A SYSTEM OF PLEAS: ASSESSING SIXTH AMENDMENT CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL IN THE MODERN CRIMINAL JUSTICE SYSTEM

INTRODUCTION

Contrary to the dramatic portrayals of the criminal justice system in movies and television, a vast majority of criminal cases are resolved through the plea bargaining system rather than by trials.[1] Guilty pleas resolve ninety to ninety-five percent of both federal and state court cases, yet the plea bargaining process generally occurs in the shadows of the criminal justice system as prosecutors can bargain without judicial oversight.[2] Many defendants make plea decisions based on the advice of counsel they met only minutes before, yet accept jail time and give up their right to a trial before a judge and jury.[3] However, prosecutors are not required to engage in negotiations with a defendant's counsel.[4] They may decline to engage at their discretion, so adequate representation is critical in cases where a guilty plea may be a fair and favorable outcome.[5]

The plea-negotiation process is the phase of criminal prosecution where defendants need the advice and skill of counsel the most because many are pressured to give up their right to a jury trial at this stage out of worry that a trial would lead to a worse outcome.[6] Plea bargaining is a process by which the government conditions a reduced charge or sentence on the defendant waiving various constitutional rights, such as the privilege against self-incrimination.[7] Effective assistance of counsel is crucial at this phase to determine whether a defendant should take either the risk of waiving their rights or the risk of pursuing trial.

The Supreme Court has upheld Sixth Amendment challenges in the plea bargaining context to align with notions of fairness, as the plea bargaining stage is "a critical phase" in the resolution of most cases.[8] The Sixth Amendment right to effective assistance of counsel recognized in *Strickland v. Washington* is analyzed under a two-part test, which requires the

defendant to show that the attorney's performance was deficient and that this deficiency prejudiced the defendant.[9] The Supreme Court applied the *Strickland* test to claims of ineffective counsel based on the nonacceptance of a plea offer in *Missouri v. Frye* and *Lafler v. Cooper*.[10] However, analyzing the second prong of prejudice is particularly challenging in this context because the court must retrospectively consider how the defendants' outcome or the fairness of their later trial was influenced by the counsel's alleged errors early in negotiations.[11] The analysis is especially challenging when plea negotiations were halted early in the process or never began due to counsel's ineffectiveness, the prosecution's refusal, or some other exceptional factor.

This Comment focuses primarily on the second prong of the *Strickland* test in arguing that a defendant does not need to demonstrate that a plea agreement was actually extended to them to meet the prejudice requirement.[12] When attempting to prove a claim of ineffective assistance of counsel in the plea bargaining phase, the defense counsel's strategies and advice throughout all negotiations are relevant.[13] Effective counsel is required throughout the process of gaining a plea deal because the entirety of the plea bargaining stage is critical in determining what legal aid could bring about a better outcome for criminal defendants.[14] Part I discusses the development of the right to effective assistance of counsel and how the question of whether a plea deal must be actually extended was brought about through past cases. Part II proposes a concrete rule to resolve the question of the standards for ineffective counsel claims in the plea bargaining context. Finally, Part III analyzes how policy considerations and criticisms addressed in past Supreme Court decisions factor into this rule.

I. Background

A. The Sixth Amendment Right to Fair Trial and Effective Assistance of Counsel

The Sixth Amendment of the Constitution provides that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."[15] The Supreme Court has

interpreted this to mean criminal defendants have the right to "effective counsel."[16] Therefore, a successful claim under the Sixth Amendment for ineffective counsel must show that counsel's errors were so significant that the defendant was deprived of his right to a fair trial of his crimes.[17] The test to determine whether counsel is effective or ineffective is governed by the two-part test outlined in the Supreme Court case *Strickland v. Washington.*[18] First, the "defendant must provide evidence to demonstrate that the counsel's performance was "deficient," and second, that the deficient performance "prejudiced" the defendant.[19]

To evaluate whether counsel's performance caused prejudice, courts use a second test, which requires the defendant to demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[20] The "reasonable probability" standard is met if the defendant shows a reasonable likelihood that the result of their case would have been different absent counsel's errors.[21]

B. Case History: Sixth Amendment Protections in the Plea Bargaining Process

After *Strickland*, a series of other Supreme Court cases built further upon the constitutional analysis of the right to counsel and remedies for violations of this right. An important trilogy of Supreme Court decisions established the right to counsel in the plea bargaining context in cases that arose in the years after Strickland.[22] In the first case of the trilogy, *Padilla v. Kentucky*, the Supreme Court established that plea negotiations are "a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."[23] *Missouri v. Frye* further expanded on the right to effective counsel by charging attorneys with the duty to notify defendants of any formal plea offers.[24] After *Frye*, a failure to communicate a plea offer to a client could sufficiently meet the prejudice requirement under *Strickland*, which implicitly established defendants' ability to challenge legal representation with

respect to potential pleas or offers.[25] The Supreme Court rulings relied on the current reality of the criminal justice system, as plea bargains are "so central to the administration of the criminal justice system" that defense counsel must meet their responsibilities in the plea bargain process "to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages."[26]

Ultimately, the Supreme Court interpreted the prejudice prong from *Strickland* to be met where a plea offer has lapsed or been rejected if the defendant can show a reasonability probability that: (1) "they would have accepted the earlier plea offer had they been afforded effective assistance of counsel," (2) "the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it," and (3) "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time."[27] The final case in the trilogy set forth remedies for defendants prejudiced by the rejection of a potential plea offer based on the advice of deficient counsel.[28] In *Lafler v. Cooper*, the Supreme Court determined that the proper remedy for a defendant convicted at trial after rejecting a favorable plea agreement is for the prosecution to reoffer the initially rejected plea.[29] The Supreme Court explicitly recognized that defendants have a Sixth Amendment right to effective assistance of counsel during the plea bargaining process with the resolution of this trilogy.[30]

Frye and *Lafler* caused controversy at the time of their decision regarding the concerns Justice Scalia brought up in his dissenting opinions.[31] Scalia and other critics viewed these decisions as the judicial expansion of Sixth Amendment protections into the plea bargaining process.[32] The dissenting opinions of *Frye* and *Lafler* argued that the Sixth Amendment only protects defendants during the trial process because defendants do not have a constitutional right

to participate in the plea bargaining process.[33] Scalia also expressed concerns that the majority opinions created a new body of "plea bargaining law" that would burden the courts with further constitutional litigation.[34] He correctly assumed that further litigation would arise related to the question of how defendants may show prejudice as required by the *Strickland* test in situations where a favorable plea offer may have been appropriate but was not offered to them due to errors made by the attorney.[35]

II. Standards for Ineffective Counsel Claims in the Plea Bargaining Context

A. Defendant's Burden

Since *Frye* and *Lafler*, lower courts have employed different approaches when interpreting the Supreme Court's rulings in cases involving forgone guilty pleas. Recent cases demonstrate that the Circuits disagree on whether prejudice can be shown when the defendant fails to accept a plea deal.[36] In *Byrd v. Skipper*, the Michigan Court of Appeals applied the *Frye* and *Lafler* decisions to decide whether the defendant could demonstrate a reasonable probability that, absent counsel's errors, the prosecutor would not have revoked a plea offer and the trial court would have accepted.[37] Though a plea offer was never expressly extended, the prosecutor testified openly about the state's willingness to engage in plea bargaining. [38]The defense counsel incorrectly advised the defendant that he would be found not guilty if the case proceeded, but he was later convicted by a jury trial, though his co-conspirator received a lesser sentence after negotiating a plea deal.[39] Thus, the defendant could show that there was "a reasonable probability that, with competent counsel, he would have availed himself of Wayne County's fair and regular pretrial process and would have successfully negotiated a favorable plea" to meet the reasonable probability standard required to show prejudice under *Strickland*.[40]

The Eighth Circuit alternatively held in *Ramirez v. United States* that a defendant had not been prejudiced by a forgone plea offer based on distinctions between his case and *Frye*.[41] The

defendant did not show a reasonable probability that the government would have extended a plea offer, as the only evidence he cited to support this contention was a letter expressly stating that the government did not promise any benefit, such as a more favorable agreement.[42] The prosecution expressed initial interest as to whether the defendant possessed information that could be beneficial to them for the purpose of plea negotiation, but the record did not support the argument that he was willing to accept a plea or share helpful information.[43] The evidence the defendant referenced did not demonstrate that his attorney's errors led to the forgone plea bargain but rather indicated that the defendant never intended to cooperate with the government in plea negotiations.[44] Only the dissenting opinion noted that "Ramirez was not allowed to even offer evidence the plea would have been entered and adopted," which likely contributed to the outcome of his case.[45]

Ramirez differs from *Byrd* in that the court found that the defense counsel's failure to advise his client about the possibility of gaining a plea agreement was insufficient to support a claim of ineffective assistance of counsel.[46] The court reasoned that "Ramirez received at most an informal plea offer," while in the Sixth Circuit, the defendant satisfied the burden of showing that he was prejudiced without any showing of a potential plea offer.[47] Though these Circuits are split on the exact standards for determining prejudice in the plea bargain context, in both cases, the defendant was required to affirmatively demonstrate evidence of prejudice.[48] The facts of these cases are distinguishable in this facet because Ramirez could not affirmatively prove that both himself and the prosecution were open to plea negotiations, whereas in *Byrd* the prosecution openly testified that they were open to negotiations.[49] *Byrd* demonstrated that an available plea would have provided favorable terms, unlike *Ramirez,* where the plea situation was less favorable to the defendant as the prosecution was seeking information as a condition of a plea

deal and the defendant showed no willingness to cooperate with their requests.[50] The aforementioned cases demonstrate that the defendant must make additional showings to claim deficient performance when it is not clear why a plea bargain was or was not negotiated.

The Supreme Court did not use language requiring the defendant to show evidence of a "formal offer" in *Lafler* but rather protected defendants' right to counsel "during plea negotiations," which implies including the entirety of the plea bargaining process.[51] Therefore, defendants enjoy the right to effective assistance of counsel when attempting to weigh their options related to plea bargains where and when it is appropriate to do so.[52] In *Byrd*, the defendant's counsel adamantly opposed accepting a guilty plea based on a false understanding of the case, which destroyed his chances of beginning any formal or informal plea negotiations.[53] Such cases highlight the need for effective counsel protections in the beginning stages of plea negotiations, where defendants likely do not know or trust their counsel at all yet are entirely reliant on their advice to determine whether a plea bargain is feasible or desirable. Additionally, *Byrd* demonstrated that the actual extension of a formal plea deal likely does not make a difference in the outcome of the proceeding.[54] A plea offer should not have to be formally extended in situations where the defense counsel fails to pursue a plea bargain based on false pretenses, which an unknowing defendant will likely rely on.

The correct question of inquiry should not be whether the defendant had a right to engage in plea bargaining but rather whether it was unjust under the circumstances for defense counsel not to pursue a plea deal. The answer depends on what the defendant and prosecution openly expressed to defense counsel during the period when plea bargaining was appropriate. In cases like *Ramirez,* where the defendant cannot affirmatively prove that he previously indicated to his attorney that he would agree to a plea bargain, the defendant likely will not be successful in

claiming ineffective counsel unless they have some other justification for why they did not express interest.[55] A defendant faces a demanding standard when raising this type of claim under Strickland, but *Byrd* demonstrates that under different circumstances, the standard may be clearly met.[56] The difficulty of proving prejudice in situations involving foregone plea bargains suggests that a concrete rule is needed to clarify what is required for defendants to seek relief under the *Strickland* test.[57]

B. Concrete Rule Resolving the Conflict Between Courts

A concrete rule could further clarify whether a defendant may have a successful claim showing they were prejudiced by their counsel's failure to seek a plea deal prior to bringing such a claim. A rule that addresses concerns raised in cases following the Supreme Court's plea bargaining trilogy could specifically define the circumstances under which a defendant can sufficiently claim that their counsel's deficiency caused the foregoing of a favorable plea agreement. The Supreme Court has reiterated that the "ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged."[58] While counsel does not have an explicit duty to initiate the plea bargaining process, the lack of an attempt to pursue a plea bargain is plainly unreasonable and prejudicial in some cases because defendants may face more extreme consequences at trial.[59]

For example, the Fourth Circuit held that a defendant was entitled to an ineffective assistance of counsel claim where his attorney gave no reason for choosing not to pursue a plea deal under circumstances where all the facts indicated that a plea deal was appropriate and favorable.[60] *Pender* demonstrates an example of a situation where the defense counsel's deficiency unreasonably led a defendant to be convicted with a mandatory life sentence, although it was clear that a guilty plea could have prevented him from facing this outcome.[61] The *Pender* decision aligns with fundamental fairness because the defendant was significantly prejudiced by

the deficiency of his counsel.[62] The defendant likely would not have faced a life sentence had his right to effective counsel been fulfilled by adequate representation.[63] *Pender* suggests a rule that considers all of the defendant's circumstances when determining whether the attorney was deficient in deciding not to negotiate a plea agreement.

Alternatively, cases on the other side of the split also identify factors that could be relevant to a concrete rule capable of resolving the gaps between Circuits. In *Davis v. United States*, a criminal defendant challenged his conviction on the grounds that his attorney failed to advise him to enter into a guilty plea despite the possibility of conviction and an increased sentence at trial.[64] The defendant in *Davis* faced a life sentence if his case went to trial, as did the defendant in *Pender*, yet here the denial of his ineffective assistance of counsel claim was upheld on appeal.[65] Neither the government nor Davis provided evidence of willingness to engage in plea bargaining prior to the trial, which distinguishes this case from *Pender.*[66] The facts align more with *Ramirez*, where further inquiry into the circumstances showed the defendant was unlikely or unable to provide evidence that he would have accepted a more favorable plea if offered.[67] Such cases suggest using a rule that requires courts to consider the full circumstances during the plea bargaining process to understand the intent and willingness of both the defendant and the prosecution to engage in plea negotiations at the stage in question.

To determine whether the attorney's errors were the root of the failure to obtain a plea deal, the defendant must be able to supply evidence supporting the contention that they would have accepted advice that encouraged them to plead guilty.[68] Additionally, *Davis* suggests that a defendant must be able to provide some concrete evidence supporting the prosecution's openness to engaging in plea negotiations to show that a deal would have been possible with effective counsel.[69] Precedent suggests that a concrete rule could eliminate some of the discrepancies

between Circuits, as the *Frye* and *Lafler* decisions provide a vague outline for determining how to measure prejudice in the plea bargaining context.

In addition to the three requirements for demonstrating prejudice outlined in *Frye*, a defendant claiming ineffective assistance of counsel in relation to a foregone plea agreement should also be required to affirmatively prove that: (1) the defendant and prosecution expressed willingness to engage in plea negotiations, (2) a plea bargain was appropriate and favorable under the circumstances, and (3) no extraneous circumstances prevented the defense counsel from seeking a plea deal, such as valid strategical reason or the defendant's opposition to pleading guilty.[70] An appropriate rule considers all of the relevant circumstances at hand in the plea bargaining context to maintain a central focus on the fundamental fairness of the proceeding, as was the original goal of the *Strickland* ruling.[71]

C. Basis for Rule

The proposed rule is supported by both Supreme Court and District Court precedent and would build upon past decisions to promote reliability in proceedings rather than further confusing the vague standards set by past precedent for analyzing Sixth Amendment claims related to a foregone plea bargain. The *Strickland* test demands more than the "mere possibility of obtaining a more favorable agreement by plea bargaining" to satisfy the prejudice prong, and the rule proposed above can concretely distinguish whether a defendant is relying on a mere possibility of obtaining a more favorable sentence by challenging counsel's actions in the plea process, or whether they genuinely lacked fair representation during the plea bargaining process.[72] Cases in this specific area of constitutional law focus mainly on the totality of the circumstances in the case at hand rather than precedent in determining whether prejudice existed, likely because ineffective assistance during plea bargaining can be shown in a variety of ways.[73]

Additionally, precedent from the Fourth and Sixth Circuits supports this rule as the holdings from *Pender* and *Byrd* do not require a formal offer but rather address external circumstances in analyzing prejudice. For example, the court may acknowledge whether the government allowed similarly positioned defendants to negotiate for a guilty plea with the result of a more favorable sentence.[74] In response to the proposed rule, an effective attorney may be able to easily refute false claims of ineffective assistance by providing evidence of their motives or strategy in choosing not to initiate plea negotiations, which was a potential defense discussed in *Pender.*[75] Though *Ramirez* and *Davis* came out differently, these cases did not expressly state that a formal offer must be extended to make an ineffective counsel claim in this context. Both cases utilized the rules from *Frye* or *Lafler,* which do not explicitly state the necessity of a formal offer to make such a claim.[76] The Supreme Court has not addressed a case where the lapsed or rejected plea offer was only informal, so it is unclear whether this is necessarily required by their previous holdings. Thus, a rule that allows for informal offers or minimal negotiations does not necessarily contradict precedent.

III. Policy Considerations of the Proposed Rule and Plea Bargaining System

The proposed rule aligns with the policy justifications supporting the Supreme Court's prior developments in constitutional law requiring adequate assistance of counsel throughout the negotiation of a plea bargain. The Supreme Court considered the importance of the plea bargaining process in deciding *Lafler* and *Frye*, though the dissent criticized the majority for considering plea bargains whatsoever in the ineffective counsel context.[77] Scalia argued that because defendants have no constitutional entitlement to a plea deal, considering the adequacy of counsel in plea bargaining should be kept separately from Sixth Amendment claims.[78] He reasoned that a defendant refusing to pursue a plea bargain is making their own voluntary choice

to proceed to a fair trial, and therefore cannot be entirely dependent on the defense counsel's errors.[79] Scalia also highlighted the potential difficulty and inefficiency of requiring a trial court to reinstate a lapsed plea deal, which was determined to be the correct remedy in *Lafler.*[80]

However, these arguments are weak when considering the plea bargain system through the majority's view on fairness in proceedings. The Sixth Amendment encompasses both the right to counsel and the right to a fair trial, and effective counsel at the plea bargaining stage has a substantial impact on whether the defendant receives a fair trial later in the process.[81] Regardless, most defendants do not reach the trial stage, so the right to counsel must be applicable to all stages of the plea bargaining system to achieve justice and reliability in proceedings.[82] Today, the plea bargaining system is not a companion of the criminal justice system, but rather "it *is* the criminal justice system."[83] The significance of the plea bargaining system itself outweighs the concerns raised in Scalia's dissents to *Frye* and *Lafler* about further constitutional litigation and the difficulty of defining counsel's duties throughout the plea process. As the rate of incarceration has quadrupled since 1960, the importance of the plea bargain system has also been elevated.[84]

Though it may be difficult to determine the proper remedy for some cases under the proposed rule, the issue is minor because, as shown in previous cases, there is typically some evidence of negotiations or the reason for lack thereof, which can help the trial court in deciding what agreement or sentence is appropriate.[85] The use of plea bargaining is so commonplace that almost all criminal cases involve some discussion of potentially gaining a plea bargain which may serve as an outline for the appropriate remedy.[86] The proposed rule restricts the cases in which a defendant can successfully bring an ineffective assistance of counsel claim to only situations where the right of due process will be advanced by reoffering a plea deal.

As plea bargaining is considered a critical stage, the proposed rule also supports notions of due process in that it ensures a defendant will receive fair proceedings. Even if a constitutionally valid jury trial results from a foregone plea deal, due process is still at issue if the proceedings leading to the trial were defective. In considering whether due process requirements are met, the court must give weight to the significance of the plea bargaining system because its dominance in the criminal justice system has changed the definition of fair proceedings.[87] As over ninety percent of both federal and state convictions are resolved by guilty pleases, the right to effective counsel and the right to due process must align with this reality while also recognizing the Supreme Court's central focus on the fundamental fairness of the proceedings.[88] Adequate counsel is necessary throughout the plea bargaining process to assure the millions of defendants who are processed each year are represented in what is typically the most critical stage in determining their future.[89]

CONCLUSION

In claiming a violation of the right to effective assistance of counsel in the plea bargaining stage, the prejudice prong of the *Strickland* test has been interpreted to require the defendant to demonstrate that they would have accepted the plea offer but for counsel's errors. A defendant who is deprived of effective counsel in plea bargaining must make additional showings to meet the prejudice prong of the *Strickland* test because prosecutors are not required to engage in plea bargaining, despite its widespread presence.[90] Additionally, the prejudice prong requires the defendant to affirmatively show a reasonable probability that the prosecution and trial court would have accepted the plea deal.[91] A court will consider the totality of the circumstances in the determination of prejudice to promote fundamental notions of fairness.[92] When a defendant has a weak case and faces an extreme sentence upon conviction, such as in

Pender, the defense counsel must be held accountable for failing to pursue a strategy that is prevalent and clearly favorable to their client.[93]

Therefore, a concrete rule that considers the appropriateness of plea bargaining under the specific circumstances, as well as external conditions that may prevent the attorney from seeking a plea deal, addresses the main concerns related to plea bargains in general. The factors outlined in *Frye* allow a court to determine whether a plea deal could actually provide a better outcome for the defendant, but adding the factors in the proposed rule would specifically address a wider range of situations where no formal offer was made and also provide a more well-rounded and concrete rule.[94] Plea bargains have become so essential to the administration of criminal justice that a concrete rule protecting defendants from counsel who fail to engage in the process is necessary to ensure the right to effective counsel; thus, the proposed rule aligns with notions of fairness and the guarantees of the Sixth Amendment.

---

[1] Alex C. Werner, *Pleading with the Past: Assessing State Approaches to Lafler and Frye's Counterfactual Prejudice Prong*, 121 COLUM. L. REV. 411, 412 (2021).

[2] Lindsey Devers, *Plea and Charge Bargaining,* U.S. Dep't of Just., Bureau of Just. Assistance 1 (Jan. 24, 2023).

[3] Lahny R. Silva, *Right to Counsel and Plea Bargaining: Gideon's Legacy Continues*, 99 IOWA L. REV. 2219, 2232 (2014).

[4] *Id.* at 2239–40.

[5] *Id.*

[6] John J. Davis, Barr D. Younker, Jr., *Frye and Lafler: New Rights or Old Responsibilities*, 75 ALA. LAW. 182, 186 (2014).

[7] Tina Wan, *The Unnecessary Evil of Plea Bargaining: An Unconstitutional Conditions Problem and A Not-So-Least Restrictive Alternative*, 17 S. CAL. REV. L. & SOC. JUST. 33, 48 (2007).

[8] Missouri v. Frye, 566 U.S. 134, 141 (2012) (citing Padilla v. Kentucky, 559 U.S. 356, 373–74 (2010); *see also* Wan, *supra* note 7, at 51–52.

[9] Strickland v. Washington, 466 U.S. 668, 687 (1984).

[10] Missouri v. Frye, 566 U.S. 134, 144–45 (2012).

[11] *Id.*

[12] *See Strickland*, 466 U.S. at 687.

[13] *Frye*, 566 U.S. at 144–45.

[14] *Id.*

[15] U.S. CONST. amend. VI.

[16] *Strickland*, 466 U.S. at 686.

[17] *Id*. at 687.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 694.

[21] *Id.*

[22] Silva, *supra* note 3, at 2234.

[23] *Frye*, 566 U.S. at 132 (citing *Padilla*, 559 U.S. at 373–74).

[24] *Frye*, 566 U.S. at 145.

[25] *Id.* at 145; Silva, *supra* note 3, 2236–37.

[26] *Frye*, 566 U.S. at 143.

[27] *Id*. at 147.

[28] *Lafler*, 566 U.S. at 174–75.

[29] *Id.*

[30] *Id.* at 162.

[31] *See Frye*, 566 U.S. at 151–53 (Scalia, J., dissenting); *Lafler*, 566 U.S. at 175–76 (Scalia, J., dissenting).

[32] *Lafler,* 566 U.S. at 186–87 (Scalia, J., dissenting).

[33] *Frye*, 566 U.S. at 152 (Scalia, J., dissenting); *Lafler,* 566 U.S. at 177–176 (Scalia, J., dissenting).

[34] *Id.*

[35] *Frye*, 566 U.S. at 155.

[36] *See* Byrd v. Skipper, 940 F.3d 248, 264 (6th Cir. 2019) (Griffin, J., dissenting).

[37] *Byrd*, 940 F.3d at 256.

[38] *Id.* at 260.

[39] *Id.* at 258–59.

[40] *Strickland*, 466 U.S. at 694; *Byrd*, 940 F.3d at 260.

[41] Ramirez v. United States, 751 F.3d 604, 607 (8th Cir. 2014).

[42] *Id.* at 606–07.

[43] *Id.* at 606.

[44] *Id.* at 606–07.

[45] *Id.* at 610.

[46] *Id.* at 608.

[47] *Id.*; *Byrd*, 940 F.3d at 257–58.

[48] *Id.*

[49] *Ramirez*, 751 F.3d at 606; *Byrd*, at 258.

[50] *Ramirez*, 751 F.3d at 606.

[51] *Lafler,* 566 U.S. at 162.

[52] *Id.*

[53] *Byrd*, 940 F.3d at 253.

[54] *Id.* at 258.

[55] *Ramirez*, 751 F.3d at 606.

[56] *Byrd*, 940 F.3d at 257.

[57] *See Strickland*, 466 U.S. at 694.

[58] *Strickland*, 466 U.S. at 696 (1984); *Frye*, 566 U.S. at 152 (2012) (Scalia, J., dissenting).

[59] *Frye*, 566 U.S. at 148.

[60] *Pender*, 514 F. App'x at 361.

[61] *Id.* at 360–61.

[62] *Id.* at 361.

[63] *Id.*

[64] Davis v. United States, No. 20-11149, slip op. at 3 (11th Cir. Feb. 10, 2022).

[65] *Id.* at 2.

[66] *Id*. at 6.

[67] *See generally Ramirez*, 751 F.3d 604.

[68] *Ramirez*, 751 F.3d at 608.

[69] *Davis*, No. 20-11149, slip op. at 4–5 (11th Cir. Feb. 10, 2022).

[70] *See* Frye, 566 U.S. at 148–49; *see also* Werner, *supra* note 1, at 423.

[71] *Strickland*, 466 U.S. at 697.

[72] *Ramirez*, 751 F.3d at 606.

[73] Silva, *supra* note 3, at 2224.

[74] *Byrd*, 940 F.3d 248 (6th Cir. 2019).

[75] *Pender*, 514 F. App'x at 361.

[76] *Ramirez*, 751 F.3d at 607.

[77] *Lafler*, 566 U.S. at 177–78.

[78] *Id*. at 186.

[79] *Frye*, 566 U.S. at 151–52 (Scalia, J., dissenting).

[80] *Lafler*, 566 U.S. at 174; Sean Michael Fitzgerald, *Losing Sight of the Forest for the Trees: The Supreme Court's Misapplication of Sixth Amendment Strickland Analysis in Missouri v. Frye and Lafler v. Cooper*, 21 AM. U. J. GENDER SOC. POL'Y & L. 681, 699 (2013).

[81] *Frye*, 566 U.S. at 143–44.

[82] *Lafler*, 566 U.S. at 186.

[83] *Frye*, 566 U.S. 134, 144 (2012) (citing Robert E. Scott William, *Plea Bargaining As Contract*, 101 YALE L.J. 1909, 1912 (1992)).

[84] Silva, *supra* note 3, at 2233.

[85] *E.g. Byrd*, 940 F.3d at 256.

[86] Silva, *supra* note 3, at 2231.

[87] *See* Wan, *supra* note 8, at 33–34.

[88] *Strickland*, 466 U.S. at 697–98; Silva, *supra* note 3, 2238–39.

[89] Silva, *supra* note 3, at 2239.

[90] *Frye*, 566 U.S. at 148–49.

[91] *Id.*

[92] *Strickland*, 466 U.S. at 680.

[93] *Pender*, 514 F. App'x at 361.

[94] *See Frye*, 566 U.S. at 147.