b)(5)).

¹²² See ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-6.2 (3d ed. 1993).

Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.¹²³

The Supreme Court cited this standard to establish the defense counsel's incompetency in *Rompilla v. Beard*.¹²⁴ Standard 14-3.2(b) of the ABA Standards for Criminal Justice, Pleas of Guilty, discusses the responsibilities of defense counsel in more detail, stating that “[d]efense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed.”¹²⁵ This standard was fashioned following *Hill* and has not been updated to reflect the Court's holdings in *Lafler* and *Frye*.¹²⁶

B. Writing Requirements for Plea Offers

In *Frye*, the Court suggested that to prevent “late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted or after a trial leading to conviction with resulting harsh consequences,” states may require that “all offers must be in writing.”¹²⁷ The Court then cited the New Jersey Court Rule requiring that “any plea offer” from the prosecution to the defense counsel be in writing.¹²⁸ Only a small minority of states, however, currently requires plea agreements to be in writing and signed by both parties.¹²⁹ Other states have not enacted a writing requirement, but have encouraged such a requirement through

¹²³ *Id.* at 4-4.1(a).

¹²⁴ 545 U.S. 374 (2005).

¹²⁵ See ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY, Standard 14-3.2 (3d ed. 1997).

¹²⁶ *Batra*, *supra* note 98, at 321–22.

¹²⁷ *Missouri v. Frye*, 132 S. Ct. 1399, 1408–09 (2012).

¹²⁸ N.J. CT. R. 3:9-1(b) (2012) (“Any plea offer to be made by the prosecutor shall be in writing and forwarded to the defendant’s attorney.”).

¹²⁹ States with writing requirements include: Alaska, D. ALASKA R. 11.2; Arizona, ARIZ. R. CRIM. P. 17.4(b); Indiana, IND. CODE ANN. § 35-35-3-3 (West); Kentucky, KY. CT. APP. BOURBON SCOTT R. XXV; Nebraska, D. NEB. R. 12-4; New Jersey, N.J. CT. R. 3:9-1; New Mexico, D. N.M. R. 6-502; North Carolina, N.C. SUP. CT. CUMBERLAND CNTY. R.; Pennsylvania, PA. SUP. CT. CHESTER CNTY. R. 590.4; Tennessee, TENN. R. 20; Texas, D. TEX. R. 5.28.

their case law.¹³⁰ In Alabama, for example, no writing requirement is codified in the state statutes or court rules, but in *Ex parte Cassady*,¹³¹ the Alabama Supreme Court explained:

The problem involved here could have been easily avoided had the plea agreement been written and all the terms and conditions made a part of the writing. If parties would reduce their plea agreements to writing, and present them to the trial court prior to sentencing, rather than afterward, as was done here, resolution of cases questioning the existence or contents of plea agreements would be greatly facilitated. The record would also show whether or not the trial court had accepted the plea agreement.¹³²

Thus, the Alabama Supreme Court is clear that written plea agreements greatly facilitate the resolution of cases where the existence or the content of a given plea agreement is at issue.

Memorializing plea agreements further allows courts to ensure that plea agreements have a factual basis. For example, Oregon provides that “[t]he court shall determine whether the plea is the result of prior plea discussions and a plea agreement. If the plea is the result of a plea agreement, the court shall determine the nature of the agreement.”¹³³ It would be difficult for a court to determine whether a plea is the result of prior plea discussions, however, if there is no record of those prior plea discussions.¹³⁴ Interestingly, documentation of plea discussions is required under Florida law when the defendant is pro se, requiring that the prosecuting attorney “maintain the record of direct discussions with a defendant who represents himself or herself and make the record available to the trial judge upon the entry of a plea arising from these discussions,” but not otherwise.¹³⁵

¹³⁰ See *Congo v. State*, 455 So. 2d 896 (Ala. 1984); *Ex parte Swain*, 527 So. 2d 1279 (Ala. 1988); *Ex parte Cassady*, 486 So. 2d 453 (Ala. 1986). See, e.g., the case notes following ALA. R. CRIM. P. 14.3 (describing how the court in *Ex Parte Yarber* “noted that negotiated plea agreements are not unenforceable merely because they are unwritten,” but in subsequent cases, encouraged the use of written pleas).

¹³¹ *Cassady*, 486 So.2d 453.

¹³² *Id.* at 456.

¹³³ OR. REV. STAT. ANN. § 135.390 (West); see also N.C. GEN. STAT. ANN. § 15A-1022 (West) (“By inquiring of the prosecutor and defense counsel and the defendant personally, the judge must determine whether there were any prior plea discussions, whether the parties have entered into any arrangement with respect to the plea and the terms thereof, and whether any improper pressure was exerted in violation of G.S. 15A-1021(b).”).

¹³⁴ *Bibas*, *supra* note 11, at 162 (“Plea decisions are especially likely to seem inevitable in hindsight because challenges depend on off-the-record evidence that is hard to prove.”).

¹³⁵ FL. R. CRIM. P. 3.171.

As various states that have adopted writing requirements for plea discussions explain, formalization of the plea bargaining process would help advance the goal of ensuring that plea offers have a factual basis, in addition to ensuring that defendants are given a fair chance to prove an ineffective assistance of counsel claim. This is especially necessary given judicial disinclination to overturn a conviction, which is exacerbated by the fact that most convicted defendants, in hindsight, would naturally claim they would have accepted the guilty plea, and judges are therefore likely to treat these claims skeptically.¹³⁶ Where an offer lapses or is rejected, there is often no record of the plea offer, which precludes the defendant from succeeding with an ineffective assistance of counsel claim under *Strickland*.¹³⁷

C. *The Court's Right to Reject a Plea*

The trial court's authority to reject a plea offer once the defendant already accepted it is derived from the persuasive influence of Federal Rule of Criminal Procedure 11.¹³⁸ Although this rule affords trial courts great liberty to reject a plea, "some reviewing courts require a trial court to articulate on the record a sound reason for rejecting a plea."¹³⁹ Still, the standard for appellate review does not serve as much of a check on trial court discretion, as the appellate court can only reverse for an abuse of discretion.¹⁴⁰ Until the trial court accepts the plea agreement, the agreement is not binding upon the parties.¹⁴¹

Every state has codified grounds upon which the trial judge may reject a plea offer with the exception of South Carolina, which relies upon case law to grant courts the authority to overrule plea agreements.¹⁴²

¹³⁶ Bibas, *supra* note 11, at 162 ("[J]udges are naturally skeptical and loath to overturn convictions and sentences, particularly final ones. That judicial inclination, whether conscious or unconscious, reinforces the difficulties of proving deficient performance and prejudice under *Strickland*.").

¹³⁷ Bibas, *supra* note 11, at 162 ("Few defendants have documentary or other evidence that their attorneys did not tell them of a plea offer or gave them incorrect advice.").

¹³⁸ FED. R. CRIM. P. 11(c).

¹³⁹ 1A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 180 (4th ed. 2013).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See ALA. R. CRIM. P. 11; ARIZ. R. CRIM. P. 17.2, 17.3, 17.5; ARK. R. CRIM. P. 24.3-24.6, 26.1; CAL. PENAL CODE §§ 1016.5, 1192.5 (West); COLO. R. CRIM. P. 11; CONN. GEN. STAT.

These laws require trial judges to ensure that the defendant enters a plea agreement voluntarily and knowingly, that there is a factual basis for the plea offer, and that courts give due consideration to public interest and effective administration of justice.¹⁴³ The court may allow the defendant to withdraw a plea offer in order to correct “manifest injustice” that would otherwise occur.¹⁴⁴

While these laws are helpful, more standardization is required. First, clarification is necessary to show whether these are the only grounds under which a trial court may reject a plea offer for the purposes of determining whether a defendant’s later claim of ineffective assistance of counsel should be entertained. Second, as noted earlier, requiring the defense counsel and prosecution to memorialize their negotiations would help the court determine if there was a factual basis for the plea.

D. *The Prosecutor’s Right to Withdraw a Plea Offer Prior to Entry of a Plea in Court*

In *Frye*, the Supreme Court stated that under the second prong of *Strickland*, the defendant must show “that the plea would have been entered without the prosecution’s canceling it . . . if they had the authority to exercise that discretion under state law.”¹⁴⁵ As Justice Scalia articulated, the majority fails to describe the specific grounds under

ANN. § 54-1j (West); D.C. SUPER. CT. R. CRIM. P. 11; DEL. R. CRIM. P. 11; FLA. R. CRIM. P. 3.170, 3.172; GA. UNIF. SUPER. CT. R. 33.7, 33.9, 33.12; HAW. R. PENAL P. 11; HAW. REV. STAT. § 802E-2 (West); I.C.R. 11; ILL. S. CT. R. 402; IND. CODE ANN. §§ 35-35-1-2, 35-35-1-3 (West); IOWA R. 2.8; KAN. STAT. ANN. § 22-3210; KY. R. CRIM. P. 8.08, 8.10; LA. REV. STAT. ANN. § 29:145; LA. CODE CRIM. PROC. ANN. art. 556, 559; ME. R. CRIM. P. 11; MD. R. 4-242; MASS. R. CRIM. P. 12; MASS. MUN. CT. R. CRIM. P. 4; MASS. R. CRIM. P. 5; MICH. R. CRIM. P. 6.302, 6.310; MICH. COMP. LAWS ANN. § 768.35 (West); MICH. COMP. LAWS ANN. § 32.1045 (West); MINN. R. CRIM. P. 15.01, 15.04-15.05; MISS. R. CRIM. P. 8.04; MO. SUP. CT. R. 24.02; MONT. CODE ANN. §§ 46-12-20, 46-12-212, 46-16-105; NEB. CRIM. R. 11.2; D. NEV. CRIM. R. 4; D.N.H. R. 2.4; N.J. CT. R. 3:9-2; D.N.M. R. CRIM. P. 5-304; N.C. GEN. STAT. ANN. § 15A-1022 (West); N.D. R. CRIM. P. 11; OHIO REV. CODE ANN. § 2937.07 (West); OKLA. STAT. ANN. tit. 22, § 517 (West); OKLA. STAT. ANN. tit. 44, § 3270 (West); OR. REV. STAT. ANN. §§ 135.335, 135.365, 135.385, 135.390, 135.395, 135.432 (West); PA. R. CRIM. P. 591; RI. R. CRIM. P. 11; S.D. CODIFIED LAWS §§ 23A-7-3, 7-4, 7-5, 7-14, 27-11; TENN. R. CRIM. P. 11; TEX. CRIM. PROC. CODE ANN. art. 26.13 (West); UTAH R. CRIM. P. 11; VT. R. CRIM. P. 11; VA. SUP. CT. R. 7C:6; VA. CODE ANN. § 19.2-296 (West); WASH. REV. CODE ANN. § 9.94A.431 (West); W. VA. R. CRIM. P. 11; W. VA. R. CRIM. P. 10; WIS. STAT. ANN. § 971.08 (West).

¹⁴³ See *supra* note 142.

¹⁴⁴ See *id.*

¹⁴⁵ *Missouri v. Frye*, 132 S. Ct. 1399, at 1403–04 (2012).

which the prosecution may exercise this discretion.¹⁴⁶ In effect, the prosecution has unregulated discretion to reject a plea offer, even without a sound basis.¹⁴⁷ The risk of prosecutorial abuse clearly establishes the need for codifying a standard that sets forth the precise grounds giving rise to the prosecutor's authority to reject an accepted plea offer.

The ABA Standards for Criminal Justice state, "[a] prosecutor should not fail to comply with a plea agreement, unless a defendant fails to comply with a plea agreement or other extenuating circumstances are present."¹⁴⁸ This standard should be expanded to require the prosecution to explain under which circumstances it will subsequently reject a plea offer after the defendant accepts it. If there is a committee of prosecuting attorneys who discuss and render a decision as to whether or not to accept a defendant's plea offer, then this discussion should be recorded in writing. The defendant can then ask for the record of plea discussions during discovery in the event that the prosecution claims it would not have accepted the plea offer even if the defendant accepted it.

Not only does the prosecution have wide discretion when choosing to reject a plea offer, but as discussed earlier, plea bargaining is characterized as a matter of "personal style" that gives the prosecution the liberty to negotiate in any matter whatsoever.¹⁴⁹ Standards should therefore be put in place to ensure that no unfair bargaining occurs, or in other words, to ensure that the prosecution is fair and consistent with all defendants when offering pleas.¹⁵⁰ Oregon stands apart from other states in codifying what is essentially a fair bargaining requirement, and attempts to ensure that "[s]imilarly situated defendants [are] afforded equal plea agreement opportunities."¹⁵¹ Here, as elsewhere, the movement by some states to codify requirements for the prosecution and court in connection with plea bargaining indicates the need for such formalization, and provides an example for other states to follow.

¹⁴⁶ See *supra* note 74 and accompanying text.

¹⁴⁷ *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

¹⁴⁸ ABA STANDARDS FOR CRIM. JUSTICE SCJ 3-4.2 (3d ed. 1993).

¹⁴⁹ See *supra* note 104 and accompanying text.

¹⁵⁰ See *Bibas*, *supra* note 11, at 164 ("[E]ven prosecutors have strong incentives to promote and safeguard plea bargains.").

¹⁵¹ OR. REV. STAT. ANN. § 135.405 (West).

V. CONCLUSION

In the absence of a formal plea bargaining process from the initial stages of negotiation, *Lafler* and *Frye* provide a superficial right to defendants, without a corresponding ability to exercise this right. A formalized process may be an effective compromise between the extremes of a “laissez-faire bargaining system” on one end and the overregulation of plea bargaining by courts on the other.¹⁵² If the plea bargaining process “is the criminal justice system,” as the Supreme Court recognizes, and such reality justifies the right of defendants to challenge a conviction on the basis of receiving ineffective assistance of counsel during plea negotiations, then the process should be recorded and standards should be in place to ensure that the process is fair.¹⁵³

The *Strickland* requirements articulate what defendants must prove in order to succeed on a claim of ineffective assistance of counsel during the plea bargaining process.¹⁵⁴ Under the first prong, the defendant must show that her defense counsel’s performance fell below the constitutional minimum for competency.¹⁵⁵ To prove incompetency, the defendant must be able to present evidence from the record; however, in the majority of states, neither prosecuting attorneys nor defense counsel are obligated to create any record.¹⁵⁶ Under the second prong of *Strickland*, the defendant must demonstrate a reasonable probability that the defendant would have accepted the plea absent defense counsel’s ineffective assistance, that the prosecution would not have rejected the plea, and that the trial court would not have rejected the plea.¹⁵⁷ This is where the need for formalization becomes most evident, as courts have stated that the defendant cannot rely on her self-serving testimony, but must demonstrate “objective evidence” to show that she would have accepted the plea absent defense counsel’s error.¹⁵⁸ Even if the defendant can prove

¹⁵² Bibas, *supra* note 11, at 152 (“In this laissez-faire bargaining system, defense lawyers, not judges or juries, are the primary guarantors of fair bargains and equal treatment for their clients.”).

¹⁵³ *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1912 (1992)).

¹⁵⁴ *Id.* at 1405.

¹⁵⁵ *Id.* at 1409.

¹⁵⁶ *See supra* note 129.

¹⁵⁷ *Frye*, 132 S. Ct. at 1409.

¹⁵⁸ *See supra* notes 102–03.

this, she must still demonstrate that the prosecution and court would not have rejected the plea offer.¹⁵⁹ Both the prosecution and the court, however, are granted broad discretion; there is no defined standard that states the grounds under which the prosecution or the court can reject a plea offer.¹⁶⁰

To summarize, the plea bargaining process should be formalized in the following ways: first, plea negotiations should be required to be in writing; second, a standard should be codified, whereby prosecuting attorneys have a duty to engage in equal and fair bargaining; third, grounds under which prosecuting attorneys may reject a plea offer should be codified; fourth, oral discussions among prosecuting committees in deciding whether or not to accept a plea should be reduced to writing; and fifth, whether the grounds under which a trial court may reject a plea offer, as codified in state statutes and rules, are the same grounds courts consider when determining whether to dismiss a defendant's claim of ineffective assistance of counsel should be clarified.

The first recommendation—to require written plea negotiations—is the most important in light of the confusion that has emerged among trial courts as to whether or not defense counsel must present a “formal offer” to a defendant before a defendant can bring a claim of ineffective assistance of counsel based on plea negotiations.¹⁶¹ Even after *Lafler* and *Frye*, courts reached different conclusions on this issue, as some defined a plea as “formal” even though it was not in writing.¹⁶² When defendants must rely on objective evidence independent of self-serving testimony, a writing requirement is necessary. Furthermore, such a requirement would improve other aspects of plea bargaining, such as helping the court determine whether there is a factual basis for a plea.¹⁶³

Much of the discussion on the effect of *Lafler* and *Frye* naturally focuses more on defense counsel, and the more stringent constitutional duty created by these cases.¹⁶⁴ Such discussion centers on ensuring that

¹⁵⁹ *Frye*, 132 S. Ct. at 1409.

¹⁶⁰ See *Bibas*, *supra* note 11, at 162.

¹⁶¹ See *supra* Part III (describing the trial court splits on this issue in more detail).

¹⁶² *Wanatee v. Ault*, 101 F. Supp. 2d 1189, 1202–03 (N.D. Iowa 2000), *aff'd*, 259 F.3d 700 (8th Cir. 2001).

¹⁶³ See *supra* note 133 and accompanying text.

¹⁶⁴ See, e.g., Jane Campbell Moriarty & Marisa Main, “Waiving” Goodbye to Rights: Plea Bargaining and the Defense Dilemma of Competent Representations, 38 HASTINGS

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defense counsel effectively represent their clients in plea bargaining negotiations that occur off the record.¹⁶⁵ Less has been said, however, about how the extension of the Sixth Amendment right to effective assistance of counsel to the plea bargaining process affects prosecuting attorneys.¹⁶⁶ Including prosecutors in the process is, in many ways, crucial to creating a just plea bargaining system.¹⁶⁷ Without documenting plea negotiations from the beginning, the potentially onerous burden is on the prosecution during discovery to search through all of its records for anything pertaining to plea negotiations. For the future, formalizing plea negotiations thus eases the burden on both the prosecution and defense counsel during litigation involving an ineffective assistance of counsel claim.¹⁶⁸ In our criminal justice system, where a majority of cases are decided by plea bargains, the heaviest burden should not be on the defendant to ensure that the system is fair.

CONST. L.Q. 1029, 1042 (2011) (discussing possible duties of defense counsel “to seek out plea negotiations with the prosecution”).

¹⁶⁵ See, e.g., Bibas, *supra* note 11, at 150.

¹⁶⁶ See *id.* at 174 (“Prosecutors, too, can take steps to guard against the worst defense lawyering, acting not just as partisan warriors but also as guardians of justice.”).

¹⁶⁷ Ellen Yaroshefsky, *Ethics and Plea Bargaining: What’s Discovery Got to Do With It?*, 23 *Crim. Just.* 28, 33 (2008), available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_cjmag_23_3_yaroshefsky.authcheckdam.pdf (proposing broader discovery and “codification and expansion of the prosecutors’ obligations” to enhance “accountability and transparency of the criminal justice system” in order to reduce wrongful convictions based on guilty pleas).

¹⁶⁸ See Bibas, *supra* note 11, at 162.

