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

Sabrina Mirza*

INTRODUCTION

Ninety-seven percent of federal criminal prosecutions and ninety-five percent of state criminal prosecutions do not go to trial; instead, they are resolved by way of guilty pleas.¹ The centrality of plea bargaining in our contemporary criminal justice system, thus, cannot be denied.² In recognition of 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 in both cases, the Supreme Court held that the Sixth Amendment right to effective assistance of counsel extends to negotiations made 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

More specifically, the Court held that a criminal defendant who decides to go to trial, rather than accept a favorable plea offer, is entitled to post-conviction relief if his or her refusal

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¹ Bureau of Justice Statistics, U.S. DEPT OF JUSTICE, Sourcebook of Criminal Justice Statistics Online, tbl. 5.24.2010, <http://www.albany.edu/sourcebook/pdf/t5242010.pdf>; id. tbl. 5.46.2006, <http://www.albany.edu/sourcebook/pdf/t5462006.pdf>.

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” and 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.”) (quoting *Santobello v. New York*, 404 U.S. 257, 261 (1971)).

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

⁴ 132 S. Ct. 1399, at 1407 (2012) (“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 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 defense.”); *Frye*, 132 S. Ct. 1399 at 1407; *Lafler*, 132 S. Ct. at 1384 (“Defendants have a Sixth Amendment Right to counsel, a right that extends to the plea-bargaining process.”).

⁶ *Frye*, 132 S. Ct. 1399, at 1407 (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)) (emphasis in original).

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 might give rise to a post-conviction ineffective assistance of counsel claim: (1) if the defense counsel provides constitutionally deficient legal advice that leads the defendant to reject a plea offer, or (2) if the defense counsel neglects to inform the defendant of a plea offer, which then lapses.⁸ Such claims are now to be evaluated under the standard set forth in *Strickland v. Washington*,⁹ which requires the defendant to show first that their defense counsel made errors falling below the constitutional standard and second, that those errors prejudiced the defendant’s case so as to deprive him or her of a fair result.¹⁰

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, despite its belated timing.¹¹ The reach of the Court’s recognition of this right, however, is not entirely clear.¹² In order to better understand this lack of clarity, it is helpful to first understand how plea bargaining 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 any hard-and-fast rules.¹⁴ Moreover, it is a process that takes place largely “off the record.”¹⁵ This makes the vast majority of plea offers

⁷ *Lafler*, 132 S. Ct. at 1386.

⁸ *Lafler*, 132 S. Ct. 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 at 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.”).

¹² See Part II (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 (defining “plea bargaining”).

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

¹⁵ Bibas, *supra* note 11, at 150.

“informal,” with the exception of plea offers that are required by some states to be in writing, which make the plea offer “formal” by creating a record of it.¹⁶

The reach of the Court’s holding is uncertain because it uses the words “formal offer” sporadically in *Frye*, including in the holding, and not at all in *Lafler*.¹⁷ Consequently, it is unclear, under *Lafler* and *Frye*, whether an informal plea offer can form 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, one thereby “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 he or she receives constitutionally deficient advice – that is, but for his or her defense counsel’s ineffective assistance of counsel, the defendant would have accepted a guilty plea.²⁰

This Note will argue that it is still difficult for a defendant to succeed on a claim of ineffective assistance of counsel, following a refusal to accept a plea offer, due to: 1) the lack of clarity on the reach of the holdings in *Lafler* and *Frye*, and 2) the lack of formal requirements during the plea bargaining process. As discussed, the prejudice prong of *Strickland* requires the defendant to show that he or she would not have accepted the plea offer absent defense counsel’s

¹⁶ See *infra* note 128 for a survey of states that require plea offers to be in writing and states that do not.

¹⁷ *Frye*, 132 S. Ct. at 1408-10 (using the words “formal offer” six different times); *Lafler*, 132 S. Ct. 1376 (never using the words “formal offer”).

¹⁸ See *infra* Part II (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 128..

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.”); see also Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650 at 2671 (2013) (describing how “obstacles have made relief from ineffective assistance generally inaccessible to individual litigants, and *Strickland* its progeny are deserving of the well-developed body of scholarly critique about the hurdles the doctrine has constructed.”)

erroneous legal advice.²¹ Lower courts disagree about whether the holdings in *Lafler* and *Frye* should be limited to “formal” plea offers or extend to all plea offers.²² This Note argues that it makes better sense, constitutionally, to extend the *Lafler* and *Frye* holdings to all plea offers.²³ Such an interpretation recognizes the reality that extensive negotiations often occur between defense counsel and the prosecution, usually without the defendant present, before any plea offer is committed to writing.²⁴ Moreover, this approach does not penalize the defendant for relying on a plea offer that the prosecution and the defense counsel failed to put into writing.

The second requirement under the prejudice prong of *Strickland*, as applied in *Lafler* and *Frye*, requires the defendant to show that if he or she had 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 the courts, however, generally have broad unregulated discretion to reject a plea bargain after the defendant accepts it, and there is no clear standard establishing what the practice of courts and prosecutors is in such circumstances.²⁶ This means that, regardless of whether the defendant would have accepted the plea offer, the defendant’s ineffective assistance of counsel claim could easily be denied on the sometimes baseless ground that the plea offer would not have been accepted by the lower court or the prosecution.²⁷ In order to safeguard the right afforded to defendants under *Lafler* and *Frye*, the plea bargaining process

²¹ *Strickland*, 466 U.S. at 687.

²² See *infra* Part II (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).

²⁴ *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 *Frye*, 132 S. Ct. at 1409 (“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 *Id.*

should be formalized by requiring written plea offers and standardized procedures that guide how the prosecution and courts may reject plea offers.

Part I 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 II shows that there is now confusion in the lower courts 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 II further analyzes the plea bargaining process and why informality in the process places defendants at a distinct disadvantage when bringing claims of ineffective assistance of counsel. Part III examines the statutes and court rules of the states, as well as the ABA Criminal Justice Standards, the Model Rules of Professional Conduct, and the Federal Rules of Criminal Procedure, in order to determine where formal processes may already be in play and where they ought to be. Finally, Part IV balances the policy implications for the duties of defense counsel and the prosecution that would be affected by carrying out the recommended formalization of the plea bargaining process outlined in Part III.

I. 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 to apply in assessing ineffective assistance of counsel claims in the plea bargaining context is the two-prong test set

²⁸ 474 U.S. 52 (1985).

²⁹ 130 S. Ct. 1473 (2010).

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:

First, 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 pleaded guilty to first-degree murder and theft of property.³³ He later 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 Court held that Petitioner did not satisfy the prejudice prong of *Strickland* 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 The holding in *Hill* 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

³⁰ *Hill*, 474 U.S. at 58.

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

³² *Strickland*, 466 U.S. at 687.

³³ *Hill*, 474 U.S. at 53.

³⁴ *Id.*

³⁵ *Id.* at 59-60.

³⁶ *Id.* at 60.

whether the defense counsel is under a constitutional duty to negotiate effectively during the plea bargaining process.³⁷

In *Padilla*, the defense counsel had misinformed the defendant about the consequences of pleading guilty, advising him that it would not result in deportation. This advice was plainly wrong and 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 broadening of the scope of the Sixth Amendment right to effective assistance of counsel.⁴¹ In focusing its discussion on the consequences of bad advice for defendants, the Court emphasized that, “we 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.”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

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

³⁸ *Padilla*, 130 S. Ct. at 1478.

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).

⁴² *Id.* at 1481.

guilty plea and foregoes trial.⁴³ *Lafler* and *Frye* differ significantly from the facts of *Padilla* and *Hill* in that they involve defendants who reject plea offers and go to trial, alleging that they would not have rejected the plea offer if they were correctly informed by their counsel.⁴⁴ The new question facing the Supreme Court in *Lafler* and *Frye* was whether a defendant could assert an ineffective assistance of counsel claim if he 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. *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, 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, misdemeanor possession of marijuana, and for 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 sentence of 51 to 85 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

⁴³ *Hill*, 474 U.S. at 368; *Padilla*, 130 S. Ct. at 1478.

⁴⁴ *Frye*, 132 S. Ct. at 1406 (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 *Id.*

⁴⁷ *Lafler*, 132 S. Ct. at 1383.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

murder Mundy because she was shot below the waist.”⁵² Cooper was offered a less favorable plea at trial, which he rejected, and was subsequently convicted on all counts, receiving 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 received a higher sentence due to his counsel’s ineffective assistance.⁵⁶

In *Frye*, Galin Frye was charged with driving with a revoked driver’s license.⁵⁷ This was his fourth offense, after three previous convictions, so it was considered a felony punishable by up to four years imprisonment.⁵⁸ Frye’s defense counsel was presented with two offers from the prosecutor in exchange for the defendant’s guilty plea: the first offer was for the defendant to agree to a 3-year sentence with a recommendation of ten days in jail, and the second offer was that the charge be reduced to a misdemeanor, with a recommendation of a ninety-day sentence.⁵⁹ Both offers expired without the defense counsel ever advising Frye of their existence.⁶⁰ Frye was sentenced to three years in jail after pleading guilty on the eve of trial.⁶¹ Frye then sought state post-conviction relief, alleging that his counsel denied him effective assistance of counsel by failing to inform him of the prosecutor’s plea offer.⁶² Although the trial court denied his motion, the Missouri Court of Appeals reversed, holding that Frye satisfied the requirements for an

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 1384.

⁵⁶ *Id.*

⁵⁷ *Frye*, 132 S. Ct. at 1404.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 1404-05.

⁶² *Id.* at 1405.

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 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 Moreover, the majority in *Lafler* similarly applied the Sixth Amendment right to the plea bargaining process and held that the court’s remedy granted to the defendant who successfully makes out a *Strickland* violation must “neutralize the taint” of the constitutional violation, as long as it does not amount to a “windfall” or “needlessly squander” state resources.⁶⁵ In 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 It is for this reason that the majorities’ opinions in *Lafler* and *Frye* are centered on the notion that defendants are entitled to correct advice on the impact of proposed plea agreements, even though there is neither a constitutional right to receive a plea offer nor a right to have a judge accept the plea offer.⁶⁷

Justice Scalia, in his dissents in *Lafler* and *Frye*, refused to recognize that constitutional rights should attach to the plea bargaining process. In focusing most of his opinion on how plea bargaining is an embarrassing part of the criminal justice system, Justice Scalia, in many

⁶³ *Id.* at 1405.

⁶⁴ *Frye*, 132 S. Ct. at 1402.

⁶⁵ *Lafler*, 132 S. Ct. at 1381 (citations omitted).

⁶⁶ *Id.* at 1388.

⁶⁷ *Frye*, 132 S. Ct. at 1410 (citing *Weatherford v. Bursey*, 429 U.S. 545 at 561) (finding no Constitutional right to be offered a plea); (citing *Santobello v. New York*, 404 U.S. 247 at 262) (finding no federal right for a judge to accept a plea).

respects, does not respond to the arguments made in the majority's opinions.⁶⁸ 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 Justice Scalia's response to this reality, much like the argument made by the government, is that no injustice has been committed against the defendant who received the "exorbitant gold standard of American justice – a full-dress criminal trial."⁷⁰ Where plea bargaining commands the criminal justice system, however, a "full-dress criminal trial" cannot be relied upon alone to protect the constitutional rights of defendants.

While Justice Scalia may have missed the mark with his discussion on plea bargaining in the criminal justice system, in other parts of his opinion, he sheds light on important questions the majority opinion failed to address.⁷¹ In particular, *Frye* provides that in circumstances where 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; (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:

It 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

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 See Bureau of Justice Statistics, *supra* note 1.

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 1391.

⁷² *Frye*, 132 S. Ct. at 1409.

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

In this attempt to address how the defendant must prove two out of the three requirements under *Frye*, the majority simply makes an assumption - “it should not be difficult to make an objective assessment” regarding the ordinary practices of prosecution and courts when rejecting plea offers – and it does not explain where that assumption is coming from. 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 trying to prove 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:

Is 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 in order for defendants to be able to prove the second prong of *Strickland*.

While codified standards were not specifically referenced as guides for meeting the second (prejudice) prong of *Strickland*, under the first prong of *Strickland*, courts are required to

⁷³ *Id.* at 1410.

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 *Id.* at 1392.

look to professional norms of attorney conduct to determine whether defense counsel's performance was ineffective.⁷⁷ The majority decision in *Frye* extends the *Strickland* idea to defense counsel's performance during plea bargain negotiations, stating, "[t]hrough the standard for counsel's performance is not determined solely by reference to codified standards of professional practice, these standards can be important guides."⁷⁸ Specifically, the majority cited 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 their determination of whether the first prong has been met; similar standards codifying how the prosecution and courts may reject plea offers would also help defendants prove the second prong of *Strickland*, as well as help judges reach a fair result on such claims.⁸⁰

II. FORMAL VS. INFORMAL PLEA OFFERS

A. Confusion over whether "Formal Offer" is required to Show Prejudice

An important part of the holding in *Frye* states, "[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*, stating, "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 more clear if some later inquiry turns on the conduct of earlier pretrial negotiations."⁸² As previously noted, the Supreme

⁷⁷ *Strickland*, 466 U.S. at 688.

⁷⁸ *Frye*, 132 S. Ct. at 1408 (emphases added).

⁷⁹ *Id.*, 1408-09.

⁸⁰ See Part III (examining codified requirements of plea bargaining).

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

⁸² *Frye* 132 S. Ct. at 1409.

Court uses the word “formal” in *Frye*, but not in *Lafler*.⁸³ This inconsistent use of the “formal offer” language between the decisions of *Lafler* and *Frye* 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 for the reason that no “formal offer” was extended to the defendant. One court even cites *Lafler* as authority for requiring the defendant to be offered a “formal” plea offer, despite the *Lafler* opinion not containing any “formal offer” language.⁸⁵ The Eighth Circuit Court of Appeals adds to the confusion in its opinion, *Kingsberry v. United States*,⁸⁶ decided prior to *Lafler* and *Frye*, holding that a formal offer is required to show prejudice for a claim of ineffective assistance of counsel. The *Kingsberry* court stated:

We 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

⁸³ *Frye*, 132 S. Ct. at 1408-10 (using the words “formal offer” six different times); *Lafler*, 132 S. Ct. 1376 (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*, 09-CV-4153 NGG, 2013 WL 817196, at *6 (E.D.N.Y. Mar. 5, 2013) (“Thus, the lack of a formal plea offer strongly weighs against a finding that DeFilippo would have pled guilty. See *Lafler* 132 S. Ct. at 1385.”) (quoting Judge Garaufis).

⁸⁶ 202 F.3d 1030 (8th Cir. 2000).

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

The Northern District of Iowa interpreted *Kingsberry*, in *Johnson v. United States*,⁸⁸ 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 claim of ineffective assistance of counsel because he was not extended a formal offer.⁹⁰ The *Johnson* court cited the Sixth Amendment as authority for denying the defendant’s claim based on there being no formal offer 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 The court arrived at this conclusion by distinguishing 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.

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

⁸⁹ *Id.* at 789.

⁹⁰ *Id.* at 790 (“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.”) (citing *Kingsberry*, 202 F.3d at 1032).

⁹¹ *Johnson v. United States*, 860 F. Supp. 2d 663 at 788 (N.D. Iowa 2012) (“Trial counsel's deficient performance in continuing to push in capital murder prosecution for an agreement to sentence for term of years, once plea to term of years became both wholly unrealistic and wholly unreasonable as bargaining position did not prejudice defendant, and thus did not constitute ineffective assistance, as prosecution never formally offered defendant a plea agreement to a sentence less than death. U.S.C.A. Const. Amend. 6”).

⁹² 101 F. Supp. 2d 1189, at 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.”); (“the initial requirement of *Kingsberry*, “that to establish . . . prejudice, the petitioner must begin by proving that a plea agreement was formally offered by the government,” *Kingsberry*, 202 F.3d at 1032, has been satisfied in *Wanatee's* case.”).

⁹⁴ *Id.* at 1203.

Some recent cases rely on a combination of *Lafler*, *Frye*, and *Kingsberry* to dismiss claims of ineffective assistance of counsel for lack of prejudice when no formal plea offer was extended.⁹⁵ On the other hand, other courts have 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, a more basic question is worth exploring: 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 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,” 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,

⁹⁵ See *Williams v. United States*, 2:08-CR-00112-GZS-2, 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*, CIV. DKC 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*, CR 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*, 4:12-CV-0898-DGK, 2013 WL 1628444, at *4 (W.D. Mo. Apr. 16, 2013) (“the movant must prove that the alleged plea agreement was formally offered by the Government . . . [i]n 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*, CIV 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*, CIV.A.01-CIV-5462, 2004 WL 2943665, at *3 (E.D. Pa. Dec. 20, 2004) (citations omitted).

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

“stress[ing] preparation as a required component of good negotiation.”⁹⁸ Also in line with the definition, courts and legal scholars have viewed the plea bargaining process as governed by contract principles.⁹⁹ Yet, if contract principles are being applied to plea bargaining, then why are there no uniform rules as to when offers must be in writing and whether or not the prosecution has discretion to reject a plea offer once it has been accepted?¹⁰⁰

These questions have become important with respect to ineffective assistance of counsel claims after *Lafler* and *Frye* because defendants must demonstrate a reasonable probability that the defendant would have accepted the plea and that the prosecution and court would not have rejected it once it 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; “objective evidence” was required to corroborate the defendant’s self-serving statement.¹⁰² The Eleventh Circuit similarly required the defendant to produce objective evidence corroborating his claim that he wanted to accept a plea offer, but was advised by the defense counsel to reject it.¹⁰³ The problem with requiring the defendant to present “objective evidence” to corroborate 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 whatsoever that would make it possible for the defendant to bring such a claim.

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); Scott & Stuntz, *supra* note 6, at 1910 (“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 IV.

¹⁰¹ *Frye*, 132 S. Ct. at 1409.

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

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

The main reason plea bargaining is informal and largely unregulated, as the Court in *Frye* recognized, is because plea bargaining is, “by its nature, defined to a substantial degree by personal style.”¹⁰⁴ For this reason, the Court hesitated 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 provided little guidance on the duties of defense counsel, setting forth only the bare minimum for defense counsel to communicate “formal offers” to the defendant.¹⁰⁶

This is not to say that there is no process at all governing plea bargaining. In fact, much has been written on effective negotiating strategies.¹⁰⁷ Post-*Padilla*, the American Bar Association provided guidance to defense counsel and prosecutors on their duties to inform defendants of immigration and other consequences 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 *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

¹⁰⁴ *Frye*, 132 S. Ct. at 1408 (citing *Premo*, 131 S. Ct. at 741); see also, G. Nicholas Herman, Plea-bargaining § 1.02 (2d ed. 1981) (discussing different plea-bargaining styles).

¹⁰⁵ *Id.* (“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. DISP. RES. 597 (2006); Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73 (1995).

¹⁰⁸ Mark Walsh, *Weighing the Consequences: Task Force Probes Defense Lawyers’ Role After Padilla*, A.B.A. J., APR. 2011, at 60-61, available at 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, for that matter, to push a prosecutor to offer one).”).

¹¹⁰ *Guideline 6.2: The Contents of the Negotiations*, THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION’S PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, available at http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines#sixone.

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

Strategies used by the prosecution and defense to negotiate plea bargains vary widely. This again makes regulation of the process more difficult. Several factors are taken 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 determining 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 what the best alternative to a negotiated agreement (“BATNA”) 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 affect the outcome of the case at hand.¹¹⁵ For the prosecution, 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:

The 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 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

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 69, at 121.

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ See *id.*, at 124.

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

III. 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 of Professional Conduct to determine competency under the first prong.¹¹⁹ While the Rules do not explicitly address plea bargaining, the Rules apply to lawyers in their capacities as negotiators.¹²⁰ Formalization of plea offers, discussed in Part B of this section, would facilitate enforcement of the ABA Model Rules of Professional Conduct, 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

¹¹⁷ See Scott & Stuntz, *supra* note 6, at 1959.

¹¹⁸ See Oliver, *supra* note 37, 637-640.

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

¹²⁰ MODEL RULES OF PROF'L CONDUCT, PREAMBLE 2 (2012).

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

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:

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 to this standard to establish the incompetency of defense counsel in *Rompilla v. Beard*.¹²⁴ The ABA Standards for Criminal Justice Pleas of Guilty discusses the responsibilities of defense counsel in more detail.¹²⁵ Standard 14-3.2(b) states 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.” This standard was fashioned following *Hill* and it has not been updated to reflect the Court’s holdings in *Lafler* and *Frye*.¹²⁶

B. Written Requirement for Plea Offers

In *Frye*, the Court suggested that in order 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

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

¹²³ *Id.* at 4-4.1(a).

¹²⁴ 545 U.S. 374 (2005).

¹²⁵ See ABA STANDARDS FOR CRIMINAL JUSTICE PLEAS OF GUILTY, 14-3.2.

¹²⁶ *Batra, supra* note 98 at 321-22.

¹²⁷ *Frye*, 132 S. Ct. at 1408-09.

to the defense 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 stated a writing requirement, but have encouraged such a requirement in 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*, the Supreme Court stated:

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.¹³¹

Thus, the Alabama Supreme Court makes clear that written plea agreements would greatly facilitate the resolution of cases where “the existence or contents of plea agreements” is at issue.

Formalization in the form of a written requirement would further allow courts to perform their duty to ensure that plea agreements have a factual basis. For example, Oregon stipulates 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.”¹³² It would be difficult for a court to determine whether a plea is the result of prior

¹²⁸ N. J. Ct. Rule 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, AK R USDCT LCrR 11.2; Arizona, Ariz. R. Crim. P. 17.4(b); Indiana, Ind. Code Ann. § 35-35-3-3 (West); Kentucky, KY R BOURBON SCOTT CIR CT Rule XXV; Nebraska, NE R 12 DIST Rule 12-4; New Jersey, N.J. Court Rules, R. 3:9-1; New Mexico, NM R MAG CT RCRP Rule 6-502; North Carolina, NC R CUMBERLAND CTY SUPER CRIM; Pennsylvania, PA R CHESTER CTY RCRP Rule 590.4; Tennessee, TN R 20 DIST CRIM GEN SESS. 11.01; Texas, TX R BEXAR CRIM DIST CT Rule 5.28.

¹³⁰ See, e.g., the case notes following Ala. R. Crim. P. Rule 14.3 (describing how the court in *Ex Parte Yarbar* “noted that negotiated plea agreements are not unenforceable merely because they are unwritten,” but in subsequent cases, encouraged the use of written pleas. 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).

¹³¹ *Cassady*, 486 So.2d at 456.

¹³² Or. Rev. Stat. Ann. § 135.390 (West)(2); 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 if there is no record of those prior plea discussions.¹³³ Interestingly, documentation of these 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.¹³⁴

As attempts by various states to require oral discussions about plea offers between the defendant and the prosecution to be recorded in writing make clear, such formalization 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 at proving 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 defendants, in hindsight, would naturally claim they would have accepted the guilty plea.¹³⁵ In dealing with cases in which an offer lapses or is rejected, there is often no record kept of the plea offer, thereby precluding the defendant from succeeding on an ineffective assistance of counsel claim under *Strickland*.¹³⁶

C. Right of Courts to Reject a Plea

The trial court’s authority to reject a plea offer once the defendant has already accepted it is derived from the persuasive influence of Federal Rule of Criminal Procedure 11.¹³⁷ Although this rule affords trial courts broad liberty to reject a plea, “some reviewing courts require a trial

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).”)

¹³³ 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.”).

¹³⁴ FL ST RCRP Rule 3.171.

¹³⁵ Bibas, *supra* note 11, at 162 (“judges 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*.”).

¹³⁶ *Id.* (“Few defendants have documentary or other evidence that their attorneys did not tell them of a plea offer or gave them incorrect advice.”).

¹³⁷ FED R. CRIM. P. 11(c).

court to articulate on the record a sound reason for rejecting a plea.”¹³⁸ 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.¹³⁹ Until the trial court accepts the plea agreement, it is not binding upon the parties.¹⁴⁰

Every state has codified grounds under 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.¹⁴¹ These codifications 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 due consideration is given to public interest and effective administration of justice.¹⁴² The court may allow the defendant to withdraw a plea offer in order to correct a “manifest injustice” that would otherwise occur.¹⁴³

While these codifications are helpful, more standardization is required. First, clarification is needed as to 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

¹³⁸ 1A Charles Alan Wright et al., *Federal Practice and Procedure* § 180 (4th ed. 2013).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ 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); CO ST RCRP RULE 11; CONN. GEN. STAT. ANN. § 54-1J (WEST); D.C. SUPER. CT. R. CRIM. P. 11; DE R COM PL CT RCRP RULE 11; FL ST RCRP RULE 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 IDAHO CRIM. R. 11; IL R S CT RULE 402; IND. CODE ANN. § 35-35-1-2, § 35-35-1-3 (WEST); IA 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; MA ST BOSTON MUN CT SPEC RCRP RULE 4; MA ST BOSTON MUN CT SPEC RCRP RULE 5; MI R RCRP MCR 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; NE CRIM R 11.2; NV ST 2 DIST CT CRIM RULE 4; NH R DIST CT RULE 2.4; N.J. COURT RULES, R. 3:9-2; NM R DIST CT RCRP RULE 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. CT; WIS. STAT. ANN. § 971.08 (WEST).

¹⁴² See *supra* note 107.

¹⁴³ See *supra* note 107.

of counsel should be entertained. Second, as noted earlier, requiring the prosecution and defense counsel to memorialize their negotiations would help the court determine if there was a factual basis for the plea.

D. Right of Prosecutors to Withdraw a Plea Bargain Offer Prior to Entry of 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.”¹⁴⁴ As Justice Scalia pointed out, no standard is articulated that describes the grounds under which the prosecution may exercise this discretion.¹⁴⁵ In effect, the prosecution has unregulated discretion to reject a plea offer, even without a sound basis.¹⁴⁶ The potential for abuse makes clear 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 states, “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.”¹⁴⁷ This standard should be expanded to require the prosecution to explain under what circumstance the prosecution would have rejected the plea offer in the event that the defendant had accepted 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 in discovery in the event that the prosecution claims it would not have accepted the plea offer even if the defendant accepted it.

¹⁴⁴ *Frye*, 132 S. Ct. at 1403-04.

¹⁴⁵ See *supra* note 41 and surrounding text.

¹⁴⁶ See *Bibas*, *supra* note 11, at 162.

¹⁴⁷ ABA STANDARDS FOR CRIM. JUSTICE SCJ 3-4.2 (3d ed., 1993).

Not only does the prosecution have wide discretion to reject a plea offer, but as discussed earlier, plea bargaining is characterized as a matter of “personal style” that allows the prosecution the liberty to negotiate in whatever manner it likes.¹⁴⁸ Standards should therefore also be put in place to ensure against unfair bargaining, or in other words, to ensure that the prosecution is being fair and consistent to all defendants when offering pleas.¹⁴⁹ At least one state, Oregon, has essentially codified a fair bargaining requirement: “Similarly situated defendants should be afforded equal plea agreement opportunities.”¹⁵⁰ Here, as elsewhere, the movement by some states to codify requirements for the prosecution and the court in connection with plea bargaining indicates the need for such formalization, and provides an example for other states to follow.

IV. CONCLUSION

Without formalization of the plea bargaining process from its initial stages of negotiations, *Lafler* and *Frye* will have provided a superficial right to defendants, without a corresponding ability to carry out this right. More formalization of the process may be an effective compromise between the extremes of a “laissez-faire bargaining system” on one end and overregulation of plea bargaining by courts on the other.¹⁵¹ 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

¹⁴⁸ See discussion *supra* note 103 and surrounding text.

¹⁴⁹ Cf. *id.*, at 164 (arguing, “Prosecutors 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.”).

¹⁵⁰ OR. REV. STAT. ANN. § 135.405 (West).

¹⁵¹ *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.”).

during plea negotiations, then there should be requirements for the process to be recorded and for standards to ensure that the process is fair.¹⁵²

The requirements under *Strickland* articulate what defendants must prove to succeed with a claim of ineffective assistance of counsel during the plea bargaining process.¹⁵³ Under the first prong, the defendant must show defense counsel's performance fell below the constitutional minimum for competency.¹⁵⁴ To show 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.¹⁵⁵ 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.¹⁵⁶ This is where the need for formalization becomes most evident, as courts have stated that the defendant cannot rely on his or her self-serving testimony, but must demonstrate "objective evidence" to show that he or she would have accepted the plea absent defense counsel's error.¹⁵⁷ Even if the defendant can prove this, the defendant must still demonstrate that the prosecution and the court would not have rejected the plea offer.¹⁵⁸ Both the prosecution and the court, however, are granted broad discretion; there is no defined standard that states the grounds under which they can reject a plea offer.¹⁵⁹

¹⁵² *Frye*, 132 S. Ct. at 1407 (quoting Robert E. Scott & William J. Stuntz, Plea Bargaining as Contract, 101 YALE L.J. 1909, 1912 (1992)).

¹⁵³ *Frye*, 132 S. Ct. at 1405.

¹⁵⁴ *Id.* at 1409.

¹⁵⁵ *See supra* note 128.

¹⁵⁶ *Frye*, 132 S. Ct. at 1409.

¹⁵⁷ *See supra* notes 102 and 103.

¹⁵⁸ *Frye*, 132 S. Ct. at 1409.

¹⁵⁹ *See Bibas, supra* note 11, at 162.

The specific recommendations for formalization in the plea bargaining system, as outlined above, are summarized as follows: first, plea negotiations should be required to be in writing; second, a standard must 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 must be reduced to writing; fifth, clarification needs to be made as to whether the grounds under which a trial court may reject a plea offer, as codified in state statutes and rules, are the same grounds to be considered for the purposes of determining whether a defendant's claim of ineffective assistance of counsel should be dismissed.

The first recommendation – to put plea negotiations in writing – is the most important in light of the confusion that has emerged among lower courts over whether or not a defendant must be presented with a “formal offer” in order to bring a claim of ineffective assistance of counsel during plea bargaining.¹⁶⁰ Courts have come to different conclusions on this issue after *Lafler* and *Frye*, with some defining a plea as “formal” even though it was not in writing.¹⁶¹ For the defendant who must rely on objective evidence independent of self-serving testimony, a writing requirement is a necessity. Furthermore, such a requirement would improve other areas of plea bargaining, such as helping the court determine whether there is a factual basis for a plea.¹⁶²

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.¹⁶³ Such discussion centers on ensuring that defense counsel effectively represent their clients because of

¹⁶⁰ See *supra* Part II.

¹⁶¹ *Wanatee*, 101 F. Supp. 2d at 1202-03.

¹⁶² See *supra* note 131 and surrounding text.

¹⁶³ See, e.g., Jane Campbell Moriarty & Marisa Main, “Waiving” Goodbye to Rights: Plea Bargaining and the Defense Dilemma of Competent Representations, 38 HASTINGS CONST. L. Q. 1029, 1042 (2011) (discussing possible duties of defense counsel “to seek out plea negotiations with the prosecution”).

the fact that so much of plea bargaining occurs off the record.¹⁶⁴ Less has been said, however, about how prosecuting attorneys are affected by the extension of the Sixth Amendment right to ineffective assistance of counsel to the plea bargaining process.¹⁶⁵ Including prosecutors in the process is in many ways crucial to creating a just plea bargaining system.¹⁶⁶ Without doing the work now to document plea negotiations, the burden on the prosecution at discovery to go through all of the records to see if there is anything on plea negotiations is potentially very burdensome. In the long run, more formalization of plea negotiations would ease the burden on the prosecution and defense counsel when litigation involving an ineffective assistance of counsel claim is brought.¹⁶⁷ Above all, 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.

¹⁶⁴ See, e.g., Bibas, *supra* note 11, at 150.

¹⁶⁵ See *id.* (“Prosecutors, too, can take steps to guard against the worst defense lawyering, acting not just as partisan warriors but also as guardians of justice.”).

¹⁶⁶ Ellen Yaroshefsky, *Ethics and Plea Bargaining: What’s Discovery Got to Do With It?* 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).

¹⁶⁷ See Bibas, *supra* note 11, at 162.