BURDEN OF THE BARGAIN: INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN THE ABSENCE OF A PLEA OFFER

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The modern criminal justice system in the United States is a "system of pleas." Plea bargains have largely supplanted trials as the primary method of resolving criminal proceedings in this country. Acknowledging their prevalence, the U.S. Supreme Court has held that the Sixth Amendment right to effective assistance of counsel extends to the plea-bargaining process. Thus, defendants may bring ineffective assistance of counsel (IAC) claims for alleged ineffectiveness during the plea-bargaining phase.

In two companion cases, Missouri v. Frye *and* Lafler v. Cooper*, the Court held that its two-pronged test for IAC, laid out in* Strickland v. Washington*, applies when attorney ineffectiveness prevents defendants from accepting favorable plea offers and results in unfavorable convictions at trial. In proving the second prong of* Strickland*—the prejudice prong—in such claims, the defendant must show a reasonable probability that, but for their defense counsel's ineffectiveness, the defendant, prosecution, and court all would have accepted the plea deal.*

Frye *and* Lafler *inevitably raised a related question: can defendants bring a successful IAC claim on the grounds that attorney ineffectiveness precluded the extension of a plea offer by the prosecution altogether? Circuit courts have answered this question in two ways. Some have imposed a threshold requirement that a plea offer precludes any such claims outright, while others have taken a more fact-dependent approach to the question and have allowed certain claims to proceed. This Note argues that the former approach is too strict and prevents defendants who have suffered prejudice from receiving relief, but it acknowledges the flaws raised by the latter approach. To mitigate those pitfalls, this Note proposes a burden-shifting framework that requires the prosecution to show that there is a "reasonable purpose" for its decision not to offer a plea. This proposal recognizes the centrality of plea bargaining in the modern criminal justice system while still*

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operating within the confines of existing IAC jurisprudence as it pertains to plea bargaining.

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INTRODUCTION

"[C]riminal justice today is for the most part a system of pleas, not a system of trials."[1] This statement, penned by former Justice Anthony

1. Lafler v. Cooper, 566 U.S. 156, 170 (2012).

Kennedy,[2] is frequently quoted in legal academic commentary on the modern criminal justice system in the United States,[3] and with good reason. Plea bargains have largely supplanted trials in criminal proceedings. Nearly 90 percent of federal criminal cases ended in guilty pleas in fiscal year 2022, whereas only 2.3 percent of such cases went to trial.[4] Studies suggest that the numbers are comparable in state courts.[5]

The role that pleas play in the criminal justice system raises questions about the right to effective counsel, guaranteed by the Sixth Amendment,[6] and the applicability of this right to the plea-bargaining process. In *Strickland v. Washington*,[7] the U.S. Supreme Court established a two-pronged test to evaluate ineffective assistance of counsel (IAC) claims: first, that "counsel's performance was deficient," and second, that said deficiency prejudiced the defendant "so . . . as to deprive [them] of a fair trial."[8] The Court has since extended the right to effective counsel to the plea-bargaining process,[9] holding that a defendant may bring IAC claims when their attorney's deficient performance resulted in conviction at trial, denying them the opportunity to accept a favorable plea offer.[10] To meet the second prong—the prejudice prong—of the *Strickland* standard in such claims, a defendant must show that there was a reasonable probability that they would have accepted the plea, that the prosecution would not have rescinded it, and that the court would not have rejected it.[11]

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2. *Id.* at 160, 170.

3. *See, e.g.*, Cynthia Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of* Lafler *and* Frye, 41 HASTINGS CONST. L.Q. 561, 574 (2014); John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 163 (2014); Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2179 (2013).

4. John Gramlich, *Fewer than 1% of Federal Criminal Defendants Were Acquitted in 2022*, PEW RSCH. CTR. (June 14, 2023), https://www.pewresearch.org/short-reads/2023/06/14/fewer-than-1-of-defendants-in-federal-criminal-cases-were-acquitted-in-2022/ [https://perma.cc/U4GZ-7WZR]. This number does not include criminal cases handled by magistrate judges and defendants who pleaded "no contest." *Id.*

5. One study estimated that, between 2012 and 2015, jury trial rates in California, Florida, Pennsylvania, and Texas ranged from 0.77 percent to 1.87 percent. Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, but Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does It Matter?*, JUDICATURE, Winter 2017, at 26, 32 app. 6.

6. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."); *see* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel.").

7. 466 U.S. 668 (1984).

8. *Id.* at 687.

9. Lafler v. Cooper, 566 U.S. 156, 162 (2012) ("Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process."); Padilla v. Kentucky, 559 U.S. 356, 373 (2010) ("[W]e have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.").

10. *See Lafler*, 566 U.S. at 166; Missouri v. Frye, 566 U.S. 134, 147–48 (2012). For the purposes of this Note, a "favorable" plea offer is one that results or would have resulted in a more lenient sentence than what the defendant received at trial.

11. *See Lafler*, 566 U.S. at 164.

But in applying the prejudice prong to claims in which defendants assert IAC because counsel failed to pursue a plea deal altogether, circuits have diverged over whether defendants can make this showing "without proof that the [g]overnment had put a plea offer on the table."[12] Some circuits have imposed a threshold requirement that defendants must have received a plea offer to show prejudice under *Strickland*.[13] Others have done away with any such requirement.[14] The latter circuits instead hold that it is sufficient for a defendant to show prejudice by establishing a reasonable probability that a plea offer was available but not extended due to attorney ineffectiveness, and then that the defendant, the prosecution, and the court would have accepted the offer.[15]

This Note attempts to resolve this disagreement—whether defendants can show prejudice under *Strickland* without receiving a formal plea offer—and craft an appropriate solution to this question within the confines of existing IAC jurisprudence.

Part I provides an overview of the current "system of pleas" that exists in the United States, as well as the evolution of the Court's approach to IAC claims concerning the plea-bargaining process. Part II discusses the diverging answers at which courts have arrived when weighing IAC claims that allege that defense counsel failed to negotiate a favorable plea deal altogether. Part III argues that defendants should be able to proceed with such IAC claims. It then proposes a solution that would attempt to minimize some of the hazards stemming from this approach—a burden-shifting framework that requires the prosecution to show that there was a "reasonable purpose" for its decision not to offer a plea.

I. *STRICKLAND* AND THE SYSTEM OF PLEAS

Plea bargaining unquestionably dominates the modern American criminal justice system.[16] Therefore, this Note begins with an overview of the plea-bargaining process and the Court's development of IAC jurisprudence pertaining to this process. Part I.A walks through the process of plea bargaining, from the prosecution's decision to charge (or not charge) the defendant, up to the defendant's entry of their guilty plea. Part I.B then discusses the general standard for IAC claims and its specific application to the plea-bargaining process.

A. The System of Pleas

Plea bargaining in the United States is not a monolith—it varies by jurisdiction and even within the same courthouse, as judges, prosecutors, and

12. Davis v. United States, 143 S. Ct. 647, 647 (2023) (Jackson, J., dissenting).
13. *See infra* Part II.A.
14. *See infra* Part II.B.
15. *See infra* Part II.B.
16. *See supra* notes 4–5 and accompanying text. Plea bargaining has been prevalent in the United States since the second half of the nineteenth century. *See* William Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. REV. 1435, 1441 (2020).

defense attorneys may have different practices and approaches.[17] Rather than attempting to cover all angles of plea bargaining, this section provides an overview of the system of pleas and factors relevant to the issue addressed in this Note.

Part I.A.1 defines pleas. Part I.A.2 describes the process of negotiating pleas and highlights two key aspects of the plea-bargaining process: (1) the power disparities between the prosecution and defense and (2) the lack of transparency in and oversight of the process. Part I.A.3 discusses the role that judges play in approving pleas and the limited authority that they otherwise have during the process.

1. Defining Plea Bargains

A plea bargain is essentially a conviction[18]—it involves the defendant's concession of their criminal liability.[19] By agreeing to a plea bargain, a defendant forgoes their right to have their guilt or innocence adjudged by a jury after a trial.[20] Thus, a plea bargain is a waiver of the defendant's Sixth Amendment right to trial by jury.[21]

In exchange for these and other concessions by the defendant, the State agrees to concessions of its own.[22] Plea bargaining broadly falls into three categories depending on the manner of the State's concessions, although bargains may include aspects from one or more of these categories: charge bargaining, sentence bargaining, and fact bargaining.[23] In charge bargaining, the State agrees to drop certain charges if the defendant agrees to plead guilty

17. THEA JOHNSON, AM. BAR ASS'N CRIM. JUST. SECTION, 2023 PLEA BARGAIN TASK FORCE REPORT 6 (2023), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf [https://perma.cc/HTF2-NN5Y].

18. Boykin v. Alabama, 395 U.S. 238, 242 (1969).

19. *See* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 3–4 (1979); William Ortman, *Plea Bargaining and Guilty Plea*, *in* ELGAR ENCYCLOPEDIA OF CRIME AND CRIMINAL JUSTICE (Pedro Caeiro, Sabine Gless, Valsamis Mitsilegas, Miguel João Costa, Janneke De Snaijer & Georgia Theodorakakou eds., forthcoming May 2024). This Note uses the terms "plea bargain," "plea offer," "plea deal," and "plea agreement" to generally refer to the same exchange of concessions defined herein.

20. *See Boykin*, 395 U.S. at 242; *see also* McMann v. Richardson, 397 U.S. 759, 766 (1970) (noting that guilty pleas involve both "a waiver of trial" and a waiver of the right to challenge evidence supporting the defendant's guilt).

21. *See Boykin*, 395 U.S. at 243. In addition to the constitutional right to trial by jury, the defendant also waives other constitutional rights when pleading guilty. *See id.* (noting that the defendant also waives the Fifth Amendment right against self-incrimination and the Sixth Amendment right to confront one's accusers); Ortman, *supra* note 19 (noting that pleading guilty waives a "panoply" of rights, including "the presumption of innocence, the right to confront witnesses, [and] the right not to testify").

22. *See* Ortman, *supra* note 19.

23. *See* JOHNSON, *supra* note 17, at 12; RAM SUBRAMANIAN, LÉON DIGARD, MELVIN WASHINGTON II & STEPHANIE SORAGE, VERA INST. JUST., IN THE SHADOWS: A REVIEW OF THE RESEARCH ON PLEA BARGAINING 2 (2020), https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf [https://perma.cc/4TYB-QQVH]. This is not an exhaustive list. For example, the parties may agree to a conditional plea, whereby the defendant enters a plea of guilty but retains the right to appeal certain determinations made during the pretrial phase. *See* 5 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 21.6(b) (4th ed. 2022).

to charges that carry less onerous sentences or lack mandatory sentences.[24] In sentence bargaining, the defendant may plead guilty in exchange for a recommendation of a sentence that is below the maximum.[25] In fact bargaining, the State and the defendant agree to omit certain facts that may expose the defendant to a more severe charge at sentencing.[26]

The attractiveness of plea bargains is obvious—they swiftly resolve cases and avoid the expensive and time-consuming process of trial, thereby reducing pressure on criminal dockets and allowing for better allocation of the state's limited resources.[27] Still, despite its prevalence, plea bargaining continues to be controversial,[28] with calls for significant reforms.[29] Criticisms have focused on the highly coercive nature of plea bargaining,[30] the potential for plea bargaining to "heighten the risk of inaccurate and unjust outcomes,"[31] the overall lack of transparency and regulation of the process,[32] and the role plea bargaining plays in eroding the public's faith in the integrity of the criminal justice system by undermining the adversarial process and by allowing misconduct by the state to go unchecked.[33] Commentators have also blamed plea bargaining for contributing to the current mass incarceration

24. *See* 5 LAFAVE ET AL., *supra* note 23, § 21.1(a); JOHNSON, *supra* note 17, at 12.

25. *See* Ortman, *supra* note 19; JOHNSON, *supra* note 17, at 12. Promises to reduce sentencing by the prosecution may be concrete reductions in sentencing or more general promises to seek a lenient sentence. *See* 5 LAFAVE ET AL., *supra* note 23, § 21.1(a). For more information on the informal and off-the-record nature of plea bargaining, see *infra* notes 73–78 and accompanying text.

26. *See* JOHNSON, *supra* note 17, at 12; SUBRAMANIAN ET AL., *supra* note 23, at 2.

27. *See* Santobello v. New York, 404 U.S. 257, 260 (1971) (calling plea bargaining "an essential component of the administration of justice" because without it, "the States and the Federal Government would need to multiply by many times the number of judges and court facilities" to deal with the increase in trials); Carissa Byrne Hessick, Jeffrey Bellin, Elana Fogel, Anjelica Hendricks, Erin Blondel & John Flynn, *Plea Bargains: Efficient or Unjust?*, 107 JUDICATURE, no. 1, 2023, at 50, 51 ("The vast and persistent use of pleas to decide huge case volumes has made the practice an engine of efficiency in the courts . . . ."); Jenia I. Turner, *Plea Bargaining*, *in* 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 73, 74 (Erik Luna ed., 2017) (noting the view that plea bargaining allows governments to allocate resources away from trials to "more valuable programs, such as probation, parole, and reentry").

28. *See, e.g.*, 5 LAFAVE ET AL., *supra* note 23, § 21.1(b) n.37 (collecting articles calling for the abolition of plea bargaining); Turner, *supra* note 27, at 75 ("[P]lea bargaining . . . remains highly controversial."); *see also* JOHNSON, *supra* note 17, at 6 (noting that the benefits of plea bargaining have come "at the cost of more fundamental values").

29. *See generally* JOHNSON, *supra* note 17 (detailing the findings of the American Bar Association's Criminal Justice Section's Plea Bargain Task Force and its recommendations for reforming plea bargaining).

30. *See, e.g.*, Turner, *supra* note 27, at 81–84 (discussing the coercive nature of plea bargains); *id.* at 81 n.43 (collecting articles discussing the coercive nature of plea bargains). *See generally* H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63 (2011).

31. *See* Turner, *supra* note 27, at 84. For further discussion on how plea bargaining increases the rate of wrongful convictions, see Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 ALB. L. REV. 919 (2016).

32. *See generally* Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973 (2021) (discussing the lack of transparency and oversight in plea bargaining and the resulting adverse consequences).

33. *See* JOHNSON, *supra* note 17, at 6–7.

crisis[34] and to the exacerbation of systemic inequalities within the criminal justice system.[35] For better or for worse, however, plea bargaining remains the dominant system of resolving criminal cases in the modern criminal justice system.[36]

2. The Imbalanced Process of "Negotiating" Plea Bargains

The process leading to a plea bargain is called plea bargaining or plea negotiation.[37] But these terms are misleading for two reasons. First, the nature of plea bargaining is highly asymmetrical. Prosecutors typically enter the process in a much stronger position than the defense, resulting in little, if any, meaningful negotiation.[38] Second, plea bargaining frequently takes place "in the shadows"[39]—in a system that is largely unregulated, informal, and opaque, further fueling power disparities between the prosecution and defense in plea bargaining.[40]

To understand the power imbalances in plea bargaining, it is important to discuss a key feature of the criminal justice system: prosecutorial discretion. Prosecutorial discretion is the near-absolute authority of the prosecutor to decide not only whether a case should proceed to trial, but whether and which charges should be brought in the first place.[41] This discretion extends from

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34. *See, e.g.*, Albert W. Alschuler, Lafler *and* Frye*: Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 705 (2013) ("By lowering the price of imposing criminal punishment, plea bargaining gave America more of it."); Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 FORDHAM L. REV. 1999, 2004 (2022) ("Plea bargaining lies at the root of American mass incarceration."). For further discussion on this topic, see Albert W. Alschuler, *Plea Bargaining and Mass Incarceration*, 76 N.Y.U. ANN. SURV. AM. L. 205 (2021).

35. *See, e.g.*, JOHNSON, *supra* note 17, at 7 (reporting findings indicating that "similarly situated defendants of color fare worse than white defendants" throughout the plea process); SUBRAMANIAN ET AL., *supra* note 23, at 24, 26–31 (discussing inequalities within plea bargaining that result from race, gender, and age). For an empirical analysis of racial disparities in plea bargaining, see Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187 (2018).

36. *See supra* notes 4–5 and accompanying text.

37. *See* WILLIAM J. CORNELIUS, SWIFT AND SURE: BRINGING CERTAINTY AND FINALITY TO CRIMINAL PUNISHMENTS 89 (1997).

38. *See* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2132 (1998) (describing the use of the term "plea bargain" as "misleading" because "[t]he frequent disparity of power between the prosecutor and the defendant" results in "virtually unilateral power" by the prosecutor "to inflict pain on the defendant").

39. Lahny R. Silva, *Right to Counsel and Plea Bargaining:* Gideon*'s Legacy Continues*, 99 IOWA L. REV. 2219, 2231 (2014). *See generally* SUBRAMANIAN ET AL., *supra* note 23.

40. *See supra* note 32 and accompanying text. *But see* Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303 (2018) (arguing, contrary to conventional scholarship, that state law, court rules and statutes, and commonplace procedures act as a "hidden law" to regulate plea bargaining).

41. *See* United States v. Batchelder, 442 U.S. 114, 124 (1979) ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion."); *see also* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1044 (2006) ("The Court allows prosecutors almost unlimited discretion to make charging decisions.").

the decision to charge up to the defendant's entry of a guilty plea before the court,[42] giving prosecutors authority to withdraw pleas before their entry.[43]

Prosecutorial discretion stems from the separation of powers doctrine, which treats the state's prosecutorial decision-making power as the sole province of the Executive Branch, "inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'"[44]

An important corollary to prosecutorial discretion is the lack of any constitutional right to a plea bargain, despite their prevalence.[45] The lack of any such right stems from the fact that "the prosecutor need not [offer a plea] if he prefers to go to trial."[46] Thus, the lack of a right to a plea bargain—or to engage in bargaining at all—is a powerful illustration of unchecked prosecutorial discretion.[47]

To be sure, there are other factors that influence prosecutors' decisions to offer (or not offer) plea deals. For example, self-interest—driven by desires to avoid lengthy trials,[48] protect conviction rates,[49] or bolster professional and political reputations[50]—may push prosecutors toward plea bargains. But prosecutorial discretion undoubtedly incentivizes prosecutors to pursue plea bargaining by allowing them to employ a variety of coercive tactics to meet these ends, including offers with short expiry dates,[51] "take-it-or-leave-it" offers,[52] the threat of the death penalty,[53] overcharging,[54] the use of trial

42. *See* 5 LAFAVE ET AL., *supra* note 23, § 21.2(f).

43. *See id.*; Annotation, *Right of Prosecutor to Withdraw from Plea Bargain Prior to Entry of Plea*, 16 A.L.R.4th 1089, § 2(a) (1982) ("[I]n a majority of . . . cases . . . courts have held that a prosecutor does have a right to withdraw from a plea bargain prior to the entry of a guilty plea . . . .").

44. Heckler v. Chaney, 470 U.S. 821, 832 (1985) (quoting U.S. CONST. art. II, § 3); *see also* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 970 (2009) ("The separation of powers . . . forbids judicial interference with prosecutorial discretion to decline to file charges.").

45. *See supra* notes 4–5 and accompanying text.

46. Weatherford v. Bursey, 429 U.S. 545, 561 (1977); *see also* McCleskey v. Kemp, 481 U.S. 279, 312 (1987) ("[A] prosecutor can decline to charge, offer a plea bargain, or decline to seek a death sentence in any particular case." (footnote omitted)).

47. *See* Bibas, *supra* note 44, at 960 ("No government official in America has as much unreviewable power and discretion as the prosecutor.").

48. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2470–71 (2004).

49. *See id.* at 2471–72.

50. *See id.* at 2472.

51. *See* Cynthia Alkon, *Hard Bargaining in Plea Bargaining: When Do Prosecutors Cross the Line?*, 17 NEV. L.J. 401, 407 (2017).

52. *See id.*

53. *See id.*

54. *See* Caldwell, *supra* note 30, at 84 (noting the view that "overcharging sets the stage for coercive pleas by virtue of the very leverage unduly obtained"). Overcharging is the practice of initially bringing additional or more severe charges than the prosecutor actually intends to pursue to "incentivize the defendant to plead guilty to another charge or charges." Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701, 704–05 (2014).

penalties,[55] and the use of pretrial detention.[56] Such tactics leave defendants with little choice but to accept what is on the table, even if the case against them is weak, making plea bargaining an attractive tool for prosecutors.[57]

However, prosecutorial discretion is not the only factor that exacerbates the disparities between the prosecution and defense in the plea-bargaining process. In fact, a key contributor to the lopsided process is the current crisis in which the indigent defense system finds itself.[58] The indigent defense system[59] is understaffed, underfunded, and overworked.[60] Those working in indigent defense manage excessive caseloads,[61] face significant resource constraints,[62] and often have mere minutes to meet with their clients.[63] Furthermore, procedural rules create informational asymmetry between the

55. *See* Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL'Y REV. 61, 77 (2015) (noting that due to trial penalties, or the difference between the sentence offered in a plea bargain and the sentence pursued after trial, "[e]ven defendants who have potential defenses or who are innocent may plead guilty" because they choose to "accept a relatively certain bargained-for outcome rather than risk a devastating post-trial sentence").

56. *See* Nick Petersen, *Do Detainees Plead Guilty Faster?: A Survival Analysis of Pretrial Detention and the Timing of Guilty Pleas*, 31 CRIM. JUST. POL'Y REV. 1015, 1027 (2020) (describing pretrial detention as a "prosecutorial hammer in plea negotiations" that "represents a form of structural coercion").

57. *See* Alkon, *supra* note 51, at 406 (stating that the use of these "hard bargaining" tactics by prosecutors "make[s] further negotiation nearly impossible"); Bibas, *supra* note 48, at 2473 ("Prosecutors can discourage defendants in strong cases from pleading guilty by refusing to make any concessions, while they can make irresistible offers in weak cases.").

58. *See, e.g.*, Silva, *supra* note 39, at 2230–31.

59. Data suggests that the majority of criminal defendants in the U.S. are indigent. *See* CAROLINE WOLF HARLOW, BUREAU JUST. STAT., DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), https://bjs.ojp.gov/content/pub/pdf/dccc.pdf [https://perma.cc/9GWA-ENKC] (finding that "approximately 66% of felony Federal defendants and 82% of felony defendants in large State courts were represented by public defenders or assigned counsel").

60. *See, e.g.*, Silva, *supra* note 39, at 2230–31. The current indigent defense crisis has been well documented across the country. *See, e.g.*, Phil McCausland, *Public Defenders Nationwide Say They're Overworked and Underfunded*, NBC NEWS (Dec. 11, 2017, 5:22 AM), https://www.nbcnews.com/news/us-news/public-defenders-nationwide-say-they-re-overworked-underfunded-n828111 [https://perma.cc/44ZG-S5R6]. For an analysis of the current state of the indigent defense system in the United States, see NICHOLAS M. PACE, MALIA N. BRINK, CYNTHIA G. LEE & STEPHEN F. HANLON, RAND CORP., NATIONAL PUBLIC DEFENSE WORKLOAD STUDY (2023), https://www.rand.org/content/dam/rand/pubs/research_reports/RRA2500/RRA2559-1/RAND_RRA2559-1.pdf [https://perma.cc/6P3R-KP9H].

61. *See, e.g.*, Richard A. Oppel Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html [https://perma.cc/R8VU-QKDA] (discussing one public defender in Louisiana who had 194 active felony cases at once).

62. *See, e.g.*, Sarah Martinson, *Public Defender Shortages in West Are Nationwide Norm*, LAW360 (Jan. 23, 2022, 8:02 PM), https://www.law360.com/articles/1457317/public-defender-shortages-in-west-are-nationwide-norm [https://perma.cc/7JAW-3FTV] (citing American Bar Association reports that found that New Mexico and Oregon face shortages of 600 and 1,300 full-time public defenders, respectively).

63. *See, e.g.*, Jessica Mador, *A Public Defender's Day: 12 Minutes Per Client*, MINN. PUB. RADIO NEWS (Nov. 29, 2010, 3:42 PM), https://www.mprnews.org/story/2010/11/29/public-defenders [https://perma.cc/687C-AMFY] (reporting on one Minnesota public defender who could only spend about twelve minutes on each case in a given day); Oppel & Patel, *supra* note 61 (noting that the "lucky" clients of one public defender got five minutes of his time, whereas "[o]thers might have gotten a minute").

prosecution and the defense.[64] This "meet 'em and plead 'em"[65] system of indigent defense hampers defense attorneys' ability to adequately investigate their clients' cases, further fueling the power imbalance between the prosecution and defense and pressuring clients into accepting guilty pleas.[66]

The nature of the attorney-client relationship also adds to the pressures that defense attorneys face during plea negotiations. A defense attorney's priority is to vigorously defend their client's innocence or to "limit their loss of freedom."[67] When advising a client on the best course of action, defense attorneys may also be required to consider certain collateral consequences that may flow from a decision to go to trial or plead guilty.[68] Faced with resource constraints and coercive negotiating tactics by the prosecution, defense attorneys often find themselves at odds with a system that asks them to robustly advocate for their clients while simultaneously pressuring them to accept pleas.[69] Conversely, because clients have "ultimate authority" over "certain fundamental decisions," including whether to enter a guilty plea,[70] defense attorneys may have clients who refuse to follow their advice by declining a plea offer and proceeding to trial despite counseling to the contrary.[71] Attorneys in these circumstances face a different challenge; they must convince clients entrenched in their decisions to change course and accept a plea, rather than to proceed with a trial that they will likely lose and

64. *See* Turner, *supra* note 27, at 84–85 (discussing rules that limit defense counsel's ability to obtain information about the defendant's case).

65. This is a common term used by public defenders "for meeting clients just a few minutes or hours before their hearings and then encouraging them to admit guilt just to get rid of the case." Jaeah Lee, Hannah Levintova & Brett Brownell, *Charts: Why You're in Deep Trouble If You Can't Afford a Lawyer*, MOTHER JONES (May 6, 2013), https://www.motherjones.com/politics/2013/05/public-defenders-gideon-supreme-court-charts/ [https://perma.cc/XMU4-4TT6].

66. *See* Bibas, *supra* note 48, at 2479–80; *see also* Turner, *supra* note 27, at 85 ("When defense attorneys carry heavy caseloads . . . they have an incentive to settle cases quickly . . . ."); Lisa C. Wood, Daniel T. Goyette & Geoffrey T. Burkhart, *Meet-and-Plead: The Inevitable Consequence of Crushing Defender Workloads*, LITIG., Winter 2016, at 20, 23 (noting that "excessive workloads diminish the quality of legal representation" and "incentivize guilty pleas").

67. Abbe Smith, *Progressive Prosecution or Zealous Public Defense?: The Choice for Law Students Concerned About Our Flawed Criminal Legal System*, 60 AM. CRIM. L. REV. 1517, 1525 (2023).

68. *See* Padilla v. Kentucky, 559 U.S. 356, 366, 373–74 (2010) (holding that defense attorneys must advise clients as to potential deportation resulting from guilty pleas); *see also* Joanmarie Ilaria Davoli, *You Have the Right to An Attorney; If You Cannot Afford One, Then the Government Will Underpay an Overworked Attorney Who Must Also Be an Expert in Psychiatry and Immigration Law*, 2012 MICH. ST. L. REV. 1149, 1175–76 (discussing the added pressures on defense attorneys due to the requirement to consider adverse immigration consequences when advising clients).

69. *See* Smith, *supra* note 67, at 1534.

70. Jones v. Barnes, 463 U.S. 745, 751 (1983); *see also* Wainwright v. Sykes, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring).

71. *See* Abbe Smith, *"I Ain't Takin' No Plea": The Challenges in Counseling Young People Facing Serious Time*, 60 RUTGERS L. REV. 11, 13–18 (2007) (discussing the struggles faced by one public defender attempting to convince her client to accept a lenient plea deal and forgo trial).

suffer harsher consequences due to the use of coercive tactics like trial penalties.[72]

To the extent that there are any negotiations between the prosecution and defense, discussions typically take place in private and off the record.[73] Often, the only record of plea bargaining is the resulting agreement that the parties publicly disclose, and even then, such agreements may not paint a complete picture of negotiations.[74] Furthermore, prosecutorial discretion results in minimal oversight, judicial or otherwise, creating a largely unregulated system of bargaining and negotiation.[75] The opaque, informal, and off-the-record nature of plea bargaining enables coercive prosecutorial tactics,[76] lends itself to abuse,[77] and undermines the fairness and legitimacy of the adversarial process.[78]

Thus, although some scholars argue that plea agreements are the outcomes of a "market" system in which parties negotiate based on expected trial

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72. *See id.* at 23–24.

73. *See* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 923 (2006) ("Plea bargaining usually occurs in conference rooms, courtroom hallways, or on private telephone calls instead of open court."); Davoli, *supra* note 68, at 1150 ("Defense counsel negotiate in courtroom stairwells, across cafeteria tables, in holding cells, and in hallways."); Turner, *supra* note 32, at 978 (noting that plea bargaining "remains informal and obscure," and that "negotiations . . . remain off the record and closed to the public").

74. *See* Turner, *supra* note 32, at 979–80. The Court has urged parties to take steps to ensure that more of the plea-bargaining process is on the record. *See* Missouri v. Frye, 566 U.S. 134, 146 (2012).

75. *See* FED. R. CRIM. P. 11(c)(1) (expressly prohibiting court involvement in plea negotiations); Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225, 1231 (2016) ("American plea bargaining is highly—probably uniquely—'deregulated.'"); Turner, *supra* note 27, at 76 ("[C]ourts and legislatures have taken a largely hands-off approach to plea bargaining, imposing few constraints on its operation."); *id.* at 79 ("[Courts] have interpreted separation-of-powers principles to prevent judges from interfering with prosecutors' decisions to reduce or dismiss charges."). *But see, e.g.*, 5 LAFAVE ET AL., *supra* note 23, § 21.3(d) n.287 (collecting cases from various jurisdictions that allow "limited" judicial involvement in plea negotiations); Brown, *supra*, at 1250–53 (discussing state rules that allow for some judicial oversight of prosecutorial decisions). *See generally* Bibas, *supra* note 44, at 965–75 (discussing the lack of legislative and judicial oversight of prosecutorial decision-making and critiquing proposals calling for more of such oversight).

76. *See* Turner, *supra* note 32, at 976 (noting that the "secrecy" of plea bargaining "prevents adequate oversight" of coercive tactics).

77. *See* Bibas, *supra* note 44, at 961 (arguing that "[p]rosecutors have great leeway to abuse their powers and indulge their self-interests, biases, or arbitrariness" because plea bargaining is a "low-visibility process").

78. *See* Turner, *supra* note 32, at 977 (arguing that increased judicial oversight would reduce the risk of "coercive practices, disparate treatment, and untruthful plea bargains"); *cf. id.* at 996 (arguing that off-the-record fact bargaining "conflicts with a central purpose of the criminal process—to seek the truth about the case").

outcomes,[79] this belief is, as Judge Jed S. Rakoff stated, "a total myth."[80] The reality of plea bargaining is that it is a deeply unbalanced system—one hidden from any real oversight and driven by the largely unchecked discretion of the prosecutor, leaving little room for any real negotiation.[81] Plea bargains therefore are not "voluntary contractual arrangement[s] between two relatively equal parties," but instead resemble "contract[s] of adhesion," with one party—the prosecution—dictating their terms.[82]

3. Judicial Approval of Plea Bargains

Reaching an agreement is not the final step of the plea-bargaining process. Although judges typically have limited involvement during actual negotiations,[83] they must approve plea agreements because defendants have no right to have them accepted by the court.[84]

In federal court, for example, judges have the authority to accept or reject plea agreements and to follow or not follow any sentencing recommendations.[85] Because plea bargains involve the waiver of various constitutional rights,[86] judges have an obligation to ensure that they are made knowingly, voluntarily, and intelligently.[87] Procedural rules and statutes may also require judges to ensure a plea's factual basis.[88] Many jurisdictions also give judges the "inherent authority to reject guilty pleas as inconsistent

79. *See, e.g.*, Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975 (1992); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 308–09 (1983); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1959 (1992).

80. Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/ [https://perma.cc/J6UX-QBVQ].

81. *See* Brown, *supra* note 75, at 1230–31 ("As is true for parties in the private market realm, parties in criminal litigation are free to negotiate and employ any tactics that ordinary criminal law does not prohibit . . . . But as in the market realm, nearly anything else goes. In particular, prosecutors can act strategically and add charges solely if a defendant insists on trial, and they can pressure defendants by leveraging circumstances such as limited defense resources [and] pretrial detention that disrupts work and family obligations . . . ." (footnotes omitted)).

82. Rakoff, *supra* note 80.

83. *See supra* note 75 and accompanying text.

84. Lynch v. Overholser, 369 U.S. 705, 719 (1962) (holding that there is no "absolute right" to have a plea bargain accepted by the court); Darryl Brown, *The Judicial Role in Criminal Charging and Plea Bargaining*, 46 HOFSTRA L. REV. 63, 77 (2018) ("[J]udges retain the final word on whether to accept plea bargain[] proposals offered by the parties.").

85. *See* FED. R. CRIM. P. 11(c)(3)(A)–(B).

86. *See supra* note 21 and accompanying text.

87. *See* Brady v. United States, 397 U.S. 742, 748 (1970).

88. *See, e.g.*, FED. R. CRIM. P. 11(b)(3); CAL. PENAL CODE § 1192.5(c) (West 2023); FLA. R. CRIM. P. 3.170(k); N.J. CT. R. 7:6-2(a)(1); WYO. R. CRIM. P. 11(f). *But see, e.g.*, 5 LAFAVE ET AL., *supra* note 23, § 21.4(f) n.242 (collecting cases holding that determining the factual basis for a plea is not constitutionally required). Courts may also accept an "*Alford* plea," in which the defendant affirms their innocence, as long as there is sufficient factual basis for their guilt. *See* North Carolina v. Alford, 400 U.S. 25, 37–39 (1970).

with the public interest,"[89] although there are limits to this power.[90] Given the limited authority of judicial discretion when reviewing pleas, it is not surprising that, in practice, its use is rare.[91]

With a basic understanding of the system of pleas, this Note now turns to another question: what happens when defense counsel fails to provide effective assistance of counsel during the plea-bargaining process?

B. Ineffective Assistance of Counsel and Plea Bargaining

The Sixth Amendment guarantees that defendants in criminal proceedings have the right to "the Assistance of Counsel" in their defense.[92] The Supreme Court has held that the federal right to counsel naturally includes the right to *effective assistance* of counsel.[93] The Court began developing this right in the first half of the twentieth century.[94] Then, in 1963, the Court ruled in *Gideon v. Wainwright*[95] that the Sixth Amendment guarantees all criminal defendants, including indigent defendants, the right to counsel.[96] Although the majority opinion in *Gideon* did not expressly discuss the right to effective counsel, it recognized that criminal trials could not be fair without defendants availing themselves of counsel to provide specialized knowledge and advice during the course of their trials.[97] However, it was not until the 1984 *Strickland v. Washington* decision that the Court articulated the standard for "actual ineffectiveness"—attorney performance that is constitutionally inadequate.[98]

Part I.B.1 discusses the test the Court established in *Strickland* for assessing IAC claims. Part I.B.2 then turns to the Court's application of the

89. Brown, *supra* note 84, at 80.

90. *See id.* at 82–85; *see also* United States v. Ammidown, 497 F.2d 615, 622 (D.C. Cir. 1973).

91. *See* Brown, *supra* note 84, at 80 ("As a matter of custom, judges tend to defer to dispositions that both parties endorse."). A 1985 survey found that judges rejected guilty pleas in only 2 percent of cases. WILLIAM F. MCDONALD, NAT'L INST. JUST., PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES 135 (1985), https://www.ojp.gov/pdffiles1/Digitization/98903NCJRS.pdf [https://perma.cc/KCG8-MDQA]. Legal scholarship and reporting generally describe judicial rejections of plea bargains as rare. *E.g.*, McConkie, *supra* note 55, at 105; Jonathan Allen, *In Rare Move, U.S. Judge Rejects Plea Agreement by Ahmaud Arbery's Murderers*, REUTERS (Jan. 31, 2022, 8:47 PM), https://www.reuters.com/world/us/us-prosecutors-reach-hate-crime-plea-deals-ahmaud-arbery-murder-court-filings-2022-01-31/ [https://perma.cc/SH5M-4D3R]. Furthermore, one former federal judge described the voluntariness inquiry as "a Kabuki ritual." Nancy Gertner, Bruce Brower & Paul Shechtman, "*Why the Innocent Plead Guilty": An Exchange*, N.Y. REV. BOOKS (Jan. 8, 2015), https://www.nybooks.com/articles/2015/01/08/why-innocent-plead-guilty-exchange/ [https://perma.cc/9JAZ-NRTR].

92. U.S. CONST. amend. VI.

93. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

94. *See* Powell v. Alabama, 287 U.S. 45, 71 (1932) (holding that the trial court's failure to provide capital defendants with "effective appointment of counsel" violated due process); *see also* Glasser v. United States, 315 U.S. 60, 76 (1942) (holding that the Sixth Amendment secured the right to effective assistance of counsel).

95. 372 U.S. 335 (1963).

96. *See id.* at 344–45.

97. *See id.* (citing *Powell*, 287 U.S. at 68–69).

98. *See* Strickland v. Washington, 466 U.S. 668, 686 (1984).

Strickland test to IAC claims that alleged that attorney ineffectiveness resulted in the acceptance of an unfavorable plea deal. Part I.B.3 examines two cases in which the Court significantly expanded the scope of IAC doctrine by applying *Strickland* to the plea-bargaining process itself.

1. *Strickland*'s Two-Pronged Test

Over the course of ten days in 1976, David Leroy Washington committed three particularly brutal murders in Florida.[99] Against the advice of his experienced court-appointed defense counsel, Washington pleaded guilty to all charges stemming from the three killings.[100] At his sentencing hearing, the judge sentenced Washington to death for three murder counts.[101] During this hearing, Washington's defense counsel allegedly failed to properly investigate and develop mitigating character evidence.[102]

After being denied relief in Florida courts, Washington sought habeas corpus relief in federal court.[103] His claim eventually made it to the Supreme Court, which took the opportunity to set the standard for actual ineffectiveness claims.[104] Rooting its decision in the principle that the purpose of the right to counsel, and by extension the right to *effective assistance* of counsel, is to ensure a fair trial through adversarial testing of the prosecution's case,[105] the Court laid out a two-pronged test to determine whether or not defense counsel's performance was actually effective.[106]

The first prong asks whether counsel's performance was deficient to the point that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[107] To meet the first prong of the *Strickland* test, the defendant "must show that counsel's representation fell below an objective standard of reasonableness."[108] Any judicial inquiry into counsel's performance "must be highly deferential" to counsel's judgment.[109]

The second prong asks whether said deficient performance prejudiced the defendant.[110] Meeting this prong requires showing that counsel's performance was so deficient that it effectively "deprive[d] the defendant of

99. Washington v. Strickland, 693 F.2d 1243, 1246–47 (5th Cir. Unit B 1982) (en banc), *rev'd*, 466 U.S. 668 (1984).
100. *Id.* at 1247.
101. *Id.*
102. *Id.*
103. *See id.* at 1247–48.
104. *See* Strickland v. Washington, 466 U.S. 668, 684 (1984).
105. *See id.* at 685.
106. *See id.* at 687. The Court contrasted "actual ineffectiveness" with other types of ineffectiveness: actual or constructive denial of counsel altogether and state interference with counsel's ability to render assistance to a defendant. *See id.* at 683.
107. *Id.* at 687.
108. *Id.* at 688.
109. *Id.* at 689; *see also* Jenny Roberts, *Proving Prejudice, Post*-Padilla, 54 HOW. L.J. 693, 700 (2011).
110. *Strickland*, 466 U.S. at 687.

a fair trial."[111] Therefore, a defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," where a reasonable probability is one "sufficient to undermine confidence in the outcome."[112]

The necessity of showing prejudice stemmed from the Court's view of the purpose of the Sixth Amendment's guarantee of counsel—to safeguard adversarial testing in a criminal proceeding so as to ensure that the court can reasonably rely on its outcome.[113] Thus, deficient performance that is merely unreasonable is not sufficient to show IAC; it must be so ineffective as to prejudice the defendant.[114] The Court rejected a more lenient test that simply asked whether counsel's deficiency had any "conceivable effect" on the outcome, as well as a more stringent test that asked whether it was more likely than not that counsel's deficient performance affected the case's outcome.[115] The Court believed that its middle ground approach—the "reasonable probability" test—struck a proper balance.[116] It provided a workable standard, which the Court believed the conceivable effect test failed to do,[117] but it still respected some degree of finality in criminal proceedings without subjecting IAC claims to a prohibitively high standard.[118]

Ultimately, the *Strickland* Court declined to "establish mechanical rules" for IAC claims.[119] Instead, it emphasized the need for the *Strickland* analysis to focus on the "fundamental fairness of the proceeding"—that is, "whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results."[120]

Writing in dissent, Justice Thurgood Marshall took issue with various aspects of the majority's holding, including both prongs of the newly formulated *Strickland* analysis.[121] His critiques of the prejudice prong were particularly pointed, as he predicted that it would prove to be a near-insurmountable hurdle for many defendants.[122]

Justice Marshall noted the inherent difficulty that defendants face in showing that the outcome of their trial would have been different absent

111. *Id.*
112. *Id.* at 694.
113. *See id.* at 691–92.
114. *See id.* at 692.
115. *See id.* at 693–94.
116. *See id.* at 693.
117. *See id.*
118. *See id.* at 694.
119. *Id.* at 696.
120. *Id.*
121. *See id.* at 707 (Marshall, J., dissenting). Justice Marshall took issue with the majority's "objective standard of reasonableness" approach to the deficient performance prong, calling it "so malleable that, in practice, it will either have no grip at all or will yield excessive variation." *Id.*
122. *See id.* at 710.

defense counsel's deficient performance.[123] Courts undertaking this sort of hindsight review would struggle to determine whether "[s]eemingly impregnable cases" would have survived adversarial testing "by a shrewd, well-prepared lawyer."[124] Furthermore, any evidence of the defendant's injury "may be missing from the record *precisely because of the incompetence of defense counsel*."[125] In other words, vigorous advocacy can change the outcome of a case,[126] but the prejudice analysis may fail to account for that fact.

But, Justice Marshall's critique of the majority's approach to prejudice also reflected concerns that the *Strickland* test undermined the Sixth Amendment right to effective assistance of counsel.[127] To Justice Marshall, the prejudice prong reflected the majority's view that the Sixth Amendment's guarantee of effective assistance of counsel was "to reduce the chance that innocent persons will be convicted," while still upholding convictions of "manifestly guilty defendant[s]" despite their "manifestly ineffective attorney[s]."[128] Justice Marshall disagreed with this view, believing that the Sixth Amendment guarantees that all defendants receive a "fundamentally fair" proceeding in which their "interests are vigorously and conscientiously advocated by an able lawyer."[129] He therefore argued that a defendant need not show prejudice in an IAC claim because the defense attorney's mere failure to put the prosecution's case through robust adversarial testing is a constitutional violation in and of itself.[130] At bottom, Justice Marshall viewed the prejudice prong as emphasizing the fundamental fairness of the result rather than the fundamental fairness of the criminal process itself—a fairness that the Sixth Amendment's right to counsel and, by extension the right to effective assistance of counsel, guarantees for all criminal defendants, regardless of their guilt or innocence.[131]

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123. *See id.* ("[I]t is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent."); *see also* Justin Murray, *Prejudice-Based Rights in Criminal Procedure*, 168 U. PA. L. REV. 277, 306–07 (2020) (arguing that *Strickland* guarantees neither a fair outcome nor a fair trial because "[i]t is immensely difficult to predict outcome-determinative prejudice ex ante," making post-conviction review difficult).

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

125. *Id.* (emphasis added).

126. *See* Todd A. Berger, *After* Frye *and* Lafler*: The Constitutional Right to Defense Counsel Who Plea Bargains*, 38 AM. J. TRIAL ADVOC. 121, 155 (2014).

127. *See Strickland*, 466 U.S. at 711 (Marshall, J., dissenting).

128. *Id.*

129. *Id.*

130. *See id.* at 711–12.

131. *See id.* Other scholars have agreed. *See, e.g.*, Barbara Allen Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1166 (1982) ("A standard that results in no reversal for ineffective assistance in cases of 'overwhelming guilt' does not fulfill the basic requirement of a working adversary model—a fair contest between equals."); Richard L. Gabriel, *The* Strickland *Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1271 (1986) ("[A]n appellate court's determination that a defendant is 'clearly guilty' cannot act as a substitute for a trial that has failed to establish guilt through fair procedures."); Patrick S. Metze, *Speaking Truth to Power: The Obligation of the*

Following in Justice Marshall's footsteps, legal commentators have long criticized the *Strickland* test, believing that it sets an exceptionally high bar that results in the failure of most IAC claims.[132] Critics have taken aim at both prongs,[133] with commentators lamenting that the prejudice prong establishes a prohibitively high standard for defendants.[134] Defendants face further difficulty in meeting the *Strickland* test because courts may dispose of IAC claims for failing one prong without even assessing the other.[135] Still, despite extensive criticism, *Strickland*'s two-pronged test remains the current framework through which courts evaluate IAC claims.[136]

2. *Hill v. Lockhart*: Extending *Strickland* to Plea Bargains

Given the prevalence of plea bargaining in the United States by the 1980s,[137] it is perhaps not surprising that just a year after its decision in *Strickland*, the Court faced the question of whether the right to effective assistance of counsel applied to defendants who accepted unfavorable guilty pleas. In *Hill v. Lockhart*,[138] the Court answered this question affirmatively.[139]

Courts to Enforce the Right to Counsel at Trial, 45 TEX. TECH L. REV. 163, 218 (2012) (arguing that the prejudice prong has made the *Strickland* test no more than "an example of pure results-oriented appellate oversight").

132. *See, e.g.*, DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 78–79 (1999) ("The *Strickland* standard has proved virtually impossible to meet."); Eve Brensike Primus, *Disaggregating Ineffective Assistance of Counsel: Four Forms of Constitutional Ineffectiveness*, 72 STAN. L. REV. 1581, 1584 n.7 (2020) (listing articles that criticize *Strickland* as an unsurmountable obstacle for most IAC claims); NAT'L RIGHT TO COUNS. COMM., CONST. PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 40–41 (2009), https://www.opensocietyfoundations.org/uploads/52165620-3308-4802-9a58-ce8b4c00a31d/justice_20090511.pdf [https://perma.cc/8ANA-KNEJ].

133. *See, e.g.*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1862 (1994) (noting that, in applying *Strickland*'s deficient performance prong, "courts indulge in presumptions and assumptions that have no relation to the reality of legal representation for the poor, particularly in capital cases"); Primus, *supra* note 132, at 1584–85 (noting that courts often view "defense attorney actions that might seem to reflect attorney incompetence" as "deliberate, strategic choices by counsel").

134. *See, e.g.*, Berger, *supra* note 126, at 153 (describing Justice Marshall's prediction in his *Strickland* dissent—that the prejudice prong would be insurmountable for most defendants—as "prophetic" and noting that most IAC claims fail on the prejudice prong); Cecelia Klingele, *Vindicating the Right to Counsel*, 25 FED. SENT'G REP. 87, 87 (2012) ("*Strickland*'s prejudice prong has proven to be a formidable obstacle in vindicating the right to counsel."); Metze, *supra* note 131, at 218 (calling the prejudice prong "meaningless" and arguing that it "create[ed] a vast amount of litigation that only on rare occasions finds relief").

135. *See Strickland*, 466 U.S. at 697; *see also* William S. Geimer, *A Decade of* Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 120 (1995) (questioning the logic of having the performance prong "when reviewing courts have been invited to skip [it] and move right to the issue . . . of prejudice").

136. *See, e.g.*, Shinn v. Kayer, 141 S. Ct. 517, 522–23 (2020).

137. *See supra* note 16 and accompanying text.

138. 474 U.S. 52 (1985).

139. *See id.* at 58–59.

William Lloyd Hill pleaded guilty to murder and theft charges in Arkansas.[140] He sought post-conviction relief, claiming that he received IAC because his attorney failed to properly apprise him of the date of his parole eligibility.[141] Hill claimed that his attorney erroneously advised him that he would be eligible for parole after serving one-third of his sentence.[142] However, under Arkansas state law, Hill would actually only be eligible for parole after serving half his sentence, not one-third, due to a prior felony conviction, thereby resulting in a later parole eligibility date than his attorney had advised.[143]

Analyzing Hill's IAC claim, the Court held that *Strickland*'s two-pronged test applied to IAC claims brought by defendants who challenged the validity of their guilty pleas.[144] Regarding the deficient performance prong, the Court held that the existing standard—objectively unreasonable performance—applied.[145] As to the prejudice prong, the Court applied the reasonable probability test from *Strickland*, holding that defendants must show that, but for counsel's errors, there was "a reasonable probability that . . . [they] would not have pleaded guilty and would have insisted on going to trial."[146] On these grounds, the Court denied Hill's IAC claim because he failed to establish prejudice.[147]

Hill was an important step in expanding the scope of IAC claims to include pleas, and its holding tacitly acknowledged the centrality of guilty pleas in the criminal justice system. However, the Court limited its holding to cases in which the defendant accepted an unfavorable plea, rather than going to trial. In so limiting its holding, the Court did not provide an answer to the reverse question: what if attorney ineffectiveness resulted in the defendant forgoing a favorable plea offer and proceeding to trial?

3. *Frye* and *Lafler*: The *Strickland* Prejudice Prong and the System of Pleas

After nearly thirty years of silence, the Court not only answered this question, but also significantly expanded IAC doctrine within the plea-bargaining process in two companion cases—*Missouri v. Frye*[148] and *Lafler v. Cooper*[149]—in 2012.[150]

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140. *Id.* at 53.
141. *Id.*
142. *Id.* at 55.
143. *Id.*
144. *Id.* at 58.
145. *See id.* at 58–59.
146. *Id.* at 59.
147. *See id.* at 60. Hill failed to show that, had his attorney correctly apprised him of his parole eligibility date, he would not have accepted the plea and would have gone to trial instead. *Id.*
148. 566 U.S. 134 (2012).
149. 566 U.S. 156 (2012).
150. *See* Silva, *supra* note 39, at 2234. Two years before *Frye* and *Lafler*, the Court took the step of recognizing plea bargaining as a "critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel" in *Padilla v. Kentucky*. 559 U.S.

Both cases dealt with situations in which the defendants alleged that their attorneys' ineffectiveness prevented them from accepting favorable plea offers, resulting in harsher sentences at trial. In *Frye*, the Court held that defense counsel's failure to communicate a favorable plea offer to the defendant could amount to IAC.[151] In *Lafler*, the Court expanded the right to effective assistance of counsel to circumstances in which defense counsel's deficient performance resulted in the defendant's rejection of a favorable plea offer.[152]

After Frye was charged with a felony for driving with a revoked license in Missouri, prosecutors extended two plea offers to his attorney, including a favorable misdemeanor plea offer.[153] However, Frye's attorney did not communicate these offers to him, and both offers expired.[154] After the offers expired but before his preliminary hearing, Frye was arrested again for driving with a revoked license and subsequently received a three-year prison sentence.[155] Frye sought post-conviction relief, claiming that his attorney provided IAC by failing to apprise him of the favorable offer, which he would have accepted.[156]

The Court first ruled that defense counsel's failure to communicate the favorable plea offer amounted to deficient performance.[157] In doing so, it acknowledged that Frye's claim—involving his ignorance of a formal offer—differed from the question raised in *Hill*.[158] It then turned to the prejudice prong and clarified the standard laid out in *Hill*.[159] Because there was no *accepted* plea offer in *Frye*, the Court stipulated that, in such situations, the defendant may meet the *Strickland* prejudice prong by showing that there was a reasonable probability that, but for counsel's ineffectiveness, they would have accepted the favorable plea offer.[160] The Court further held that the prejudice prong requires showing a reasonable probability that the prosecution would not have withdrawn the plea and that the court would not have rejected it.[161] The Court emphasized the importance of the latter two conditions given the lack of a federal right to receive a plea bargain or have one accepted by the judge.[162] Based on these parameters, the Court thought that determining whether there was a reasonable probability that the prosecution and judge would have accepted

356, 373 (2010). However, because the Court declined to address the prejudice prong in *Padilla*, *id.* at 369, this Note does not discuss this case in detail.

151. *See Frye*, 566 U.S. at 149–151.
152. *See Lafler*, 566 U.S. at 172–74.
153. *Frye*, 566 U.S. at 138–39.
154. *Id.* at 139.
155. *Id.*
156. *Id.*
157. *Id.* at 147.
158. *Id.* at 148.
159. *See id.*
160. *See id.* at 147.
161. *See id.*
162. *See id.* at 148–49. For a discussion of the lack of a right to plea bargain and to have the court accept a plea agreement, see *supra* notes 45–46, 84 and accompanying text.

the favorable plea offer would not be difficult in most cases, as "prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences."[163] The Court found that Frye had met both *Strickland* prongs[164] and remanded the case back to the Missouri courts to determine the appropriate remedy.[165]

The Court dealt with a similar issue in *Lafler*: the lack of any accepted plea bargain due to counsel's advice. In 2003, Anthony Cooper repeatedly shot at another individual in Michigan.[166] Authorities charged Cooper with various counts, including intent to murder.[167] The prosecution extended multiple plea offers.[168] However, Cooper rejected these offers and proceeded to trial, allegedly on the advice of counsel, who claimed that the prosecution would not be able to establish intent to murder.[169] A jury convicted Cooper on all charged counts, and he received a mandatory minimum sentence of 185 to 300 months, far in excess of the sentences in his rejected plea bargains, which recommended sentences as lenient as fifty-one to eighty-five months.[170] He eventually sought post-conviction relief, claiming IAC due to his attorney's recommendation to proceed to trial rather than to accept any of the favorable plea offers.[171]

In its decision, the Court reiterated the standard for prejudice it had set in *Frye*, holding that defendants may bring IAC claims when alleging that attorney ineffectiveness precluded them from accepting a favorable plea offer.[172] In doing so, it rejected the narrower view put forth by the petitioner—that the primary purpose of the Sixth Amendment right to assistance of counsel and the right to effective assistance of counsel is to safeguard the right to a fair trial.[173] Under this view, any pretrial errors by counsel, including errors made during the plea-bargaining process, are not subject to an IAC claim unless they affect the fairness of the defendant's trial.[174] The crux of the Court's reasoning in rejecting this view ultimately rested on the recognition that "criminal justice today is for the most part a system of pleas, not a system of trials."[175] Therefore, the petitioner's argument that "[a] fair trial wipes clean any deficient performance by defense counsel during plea bargaining"[176] amounted to an unduly narrow view that

163. *Frye*, 566 U.S. at 149.
164. *Id.* at 149–50.
165. *Id.* at 151. The Court did not directly address the issue of remedy because it required determining whether the prosecution would have withdrawn the offer or whether the court would have rejected the offer—both of which implicated Missouri state law. *See id.* at 151–52.
166. Lafler v. Cooper, 566 U.S. 156, 160–61 (2012).
167. *Id.* at 161.
168. *See id.*
169. *Id.*
170. *See id.*
171. *Id.* at 161–62.
172. *See id.* at 164.
173. *Id.*
174. *Id.* at 164–65.
175. *Id.* at 170.
176. *Id.* at 169.

does not comport with the realities of the modern criminal justice system.[177] However, the Court did impose a key limitation on its holding—it acknowledged that *Frye* and *Lafler* do not apply if the prosecution never extends a plea offer, as there is no constitutional right to plea bargain.[178]

In contrast to *Frye*, in which the Court remanded the issue of remedy to the state courts,[179] the *Lafler* Court decided the remedy issue itself.[180] The Court presented two possible paths for remedying Cooper's constitutional injury. In certain circumstances, namely when the plea bargain would have resulted in a lesser sentence, the trial court may resentence the defendant, exercising its discretion to hand down a sentence in line with the plea offer, the sentence the defendant received at trial, or something in between.[181] In other circumstances, resentencing may not be appropriate.[182] In such situations, the trial court may order the prosecution to reoffer the plea, with the trial court exercising its discretion to vacate the conviction and accept the reoffered plea or to leave the conviction in place.[183] This solution would allow the judge to consider any changed circumstances relevant to the case that may have an impact on the resurrected plea offer[184] while avoiding ordering a new trial.[185] Ultimately, the Court determined that the best solution for Cooper was to order the prosecution to reoffer the original plea.[186]

Dissenting in both cases, Justice Antonin Scalia leveled several criticisms at the majority opinions, including arguing that *Frye*'s and *Lafler*'s extensions of IAC jurisprudence to the plea-bargaining process "open[ed] up a whole new field of constitutionalized criminal procedure: plea-bargaining law."[187] Justice Scalia argued that the Sixth Amendment right to effective assistance of counsel only ensures that the defendant receives a fair trial, and therefore the majority's holdings conferred a judge-made "right to effective

177. *See id.* at 170.

178. *See id.* at 168–69 ("If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it . . . . It is, of course, true that defendants have 'no right to be offered a plea . . . nor a federal right that the judge accept it.' In the circumstances here, that is beside the point. If no plea offer is made, or a plea deal is accepted by the defendant but rejected by the judge, the issue raised here simply does not arise." (second alteration in original) (citation omitted) (quoting Missouri v. Frye, 566 U.S. 134, 148 (2012))); *see also supra* note 46 and accompanying text.

179. *See supra* note 165 and accompanying text.

180. *See Lafler*, 566 U.S. at 170–72.

181. *See id.* at 170–71.

182. *Id.* at 171. For example, resentencing may not be appropriate if the jury convicted the defendant of a count more serious than the count stipulated in the plea offer. *See id.*

183. *Id.*

184. *Id.* at 171–72. For example, the trial court could consider the defendant's willingness, or lack thereof, to accept responsibility for the charged crime(s). *Id.* at 171.

185. *See id.* at 172.

186. *Id.* at 174. In doing so, the Court reversed the district court's decision to order specific performance of the original plea agreement. *Id.*

187. *Id.* at 175 (Scalia, J., dissenting); *see also* Missouri v. Frye, 566 U.S. 134, 155 (2012) (Scalia, J., dissenting) (arguing the same).

plea bargaining."[188] As a result, the Court had "elevate[d] plea bargaining from a necessary evil to a constitutional entitlement."[189]

Justice Scalia also took issue with the *Frye-Lafler* approach to prejudice. He decried the hindsight analysis required to determine whether the prosecution and the court would have accepted the plea,[190] calling it "retrospective crystal-ball gazing posing as legal analysis."[191]

There are several important takeaways from *Frye* and *Lafler*. First, the Court explicitly recognized, albeit belatedly, that our criminal justice system is a "system of pleas," underscoring the centrality of plea bargaining in criminal proceedings and the applicability of the Sixth Amendment's right to effective assistance of counsel to plea bargaining.[192]

Second, both cases flipped *Hill*'s approach to prejudice. Rather than viewing prejudice as avoiding trial by accepting a plea,[193] both cases recognized that defendants who proceed to trial rather than take a favorable plea may still be prejudiced due to a more severe conviction or sentence.[194] Thus, the Court's rulings in *Frye* and *Lafler* recognize that attorney ineffectiveness during plea bargaining can undermine the "fundamental fairness" of the proceeding, regardless of whether the defendant went to trial.[195]

Third, the Court's elaboration on the *Strickland* standard—that the defendant, prosecution, and judge were all reasonably likely to accept the plea—recognizes the substantial discretion that the current "system of pleas" gives to the prosecution.[196] However, by giving judges some latitude to construct an appropriate remedy,[197] *Lafler* also calls for judges to exercise their limited discretion in the plea-bargaining process.

II. PROVING PREJUDICE WITHOUT A PLEA BARGAIN

Frye and *Lafler* opened the door to IAC claims alleging that the defendant suffered prejudice by going to trial rather than accepting a favorable plea deal.[198] But in both cases, the prosecution had already extended a plea

188. *Lafler*, 566 U.S. at 177 (Scalia, J., dissenting); *see also* Silva, *supra* note 39, at 2237.
189. *Lafler*, 566 U.S. at 186 (Scalia, J., dissenting).
190. *Frye*, 566 U.S. at 153–54 (Scalia, J., dissenting).
191. *Id.* at 154.
192. *Id.* at 143 (majority opinion) ("The reality is that plea bargains have become so central to the administration of the criminal justice system 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 at critical stages."); *see also Lafler*, 566 U.S. at 165 (holding that the Sixth Amendment right to effective counsel extends to "pretrial critical stages that are part of the whole course of a criminal proceeding").
193. *See supra* note 146 and accompanying text.
194. *See Lafler*, 566 U.S. at 166; *Frye*, 566 U.S. at 147–48.
195. *See supra* note 120 and accompanying text.
196. *See Lafler*, 566 U.S. at 168 (recognizing that the power to offer a plea rests with the prosecution due to the lack of any right to a plea offer); *Frye*, 566 U.S. at 148–49 (same).
197. *See Lafler*, 566 U.S. at 170–72.
198. *See supra* notes 193–94 and accompanying text.

bargain to the defendant.[199] What if there is evidence showing that the defendant *should* have received a favorable plea bargain, but defense counsel failed to negotiate one, and, as a result, the defendant proceeded to trial and received an unduly harsh sentence? How can defendants meet the *Strickland* prejudice prong in cases in which an offer never existed in the first place?

Circuits have approached the latter question in two ways. Some circuits hold that the prosecution must extend a plea offer to the defendant to meet the prejudice prong under *Frye* and *Lafler* and that the lack of any plea offer is inherently fatal to the IAC claim.[200] Part II.A discusses this "threshold requirement" approach. Other circuits hold that the lack of a plea offer is not fatal to an IAC claim and that the defendant may meet the *Strickland* prejudice prong if there is sufficient evidence in the record to meet the reasonable probability standard laid out in *Frye* and *Lafler*.[201] Part II.B discusses this alternative approach, led by the U.S. Court of Appeals for the Sixth Circuit's ruling in *Byrd v. Skipper*.[202] Part II.C ends with a brief summary, highlighting the strengths of each approach.

A. The Threshold Requirement: Plea Offer as a Prerequisite

Several circuits, including the U.S. Courts of Appeals for the Third,[203] Seventh,[204] Eighth,[205] Tenth,[206] and Eleventh[207] Circuits, have imposed a threshold requirement that defendants must have received a plea offer to meet *Strickland*'s prejudice prong when bringing IAC claims related to the plea-bargaining process.

These courts have found that the lack of any plea offer is fatal to the prejudice showing, as defendants would be unable to demonstrate with reasonable probability that the defendant, the prosecution, and/or the court would have accepted the plea.[208] These courts root their decisions in the lack of a constitutional right to plea bargain—which itself flows from

199. *See supra* notes 153, 168 and accompanying text.

200. *See infra* Part II.A.

201. *See infra* Part II.B.

202. 940 F.3d 248 (6th Cir. 2019).

203. *See* Shnewer v. United States, 703 F. App'x 85, 88 (3d Cir. 2017); Herrera-Genao v. United States, 641 F. App'x 190, 193 (3d Cir. 2016); United States v. Nguyen, 619 F. App'x 136, 140–41 (3d Cir. 2015).

204. *See* Delatorre v. United States, 847 F.3d 837, 845 (7th Cir. 2017).

205. *See* Ramirez v. United States, 751 F.3d 604, 608 (8th Cir. 2014); Jackson v. United States, 510 F. App'x 484, 489 (8th Cir. 2013); Kingsberry v. United States, 202 F.3d 1030, 1032 (8th Cir. 2000).

206. *See* United States v. Kalu, 683 F. App'x 667, 669 (10th Cir. 2017); United States v. Rendon-Martinez, 497 F. App'x 848, 849 (10th Cir. 2012).

207. *See* Davis v. United States, No. 20-11149, 2022 WL 402915, at *2 (11th Cir. Feb. 10, 2022), *cert. denied*, 143 S. Ct. 647 (2023); Osley v. United States, 751 F.3d 1214, 1225 (11th Cir. 2014).

208. *See, e.g.*, *Davis*, 2022 WL 402915, at *2 (finding that an IAC claim failed the prejudice prong because the defendant could not show that any plea agreement "would have been presented to the court"); *Ramirez*, 751 F.3d at 608 (finding that the defendant failed to show prejudice because, without a plea offer, he could not prove with "reasonable probability that the plea would have been entered without the prosecution canceling it").

prosecutorial discretion[209]—and on the separation of powers doctrine, which prevents the judiciary from interfering with executive decision-making.[210]

1. *Ramirez v. United States*

The Eighth Circuit outlined the logic behind the threshold requirement approach in *Ramirez v. United States*.[211] In 2009, Lino Ramirez pleaded guilty to two conspiracy to distribute charges and received a twenty-year prison sentence—the mandatory minimum.[212] Prior to the entry of Ramirez's plea, the prosecution sent a letter to his attorney stating that the Government would be open to Ramirez's cooperation,[213] but that there were "no promises or assurances" of any plea offer resulting from that cooperation.[214] The prosecution received no response from Ramirez, and, as a result, Ramirez did not enter any cooperation agreement.[215] After losing his direct appeal, Ramirez filed a habeas corpus petition on IAC grounds.[216]

The Eighth Circuit ruled against Ramirez.[217] Finding that he "received at most an informal plea offer," the court held that he failed to show a reasonable probability that the Government would have even extended a plea offer in the first place, as any offer was contingent on his cooperation and ability to provide valuable information to the Government.[218] Therefore, Ramirez failed to show a reasonable probability that he would have accepted the plea.[219] He also failed to show a reasonable probability that the Government would not have withdrawn the plea, particularly given his lack of any right to a plea offer in the first place.[220]

Writing in a dissenting opinion, Judge Kermit E. Bye disagreed with the majority's "narrow" reading of *Frye*—that the holding only applies to cases in which defense counsel failed to communicate formal plea offers to the defendant.[221] Instead, Judge Bye argued that the Court's holding in *Frye* "require[s] effective counsel during the process of plea *negotiations*."[222]

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209. *See supra* notes 41–47 and accompanying text.
210. *See supra* note 44 and accompanying text.
211. 751 F.3d 604 (8th Cir. 2014).
212. United States v. Ramirez, 397 F. App'x 283, 284 (8th Cir. 2010).
213. *Ramirez*, 751 F.3d at 606–07.
214. *Id.* at 608.
215. *Id.* at 607.
216. *Id.* at 605. Ramirez's sole IAC claim before the Eighth Circuit centered on the fact that his attorney failed to disclose the Government's interest in a cooperation agreement that could have resulted in a more lenient plea agreement. Appellant, Lino Terrazas Ramirez's, Brief and Argument at 7, 11, 15, *Ramirez*, 751 F.3d 604 (No. 13-1187). Ramirez alleged that this failure prejudiced him by preventing him from choosing between cooperating and not cooperating. *Ramirez*, 751 F.3d at 606.
217. *Ramirez*, 751 F.3d at 608.
218. *Id.*
219. *Id.*
220. *Id.* ("Ramirez fails to demonstrate that he suffered the requisite prejudice under *Strickland* and *Frye*, especially where Ramirez 'has no right to be offered a plea.'" (quoting Missouri v. Frye, 566 U.S. 134, 148 (2012))).
221. *Id.* at 609 (Bye, J., dissenting).
222. *Id.* (emphasis added); *see also supra* note 192 (quoting similar language in *Frye*).

Therefore, Judge Bye believed that Ramirez should have had the opportunity to establish whether a favorable plea would have been accepted by him, the prosecution, and the court—an opportunity he did not have due to the majority's imposition of the threshold requirement.[223] Judge Bye also noted the trial court's dissatisfaction with the harshness of Ramirez's sentence and argued that a cooperation agreement could have avoided the case's unjust outcome.[224]

2. *United States v. Rendon-Martinez*

In an unpublished decision, the Tenth Circuit applied logic similar to the Eighth Circuit's reasoning in *Ramirez* in *United States v. Rendon-Martinez*,[225] a case that dealt directly with an IAC claim for failing to affirmatively negotiate a favorable guilty plea.

In 2010, Doroteo Rendon-Martinez fired warning gunshots into the yard of his home because he believed that several individuals were attempting a break-in.[226] Authorities charged Rendon-Martinez, a convicted felon and noncitizen who had previously been removed from the country, with firearm possession by a felon, firearm possession by an undocumented immigrant, and one count of illegal reentry.[227] Rendon-Martinez stipulated to facts that supported the elements of each charge and proceeded to a bench trial, at which the judge found him guilty of two of the three charges and sentenced him to two concurrent sentences of fifteen years.[228] Rendon-Martinez eventually filed a federal habeas petition, alleging IAC, which the district court denied, prompting his application for a certificate of appealability on his IAC claims.[229]

In his application, Rendon-Martinez brought multiple IAC claims, including a claim under *Frye* and *Lafler* that his attorney's failure to request a favorable guilty plea amounted to IAC.[230] Rendon-Martinez claimed that he informed his attorney that he wanted to plead guilty to the reentry charge but was unwilling to plead guilty to the felon-in-possession charge, believing that he had a justification defense.[231] However, Rendon-Martinez claimed that his attorney instead failed to negotiate a plea for the reentry count.[232] He argued that, although *Frye* and *Lafler* addressed cases in which the prosecution had extended a plea agreement, both holdings opened the door

223. *See Ramirez*, 751 F.3d at 610 (Bye, J., dissenting).
224. *See id.*
225. 497 F. App'x 848 (10th Cir. 2012).
226. United States v. Rendon-Martinez, 437 F. App'x 685, 686 (10th Cir. 2011).
227. *Id.*
228. *See id.* at 686–87.
229. United States v. Rendon-Martinez, 497 F. App'x 848 (10th Cir. 2012).
230. Appellant's Opening Brief and Application for a Certificate of Appealability at 9–11, *Rendon-Martinez*, 497 F. App'x 848 (No. 12-6175).
231. *Id.* at 1.
232. *See id.*

for courts to consider whether defendants have the right to have counsel seek a favorable guilty plea by creating a new field of "plea-bargaining law."[233]

Unconvinced by Rendon-Martinez's "novel reading" of *Frye* and *Lafler*, the Tenth Circuit denied his request for a certificate of appealability and dismissed his appeal.[234] In a concise opinion written by then-Judge Neil Gorsuch, the Tenth Circuit held that the Supreme Court limited *Frye*'s and *Lafler*'s holdings to cases in which the prosecution had already extended a plea offer.[235] Therefore, the Tenth Circuit held that the absence of any plea offer was fatal to Rendon-Martinez's claim, as prosecutorial discretion to offer and rescind plea offers and judicial discretion to reject them afford "no right to a plea offer."[236] Thus, the Tenth Circuit imposed a threshold requirement—similar to the one imposed by the Eighth Circuit in *Ramirez*—on claims that defense counsel provided IAC by failing to negotiate a favorable plea altogether.

3. *Davis v. United States*

In *Davis v. United States*,[237] the Eleventh Circuit, following *Ramirez* and *Rendon-Martinez*, denied the defendant's IAC claim based on the failure of his attorney to negotiate a plea agreement by imposing a threshold requirement of a formal plea offer.

In 2011, a grand jury indicted Quartavious Davis and five codefendants on seventeen counts for their involvement in a series of Hobbs Act[238] robberies.[239] The case went to trial, and the jury found Davis guilty on multiple counts.[240] His conviction exposed him to a possible mandatory sentence of over 150 years.[241] The district court ultimately sentenced him to over 159 years in prison.[242]

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233. *See id.* at 10–11 (quoting Missouri v. Frye, 566 U.S. 134, 155 (2012) (Scalia, J., dissenting)).

234. *Rendon-Martinez*, 497 F. App'x at 849.

235. *Id.*; *see also supra* note 178 and accompanying text.

236. *Rendon-Martinez*, 497 F. App'x at 849 (citing Lafler v. Cooper, 566 U.S. 156, 168 (2012)). The Tenth Circuit also ruled that, even without the threshold requirement in place, Rendon-Martinez would still fail to meet the prejudice showing because his claim that a favorable plea was available to him was "mere speculation" and therefore insufficient to show prejudice under the Tenth Circuit's case law. *Id.* (citing Byrd v. Workman, 645 F.3d 1159, 1168 (10th Cir. 2011)). Rendon-Martinez's claim that a favorable plea offer was forthcoming appeared to be limited to his assertion that "the U.S. Attorney's Office usually does [tender a plea agreement]." Appellant's Opening Brief and Application for a Certificate of Appealability, *supra* note 230, at 11.

237. No. 20-11149, 2022 WL 402915 (11th Cir. Feb. 10, 2022), *cert. denied*, 143 S. Ct. 647 (2023).

238. 18 U.S.C. § 1951.

239. *Davis*, 2022 WL 402915 at *1.

240. *Id.*

241. *Id.*

242. *Id.*

Challenging his conviction, Davis alleged that his attorney failed to pursue a favorable plea deal, amounting to IAC.[243] As to *Strickland*'s deficiency prong, Davis argued that the probability that Davis would receive a mandatory sentence of over 150 years was clear from the outset due to the strength of the prosecution's case.[244] He also alleged that a plea deal would have been available because all five of Davis's codefendants pleaded guilty, receiving sentences of less than forty years,[245] and because two codefendants who were "most similarly situated" to him successfully negotiated plea agreements that reduced their sentences by one hundred years each.[246] Davis therefore argued that any "competent counsel would pursue plea negotiations with the government" when faced with such circumstances.[247]

Turning to the prejudice prong, Davis argued that his attorney's failure to pursue plea negotiations, in light of the exceptionally strong case against him, precluded him from negotiating a favorable plea agreement and subjected him to an unduly harsh sentence after trial.[248] To meet the *Frye-Lafler* reasonable probability test, Davis first argued that his codefendants' favorable plea offers were sufficient to show that the prosecution would have offered Davis a favorable plea agreement and that the court would not have rejected such an offer.[249] Davis also pointed to other factors to support this claim, including his young age, his lack of any prior convictions, the fact that he suffered from certain disorders and disabilities, and the fact that the prosecution did not dispute that it would have offered Davis a favorable plea agreement.[250] Therefore, according to Davis, the lack of a formal plea offer did not bar his IAC claim.[251] Davis also argued that there was sufficient evidence in the record to support his claim that there was a reasonable probability that he would have accepted a favorable plea offer.[252] Davis thus argued that he had met the prejudice prong as set forth in *Frye* and *Lafler*.

In an unpublished decision, the Eleventh Circuit denied Davis's appeal on the grounds that he failed to show prejudice under *Strickland*.[253] The court held that because the Government never extended a plea deal, and because Davis did not allege that he would have accepted such a deal, he could not show that there was a reasonable probability that he, the prosecution, and the court would have accepted a favorable plea deal.[254]

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243. *See* Brief of the Appellant Quartavious Davis at 16–19, *Davis*, 2022 WL 402915 (No. 20-11149).

244. *See id.* at 16–17.

245. *See id.* at 5–6, 16–17.

246. *Id.* at 9.

247. *Id.* at 17.

248. *Id.* at 23.

249. *Id.* at 24, 26–27 (quoting Byrd v. Skipper, 940 F.3d 248, 258 (6th Cir. 2019)). For further discussion on *Byrd*, see *infra* Part II.B.2.

250. *See* Brief of the Appellant Quartavious Davis, *supra* note 243, at 24–25.

251. *See id.* at 25.

252. *See id.* at 26.

253. *See* Davis v. United States, No. 20-11149, 2022 WL 402915, at *3 (11th Cir. Feb. 10, 2022), *cert. denied*, 143 S. Ct. 647 (2023).

254. *See id.* at *2 ("To demonstrate prejudice in the plea process, Davis must show that the plea agreement would have been presented to the court. Davis did not allege . . . that the

Although the specifics of each of the holdings in *Ramirez*, *Rendon-Martinez*, and *Davis* differ slightly, they all pull from the same thread of reasoning to justify the threshold requirement: the lack of any constitutional right to a plea bargain precludes the defendant from meeting the *Frye-Lafler* probability test.

B. The Byrd *Approach: No Plea Offer Required to Show Prejudice*

Other courts of appeals, including the U.S. Courts of Appeals for the Fourth[255] and Sixth[256] Circuits, do not impose the same threshold requirement. Instead, they hold that *Strickland* prejudice can be met by establishing a reasonable probability that a plea offer was available but was not made due to defense counsel's ineffectiveness and then that the offer would be accepted by all relevant parties.[257] These cases differ from cases in which the prosecutor exercised discretion by not extending a plea offer because, in those cases, "factors outside of counsel's errors precluded successful negotiations."[258]

1. *United States v. Pender*

In *United States v. Pender*,[259] the Fourth Circuit held that defendants can bring IAC claims centered on defense counsel's failure to negotiate a plea bargain.[260] In 2006, federal authorities indicted Anthony Pender, a convicted felon, on a firearm possession charge and a charge of possession of cocaine with intent to distribute.[261] Pender was found guilty at trial; he received a ten-year sentence for the first charge and a mandatory life sentence for the second charge.[262] After the Fourth Circuit affirmed his convictions, Pender sought post-conviction relief, bringing an IAC claim on habeas appeal.[263]

Pender's claim centered on his assertion that his attorney failed to seek a plea bargain despite strong evidence against him and despite facing a mandatory life sentence.[264] In response, the Government put forth an unsworn, unauthenticated assertion that it had offered Pender a favorable plea agreement that he personally rejected.[265] However, there was a dispute

government even offered a plea deal, nor does he allege that he would have accepted one. Accordingly, we affirm the district court's denial of Davis's ineffective assistance of counsel claims regarding trial counsel's failure to pursue a plea deal." (citation omitted)).

255. *See* United States v. Pender, 514 F. App'x 359, 361 (4th Cir. 2013).

256. *See* Byrd v. Skipper, 940 F.3d 248, 259–60 (6th Cir. 2019).

257. *See Pender*, 514 F. App'x at 361; *Byrd*, 940 F.3d at 259–60.

258. *Byrd*, 940 F.3d at 259.

259. 514 F. App'x 359 (4th Cir. 2013).

260. *See id.* at 360.

261. Pender v. United States, No. 09-0034, 2012 WL 1078228, at *1 (D. Md. Mar. 29, 2012), *vacated*, 514 F. App'x 359 (4th Cir. 2013).

262. *Id.*

263. *Id.* at *1, *5.

264. *Pender*, 514 F. App'x at 360. This evidence included the discovery of the drugs and firearm in question in Pender's bedroom closet. *Id.* at 361.

265. *Id.* at 360–61.

on this issue, as the Government also admitted that it would have offered a favorable plea offer had Pender's attorney asked for one.[266]

In an unpublished opinion, the Fourth Circuit sided with Pender.[267] Although acknowledging that defendants have no constitutional right to plea agreements,[268] the Fourth Circuit reasoned that, because *Lafler* extended the right to effective assistance of counsel to the plea-bargaining phase, Pender's attorney still had "to be a 'reasonably effective advocate' regarding the decision to seek a plea bargain."[269] The Fourth Circuit therefore reasoned that Pender had raised a factual issue as to whether his attorney had provided constitutionally unreasonable advice by failing to pursue a plea agreement with the Government, despite having a "very weak" defense and facing a life sentence.[270] Turning to the prejudice prong, the court stated that, because the Government had admitted that it would have extended a plea offer had Pender's attorney asked, Pender would have been able to show prejudice if he had also shown that "he would have accepted such a plea."[271] Thus, the Fourth Circuit rejected the threshold requirement and opened the door for defendants to allege IAC on the grounds that their attorneys failed to negotiate a favorable plea deal.[272]

2. *Byrd v. Skipper*

In *Byrd v. Skipper*, the Sixth Circuit, faced with a similar question before the court in *Pender*, held in a precedential opinion that the lack of a formal plea offer was not an insurmountable hurdle to the reasonable probability test set forth in *Frye* and *Lafler*.[273]

In 2010, Curtis Byrd and his girlfriend planned to rob an individual at gunpoint in Michigan.[274] Byrd "suggested the plan and provided the gun."[275] However, Byrd backed out at the last minute, and his girlfriend proceeded alone.[276] During the attempted robbery, a struggle ensued and the gun went off, fatally wounding the victim.[277] Byrd later surrendered to the police, and Wayne County prosecutors brought multiple charges against him and his

266. *Id.* at 361.
267. *Id.* at 361–62.
268. *Id.* at 361.
269. *Id.* (quoting Brown v. Doe, 2 F.3d 1236, 1246 (2d Cir. 1993)).
270. *Id.*
271. *Id.*
272. *See id.* Two months before its decision in *Pender*, the Fourth Circuit acknowledged that "there may be cases in which a petitioner can show *Strickland* prejudice *despite the incipience of the plea offer* he did not accept due to his counsel's lack of communication or inadequate advice." Merzbacher v. Shearin, 706 F.3d 356, 369–70 (4th Cir. 2013) (emphasis added). In that case, however, the court held that the petitioner was unable to meet the reasonable probability showing. *See id.* at 370.
273. Byrd v. Skipper, 940 F.3d 248, 260 (6th Cir. 2019).
274. *See id.* at 251.
275. *Id.*
276. *Id.* at 251–52.
277. *Id.* at 252.

girlfriend, including first-degree felony murder.[278] Although Byrd faced a life sentence and had inquired about pleading guilty, his attorney, Marvin Barnett, insisted that he go to trial and convinced Byrd during two short meetings to do so.[279] At trial, the jury found Byrd guilty on multiple charges, including first-degree felony murder,[280] and Byrd received a life sentence without parole.[281]

Despite Barnett's insistence, there was substantial evidence that Barnett should have sought a plea deal that avoided a possible life sentence instead of going to trial. First, Barnett's confidence in Byrd's victory at trial was misplaced and based on fundamental misunderstandings of Michigan law.[282] Second, the prosecution likely would have extended a plea offer had Barnett initiated negotiations. The Wayne County prosecutor's office had "a demonstrated record of preferring plea deals over trials," although office practice was to wait for defense counsel to request a plea first.[283] Additionally, the prosecutor in Byrd's case testified that the office "ha[d] even more incentive to reach plea agreements with aiders and abettors," like Byrd, once the principal had pleaded guilty.[284] Byrd's girlfriend, the crime's principal, had pleaded guilty and received a thirty- to fifty-year sentence.[285] Furthermore, the prosecutor testified that judges in Wayne County "rarely reject plea agreements."[286]

Bringing an IAC claim before the Sixth Circuit, Byrd argued that his attorney's misunderstandings of Michigan law amounted to constitutionally deficient performance[287] and that he suffered prejudice because Barnett failed to negotiate a plea agreement and instead convinced him to go to trial.[288] Byrd argued under *Lafler* that he could demonstrate prejudice where attorney ineffectiveness resulted in the "loss of a [favorable] plea opportunity" and instead led to a harsher sentence due to conviction at trial.[289] Based on the record, including the prosecution's stated willingness

278. *Id.* Wayne County prosecutors brought murder charges against Byrd under an aiding-and-abetting theory, as Michigan state law exposes an individual who aids and abets to the same penalties as the principal. *Id.*; *see also* MICH. COMP. LAWS § 767.39 (2024).

279. *See Byrd*, 940 F.3d at 252–53. Byrd's total preparation time for trial with Barnett consisted of two thirty-minute meetings—one at his preliminary hearing and another the night before Byrd's trial began. *Id.* at 252. Such limited interaction with defense counsel is common for many indigent criminal defendants. *See supra* note 63 and accompanying text.

280. *Byrd*, 940 F.3d at 254.

281. *Id.*

282. *See id.* at 253. These errors included Barnett's "confusion about—and possibly his abject ignorance of—the law" regarding his planned abandonment defense, which case law suggested would not be successful. *Id.*

283. *Id.* at 252. The Sixth Circuit also noted that Wayne County's practice of preferring pleas over trials "reflects the national trend in both state and federal court." *Id.* at 252 n.3; *see also supra* notes 4–5 and accompanying text.

284. *Byrd*, 940 F.3d at 252.

285. *Id.*

286. *Id.*

287. *See* Principal Brief for Petitioner-Appellant at 15–31, *Byrd*, 940 F.3d 248 (No. 18-2021); *see also supra* note 282 and accompanying text.

288. *See* Principal Brief for Petitioner-Appellant, *supra* note 287, at 32.

289. *Id.* (citing Lafler v. Cooper, 566 U.S. 156, 168 (2012)).

to extend a plea offer to Byrd and Byrd's inquiry into pleading guilty, he argued that he met the *Frye-Lafler* reasonable probability test, thereby establishing prejudice.[290] The Government argued that Byrd could not show prejudice because the prosecution simply did not make an offer, and therefore Byrd could not meet the reasonable probability showing.[291]

The Sixth Circuit sided with Byrd, agreeing that he had met both *Strickland* prongs.[292] The court first held that Barnett's insistence on going to trial based on fundamental misunderstandings of the law in the face of a mandatory life sentence amounted to constitutionally deficient performance.[293]

Turning to the prejudice analysis, the court rejected the narrow view offered by other circuits—that the lack of a formal plea offer is a threshold requirement to showing prejudice.[294] The court began by acknowledging *Lafler*'s extension of the Sixth Amendment's right to counsel to the plea-bargaining phase of criminal proceedings.[295] According to the Sixth Circuit, the Supreme Court's recognition of plea negotiations as a "critical phase" of criminal litigation extended the right to effective assistance to the entire plea process, not only after the prosecution extends a plea offer.[296]

Next, the Sixth Circuit rejected the view that the lack of any constitutional right to a plea bargain precluded Byrd's claim, as he never received one.[297] In fact, the Sixth Circuit stated that Byrd's claim did not raise any potential constitutional right to plea bargain, or the lack thereof, because Barnett's ineffectiveness "foreclosed the possibility that the prosecution . . . could exercise such discretion" in the first place.[298] Citing prior Sixth Circuit precedent, the court concluded that neither *Frye* nor *Lafler* imposed a threshold requirement when "counsel's deficient performance deprives a defendant of a fair opportunity in plea negotiations."[299] Instead, the Supreme Court required only that the defendant meet the *Frye-Lafler* reasonable probability test—that, but for counsel's deficient performance, there was a

290. *Id.* at 33–34.
291. *See* Brief for Respondent-Appellee at 20, *Byrd*, 940 F.3d 248 (No. 18-2021).
292. *See Byrd*, 940 F.3d at 260.
293. *See id.* at 255–56.
294. *See id.* at 256–57.
295. *Id.* at 255; *see supra* note 192 and accompanying text.
296. *See Byrd*, 940 F.3d at 255.
297. *See id.* at 255–56.
298. *Id.* at 255.
299. *Id.* at 256. The Sixth Circuit cited to its prior holding in *Rodriguez-Penton v. United States*, 905 F.3d 481 (6th Cir. 2018). In *Rodriguez-Penton*, the Sixth Circuit held that the defendant could show prejudice when his attorney failed to notify him of adverse immigration consequences stemming from a plea offer, thereby denying him the opportunity to negotiate an offer without such adverse consequences, even if the prosecution never extended such an offer. *Id.* at 488. To do so, the defendant had to show that, had he known of the adverse consequences of his guilty plea, "he would have bargained for a more favorable plea." *Id.* In other words, "[t]he mere potentiality of [the defendant's] negotiation of a more favorable plea did not prevent [the Sixth Circuit] from determining that he could succeed on his ineffective-assistance claim . . . ." *Byrd*, 940 F.3d at 256 (citing *Rodriguez-Penton*, 905 F.3d at 488–89).

reasonable probability that the defendant would have accepted the offer, the prosecution would not have withdrawn it, and the court would not have rejected it.[300] Applying the facts of Byrd's claim to its view of the prejudice prong, the Sixth Circuit held that there was "significant, persuasive evidence" that Byrd had satisfied these conditions.[301]

Finally, the Sixth Circuit turned to the requirement that defendants must still show that prejudice resulted from their attorneys' deficient performance and not from other factors.[302] The court acknowledged the difficulties that defendants face in meeting this requirement due to broad prosecutorial discretion, allowing prosecutors to offer, forgo, or retract plea offers—problems that proved to be insurmountable hurdles in other cases, including *Ramirez*.[303] However, the Sixth Circuit distinguished Byrd's cases from others by noting that Barnett's failure to negotiate a favorable plea agreement stemmed from his deficient performance, whereas such failures in cases like *Ramirez* stemmed from "factors outside of counsel's errors."[304] Therefore, the Sixth Circuit held that Byrd had met both *Strickland* prongs and reversed and remanded the case back to the district court.[305]

In a lengthy dissent, Judge Richard Allen Griffin took umbrage with the majority opinion.[306] Of particular relevance to this Note are two points that Judge Griffin's dissent raises: the lack of any formal plea offer and issues pertaining to the remedy resulting from the majority's opinion.[307]

Judge Griffin argued that a plea offer is a requirement for any IAC claim pertaining to the plea process under *Frye* and *Lafler*.[308] Judge Griffin noted that in both cases, the prosecution extended formal plea offers to the respective defendants, in contrast to *Byrd*.[309] He therefore argued that both cases explicitly limited their holdings to cases in which the prosecution had

300. *Byrd*, 940 F.3d at 256.

301. *Id.* at 259. The court cited to both the prosecutor's testimony as evidence that a plea was available to Byrd, as well as to Byrd's girlfriend's favorable plea as evidence that Byrd's plea would have been favorable. *Id.* at 258. The court also used this evidence as proof that he would not have rejected his plea. *Id.* at 258. The Sixth Circuit found that the question of whether Byrd would have accepted the offer was more difficult to answer, but ultimately it found that his inquiry into a plea was sufficient evidence to establish a reasonable probability that he would have accepted a more favorable plea agreement. *See id.* at 258–59.

302. *See id.* at 259.

303. *Id.*; *see also supra* Part II.A.I.

304. *Byrd*, 940 F.3d at 259. For example, the Sixth Circuit noted that, in *Ramirez*, the prosecutor decided to forgo a plea offer absent the defendant's cooperation. *Id.*; *see also* Ramirez v. United States, 751 F.3d 604, 608 (8th Cir. 2014).

305. *Byrd*, 940 F.3d at 260. On remand, Byrd pleaded guilty to a second-degree murder charge and a felony firearms charge, receiving a sentence of twelve to twenty years for the former and a concurrent sentence of two years for the latter. *See Offender Tracking Information System Profile for Curtis Jerome Byrd*, MICH. DEP'T CORR., https://mdocweb.state.mi.us/otis2/otis2profile.aspx?mdocNumber=786516 [https://perma.cc/Z2LD-A5BS] (last visited Mar. 3, 2024).

306. *See Byrd*, 940 F.3d at 261–70 (Griffin, J., dissenting).

307. *See id.* at 261–68.

308. *Id.* at 262.

309. *Id.*

extended a formal plea offer.[310] Thus, in Judge Griffin's view, the lack of any formal plea offer extended to Byrd "erect[ed] an impassible barrier" to his IAC claim.[311]

In addition, Judge Griffin raised concerns over what remedy would be available to Byrd.[312] First, he argued that the remedies laid out in *Lafler* do not provide any avenue to redress Byrd's purported constitutional injury—that he did not get the opportunity to negotiate a plea agreement.[313] *Lafler*'s remedies allowed the trial court to resentence the defendant to the offered plea agreement, what the defendant received at trial, or a sentence in between.[314] Per *Lafler*, if resentencing could not address the defendant's injury, then the trial court could once again exercise its discretion to order the prosecution to reoffer the existing plea, and then "decid[e] whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed."[315] Judge Griffin therefore posited, at bottom, that "*Lafler*'s remedial regime only guarantees the restoration of the opportunity to consider a *previously offered* plea deal."[316]

Judge Griffin raised another important issue associated with the remedy for Byrd—the inability of any court to order the state to offer a plea agreement when one never existed in the first place.[317] Such authority granted to the courts would, in Judge Griffin's view, not only "unnecessarily infringe on competing interests,"[318] but also waste the state's limited resources.[319] Ultimately, "[r]equiring a state prosecutor to set aside his absolute prosecutorial discretion, create a plea offer from whole cloth, and propose it to a defendant that a jury has already tried and convicted would unquestionably upset comity principles and the delicate balance that is separation of powers."[320]

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310. *Id.* Judge Griffin cited to language in *Frye* that emphasized the "particular importance" of showing a reasonable probability that neither the prosecution nor the court would have rescinded or rejected the existing plea offer "because a defendant has no right to be offered a plea, nor a federal right that the judge accept it." *Id.* (citation omitted) (quoting Missouri v. Frye, 566 U.S. 134, 148–49 (2012)). Judge Griffin pointed to similar language in *Lafler*, noting that the Court made clear that "its holding depended on a plea being offered *and* [that] the absence of a plea offer from the government is fatal to advancing a plea-related ineffective-assistance-of-counsel claim . . . ." *Id.* at 263; *see also supra* note 178 (quoting relevant language in *Lafler*).

311. *Byrd*, 940 F.3d at 265 (Griffin, J., dissenting). Judge Griffin also argued that the majority's holding went against the Sixth Circuit's own past precedents, as well as precedents of other circuits and of various state courts, all of which embraced the threshold requirement of a formal plea offer to proceed with an IAC claim resulting from the plea-bargaining process. *See id.* at 263–65.

312. *See id.* at 267–68.

313. *Id.* at 267.

314. *See supra* note 181 and accompanying text.

315. *Byrd*, 940 F.3d at 267 (quoting Lafler v. Cooper, 566 U.S. 156, 171 (2012)).

316. *Id.* (emphasis added).

317. *Id.*

318. *Id.* (quoting *Lafler*, 566 U.S. at 170).

319. *See id.*

320. *Id.* at 268.

C. Comparing the Two Approaches

Each of the two competing approaches outlined above has their benefits. The threshold requirement has three main strengths. First, it closely adheres to the language of the Supreme Court's holdings in *Frye* and *Lafler*—that they do not apply if there is no plea offer made.[321] Second, as Judge Griffin noted, this approach avoids difficult remedial issues by ensuring that a plea bargain already existed.[322] It thus prevents courts from crafting remedies that overreach and violate prosecutorial discretion and separation of powers principles by ordering the State to propose a plea offer when it never extended one to the defendant, potentially creating a constitutional right to plea bargain.[323] Finally, it prevents courts from engaging in a difficult hindsight analysis as to the intents of the defendant, the prosecution, and the court—the sort of "retrospective crystal-ball gazing" that Justice Scalia criticized in *Frye*.[324] Such hindsight review has frequently proved difficult and risks producing disparate results based on the same or similar facts.[325] Faced with an even more challenging hindsight analysis when assessing prejudice in the absence of a plea offer,[326] courts could also struggle to parse between legitimate IAC claims and "late, frivolous, or fabricated claims."[327]

The *Byrd* approach has benefits of its own. First, it creates an avenue for relief for defendants who otherwise have a credible IAC claim, like the defendants in *Pender* and *Byrd*.[328] Second, the *Byrd* approach recognizes that attorney ineffectiveness during the plea process may prejudice the defendant by foreclosing the possibility of a favorable plea bargain and subjecting the defendant to an unduly harsh punishment. In doing so, it engages in a fact-dependent analysis of the *Frye-Lafler* prong that eschews any "mechanical rules."[329] It instead embraces the Supreme Court's pronouncement that the core inquiry of *Strickland* analysis is the "fundamental fairness" of the proceeding[330] and its subsequent extension of

321. *See supra* note 310 and accompanying text; *see also supra* note 220.

322. *See supra* note 320 and accompanying text.

323. *See supra* note 320 and accompanying text.

324. *See supra* note 191 and accompanying text.

325. *See* Lisa Kern Griffin, *Criminal Adjudication, Error Correction, and Hindsight Blind Spots*, 73 WASH. & LEE L. REV. 165, 193 (2016) ("There is little record of what occurs during plea bargaining . . . and it will not always be sufficiently apparent what the defendant would have done . . . ."); *id.* at 190 (highlighting the "subjective nature" of the reasonable probability inquiry, given that courts often "reach different results on similar fact patterns").

326. *See* Berger, *supra* note 126, at 157–70 (discussing the inherent challenges defendants face in showing prejudice in the absence of a plea offer).

327. Missouri v. Frye, 566 U.S. 134, 146 (2012); *see also* Byrd v. Skipper, 940 F.3d 248, 262 (6th Cir. 2019) (Griffin, J., dissenting) (describing the defendant's claim as merely "wish[ing] in hindsight that he would have avoided trial"). The claims brought by the petitioner in *Ramirez* and *Rendon-Martinez* arguably fall into these categories, as in both cases, the courts found that the extension of a formal plea offer was speculation. *See supra* note 218 and accompanying text; *see also supra* note 236.

328. *See supra* Part II.B.

329. Strickland v. Washington, 466 U.S. 668, 696 (1984).

330. *Id.*; *cf.* Kovacs v. United States, 744 F.3d 44, 52 (2d Cir. 2014) ("The proper focus [of *Strickland*] is not on the specific test applied in *Hill* or *Frye*; each case is a context-specific

that inquiry to the entire plea process.[331] Finally, the *Byrd* approach's broader reading of *Frye* and *Lafler* acknowledges the centrality of pleas within the plea-bargaining process by allowing defendants to assert IAC claims in the absence of a formal plea offer.[332]

III. PERMITTING IAC CLAIMS WITHOUT PLEA OFFERS USING A BURDEN-SHIFTING FRAMEWORK

Having laid out the split at issue here, this Note now turns to an analysis of the two approaches. This part of the Note argues that, although both the threshold requirement and the *Byrd* approach have merit, the threshold requirement approach is too restrictive.[333] However, recognizing that the *Byrd* approach has drawbacks of its own, this Note proposes a path forward to afford defendants relief while minimizing some of the risks associated with the *Byrd* approach.[334]

Part III.A argues that the *Byrd* approach, despite potential issues pertaining to remedy, is superior to the threshold approach. It avoids inequitable outcomes, is in line with the core "fundamental fairness" inquiry established in *Strickland*, and recognizes the primacy of plea bargaining in criminal proceedings. Part III.B then presents a potential path forward by proposing the application of a burden-shifting framework to cases in which the defendant raises an IAC claim based on defense counsel's failure to affirmatively negotiate a plea bargain.

A. Byrd *as an Imperfect Approach*

Despite the benefits to both approaches,[335] there are several reasons why the *Byrd* approach is the better of the two, although it has flaws of its own.

First, the threshold requirement's narrow reading of *Frye* and *Lafler* may result in unduly harsh outcomes. Under the threshold requirement, there was no relief available for Quartavious Davis, who not only received a de facto life sentence while his other codefendants received far more lenient punishments,[336] but also likely presented significant evidence to suggest that he would have been able to meet the *Frye-Lafler* reasonable probability standard in the absence of such a requirement.[337] The threshold requirement's constrained view of *Frye* and *Lafler*—that those cases only apply when the prosecution extends a plea offer—results in one of the problems of which Justice Marshall warned in his *Strickland* dissent: "that evidence of [the] injury"—in Davis's case, the lack of a plea bargain—"may

application of *Strickland* directed at a particular instance of unreasonable attorney performance.").

331. *See supra* note 192; *see also Byrd*, 940 F.3d at 255.
332. *See supra* notes 222–23 and accompanying text.
333. *See infra* Part III.A.
334. *See infra* Part III.B.
335. *See supra* Part II.C.
336. *See supra* notes 245–46 and accompanying text.
337. Davis v. United States, 143 S. Ct. 647, 648 (2023) (Jackson, J., dissenting).

be missing from the record *precisely because of the incompetence of defense counsel*."[338] Thus, the *Byrd* approach avoids inequitable results by providing relief to defendants who have a viable IAC claim because of attorney ineffectiveness during the plea-bargaining phase.

Second, although the threshold requirement ostensibly avoids engaging in subjective and speculative hindsight analysis that the *Byrd* approach requires, courts must still engage in such analysis under the *Frye-Lafler* approach. And even when applying the threshold requirement, courts may still disagree about the existence of a formal plea offer. For example, in *Kingsberry v. United States*,[339] the Eighth Circuit held that the defendant failed to meet the prejudice prong because the record indicated that the prosecution did not extend a formal plea offer.[340] However, the dissenting opinion reached a different conclusion, finding that the record actually supported the defendant's claim that the prosecution extended an offer.[341] *Kingsberry* shows that even the threshold requirement is not as straightforward as it may seem, particularly given the lack of formality and structure that exists within the current system of pleas and the lack of records that may exist up to and until the defendant's entry of a guilty plea.[342] Furthermore, finality concerns tend to weigh against defendants in hindsight review.[343] Therefore, concerns that courts following the *Byrd* approach may expose themselves to a flood of unmeritorious claims are likely unfounded,[344] particularly considering *Strickland*'s generally prohibitive nature.[345] At bottom, the fact that *Strickland* and its progeny necessitate often challenging hindsight review should not preclude defendants from remedying constitutional wrongs, as the threshold requirement risks doing.

Finally, the threshold requirement's narrow view of *Frye* and *Lafler* fails to recognize the centrality of plea bargains in our criminal justice system. Although the lack of any constitutional right to plea bargain informs this narrow reading,[346] the claims at issue here do not implicate a right to plea bargain because attorney ineffectiveness prevented the prosecution from exercising its discretion in the first place.[347] Furthermore, this constrained reading does not comport with the Court's recognition of plea bargaining as a critical phase of criminal proceedings, to which the Sixth Amendment right

338. Strickland v. Washington, 466 U.S. 668, 710 (1984) (Marshall, J., dissenting) (emphasis added).

339. 202 F.3d 1030 (8th Cir. 2000).

340. *See id.* at 1032–33.

341. *See id.* at 1034 (Arnold, J., dissenting).

342. *See supra* notes 73–74 and accompanying text.

343. *See* Griffin, *supra* note 325, at 190.

344. *See* Missouri v. Frye, 566 U.S. 134, 146 (2012).

345. *See supra* notes 132–34 and accompanying text; *see also* Lafler v. Cooper, 566 U.S. 156, 172 (2012) (rejecting a "floodgates" argument against providing a remedy for the claim raised); Padilla v. Kentucky, 559 U.S. 356, 371 (2010) (noting that "[a] flood" of claims "did not follow" after *Hill* due to *Strickland*'s "high bar").

346. *See supra* notes 308–11 and accompanying text.

347. *See supra* note 298 and accompanying text.

to effective counsel applies.[348] If plea bargaining is indeed a critical stage of the criminal process, then the right to effective assistance of counsel should not begin only once a plea offer has been extended to the defendant.[349] Ultimately, defendants should not suffer harsh convictions due to attorney ineffectiveness stemming from a failure to affirmatively negotiate a favorable plea offer.

However, the threshold requirement does present one significant advantage over the *Byrd* approach: it avoids dealing with difficult questions of crafting an appropriate remedy.[350]

Thus, imposing a threshold creates an unnecessarily strict requirement for defendants to overcome and fails to recognize the realities of the modern system of pleas. But the *Byrd* approach presents problems of its own. So, is there a way to provide relief for defendants in these cases while avoiding, or at least minimizing, the hazards that the latter approach presents? And can this solution recognize the centrality of pleas in today's criminal justice system while tipping the scales of a heavily unbalanced system slightly in favor of defendants?

B. A Way Forward: Applying a Burden-Shifting Framework

In response to these concerns, this Note proposes applying a burden-shifting framework to cases in which the defendant alleges IAC because their defense attorney failed to negotiate a favorable plea offer. This approach would provide a clearer analytical framework through which courts could analyze such claims while minimizing some of the pitfalls of *Byrd* and recognizing the centrality of plea bargaining in the modern criminal justice system.

Under this framework, the defendant would still bear the burden of showing, in their habeas claim, that they have satisfied both prongs of the *Strickland* test—that the defendant suffered constitutionally deficient performance and that said deficient performance resulted in prejudice by precluding the negotiation of a favorable plea offer. Given that the claim pertains to plea bargaining, the defendant would still have to establish that there was a reasonable probability that they would have accepted the plea, that the prosecution would not have rescinded the plea, and that the court would not have rejected the plea.[351] To satisfy this test, the defendant would first bear the burden of establishing that the prosecution would have accepted the plea by making a showing similar to that of the defendants in *Pender*[352] and *Byrd*.[353]

348. *See supra* note 192 and accompanying text.
349. *See supra* notes 222, 296 and accompanying text.
350. *See supra* notes 312–20 and accompanying text.
351. *See supra* notes 160–61 and accompanying text.
352. *See supra* notes 271–72 and accompanying text.
353. *See supra* notes 300–01 and accompanying text.

Next, after showing that no party would have rejected the plea, the burden shifts to the state. In responding to the habeas petition, the state would have to affirmatively demonstrate *why* the prosecution did not offer a plea bargain. At this stage, the prosecution would bear the burden of production to show that there was a reasonable purpose for not extending a plea offer to the defendant. Examples could include the prosecution's desire to proceed to trial due to the severity of the alleged crime, a failure by the defendant to agree to terms of a proffer or conditional plea, or an informed decision by the defendant to proceed to trial rather than negotiate a plea deal. An unreasonable purpose may include a policy of waiting for defense counsel to initiate plea negotiations[354] or simply choosing not to extend a plea offer despite admitting that one would have been forthcoming had defense counsel initiated negotiations. Reflecting the fact-dependent nature of these cases, the court would consider the facts and circumstances specific to the defendant in determining whether the prosecution provided a reasonable purpose for not providing a plea deal.

If the reviewing court determines that there was a reasonable purpose for the lack of any plea offer, then the defendant's claim would fail on the prejudice prong. If, however, the court finds that there was no reasonable purpose for the lack of a plea offer, then the court would presume that there was a reasonable probability that the prosecution would have accepted the plea offer. At this point, the burden would shift back to the defendant, with the court assessing the rest of the defendant's *Strickland* claim, including the rest of the prejudice showing—that the defendant would have accepted the plea and that the court would not have rejected it.

This proposal has several advantages. Its clearest benefit is that it allows defendants who have missed out on favorable pleas due to attorney ineffectiveness to proceed with their IAC claims. Using this burden-shifting framework, Quartavious Davis's IAC claim would not have failed solely because there was no plea offer.[355] This approach would also address one of Justice Marshall's critiques of the *Strickland* test—that attorney ineffectiveness resulted in the lack of any injury to the defendant in the record.[356] In addition, by permitting defendants to bring IAC claims in these cases, this proposal recognizes the importance of *Strickland*'s "fundamental fairness" inquiry.[357] And, perhaps most importantly, it recognizes the centrality that the plea-bargaining process plays in criminal proceedings and the necessity of effective advocacy during this phase of proceedings.[358]

Furthermore, this proposal shifts some of the burden of the prejudice analysis, which typically rests solely with the defendant, to the prosecution. Shifting the burden in this way would encourage the prosecution—the party that typically has the power, resources, and information in the criminal

354. *See supra* note 283 and accompanying text.
355. *See supra* note 254 and accompanying text.
356. *See supra* notes 125, 338 and accompanying text.
357. *See supra* note 330 and accompanying text.
358. *See supra* notes 192, 296 and accompanying text.

process[359]—to ensure that the record, as it pertains to plea bargaining, is complete. This not only follows recommendations from the Supreme Court to improve the record during the plea-bargaining process,[360] but also aligns with prosecutorial incentives to ensure that convictions are protected and not overturned in post-conviction proceedings.[361] Improving the record during the plea-bargaining process would not only reduce the number of *Byrd*-, *Pender*-, and *Davis*-style claims, but also improve transparency and bring some formality and structure to an otherwise opaque process. In addition, although courts would still have to engage in hindsight review during the prejudice analysis, a more robust and complete record would limit some of the "retrospective crystal-ball gazing" in which the reviewing court would have to engage.[362]

Additionally, the "reasonable purpose" analysis respects prosecutorial discretion while discouraging less than desirable prosecutorial practices. As previously discussed, there are a variety of reasons why prosecutors may or may not proceed to trial, including self-interest.[363] But as long as the prosecutor can provide a reasonable purpose for declining to extend a plea bargain—for example, due to the severity or seriousness of the alleged crime—then the defendant's claim would fail on the prejudice prong. If, however, the prosecutor did not extend a plea offer due to a policy of waiting for the defendant, then the defendant's IAC claim may proceed. Such policies, which were at issue in *Byrd*,[364] provide little benefit to either side. Requiring defense attorneys to initiate plea negotiations puts additional stress on already overburdened indigent defense attorneys.[365] Conversely, prosecutors who follow such policies and do not extend plea offers unless defense counsel makes the first move, even when the State is amenable to an offer, waste judicial and state resources and reduce efficiency in the criminal process. Ultimately, the "reasonable purpose" analysis encourages the prosecution to make an affirmative decision, even if that is a decision not to offer a plea, and it discourages passive policies that result in the lack of a plea when one would have been offered had defense counsel initiated discussions.

Finally, the "reasonable purpose" analysis would still ensure that certain meritless IAC claims would not proceed. For example, claims of the sort raised by the defendant in *Rendon-Martinez*—in which the defendant put forth, at best, speculation that the prosecution was prepared to extend a plea offer[366]—would still fail on the prejudice prong because the prosecution would be able to present a reasonable purpose for the lack of any plea offer.

359. *See supra* Part I.A.2.
360. *See supra* note 74.
361. *See* Bibas, *supra* note 48, at 2471–72 (discussing the importance of maintaining strong win-loss records to prosecutors).
362. *See* Berger, *supra* note 126, at 155 (highlighting the difficulty of determining prejudice during plea bargaining due to its informality and lack of external supervision).
363. *See supra* notes 48–50 and accompanying text.
364. *See supra* note 283 and accompanying text.
365. *See supra* Part I.B.2.
366. *See supra* note 236.

Thus, any "late, frivolous, or fabricated" claims brought by defendants receiving harsh sentences at trial would not proceed.[367]

However, this proposal is not without its flaws. One concern stemming from this proposal is the lack of effective guidance that the "reasonable purpose" test provides to courts. Thus, there may be concerns that a reviewing court would accept minimal or pro forma justifications put forth by the prosecution to dismiss IAC claims. Such concerns should be alleviated somewhat by the requirement that the reviewing court consider the facts and circumstances relevant to the defendant, thereby reflecting the highly fact-specific nature of these cases.

Additionally, this proposal does not solve the remedy issues raised by the *Byrd* approach.[368] In the event that the defendant can pass the *Strickland* test, and resentencing is not an appropriate remedy, the trial court would still be faced with the challenging task of crafting a remedy in the absence of any formal plea offer.

Although this critique is valid, one of the consequences of the proposed burden-shifting framework would be to minimize these claims from arising by ensuring that the prosecution maintains a robust record and has a reasonable purpose for not offering a plea bargain. Therefore, the burden-shifting framework would ideally prevent the court from being put in a position to craft a remedy in the first place.

An additional concern is that this proposal could further entrench plea bargaining by making even more plea bargains available, thereby further undermining the adversarial process.[369] Although valid, this is a broader critique of the criminal justice system and should not be a reason to foreclose relief for defendants that have been prejudiced by IAC during plea bargaining. Ensuring a truly adversarial criminal justice system with vigorous advocacy by both sides goes beyond the scope of the problem addressed in this Note and requires systemic reform of plea bargaining—and of the criminal justice system as a whole. This proposal offers a solution within the confines of existing IAC jurisprudence. It is not a panacea for all problems with the system of pleas, but it does provide a lifeline for defendants who deserve relief but cannot obtain such relief under the threshold requirement.

CONCLUSION

Our criminal justice system is a system of pleas. After the Court's creation of the two-pronged test for IAC in *Strickland*, the Court largely failed to acknowledge this reality until its holdings in *Frye* and *Lafler*, when it recognized that IAC may result in defendants forgoing favorable plea offers and instead receiving unduly harsh punishments at trial. But these two decisions inevitably raised the question of whether a defendant may bring

367. *See supra* note 327 and accompanying text.
368. *See supra* notes 312–20 and accompanying text.
369. *See supra* note 78 and accompanying text.

such an IAC claim in the absence of *any* plea offer. Circuit courts have presented differing views on this question. Some circuits have held that the lack of any formal offer is fatal to the IAC claim. Others have rejected this threshold requirement approach, applying a fact-intensive interpretation to the test for prejudice created in *Frye* and *Lafler*—whether there is a reasonable probability that the defendant would have accepted the offer, that the prosecution would not have withdrawn the offer, and that the court would not have rejected the offer. Although both approaches have their merits, the latter approach is more attractive, as it avoids inequitable outcomes, is in line with the Court's emphasis on the "fundamental fairness" of the outcome when applying the *Strickland* test, and recognizes the prevalence of plea bargaining, although it is not without its own limitations.

The paradox that exists in plea bargaining—the lack of a right to one despite its dominance in our criminal justice system—has resulted in the difficult question that this Note attempts to answer. A burden-shifting framework that would require the prosecution to provide a "reasonable purpose" for the lack of a plea offer, given the facts and circumstances unique to the defendant, would allow defendants to proceed with IAC claims that center on their attorneys' failure to affirmatively negotiate a plea offer. Even though this approach is not perfect, it would provide relief to defendants who would otherwise suffer significant injury under the threshold requirement while staying within the bounds of existing IAC jurisprudence.