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Rishi Batra
St. Mary's University School of Law, rbatra@stmarytx.edu

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ARTICLES

LAFLER AND *FRYE*: A NEW CONSTITUTIONAL STANDARD FOR NEGOTIATION

*Rishi Batra**

I. INTRODUCTION

The Sixth Amendment guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[1] In 1984 the Supreme Court in *Strickland v. Washington*[2] established the standard for ineffective assistance of counsel[3] that is a violation of this right.[4] In a pair of decisions handed down in 2012, *Lafler v. Cooper*[5] and *Missouri v. Frye*,[6] the Supreme Court extended the holding in *Strickland* to cover ineffective assistance by defense counsel in the plea-bargaining phase. Recognizing that pleas account for ninety-five percent of all criminal convictions, the court stated that "the negotiation of a plea bargain . . . is almost always the critical point for a defendant" and "defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires."[7]

What might these responsibilities be, and how might we determine them? This paper argues that by holding that there is a constitutional minimum standard for counsel in the plea-bargaining

* Visiting Assistant Professor, Whittier Law School; Assistant Professor, Texas Tech University School of Law, September 2013. J.D., Harvard Law School, B.A., B.S., University of California, Berkeley. The author wishes to thank Douglas Berman, Michael Moffitt, Andrea Schneider, Cynthia Alkon, Christopher Fairman, and Joseph Stulberg for their thoughts and advice, and Gabriel Mendoza and Amanda Breyer for excellent research assistance.

1 U.S. CONST. amend. VI. The text of the amendment uses the British spelling "defence" as opposed to the modern American spelling "defense."

2 Strickland v. Washington, 466 U.S. 668 (1984).

3 The Supreme Court established the constitutional right to *effective* assistance of counsel in *Powell v. Alabama*, 53 S. Ct. 55 (1932).

4 *Strickland*, 466 U.S. at 688-689.

5 Lafler v. Cooper, 132 S. Ct. 1376 (2012).

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

7 *Id.* at 1407.

context, the court has effectively created a negotiation competency bar for criminal defense attorneys. This paper will look to existing and potential sources of standards for negotiation competency in plea-bargaining to determine how lower courts can and should shape the scope of this right in the future.

Part II of the paper examines the *Frye* and *Lafler* decisions in light of the Supreme Court's previous rulings on ineffective assistance of counsel claims and in particular the assistance of counsel during the plea-bargaining stage. It shows that the Court went further than just considering the individual errors by defense counsel in each case to make a broader ruling that extends ineffective assistance jurisprudence to the larger negotiation context of plea bargains. It asserts that while the Court has been reluctant to establish exact standards for defense counsel's role in the plea-bargaining process,[8] establishing these standards will be critical for lower state and federal courts to define the scope of the right and address the multiple ills of plea-bargaining caused by counsel's bad incentives.

As previous cases state that the "'proper standard for [measuring] attorney performance is that of reasonably effective assistance,' as guided by 'prevailing professional norms' and consideration of 'all the circumstances' relevant to counsel's performance'"[9] this paper then explores what sort of prevailing professional norms and circumstances can provide guidance in this area. Part III looks to existing standards of professional practice, such as the ABA's Model Rules of Professional Conduct, as a first source of guidance for plea negotiators. This part also looks to other ABA Standards such as the ABA Standards for Criminal Justice, as courts have adopted these standards in defining ineffective assistance in other areas, and concludes that these provide guidance for plea bargain negotiations as well. It also looks at other types of behavior that have been determined to be ineffective assistance of counsel in the trial context and draws analogies to behavior in the negotiation context. Just as counsel at trial need to prepare to a reasonable standard,[10] we can analogize to the amount of preparation required in the context of a negotiation of a plea bargain. Part III concludes with a brief overview of popular and scholarly literature on negotiation theory, and pulls common threads, such as the need to for legitimate standards and knowledge of alternatives that may be helpful in the plea context.

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[8] *See e.g.*, Premo v. Moore, 131 S. Ct. 733, 741 (2011).

[9] WAYNE LAFAVE, ET. AL., CRIMINAL PROCEDURE §11.10 (5d. 2009).

[10] *See e.g.*, Wiggins v. Smith, 539 U.S. 510 (2003).

Part IV examines how courts may apply the standards delineated in Part III to future defendants who claim a violation of their Sixth Amendment right to effective assistance of counsel. It looks at five different situations that may give rise to new claims of ineffectiveness: (1) poor preparation, (2) trading off the interests of one client for another in a plea bargain, (3) taking no time for a plea bargain negotiation, (4) antagonizing the prosecutor, and (5) refusing to bargain. For each of these we attempt to apply the standards to consider whether a court could uphold an ineffectiveness claim based on attorney performance.

Even with minimum standards of negotiation determined and applied to new claims, the courts will also have to apply the second part of the Supreme Court's test in *Strickland,* that counsel falling below these standards has prejudiced the outcome for the defendant.[11] Part V examines the hurdles that petitioners will have to face in meeting this part of the test, concluding that while in some cases prejudice will be obvious, in many cases it may not be. A proposed structural reform, creating databases of plea-bargaining settlements, will be necessary to vindicate the rights of defendants in this area. Part VI offers a brief conclusion that suggests areas for future scholarly work in the area.

II. A NEW STANDARD FOR NEGOTIATION

When considering the cases of both the petitioners in *Lafler* and *Frye*, the Court went beyond the individual situations presented by the facts of their cases to make a broader ruling regarding the responsibilities of defense counsel in negotiation. In doing so, the Court continued a recent trend of acknowledging the reality of the prevalence and importance of plea-bargaining in the criminal justice system. By bringing a measure of judicial oversight to the negotiation of plea bargains, the Court has a chance to address some of the structural inequities in the plea-bargaining process.

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11 *Strickland*, 466 U.S. at 693-94. .

A. Missouri v. Frye & Lafler v. Cooper

In August 2007, Galin Frye was charged with driving with a revoked license.[12] Because he had been convicted of the same offense three times before, he was charged, under Missouri law, with a felony carrying a maximum four-year prison term.[13] The prosecutor sent Frye's counsel a letter, offering two possible plea bargains, the lesser of which was an offer to reduce the charge to a misdemeanor and to recommend, with a guilty plea, a ninety-day sentence.[14] The misdemeanor charge of driving with a revoked license carried a maximum term of imprisonment of one year.[15] The letter stated that both offers would have an expiration date, but Frye's counsel did not convey the offers to Frye, and they expired.[16] Less than a week before Frye's preliminary hearing, he was again arrested for driving with a revoked license.[17] He subsequently pleaded guilty to a felony with no underlying plea agreement and was sentenced to three years in prison.[18]

Seeking post-conviction relief in state court, Frye alleged that his counsel's failure to inform him of the earlier plea offers denied him the effective assistance of counsel, and he testified that he would have pleaded guilty to the misdemeanor had he known about the offer.[19] The trial court denied his motion, but the Missouri appellate court reversed, holding that Frye met both of the requirements for showing a Sixth Amendment violation under *Strickland v. Washington*, 466 U.S. 668.[20] Specifically, the appellate court found that defense counsel had been ineffective in not communicating the plea offers to Frye and concluded that Frye had shown that counsel's deficient performance caused him prejudice because he pleaded guilty to a felony instead of a misdemeanor.[21]

At immediate issue in the case was whether the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected.[22] Writing for a five-four ma-

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12 *Frye*, 132 S. Ct. at 1404.
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.* at 1404-05.
19 *Id.* at 1405.
20 *Id.*
21 *Id.*
22 *Id.*

jority, Justice Anthony M. Kennedy reasoned that the right to counsel extends to the plea-bargaining process because of the "simple reality" that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."[23] Since the criminal justice system is "for the most part a system of pleas, not a system of trials,"[24] therefore "the negotiation of a plea bargain . . . is almost always the critical point for a defendant"[25] where the right to counsel should apply.

The Court stated, "claims of ineffective assistance of counsel in the plea-bargaining context are governed by the two-part test set forth in *Strickland*": (1) that defense counsel had been ineffective; and (2) that there was resulting prejudice.[26] It then held as a general rule, defense counsel has a duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.[27] Because this was not done here, defense counsel did not render effective assistance of counsel as required by the Constitution.[28] It remanded the case to the state court to determine the second part of the inquiry, whether the ineffective assistance resulted in prejudice.[29]

However, while the Court could have limited itself to this narrow conclusion—that not communicating a formal plea-bargaining offer with an expiration date was ineffective assistance—the Court explicitly went farther than this. Writing for the majority, Justice Kennedy stated that in order for the benefits of a plea agreement to be realized, "criminal defendants require effective counsel during plea negotiations. Anything less might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him."[30] Because "[i]n today's criminal justice system . . . the *negotiation* of a plea bargain . . . is almost always the critical point for the defendant,"[31] the Court reasoned that the "inquiry" in this case was "how to define the duty and responsibility of the defense counsel in the plea bargain *process*."[32]

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23 *Id.* at 1407.

24 *Id.* (citing *Lafler*, 132 S. Ct. at 1388).

25 *Id.*

26 *Id.* at 1405.

27 *Id.* at 1408.

28 *Frye*, 132 S. Ct. at 1408.

29 *Id.* at 1411. *See* Part V, *infra*, discussing how the prejudice prong of *Strickland* may be applied.

30 *Frye*, 132 S. Ct. at 1407-08 (citing Massiah v. United States, 377 U.S. 201, 204 (1964)).

31 *Id.* at 1407 (emphasis added).

32 *Id.* at 1408 (emphasis added).

Kennedy immediately acknowledges that "this is a difficult question," because "[t]he art of negotiation is at least as nuanced as the art of trial advocacy"[33] and that "[b]argaining is, by its nature, defined to a substantial degree by personal style."[34] By explicitly linking bargaining and negotiation to the duties of the counsel during the plea bargain process however, the Court is stating that its earlier conclusion "that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process . . . "[35] applies to the negotiation stage of plea bargains, not just the communication of offers to the defendant.

Scalia, writing for the dissent, explicitly acknowledges the new step this court has taken, that of bringing a constitutional lens to the negotiation of plea bargains. He states that "counsel's plea-bargaining skills . . . must now meet a constitutional minimum," and calls this the "constitutionalization of the plea-bargaining process."[36] He worries, however, that these new constitutional standards will be hard to define, since "it will not be so clear that counsel's plea-bargaining skills . . . are adequate."[37]

This is a concern shared by the majority as well. Kennedy worries that "[t]he alternative courses and tactics in negotiation are so individual that it may. . . [not be] practicable to try to. . . define detailed standards for the proper discharge of defense counsel's participation in the process."[38] While the Court states that the *Frye* case does not present the "necessity or occasion to define the duties of defense counsel in these respects,"[39] to fully vindicate the right of effective counsel in plea-bargaining, these standards will have to be determined by the lower courts, on a case-by-case basis.[40]

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33 *Id.*

34 *Id.*

35 *Id.* at 1407.

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

37 *Id.* Scalia is also concerned that there will be inadequate standards for determining prejudice. *Id.* at 1412-13. He is unclear whether, for example, a defense counsel refusing to bargain would be considered constitutionally invalid. *Id.* I take up this question below in Part IV.

38 *Id.* at 1408.

39 *Frye*, 132 S. Ct. at 1408.

40 Part III of this paper looks to sources that lower courts may use to determine the first part of the *Strickland* test, *i.e.* whether the counsel has been ineffective, and Part V looks at how the second part of the test, *i.e.* showing that this ineffective assistance is reasonably likely to have resulted in prejudice, is to be determined.

In the associated case, *Lafler v. Cooper*, decided the same day, the Court considered what the *remedy* for ineffective assistance of counsel should be when there are defense counsel errors in the plea-bargaining process. In *Lafler*, unlike *Frye*, the petitioner rejected a plea offer based on erroneous advice and proceeded to a "full and fair trial" where he was convicted of assault with attempt to murder and other charges.[41] Convinced by his attorney that the prosecution could not show intent to murder given that all of his shots hit his victim "below the waist,"[42] the petitioner rejected two pre-trial plea offers and one at the trial itself.[43] The Court rejected the contention that "[a] fair trial wipes clean any deficient performance by defense counsel during plea-bargaining" and found that the petitioner did suffer prejudice from his attorney's erroneous advice.[44] The Court proposed two possible remedies when ineffective assistance led to an offer's rejection: (1) a resentencing considering the original offer the defendant would have accepted and the result at trial, or (2) a requirement of reoffering the original plea agreement, subject to the judge's discretion in accepting it.[45]

B. *An Acknowledgement of Plea-bargaining Realities*

This consideration by the Supreme Court of the prevalence and mechanisms of plea-bargaining is a relatively new development in the Court's jurisprudence. For years, the Court had taken a trial focused approach to criminal procedure.[46] Plea-bargaining was seen as an inherent good for all: defendants got reduced sentences and avoided trial, while the government saved time and money and increased the swiftness of punishment, resulting in a

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41 *Lafler*, 132 S. Ct. at 1383.

42 *Id.*

43 *Id.*

44 *Id.* at 1388-89.

45 *Id.* at 1389. In formulating these remedies, the Court chose one among several options considered by other courts for this situation. There are generally three: reinstating the plea with no option for a new trial, *See e.g.* Williams v. State, 605 A.2d 103 (Md. 1992) reinstating the plea with an option for a new trial, *See e.g.* Dew v. State 843 N.E.2d 556 (2005), or a retrial, *See e.g.* Commonwealth v. Napper 385 A.2d 521 (1978). By choosing to reinstate the plea, the Court did not discuss the abstention, separation of powers, or double jeopardy concerns that at least one scholar has raised. *See* David A. Perez, *Deal or No Deal? Remedying Ineffective Assistance of Counsel During Plea Bargaining*, 120 YALE L.J. 1532, 1551-52 (2011). (The author surveys the different court remedies and ultimately concludes a retrial as an appropriate option).

46 *See* Stephanos Bibas, *Regulating the Plea-bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1122-27 (2011).

mutuality of advantage.[47] Plea-bargaining supposedly took place in the shadow of expected trial outcomes, so regulation of trials should theoretically protect defendants as well.[48] Where the *Strickland* test was applied to plea-bargaining, the impact of poor defense counsel in plea-bargaining was limited to whether the defendant was erroneously advised to take a plea bargain when he would have had a better result at trial.[49]

However, in 2010, in *Padilla v. Kentucky*,[50] the Court focused for the first time on the collateral consequences of guilty pleas and the defense lawyers' duty to advise clients about them.[51] In that case, Jose Padilla, a Honduran and U.S. permanent resident was charged with felony trafficking in marijuana. His lawyer erroneously assured him that a guilty plea would not expose him to deportation since "he had been in the U.S. for so long."[52] Relying on the erroneous advice, Padilla pleaded guilty, but then collaterally attacked his plea in state court, stating that he would have gone to trial but for the mistaken advice of his lawyer.[53] The Court held that a lawyer's failure to advise a noncitizen defendant about deportation can violate the Sixth Amendment guarantee of effective assistance of counsel if it prejudices his decision.[54]

Importantly, the Court in this case showed a new focus on the realities of plea-bargaining. They acknowledged that plea bargains were the norm for criminal convictions, and cited the large percentage of cases that were resolved through bargaining,[55] a fact cited again in *Frye*.[56] Moving away from trial results as the normative baseline,[57] it recognized that competent defense attorneys could "plea bargain creatively with the prosecutor in order to craft a conviction and sentence" that suits both sides' interests.[58] The Court

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47 *See* Brady v. United States, 397 U.S. 742, 752-53 (1970).

48 For a history and excellent critique of this "shadow of trial" assumption, *see* Stephanos Bibas, *Plea-bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

49 *See* Hill v. Lockhart, 474 U.S. 52 (1985) (applying the *Strickland* test to plea bargains). Even in *Hill*, the petitioner was not able to meet the prejudice prong of the *Strickland* test, since the court was not convinced he would have chosen to go to trial without attorney error.

50 Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

51 *See* Bibas, *Regulating the Plea-bargaining Market: From Caveat Emptor to Consumer Protection, supra* note 48, at 1137.

52 *Padilla*, 130 S. Ct. at 1477-78.

53 *Id.* at 1478.

54 *Id.*

55 *Id.* at 1485.

56 *Frye*, 132 S. Ct. at 1407.

57 *See* Bibas, *supra* note 48, at 1138.

58 *Padilla*, 130 S. Ct. at 1486. *See also* Bibas, *supra* note 46, at 1139. (In plea bargains where deportation is a risk, appropriate bargains over charges, or even reducing the jail sentence from

in the next term followed on by recognizing the complexity of negotiations involved in bargaining in a habeas challenge to a defense lawyer's advice to take a quick plea bargain before filing a suppression motion.[59] While the claim there ultimately failed, the Court again acknowledged that "the art of negotiation is at least as nuanced as trial advocacy" but is "further removed from immediate judicial supervision."[60]

C. *Addressing the Ills of the Plea-bargaining System*

With *Frye* and *Lafler*, the Court for the first time is bringing some judicial supervision to the plea-bargaining process wholly apart from the process of trial, or even a subsequent plea bargain. *Lafler* was the first case to consider errors in the plea-bargaining process even when followed by a full and fair trial.[61] *Frye* considered the errors of counsel in plea-bargaining, even when followed by a subsequent bargain that was accepted.[62] By scrutinizing the behavior of counsel during negotiation of plea bargains, the lower courts have the potential to address many of the ills of the plea-bargaining system.

Scholars have long criticized plea-bargaining, arguing that the system under which they are conducted is inherently unfair to defendants, given the power differential between prosecutors and defendants, as well as the coercive nature of the process.[63] Others have focused on the pressures and incentives that defense attorneys face which can prejudice their clients.[64] They note that many defense lawyers are public defenders, who are paid fixed salaries to represent large numbers of indigent clients,[65] or who are private attorneys appointed by the court for low hourly rates and subject to caps on compensation.[66] This creates little incentive for these lawyers to try cases[67] and great incentive to plead cases out quickly

365 to 364 days may avoid deportation (citing State v. Quintero Morelos, 133. P.3d 591 (Wash.Ct.App 2006)).

59 Premo v. Moore, 131 S. Ct. 733 (2011).

60 *Id.* at 741.

61 *Lafler*, 132 S. Ct. at 1383.

62 *Frye*, 132 S. Ct. at 1404.

63 *See generally*, Stephen Schulhofer, *Plea-bargaining as Disaster*, 101 YALE L.J. 1979 (1992).

64 *See* Bibas, *supra* note 48, at 2476-86.

65 *Id.*

66 *Id.*

67 *Id.* at 2477.

in order to handle larger volumes.[68] In addition, these appointed lawyers are given few resources with which to try cases, and so are unlikely to afford the extensive discovery that may be required.[69]

In addition to having few financial incentives to take cases to trial, defense attorneys are often overburdened with the number of cases they have to handle. They can often handle hundreds of cases a year, meaning that plea-bargains are often the norm since these attorneys have no time to go to trial.[70] Many of these lawyers have no motivation (other than pride) to bargain well regardless, because if they are public defenders or handle primarily court appointments their reputation will not improve business as their clients have no choice of counsel.[71] Finally, defense attorneys are subject to pressures from judges and clerks to settle cases, either to avoid judicial reprisals and possibly to continue to receive court appointments.[72]

Due to these poor incentives, clients who have these attorneys as counsel can be prejudiced in several ways. A lawyer that cannot credibly threaten trial is less likely to be offered concessions in the plea-bargaining process.[73] In addition, overburdened defense counsel with several cases have been known to trade off the settlements of some cases against others, usually to the detriment of indigent clients and the benefit of paying clients.[74] Appointed counsel will also file fewer motions, meet with their clients fewer times, meet with their clients later, and be less familiar with sentencing rules than paid defense counsel,[75] all of which can lead to poor outcomes.[76]

By allowing ineffective assistance claims in plea-bargaining negotiations, the court has taken a step towards vindicating defendants' Sixth Amendment rights in this area. However, to truly vindicate this right, lower courts using the *Strickland* framework will need to define with precision both what negotiation efforts are unacceptable as ineffective assistance, and how prejudice will be

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68 *Id.*

69 *Id.* at 2479.

70 *Id.*

71 *Id. See also* Robert Scott & William Stuntz, *Plea-bargaining as Contract*, 101 YALE L.J. 1909, 1958 (1992).

72 *See* Bibas, *supra* note 48, at 2480. *See also* Albert Alschuler, *The Defense Attorney's Role in Plea-bargaining*, 84 YALE L.J. 1179, 1210-11, 1222, 1224 (1975).

73 Bibas, *supra* note 48, at 2478. *See also* Alschuler, *supra* note 72, at 1185-86.

74 Bibas, *supra* note 48, at 2480.

75 *Id.* at 2481-2482.

76 Cognitive biases of defense counsel can also lead to poor outcomes and untrained defense counsel are also more likely to be subject to these. *See* Bibas, *supra* note 48, at 2521-23.

determined if counsel is ineffective. The next part discusses what standards courts may look to in order to determine how counsel's actions may be found ineffective.

III. Sources for Standards of Professionally Competent Assistance

In adopting the two-part test from *Strickland v. Washington* to apply to the negotiations of plea-bargaining, the Court has required the lower courts to determine standards for the first part of the *Strickland* test—namely, what actions are "outside the wide range of professionally competent assistance."[77] This is done, according to *Strickland*, by referring to "reasonableness under prevailing professional norms."[78] There are several sources that a court could potentially look at to determine what competent assistance looks like in a plea negotiation context.

A. *ABA Standards*

As the Court acknowledged in *Frye*, "[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] It was on this basis, in fact, that the Court held that defense counsel had the duty to communicate the offer from the prosecution to his client.[80] Following this model, a lower court would have several different standards to consult to determine the proper "range of professionally competent assistance" in the plea-bargaining context.

1. Model Rules of Professional Conduct

First and foremost, the Model Rules of Professional Conduct can be referred to in all cases regarding attorney misconduct. These Rules also form the basis for most if not all of the state bar professional standards for attorneys.[81] Looking at the Model Rules

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77 *Strickland*, 466 U.S. at 690.

78 *Id.* at 688.

79 *Frye*, 132 S. Ct. at 1408.

80 *Id.*

81 *See e.g.*, Fla. Rule Regulating Bar (2008); Ill. Rule Prof. Conduct (2011); Mich. Rule Prof. Conduct (2011).

(and the associated state statutes), courts can find general standards that will be appropriate to determine the scope of appropriate attorney conduct in the plea-bargaining context.[82]

Negotiation is not specifically mentioned frequently in the Model Rules themselves. It is mentioned in the context of not representing adverse clients when negotiation is imminent.[83] It is discussed more extensively as an exception to the general rule against not making a false statement of material fact or law, since under "generally accepted conventions in negotiation," certain statements, such as those about price or the existence of an undisclosed principal are not taken as statements of material fact.[84] From this rule, defense attorneys can take as guidance that in the context of negotiation their client's intentions as to settlement will not usually be taken as material facts.[85]

However while the Rules do not address negotiation of plea bargains directly, the Rules anticipate that they should be applied to attorney conduct of negotiation in general. As the Preamble and Scope sections of the Rules state, "[a]s a representative of clients, a lawyer performs various functions. . . . As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others,"[86] making explicit that negotiation is within the functions of a lawyer, and that these rules are to "describe a lawyers role"[87] in the negotiation as well as other contexts. Accordingly, lawyers conducting plea bargains should be subject to the same standards as other lawyers concerning confidentiality,[88] conflicts of interest,[89] and competence,[90] among other rules.

2. ABA Standards for Criminal Justice: Defense Function

Another prime example of guidance as to how defense attorneys should represent clients in plea-bargaining is the American

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82 The Model Rules have been consulted in other Supreme Court cases applying the *Strickland* standard. *See e.g.*, Wiggins v. Smith, 539 U.S. 510, 524 (2003).

83 MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 29 (2012).

84 MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 2 (2012).

85 *Id.* In addition, a certain amount of "puffing" is allowed during negotiations as well. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-370 (1993); *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-439 (2006).

86 MODEL RULES OF PROF'L CONDUCT, Preamble ¶ 2 (2012).

87 *Id.*, Scope ¶ 1.

88 MODEL RULES OF PROF'L CONDUCT R. 1.6 (2012).

89 MODEL RULES OF PROF'L CONDUCT R. 1.7 (2012).

90 MODEL RULES OF PROF'L CONDUCT R. 1.1 (2012).

Bar Association's influential *Standards for Criminal Justice*, which addresses both prosecution and defense functions.[91] Promulgated after "extensive review by representatives of all segments of the criminal justice system," the ABA Standards represent "a consensus view of all segments of the criminal justice community about what good, professional practice is and should be."[92] The Court has used these Standards extensively in determining *Strickland* ineffectiveness.[93] As one dissent claimed, the Court has treated these guidelines "as if they were binding statutory text."[94]

Importantly for courts considering attorney conduct in plea-bargaining, the Standards contain specific guidelines for plea-bargaining for defense attorneys.[95] For example, it further specifies the guideline for false statements when dealing with the prosecutor, specifying that that this requirement encompasses statements only about the evidence.[96] It also calls out the practice of trading off the interests of one client for concessions in another case.[97]

3. ABA Standards for Criminal Justice Pleas of Guilty

A closely related text is the ABA's *Standards for Criminal Justice Pleas of Guilty*.[98] This expands on the Criminal Justice standards above by more specifically discussing the procedures of a court taking a plea of guilty as well as the practice of negotiating between prosecutors and defense counsel.[99] Standard 14-3.2[100] addresses the responsibilities of defense counsel in the plea context.

Of note is Standard 14-3.2(b), which 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

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91 ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d. 1993).

92 *Id.* at xii, xiv.

93 *See* Rompilla v. Beard, 545 U.S. 374 (2005), John H. Blume & Stacey D. Neumann, *It's Like Déjà vu All Over Again*, 34 AM. J. CRIM. L. 127, 152 (2007) (noting that "*Rompilla* cited to ABA standards on eight occasions as evidence that trial counsel's efforts were below the constitutional floor.").

94 *Rompilla*, 545 U.S. at 400 (Kennedy, J., dissenting).

95 *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, *supra* note 91, Std. 4-6.2.

96 *Id.* at Std. 4-6.2(b). Presumably, other false statements of material fact would also be out of bounds as well, but are not specifically called out by these guidelines.

97 *Id.* at Std. 4-6.2(d).

98 ABA STANDARDS FOR CRIMINAL JUSTICE PLEAS OF GUILTY (1999).

99 *Id.* at xi.

100 *Id.* at Std. 14-3.2.

completed."[101] The appropriate amount of investigation may be limited, however, if a favorable plea offer is on the table early.[102] The notes to this standard specifically are crafted with *Hill v. Lockhart* in mind,[103] suggesting that the standards themselves may evolve in light of the *Lafler* and *Frye* rulings.

B. *Analogies to Existing Case Law*

To determine how the *Strickland* standard may be applied to attorney conduct during plea negotiations, the court may also look to how it has been applied in other contexts, notably the context of trial. This is consistent with the approach the court took in *Strickland*, which was "premised in part on the similarity between such a proceeding [capital sentencing] and the usual criminal trial,"[104] and in *Hill v. Lockhart* when considering the prejudice inquiry, stating that "[i]n many guilty plea cases, . . . the inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial."[105]

It is true, as scholars have noted, that "[c]ourts rarely reverse convictions for ineffective assistance of counsel, even if the defendant's lawyer was asleep, drunk, unprepared, or unknowledgeable. In short, any 'lawyer with a pulse will be deemed effective.'"[106] However, in a series of recent cases, the Supreme Court has shown a willingness to take these cases more seriously.[107] Generally, these claims have turned on failure of defense counsel to discover and present readily available evidence that would have constituted strong grounds for leniency.[108] The Court has found ineffective as-

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101 *Id.*

102 *Id.* at Std. 14-3.2. cmt. How a defense counsel or a court may determine whether an offer favorable, and therefore warrants a reduced investigation is addressed in Part V, *infra*.

103 *Id.*

104 Hill v. Lockhart, 106 S. Ct. 366, 370 (1985).

105 *Id.*

106 Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 1 (2004) (footnote omitted) (citing Marc. L. Miller, *Wise Masters*, 51 STAN. L. REV. 1751, 1786 (1999) (reviewing MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURT'S REFORMED AMERICA'S PRISONS (1998)). *See also* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) (collecting examples of poor representation).

107 *See generally*, Stephen F. Smith, *Taking Strickland Claims Seriously*, 93 MARQ. L. REV. 515 (2009).

108 *Id.* at 526.

sistance when there was a failure to investigate mitigation evidence,[109] a failure to pursue favorable witnesses,[110] or a failure to investigate and present aggravation evidence.[111] This is consistent with several lower court decisions, finding ineffective assistance due to inadequate pretrial preparation, as well as failure to present defenses at trial.[112] Applying this by analogy to the plea-bargaining context, courts could conclude that a failure to prepare for the plea bargain negotiation itself, without gathering "mitigation" information that may reduce the likely sentence offered, could be considered a type of *Strickland* violation.

C. *Negotiation Texts*

Another area that a court looking to define the defective performance prong of *Strickland* as it applies to plea-bargaining could look to is the wide range of negotiation literature that is available to advise both attorneys and the general public on how best to negotiate.[113]

While it may seem strange to apply general negotiation theory to plea bargains, courts themselves consider a plea as a bargain struck by two independent parties, treat the plea agreement as a contract, and see the bargaining as a type of contractual transaction.[114] Legal scholars have also viewed plea agreements as another form of negotiated dispute resolution.[115] As two scholars have described the issue, "the typical plea bargain is strikingly simi-

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109 *See* Wiggins v. Smith, 539 U.S. 510 (2003).

110 *See* Williams v. Taylor 529 U.S. 362 (2000).

111 *See* Rompilla v. Beard, 545 U.S. 374 (2005). While these recent cases are all death penalty cases, there is an argument that this reasoning should apply to all criminal convictions, since the reasoning in them is not death penalty specific. Smith, *supra* note 107, at 527.

112 *See e.g.*, Profitt v. Waldron, 831 F.2d 1245 (5th Cir. 1987) (failure to raise insanity defense); Bridges v. State, 466 So.2d 348 (Fla. Dist. Ct. App. 4th Dist. 1985) (failure to raise defense of involuntary intoxication).

113 *See e.g.*, ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1992); G. RICHARD SCHELL, BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE (2d. 2006); MARTIN E. LATZ, GAIN THE EDGE!: NEGOTIATING TO GET WHAT YOU WANT (2004); DEEPAK MALHOTRA & MAX BAZERMAN, NEGOTIATION GENIUS (2008), ROBERT H. MNOOKIN ET AL., BEYOND WINNING (2000).

114 Rebecca Hollander-Blumoff, *Getting to "Guilty": Plea-bargaining as Negotiation,* 2 HARV. NEGOT. L. REV. 115, 119 (1997).

115 *Id.*; *see also*, Albert Alschuler, *The Changing Plea-bargaining Debate,* 69 CAL. L. REV. 652, 683 (1981); DOUGLAS MAYNARD, INSIDE PLEA-BARGAINING: THE LANGUAGE OF NEGOTIATION (1984).

lar to the simple dickered bargain—my car for $500—that is the staple example of enforceable exchange . . . ."[116]

However, when looking at the negotiation literature, it may be difficult to determine the "range of professionally competent assistance" that is demanded by the *Strickland* standard. Much of legal academia seems to have adopted the "integrative bargaining" methodology embodied in the landmark negotiation text "Getting to Yes" by Roger Fisher and William Ury.[117] Much of the subsequent literature builds on the idea in this book of focusing on "interests" rather than "positions,"[118] and further refinements still use the underlying integrative framework.[119] However, there are critics of the methodology,[120] and other methodologies have been proposed.[121]

Furthermore, even within the literature that advocates an integrative framework, there is an acknowledgement that each person approaches negotiation with his or her own particular style.[122] Many of these books try to classify negotiators in to categories of negotiation styles, but suggest that no particular style is "correct" in any situation.[123] A court looking to this literature would be hard pressed to determine if a lawyer's particular style in negotiating a plea bargain was outside of the range of professional competence such that the first prong of *Strickland* should apply.

Another difficulty that may arise in trying to apply negotiation theory to plea-bargaining is that the nature of plea bargains may

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116 Scott & Stuntz, *supra* note 71, at 1922.

117 ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1992). This is also variously referred to as "problem solving," "principled," "interest based," "win-win," or "cooperative" negotiation.

118 *See e.g.*, DEEPAK MALHOTRA & MAX BAZERMAN, *supra* note 113; LATZ, *supra* note 113, at 60-61.

119 *See e.g.*, WILLIAM URY, GETTING PAST NO (1993); ROBERT FISHER & DANIEL SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE (2005).

120 *See, e.g.*, J. White, *The Pros and Cons of "Getting to Yes,"* 34 J. LEGAL EDUC. 115 (1984).

121 *See generally* D. Lax & J. Sebenius, *The Manager as Negotiator: Creating and Claiming Value*, in DISPUTE RESOLUTION, 49-62 (STEPHEN GOLDBERG ET AL. 2d ed. 1992) (encompassing both the integrative and distributive aspects); M. Meltzner & P. Schrag, *Negotiating Tactics for Legal Services Lawyers*, *in* 7 CLEARINGHOUSE REV. 259 (1973) (advocating a more positional approach).

122 *See* G. NICHOLAS HERMAN, PLEA-BARGAINING § 1.02 (2d ed. 1981) (contrasting three types of plea-bargaining styles—competitive, cooperative, and a combination—with the adversarial and problem solving "strategies"); for a general discussion about how lawyers negotiate in competitive vs. collaborative ways, *see* GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT (1984).

123 *See, e.g.*, LATZ, *supra* note 113, at 239-46 (Three styles—competitors, accommodators, avoiders); G. RICHARD SCHELL, *supra* note 113, at 9-15 (5 styles).

not make them amenable to integrative solutions. In many cases, plea-bargaining, while not completely a "zero sum" negotiation, where a gain for one side is a loss for the other, it is often seen as a negotiation where both sides attempt to maximize their own gain, making more integrative solutions difficult, if not impossible.[124] In addition, the constitutional right to the privilege against self-incrimination may make an open exchange of information more difficult,[125] foreclosing some options for mutual gain.

Despite the above difficulties, regardless of negotiation style, there are some commonalities that may provide guidance to courts. Just as the ABA Standards above suggest the importance of preparation to legal practice, all negotiation texts stress preparation as a required component of good negotiation.[126] In particular, they stress the importance of knowing both your Best Alternative to Negotiated Agreement (BATNA),[127] as well as being able to bring legitimate standards to bear upon the negotiation to justify and evaluate offers.[128] These general standards for negotiation can be used by courts for guidance in evaluating attorney performance, particularly in the context of new claims that will be brought post *Lafler* and *Frye.*

IV. POTENTIAL CLAIMS UNDER *LAFLER* AND *FRYE*

Using the standards above, what new claims my courts consider as ineffective assistance in plea bargaining? In the examples below, we consider a few behaviors of defense counsel in plea-bargaining and consider how courts may apply the first prong of the *Strickland* test—whether the actions of defense counsel were unreasonable – in these contexts. The second prong of the test, regarding prejudice, is taken up in Part V below.

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124 However, this may not strictly be true. Herman has identified 24 different types of plea provisions over which bargaining may be possible in a plea negotiation, and not all of these are strictly zero sum. HERMAN, *supra* note 122, at §7.10. A full analysis of the possibility of integrative bargaining in the plea-bargaining context is beyond the scope of this paper, and left for a future article.

125 *Id.* For a discussion of the advantages of negotiating with a "full, open, and truthful exchange" of information, *see* Howard Raffia, Lectures on Negotiation Analysis at Harvard Law School (Spring 1996).

126 *See, e.g.*, SCHELL, *supra* note 113, at 117-138; LATZ, *supra* note 113, at 5-6; MNOOKIN *et. al*, *supra* note 113, at 28.

127 FISHER & URY, *supra* note 117, at 97.

128 *Id.* at 82-86.

A. *Poor Preparation for Plea-bargaining*

One area that courts will be able to scrutinize more carefully post *Lafler* and *Frye* is the preparation that counsel puts in to plea-bargaining. All of the potential standards identified above suggest that preparation is important for lawyers in all contexts. The ABA Model Rules require competence[129] and diligence[130] in practice, and the ABA Standards for Criminal Justice Pleas of Guilty state that counsel should not recommend a plea bargain till adequate preparation has been completed.[131] By analogy to existing case law, defense counsel has a duty to investigate mitigating and aggravating evidence,[132] which in the plea-bargaining context would be all factors that would help argue for a lower sentence for the client.[133]

From an evidentiary perspective, the petitioner in an ineffective assistance of counsel case will actually be in a good position to testify regarding counsel's preparation. Assuming that much of the evidence to help reduce the sentence will come from the client themselves,[134] the client will be able to testify to how much time and effort the counsel put in to interviewing them to get relevant information, even if they do not have insight in to what other preparation the counsel has performed.[135]

In addition to the evidence from the petitioner, the defense counsel has a responsibility to prepare herself with information on the going "price" of bargains, in terms of the sentence that is usually offered for the type of crime or crimes that her client is accused of. From a dispute resolution perspective, knowing legitimate standards for the outcome of a negotiation is critical to being able to make and evaluate offers.[136] Many scholars of plea-bargaining[137] as well as practitioner guides[138] have pointed out how this is a critical piece of information for defense counsel to acquire.

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129 MODEL RULES OF PROF'L CONDUCT R. 1.1 (2012).

130 MODEL RULES OF PROF'L CONDUCT R. 1.3 (2012).

131 ABA STANDARDS OF CRIMINAL JUSTICE PLEAS OF GUILTY 14-3.2(b) (1999).

132 *See* Part III, *supra.*

133 *See* HERMAN, *supra* note 122, at § 5.02, for a list of things that counsel should investigate before going in to the plea bargain.

134 Unless they are incapacitated or under some sort of disability.

135 *See* Johnson v. U.S., 860 F.Supp. 2d 663 (N.D. Iowa 2012) (petitioner presented evidence that counsel did not take enough time with her to establish rapport that would engender trust—a fact that the court finds "unfortunate".).

136 *See, e.g.* FISHER & URY, *supra* note 117; LATZ, *supra* note 113.

137 *See, e.g.* Scott & Stuntz, *supra* note 71, at 1959-60.

138 HERMAN, *supra* note 122, at § 7.09.

However, the going "price" of a particular crime varies by jurisdiction[139] and may not be readily available.[140] While wealthier clients presumably have access to more experienced defense counsel,[141] and public defenders will potentially have access to the collective institutional knowledge of their organization, clients will now have some potential protection from inexperienced, appointed counsel that are unprepared for their negotiations.[142]

B. *Trading Off One Client for Another During a Negotiation*

There have been cases where defense counsel handling multiple cases agrees to trade a plea-bargaining concession in case A for a harsher sentence in case B.[143] This can be especially troubling when the benefits of these tradeoffs are given to the attorney's paying clients and not the court-appointed ones.[144]

If the client can show that this sort of tradeoff had occurred, this would be the kind of violation that a court would be easily able to find unreasonable. Referring to the standards set by the ABA, the court would turn to Model Rule 1.8(g).[145] In addition the ABA Defense Function Standards clearly address this exact violation in 4-6.2(d).[146] This type of violation may be so egregious, in fact, that the court would not need to turn to the second prong of the *Strick-*

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139 *Id.*; *see also* Scott & Stuntz, *supra* note 71, at 1981.

140 *See* Bibas, *supra* note 48, at 2481. *See* Part V, *infra*, for a potential solution to this problem using a database for better transparency.

141 *See* Bibas, *supra* note 48, at 2476-2481; *See also* Rebecca Hollander-Blumoff, *supra* note 114 at 146 n.143 (discussing former prosecutors becoming defense counsel).

142 While clients are typically not there for the bargaining stage, they will receive information from their lawyer about potential sentences in the jurisdiction, and will be able to testify to how accurate those were. Prosecutors who see inappropriate offers or demands can also provide information to courts looking to find ineffective assistance of defense counsel.

143 *See* Bibas, *supra* note 48, at 2480; *See also* ABA Standards For Criminal Justice Prosecution Function and Defense Function 4-6.2(d).

144 *See* Alschuler, *supra* note 72, at 1223.

145 MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2012) ("A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client."). While aggregate claims *per se* are not banned, as the Comments to this rule state "the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted." *Id.* R. 1.8(g) cmt. 13.This is not the kind of behavior described by Alschuler and Bibas, above. *See* Bibas, *supra* note 48, at 2480.

146 ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 4-6.2(d) (1993) ("Defense counsel should not seek concessions favorable to one client by any agreement which is detrimental to the legitimate interests of a client in another case.").

land test, that of showing prejudice. Some violations of the representational ideal are so inherently prejudicial that they are reversible even if *Strickland* prejudice cannot be shown, and an actual conflict of interest is one of these.[147]

It is important to note, however, that this sort of violation of a client's rights would not have been considered constitutionally suspect before the *Lafler* and *Frye* decisions. Since *Strickland* prejudice did not apply to plea negotiations where there was no subsequent trial that may have resulted in a better outcome,[148] there was no right that the plea negotiations were to be done correctly by counsel. This is one area where these two decisions may have an immediate impact.

C. *Taking No Time for the Plea Bargain*

As discussed in Part II, *supra*, defense counsel are usually overburdened with far more cases than they are able to handle at one time.[149] As a result, the negotiations for many plea bargains are often handled in courthouse hallways on short time frames.[150] However, counsel still has the duty of diligence[151] towards all clients, and a petitioner may argue that a counsel that only spent a few minutes on the plea bargain was ineffective in the negotiation.

In these cases, though, without more evidence, petitioners will most likely fail. As has been pointed out by scholars of plea bargaining, there is little connection between the amount of time taken on a plea bargain and the quality of the outcome.[152] Even

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147 *See Strickland*, 466 U.S. at 692; *see also* Cronic v. United States, 466 U.S. 648 (1984) (absence of counsel, failure to subject the prosecution's case to meaningful adversarial testing, actual conflict of interest for counsel all inherently prejudicial); But *Cf.* Cuyler v. Sullivan, 446 U.S. 335 (1980) (defendant must show that the conflict adversely affected counsels performance for the defendant); *see also* Mickens v. Taylor, 535 U.S. 162 (2002) (no automatic claim of ineffective assistance even when defense counsel previously represented murder victim in capital murder case). An interesting future inquiry will be to see if courts find certain conduct in plea-bargaining *per se* violations of ineffective assistance, without having to show likelihood of prejudice.

148 *See Hill* 474 U.S. 52.

149 *See* Bibas, *supra* note 48, at 2479.

150 HERMAN, *supra* note 122, at § 7.03.

151 MODEL RULES OF PROF'L CONDUCT R. 1.3 (2012).

152 Scott & Stuntz, *supra* note 71, at 1959 ("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 cases, knows the market price, realizes that investigation is extremely unlikely to lead anywhere, and understands how to get to the best offer expeditiously.").

"taking the first offer" which is generally frowned upon in a negotiation[153] may be acceptable if is unusually favorable to the defendant for some reason.[154] Petitioner will have to show that he was unusually prejudiced as a result of the short time frame taken, but a short negotiation alone will not be prima facie evidence of ineffective assistance.

D. *Antagonizing the Other Side*

Another possible incidence of misconduct by a defense counsel may be to antagonize the prosecutor or perhaps the judge to such an extent that a plea offer is not given or is withdrawn. This may happen in cases of a new, inexperienced defense counsel, since they often push harder and demand more than is customary in the jurisdiction.[155] Inexperienced counsel can also face reprisals from judges who expect pleas for almost all their criminal cases.[156] While this would obviously be detrimental to the client, a court could find this choice so unreasonable that it becomes a violation of the *Strickland* performance prong.

Regardless of a particular negotiation style,[157] almost all negotiation theory recommends developing a relationship with the other side.[158] Defense counsel, in particular, are usually repeat players in a jurisdiction with a limited number of prosecutors, so are incentivized to maintain a good relationship.[159] Counsel, in

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153 MALHOTRA & BAZERMAN, *supra* note 113, at 46-48.

154 ABA STANDARDS FOR CRIMINAL JUSTICE PLEAS OF GUILTY Std.14-3.2(a) cmt. (1996). ("While defense counsel generally has a duty to seek crucial items of discovery before plea negotiations are completed, there may be some cases in which defense counsel legitimately determines that a better plea agreement may be available if the defendant enters a plea at a point in time before all of his or her discovery rights may apply. Thus, an "appropriate" investigation may be quite limited in certain cases-for example, where a highly favorable pre-indictment plea is offered, and the pleas offered after indictment are likely to carry significantly more severe sentences").

155 Albert W. Alschuler, *Personal Failure, Institutional Failure, and the Sixth Amendment*, 14 N.Y.U. REV. L. & SOC. CHANGE 149, 152 (1986).

156 Judges who prefer plea bargains can punish defendants who go to trial by increasing their post-trial sentences. Alschuler relates a case in which a judge imposed a 270-year sentence after trial and then told the public defender: "Don't you ever bring a case like this one into my court. You bargain it out first." Alschuler, *supra* note 72, at 1240 n.172 (internal quotation marks omitted).

157 *See* SCHELL, *supra* note 113, at 3-25.

158 *See, e.g.*, FISHER & URY, *supra* note 117, at 18-22.

159 Bibas, *supra* note 48, at 2480.

general, are encouraged to maintain a collegial relationship with other attorneys.[160]

An attorney that violates these norms could be considered outside the range of professional assistance that *Strickland* contemplates. Particularly if egregious actions by defense counsel result in a withdrawal or non-offer of a plea agreement, it would suggest that the performance was so unreasonable in this case that the other party felt it to be out of the range of professionalism demanded by an attorney.[161] And a non-offer or withdrawn offer would be evidence of the prejudice suffered by the client, which is taken up in the next part.[162]

E. *Refusing to Bargain*

We turn finally to Justice Scalia's hypothetical in the *Frye* dissent: "[D]oes a hard bargaining personal style now violate the Sixth Amendment?"[163] He questions whether a lawyer who is trying to establish a reputation for hard bargaining may violate his clients' rights by rejecting all but the most favorable offers.[164] While it is true that negotiation styles vary,[165] this hypothetical contemplates not a style choice while negotiating, but a choice not to bargain at all unless offered extremely favored terms. While this is a difficult question for the Justice, in that he claims it "inconceivable" that a lawyer could compromise his client's constitutional rights by using a difficult negotiating style,[166] the standards above may make the answer clearer.

It is true that "defendant has no right to be offered a plea,"[167] yet the Comments to the ABA Standards for Criminal Justice Defense Function state that "[p]lea discussions should be considered the norm, and failure to seek such discussions an exception unless

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160 *See, e.g.*, MODEL RULES OF PROF'L CONDUCT, Preamble ¶ 9 (2012) (lawyers have an obligation to act with a "professional, courteous, and civil attitude towards all persons involved in the legal system").

161 Of course, the prosecutor must maintain his professionalism and not necessarily withdraw a plea agreement just to punish the other attorney, but since prosecutors often have broad discretion in this area, this is a real possibility.

162 *See* Part V, *infra*.

163 *Frye*, 132 S. Ct. at 1413 (Scalia, J., dissenting).

164 *Id.* at 1412-13 (Scalia, J., dissenting).

165 *See* Part III on Negotiation Texts, *supra*.

166 *Frye*, 132 S. Ct. at 1412-13 (Scalia, J., dissenting).

167 *Id.* at 1410.

defense counsel concludes that sound reasons exist for not doing so."[168] It would be up to a court to determine whether a defense counsel looking to establish as a reputation as a hard bargainer would be a "sound reason," but looking through the standards, it would be a hard case to make. ABA Model Rule 1.7(a)(2) states that a lawyer *shall* not represent a client where "there is a significant risk that the representation . . . will be materially limited by . . . a personal interest of the lawyer."[169] Establishing a personal reputation would seem to meet the test of a personal interest in this case.[170]

Even if the attorney claims he might have been refusing to bargain in order to ensure the benefit of future clients, instead of himself, this would also seem to be prohibited by standards looked to by courts. Standard 4-6.2 of the ABA Standards for Criminal Justice for the Defense Function clearly state that [d]efense counsel should not seek concessions for one client by any agreement which is detrimental to the legitimate interests of a client in another case."[171] Arguably here, counsel is looking for potential concessions with future clients, rather than looking for the best agreement for current clients.

V. THE SECOND PRONG PROBLEM – HOW TO SHOW PREJUDICE

As explained above, the *Frye* and *Lafler* decisions have the potential to shine a light on a previously unregulated area of legal practice—that of the negotiation of a plea bargain. The decisions themselves suggest that defense counsel is required to perform to a standard befitting lawyers in the area of practice, and the above parts suggested where those standards may come from. However, to get the relief promised in *Lafler*, clients of underperforming lawyers face two other hurdles—that of showing that there is a reasonable likelihood of prejudice resulting from counsel's error,[172] and

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168 ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 4-6.1 cmt. (1993).

169 MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2012).

170 The lawyer may also be limited by the general duty not to engage in conduct involving dishonesty or deceit which, arguably, not bargaining in good faith with the prosecutor could be. *See* MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2012).

171 ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 4-6.2(d) (1993).

172 *Strickland*, 466 U.S. at 682-83. *But see* note 147, suggesting there may be some errors so egregious that prejudice is presumed.

that any plea that was not taken would have been accepted by the prosecutor and the trial court.

A. *Showing Prejudice Through Comparison with Other Pleas*

In the *Frye* and *Lafler* decisions themselves, prejudice due to attorney error was easily shown, because the alternatives to the plea bargain were so clear. In a *Lafler* situation, it is easy to show that the petitioner received a sentence at trial that was much greater than the plea bargain he was offered. Similarly in *Frye*, there was an actual, lapsed plea bargain that could be compared to the one that petitioner actually accepted.[173] If courts can find other clear cut cases where either a plea offer is never given or withdrawn due to attorney error, such as in the case of an attorney that so frustrates the prosecutor an offer is not forthcoming where it might usually be,[174] these would seem like easy cases to find prejudice.[175]

However, in cases of other negotiation errors, it will be much more difficult for petitioners to show prejudice resulting from attorney error. As Scott and Stuntz note in their now classic article, "regulating mistake is hard, if not impossible," because:

> 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 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.[176]

While the suggestion that there is no way by which to judge negotiation process is certainly overstating the case,[177] it is true

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173 *But see* the discussion about additional hurdles in *Frye*, *infra*.

174 *See* Part IV, *supra*.

175 Here we could show actual prejudice, rather than reasonable likelihood of prejudice, which is all that the standard actually demands. *See Strickland*, at 2067.

176 Scott & Stuntz, *supra* note 71, at 1959.

177 *See* Part III, *infra*.

that it may be hard for a court to determine if the strategy (or lack thereof) used actually had an impact without comparing the outcome to plea agreements for similar cases. Scott and Stuntz go on to say that "[t]he only feasible alternative is to review not process but outcomes. A bargained-for sentence that substantially exceeds the norm for the crime is probably due to some kind of defense attorney mistake; at the least, the bargain requires some explaining."[178]

Making the determination of whether a plea exceeds the norm, of course, is difficult, as the negotiation of plea bargains is hidden from public view.[179] Better sharing of sentencing information could help both defense counsel and prosecutors have a better sense of what the "going rates" or "prices" for crime may be.[180] One scholar has proposed a solution of having a database of plea bargains,[181] much like those for civil settlements.[182] More experienced lawyers, of course, have access to their own past plea bargaining results already, and lawyers working for defense firms or public defenders offices can rely on other lawyers for this information. In today's practice, lawyers can and do share this information already over group emails as well.[183] A database of past plea-bargaining options would give access to information that some lawyers may know, but overburdened or newer less experienced lawyers may not.[184] It may also increase the efficiency of plea-bargaining, giving both prosecutors and defense counsel an easy starting point for particular negotiations.[185]

More importantly, having better transparency for the range of plea bargains typical for a particular type of crime would allow courts to have better information on which to judge the "reasonable probability that . . . the result would have been different" as the

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178 Scott & Stuntz, *supra* note 71, at 1959.

179 *See* Bibas, *supra* note 48, at 2475.

180 *Id.* at 2532.

181 *Id.*

182 While civil settlements are also often hidden from public view, many of them are collected in commercial electronic databases or in legal resources such as LEXIS or Westlaw. *Id.* at 2475 n.41.

183 Thanks to Ellen Podgor for this suggestion.

184 Bibas, *supra* note 48, at 2532. The amount of plea bargains to make comparisons with would vary by jurisdiction, and there may be some crimes without comparable information to make a meaningful analysis.

185 These would of course only form the starting point for bargaining, and may not capture the complex multidimensional nature of some plea bargains. *Id.* However, from a negotiation perspective, even some data can form a "standard of legitimacy" that can improve bargaining. FISHER & URY, *supra* note 117, at 81-92.

second prong of the *Strickland* test requires.[186] By having a set of plea bargains for similar crimes to look at, a court would be better able to see if a particular plea bargain that was negotiated for by a defense counsel is outside the normal range for this crime. It may be true that "in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences" and that "[t]he determination that . . . the outcome would have been different . . . can be conducted within that framework,"[187] a standard database would be more reliable, and more predictable for petitioners challenging their sentence, than the "retrospective crystal-ball gazing" feared by the dissent in *Frye*.[188]

Having a database of comparable plea bargains will be particularly important given the remedy proposed by the Court in *Lafler* for these types of violations. As the Court decided, the remedy to be considered by a trial court is to compare the resulting trial outcome with the plea offer, and make a determination of a fair offer based on those ranges, or, if that is not possible, to have the prosecutor reoffer an original plea.[189] However, as stated above,[190] there may be cases where a plea offer is not forthcoming due to attorney error. In these cases, the court would have no basis for comparison with an offer that was already available to the petitioner. In order to form a valid comparison to the likely outcome, using a database of pleas for similar crimes would be a good starting point.

One way that these databases could be set up is through the Court itself. The Court anticipates in *Frye* that trial courts may adopt measures to insure against frivolous claims. They suggest that the terms and processing of formal offers be documented so "what took place in the negotiation process becomes more clear."[191] In addition, the Court suggests that states may elect to follow rules that offers must be in writing, and that formal offers be made part of the record.[192] Assuming a state does follow these recommendations, it would be short work to create a collected record of these formal offers in writing. The Court, in its rulemaking capacity, promulgates the Federal Rules of Criminal Procedure,

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186 *Strickland*, 466 U.S. at 669.

187 *Frye*, 132 S. Ct. at 1410.

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

189 *Lafler* 132 S. Ct. at 1389.

190 *See* Part IV, *supra*.

191 *Frye*, 132 S. Ct. at 1408-09.

192 *Id.*

which many states copy in large part.[193] By using these rules to formalize the structure they have proposed, the Court could in fact encourage the creation of these sorts of records and allow courts to truly vindicate the rights of defendants hurt by poor plea-bargaining.[194]

B. *Showing Prejudice by Showing a Likely Acceptance of the Plea by Prosecutors and the Court*

Even though petitioner Frye had met the burden to show ineffective assistance of counsel, and had shown that he pled to a worse agreement than originally offered, the Court in *Frye* stated he must go further, and remanded his case to the state court to overcome two other hurdles to show prejudice, even though it was given that there was a lapsed offer.

First, Frye would have to show that if he had accepted the first plea offer, the prosecution would have adhered to the deal.[195] The Court remanded the case to the Missouri Court of Appeals to determine the answer to that question, but suggested that Frye would not be able to meet this burden. While states vary on whether prosecutors can withdraw a plea offer after it has been accepted, in Missouri, "it appears 'a plea offer once accepted by the defendant can be withdrawn without recourse' by the prosecution."[196] The Court stated that Frye would have to show that it was reasonably likely the prosecutor would not have withdrawn the original offer when he was subsequently arrested for driving with a suspended license.[197]

Even if Frye meets this burden, he has one last hurdle to overcome before the Court accepts a showing of prejudice. Petitioner has the further burden to show that the trial court would approve the arrangement. As the Court stated, "the Court of Appeals failed, however, to require Frye to show that the first plea offer, if accepted by Frye, would have been . . . accepted by the trial court."[198] Since "[t]he extent of the trial court's discretion in Mis-

193 Rules Enabling Act §2072(a), 28 U.S.C. §2072 (2006).

194 *See* Bibas, *supra* note 46, at 1152 (encouraging the Court to use the Federal Rules of Criminal Procedure to experiment with other changes in plea-bargaining procedure to encourage more transparency).

195 *Frye*, 132 S. Ct. at 1411.

196 *Id.*

197 *Id.*

198 *Id.*

souri to reject a plea agreement appears to be in some doubt,"[199] the court remanded the action to determine this state law question. Frye, and similarly situated petitioners, will have to show that there is a "reasonable probability the trial court would have accepted the plea."[200]

In placing this further burden on the petitioner to show the likelihood of the trial court accepting the plea, the Court does not recognize that most plea bargains are accepted by the trial court, although other courts have done so.[201] In the similar case of *People v. Curry*, the Illinois Supreme Court considered the State's argument that a trial judge is not bound by the terms of a plea bargain agreement and may in fact issue a different sentence.[202] However, the Illinois Court declined to impose the requirement on the petitioner, believing it to be at odds with the realities of the plea bargain process and unwise to require litigants to speculate about how a particular judge would have acted.[203] The Sixth Circuit, in a similar case of a petitioner convicted at trial after erroneous plea bargaining, found that because disapproval of plea bargain offers are so rare,[204] the burden of proving that the trial court would have *rejected* the offer should be on the State.

By declining to follow these courts' approaches, the Supreme Court has given with one hand, and taken away with the other. While they are now considering claims of ineffective plea-bargaining negotiation separate from trial or even subsequent plea agreements, they have made it difficult for petitioners that were the victims of ineffective assistance to show that this ineffective assistance was prejudicial.[205] This could limit the impact of the *Lafler* and *Frye* decisions in the future. How a petitioner could show whether a trial court judge would have accepted an offer as a way to determine actual prejudice, is left to another article.

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199 *Id.* (citing Frye v. State, 311 S.W. 3d at 360). *See also* Mo. Sup. Ct. Rule 24.02(d)(4)).

200 *Id.*

201 Turner v. Tennessee, 858 F.2d 1201, 1207 (1988).

202 687 N.E.2d 877 (Ill. 1997).

203 *Id.* at 890.

204 *Id.*; *see also* Commonwealth v. Napper, 385 A.2d 521, 524 (Pa. Super. Ct. 1978).

205 *See* Johnson v. U.S., 860 F.Supp.2d 663 (N.D. Iowa 2012) (continuing to ask for a lenient plea bargain even though circumstances had changed in the case was ineffective assistance, but no prejudice shown).

VI. CONCLUSION

While the Court in *Frye* and *Lafler* could have taken a dismissive view of pleas and plea-bargaining, relegating it to something outside of the purview of the courts, the Court continued the trend from *Padilla* and grappled with the reality that "ours is . . . a system of pleas . . . ."[206] In doing so, they invited lower courts to determine, on a case-by-case basis, the new standards for criminal defense counsel in negotiating these bargains. By bringing scrutiny to this process of negotiation, the Court has assured that it will change in the future.

This article provides some thoughts on how courts may determine these new standards for negotiating plea bargains, suggests possible new claims for ineffective assistance in the plea bargaining context, and observes that determining prejudice, even in the face of ineffective assistance, will be where much of the inquiry will lie. Given this reality, it would be better for defendants, defense counsel, and judges for there to be more transparency in plea bargains, with more information readily available in databases as standards for future bargains.

There is more scholarship to be done in this area. As lower courts work out the nuances of when plea bargaining is constitutionally ineffective through future litigation, we will see if the existing standards provide adequate guidance, or if courts will be required to determine their own guidelines. The ABA Standards themselves are likely to change as courts work out what is and what is not permissible over time.

These decisions could also impact the way attorneys work on plea bargains. Given the guidance from the Court, it is possible that states will be encouraged to make the system of pleas more formalistic, heeding the call to have formal offers in writing, available for future reference.[207] This, transparency, in turn, may also change the way that plea-bargaining is done, either in the way that attorneys are trained to bargain, or in the types of bargains they make. Hopefully also, some of the worst ills of plea-bargaining will be ameliorated as courts take a more watchful eye on defense counsel actions.

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206 *Frye*, 132 S. Ct. at 1408 (citations omitted).

207 *Id.* at 1409.

As all of these trends develop, future scholarship will continue to examine the "newly created constitutional field of plea-bargaining law."[208]

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[208] *Id.* at 1413 (Scalia, J., dissenting).