DEAL OR NO DEAL: WHY THE ABSENCE OF A FORMAL PLEA OFFER SHOULD NOT PRECLUDE CRIMINAL DEFENDANTS FROM PREVAILING IN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

INTRODUCTION

The dominance of plea bargaining in modern criminal proceedings marks a significant shift from a system of trials to "a system of pleas."[1] Initially designed as a tool to alleviate the burden on court systems, the inherent unpredictability of jury decisions now compels an overwhelming majority of criminal defendants to settle for conclusive charges and sentences decided through negotiations.[2] In avoiding unpredictability, this process of negotiated justice effectively allows defendants to forgo the possibility of acquittal by waiving their Sixth Amendment right to a "speedy and public trial."[3] Nevertheless, decisions in *Powell v. Alabama* and *Gideon v. Wainwright* recognized that the Sixth Amendment's protection of a fair trial is fundamentally intertwined with the guarantee of effective legal representation.[4] American jurisprudence has since recognized this guarantee as being constitutionally protected and extending beyond the trial itself.[5]

In reinforcing this principle set forth in *Powell* and *Gideon*, the landmark decision in *Strickland v. Washington* affirmed the necessity of effective counsel assistance at all "critical stages" of criminal proceedings.[6] Accordingly, the court introduced a two-prong test for assessing ineffective assistance of counsel (IAC) claims that requires defendants to prove both deficient assistance and consequential prejudice.[7] Soon after, the *Missouri v. Frye*[8] and *Lafler v. Cooper*[9] decisions expanded the application of this test to the plea-bargaining process, affirming the need for constitutional protection of effective counsel in this critical stage.[10]

However, applications of the *Strickland* test have varied among circuit courts, particularly concerning whether a formal plea offer must have been extended for a defendant to claim

ineffective assistance in the context of plea negotiations. The Fourth[11] and Sixth[12] Circuits have adopted a lenient approach when analyzing of counsel's assistance by finding prejudice without requiring proof of a formal plea offer. Meanwhile, the Eighth[13] and Eleventh[14] Circuits have employed a clear and tangible benchmark for evaluating ineffective assistance claims by requiring defendants to show a formal plea offer as evidence of prejudice. This disparity reflects the challenges courts face in balancing defendants' right to a fair trial while respecting the discretion of the prosecution and defense counsel when assessing IAC claims.

This Note proceeds in three Parts to argue against adopting a strict rule requiring defendants to show a formal plea offer was extended to prevail in IAC claims. Part I provides a comprehensive background on the evolution of Sixth Amendment rights, the development of the *Strickland* test, and its application to evaluating IAC claims in the context of plea bargaining. Part II discusses the rationale against adopting a strict rule requiring proof of a plea offer to establish prejudice. This Part examines how this requirement conflicts with the modern landscape of criminal proceedings and undermines the principles of effective counsel and fair trial enshrined by the Sixth Amendment. Part III proposes the adoption of a dual-pathway standard that would allow defendants to validate IAC claims either with or without a formal plea offer being extended.

I. BACKGROUND

A. *The Evolution of the Right to Counsel*

The Sixth Amendment was designed as a safeguard to uphold the integrity of the criminal justice system, ensuring that every individual facing criminal charges can anticipate a fair judicial process.[15] This Amendment enshrines several fundamental rights: the right to a speedy and public trial, the right to be informed of the nature of the accusations, and critically, the right to the assistance of counsel for defense.[16] Once perceived as merely ensuring the presence of formal

representation at trial, the right to counsel has experienced an evolution and expansion over the past century through a series of landmark cases. In *Powell v. Alabama*, the Supreme Court recognized the necessity of appointing counsel in capital cases for defendants hindered by disadvantages such as ignorance or illiteracy.[17] *Gideon v. Wainwright* extended the principle established in *Powell* to the provision of legal representation in all federal and state felony proceedings.[18] Yet, it was not until *Strickland v. Washington* that the court recognized that upholding the protection of a fair trial required more than the mere presence of counsel.[19]

Addressing this gap, *Strickland* set the framework for assessing the adequacy of counsel's assistance, providing that it must also be effective to guarantee a fair trial.[20] The *Strickland* court introduced a two-prong test for judging ineffectiveness claims, turning to an assessment of "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[21] The test requires defendants to show both deficient assistance and consequential prejudice.[22] Satisfying the deficiency prong demands that defendants demonstrate that their counsel's assistance fell below an "objective standard of reasonableness" informed by prevailing professional norms.[23] The prejudice prong requires defendants to show a "reasonable probability" that, but for the counsel's errors, the decision of the trial would have been different.[24]

Strickland's test requiring that defendants prove both deficient performance and consequential prejudice to prevail in IAC claims has been argued as creating excessive barriers for defendants to successfully validate their claims.[25] However, in setting this threshold, the *Strickland* Court intentionally opted for a highly deferential approach when reviewing counsel's performance to deter excessive post-trial scrutiny and preserve the discretion afforded to counsel in making

strategic decisions.[26] Despite criticism, *Strickland* remains the reference point for adjudicating IAC claims in a range of contexts, including plea negotiations.[27]

B. *Pleas and Prejudice: Adapting the Strickland Test to a System of Pleas*

Over 90% of state and federal cases are now resolved in a private venue where plea negotiations between the prosecution and defense often determine the fate of the accused.[28] Recognizing the significance of plea bargaining, the Supreme Court has deemed it a "critical stage" in criminal proceedings, thereby extending the right to effective counsel to the plea negotiation context.[29] However, the private and largely informal nature of plea negotiations has challenged the traditional roles and expectations of counsel. Accordingly, the application of *Strickland* has also evolved to address ineffective counsel claims specific to the nuances of plea bargaining.[30] In *Padilla v. Kentucky*, the court adjusted *Strickland*'s deficiency prong based on the unique expectation of counsel during plea bargaining.[31] The *Padilla* court held that defense counsels have an affirmative duty to understand and communicate potential ramifications resulting from plea deals to defendants.[32] This redefinition broadened the obligations of defense counsel at the stage where defendants are given the option to waive their constitutional right to a trial.

The Supreme Court's decision in *Hill v. Lockhart* addressed the prejudice prong in the plea-bargaining context, establishing that a defendant must demonstrate a reasonable probability that, but for counsel's errors, they would not have pleaded guilty.[33] *Hill* accentuated the necessity of showing a demonstrable impact of counsel's deficiencies on the defendant's decision-making process while recognizing that erroneous advice on collateral matters can nonetheless reflect a substantial likelihood of a different and prejudicial outcome.[34]

Notably, the Court in *Missouri v. Frye* and *Lafler v. Cooper* affirmed the importance of competent legal representation at all stages of criminal proceedings and rejected the argument that a fair trial neutralizes ineffective counsel performance during the plea-bargaining stage.[35] These cases further redefined the *Strickland* test by introducing criteria for establishing prejudice tailored to the context of plea bargaining. Demonstrating prejudice in the wake of *Lafler* and *Frye* requires a defendant to show a reasonable probability that, but for counsel's ineffective assistance: (1) a plea offer would have been presented and accepted by the defendant, (2) the prosecution would not have withdrawn the offer, (3) the court would have approved the plea's terms, and (4) the conviction or sentence resulting from the offer would have been less severe than the one imposed at trial.[36] Collectively, this string of cases laid the groundwork for the application of *Strickland* to the plea-bargaining process that has been since used to evaluate claims of ineffective assistance.

C. *Interpretations of Prejudice in Plea-Bargaining Across Circuits*

While decisions in *Padilla*, *Hill*, *Lafler*, and *Frye* shaped the Strickland test to the context of plea bargaining, circuit courts have varied the application of the standard when assessing prejudice. The Fourth and Sixth Circuits recognize that although plea agreements are not constitutionally guaranteed, counsel must still act as a "reasonably effective advocate" for a defendant when making decisions to engage in bargaining.[37] In cases like *U.S. v. Pender*[38] and *Byrd v. Skipper*[39], these circuits found that deficient assistance during plea negotiations can prejudice a defendant, regardless if an offer was extended. These decisions exemplify a lenient IAC assessment, allowing prejudice to be established if there was a reasonable probability that the defendant missed out on a potentially favorable plea deal but for counsel's failure to negotiate.[40] The interpretations of *Strickland* by the Fourth and Sixth Circuits reflect the necessity of providing effective counsel during all pre-trial procedures, not just when actual negotiations begin.

Conversely, the Eighth[41] and Eleventh[42] Circuits have adopted a more rigid standard by requiring proof that a formal plea offer was extended as a prerequisite to establishing prejudice. In *Davis v. U.S.*[43] and *Ramirez v. U.S.*[44], the circuit courts respectively determined that the absence of a plea offer precluded the defendants from proving that they were prejudiced by their counsel's assistance. These circuits justified their decisions by asserting that defendants cannot substantiate IAC claims solely by assuming a plea deal would have been offered if their counsel had chosen to engage in plea bargaining.[45] The *Davis* and *Ramirez* decisions reflect *Strickland*'s principle that courts should be hesitant to scrutinize counsels' professional judgment absent tangible evidence confirming a defendant was prejudiced by decisions made.[46] The split assessments of IAC claims among circuits mark an ongoing debate over the scope of counsel's duties during plea negotiations and the extent to which courts should protect defendants' rights in this pre-trial context.

II. PROOF OF A PLEA OFFER SHOULD NOT BE REQUIRED TO PREVAIL IN IAC CLAIMS

This Part will discuss the rationale against adopting a strict rule requiring proof of a formal plea offer as the only means of establishing prejudice under *Strickland*. The first section of this Part will discuss how a strict rule requiring proof of a formal plea offer to establish prejudice could deprive defendants of the benefits provided by plea bargaining and infringe on their fundamental rights protected during criminal proceedings. The second section will consider arguments in favor of requiring proof of a plea offer for establishing prejudice and address why such a rule is nevertheless an unfavorable approach for assessing prejudice in the plea-bargaining context.

A. *The Adverse Effects of Requiring Proof of a Plea Deal to Establish Prejudice*

The Supreme Court has consistently upheld plea bargaining as a "give-and-take negotiation" that provides balanced bargaining power to both the prosecution and the defense.[47] While plea negotiations do not guarantee plea deals, let alone favorable outcomes[48], the process of

plea bargaining nonetheless conveys benefits to defendants. Plea negotiations provide defendants with an opportunity to avoid the uncertainties of trial by agreeing to fixed and potentially lighter sentences in exchange for a guilty plea.[49] Notably, pursuing plea negotiations can be particularly attractive to defendants who lack the financial resources to endure lengthy criminal proceedings or who may face disproportionately severe penalties if convicted at trial.[50]

Yet, the dominance of plea bargaining in criminal proceedings also poses the risk of disadvantaging defendants. Although the Constitution does not protect against omissions to engage in plea bargaining[51], the process of negotiating case outcomes can nonetheless serve as the venue for the infringement of fundamental rights resulting from acts or omissions on the part of counsel. The Supreme Court considers a guilty plea—and the subsequent waiver of a defendant's rights—valid as long as it is made voluntarily, intelligently, and with a factual basis.[52] However, defendants often lack a comprehensive understanding of their rights and the law, making them vulnerable to unjust case outcomes in the absence of adequate guidance from counsel.[53] This vulnerability is further amplified by the inherently informal nature of the plea-bargaining process.[54] The procedure of bargained resolution is often conducted with "no clear standards or timelines and with no judicial supervision of the discussions between prosecution and defense."[55] The lack of formal documentation makes many defendants particularly susceptible to the adverse effects of their counsel's deficiencies, especially when these deficiencies cannot be traced to the extension of a formal offer.[56] Placing an additional burden on defendants to provide formal documentation of a plea offer would heighten their vulnerability, adding an extra hurdle for them to overcome when seeking relief when they have been prejudiced. Such a restriction would contradict the fundamental purpose of effective counsel claims, which is to protect defendants' rights and ensure they receive fair treatment under the law.

The importance of upholding defendants' rights to effective counsel to navigate this decisive and complex process cannot be overstated. Plea bargaining can impose significant and potentially detrimental impacts on the fate of defendants.[57] Hence, the judicial system relies on counsel's effective performance to avoid detrimental outcomes and ensure just results.[58] In developing the *Strickland* test, the Supreme Court articulated that "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[59] This standard was designed to protect the integrity of the legal process by certifying that defendants receive competent legal representation throughout all stages of the prosecution, including plea negotiations. After all, the very purpose of allowing IAC claims is to allow courts to rectify disruptions of the adversarial system's principles of fairness and equity. Yet requiring a formal plea offer to establish prejudice fails to uphold these principles by disregarding the rights of vulnerable defendants who have been silently wronged by their counsel's deficiencies. Such a requirement would diminish the critical role of defense counsel in these informal negotiations and fail to protect the protections offered by the Sixth Amendment.

Byrd serves as an ideal example of a case where adopting a strict requirement of a plea offer would prevent blatant counsel incompetency from being adequately addressed and remedied. The *Byrd* court recognized that, by refusing to engage in plea negotiations due to their flagrant misunderstanding of the law, the defense counsel's unrealistic pursuit of acquittal at trial undoubtedly resulted in a lost opportunity for the defendant to obtain a favorable outcome.[60] The court ultimately ruled that the counsel's conduct during the pre-trial stage resulted in a prejudicial outcome for the defendant and was thus constitutionally ineffective.[61] Accordingly, the court held that the defendant was entitled to relief.[62] Yet, the defendant's IAC claim in *Byrd* would not fly

under a strict plea offer requirement. If a plea deal were required to establish prejudice, the adverse impacts of the counsel's errors would have been effectively ignored, barring the defendant from obtaining relief. Precluding the validation of IAC claims in the absence of a formal plea offer ignores the reality that deficient assistance by counsel during plea negotiations significantly influences the outcomes of cases, regardless of whether there exists a formal offer.

Failure to properly address counsel deficiencies solely due to the absence of a formal plea offer could pose significant risks beyond depriving wronged defendants of relief. Since plea bargaining now dictates the resolution of the vast majority of criminal cases, imposing a strict requirement could allow virtually all defense counsel to neglect their duties during the plea negotiation process as long as there was no plea deal extended to the defendant. This preclusion of ineffectiveness claims solely based on the absence of a documented plea offer would thereby fail to hold counsel accountable for acts or omissions resulting in clear prejudice to defendants during the critical pre-trial stage. In turn, this rule could inadvertently degrade the quality of legal representation that defendants receive, conflicting with the imperative of upholding defendants' Sixth Amendment rights during the critical stage of plea bargaining.

B. *Addressing Arguments in Favor of a Plea Offer Requirement*

Admittedly, requiring a formal plea offer to establish prejudice under Strickland has certain benefits that merit consideration. For one, a strict requirement harmonizes with courts' reluctance to make speculations about the outcomes of criminal proceedings.[63] The prerequisite of proving a formal plea offer was extended serves as a tangible indicator that a defendant was deprived of a more favorable outcome by their counsel's deficient performance. This requirement would also simplify the determination of a remedy in cases where ineffective assistance is proven. *Lafler* established that if the counsel's rejection of a plea offer does equate to ineffective assistance, courts

can correct the prejudicial outcome by reoffering the prosecution's plea deal to the defendant.[64] This standard provides a straightforward solution where the uncertainties involved in attempting to reconstruct hypothetical plea negotiations are avoided.[65] It is also important to recognize that defendants are not constitutionally entitled to negotiate the terms of their conviction through plea bargaining.[66] Thus, the absence of a strict benchmark poses the risk of allowing defendants to exploit the system and make baseless IAC claims in response to harsh sentences received at trial.

While this approach provides a clear remedy and directly avoids an influx of frivolous claims, it fails to address the broader issue of ensuring fair and just outcomes for all defendants. In their *Frye* opinion, Justice Kennedy stressed the importance of upholding the Constitution's guarantee to effective assistance during plea negotiations, as "[a]nything less ... might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'"[67] Thus, focusing solely on the presence of a formal plea offer ignores the various ways in which counsel's ineffective assistance during plea-bargaining can result in prejudicial outcomes. This approach leaves a significant gap in remedying ineffective assistance and would effectively fail to protect the full spectrum of defendants' rights as intended by the Sixth Amendment.

Additionally, the risk of validating frivolous IAC claims is properly mitigated by the existing *Strickland* framework, which already imposes a high threshold for proving prejudicial deficiencies.[68] The additional requirements of proving a plea offer would not have been withdrawn by the prosecution and would have also been approved by the court to establish prejudice act as an effective shield against IAC claims made by disappointed defendants.[69] This heightened standard allows courts to distinguish true prejudice from claims of missed opportunities for more favorable outcomes that never existed in the first place. Consequently, the concern of defendants sustaining

speculative claims should not deter the adoption of a flexible approach that better protects defendants' Sixth Amendment rights to effective counsel.

III. PROPOSAL OF A DUAL-PATHWAY STANDARD FOR ASSESSING IAC CLAIMS

The *Strickland* Court made it clear that the Sixth Amendment's guarantee of effective counsel extends to all critical stages of criminal proceedings.[70] Yet, requiring a plea deal to substantiate IAC claims fails to protect this guarantee during the full scope of the critical plea-bargaining stage.[71] The differing standards employed by circuits for assessing IAC claims illustrate the need for a nuanced rule tailored to plea bargaining. This Part proposes the adoption of a dual-pathway standard that would allow defendants to validate IAC claims either with or without having been extended a formal plea offer. The first section of this Part proposes that the *Strickland* test be maintained but limited to assessing claims only when a plea offer is extended. The second section proposes a new standard for cases where a formal offer was not extended but a defendant may have nonetheless been prejudiced by their counsel's failure to enter negotiations altogether. This section also examines how this new standard resolves the discrepancies among circuit courts while preserving the judicial system's foundational principles.

A. *Assessing IAC Claims When a Plea Offer Was Extended*

The Supreme Court's rulings in *Lafler* and *Frye* firmly established that defendants can validate IAC claims when a presented plea offer was not pursued due to counsel's deficient performance, resulting in a prejudicial outcome at trial.[72] Under this current standard, the defendant must show that (1) they would have accepted the plea offer, (2) the prosecution would not have withdrawn the offer, (3) the court would have accepted the plea's terms, and (4) the resulting conviction or sentence would have been less severe than the one imposed at trial.[73] The

effectiveness of this standard lies in its ability to provide courts with a tangible benchmark when evaluating the impact of counsel's deficient performance on the defendant's outcome.

There is little reason to entirely abolish this standard for assessing IAC claims when the presence of a plea offer provides courts with verifiable evidence of prejudice. However, the current standard does not adequately address all scenarios in the plea-bargaining process where counsel's assistance was deficient and prejudicial to a case's outcome. In dissent, Justice Scalia noted that the Court in both *Lafter* and *Frye* "[left] other aspects [of analyzing IAC claims] to be worked out in further constitutional litigation."[74] Adopting the second standard proposed in the next section would bridge this gap in assessing IAC claims under the Sixth Amendment.

B. *Assessing IAC Claims When a Plea Offer Was Not Extended*

In dissenting *Ramirez*'s majority opinion, Judge Bye proclaimed that *Frye*'s application of *Strickland* should be widely interpreted to protect rights to effective counsel throughout the entire negotiation process, as "no language limits the requirement of effective counsel to formal negotiations or formal plea offers."[75] Extending the right to effective assistance to all stages of negotiation necessitates that defense counsels be held accountable for failing to advocate for their client's interests when the prosecution presents an opportunity to negotiate a plea. Accordingly, the following alternative standard adapting to this necessity should be adopted to evaluate IAC claims. This standard would require that defendants prove: (1) that the prosecution extended an invitation to negotiate a plea offer, (2) that the defendant showed a clear interest in engaging in these negotiations, and (3) that their request to negotiate was denied unreasonably by their counsel. This alternative standard expands the definition of ineffective assistance in a manner consistent with the broader interpretation of *Frye*, holding counsel responsible for unreasonably depriving defendants of an opportunity to negotiate a plea at the critical stages of pre-trial proceedings.

The first requirement, that the prosecution extended a formal invitation to negotiate a plea offer, serves to protect the prosecution's discretion to initiate plea negotiations. Dissenting in *Lafler*, Justice Scalia noted that allowing IAC claims without the prosecution's interest in negotiation would invite judicial intrusion into prosecutorial decision-making processes and violate the constitutional of separation of powers.[76] The first requirement addresses this concern, recognizing that Courts should not take a defendant's entitlement to a plea as a signal to intervene in prosecutorial decisions. Employing this requirement would prevent defendants like in *Davis v. United States* from prevail in IAC claims based on presumed entitlements to a plea, eliminating opportunities for judicial overreach that Justice Scalia feared would become normative.[77] At the same time, this initial requirement recognizes that signals by the prosecution indicating a willingness to negotiate create critical opportunities for the defense to engage in discussions that could lead to a more favorable outcome for the defendant. Ultimately, this requirement maintains a balance between safeguarding against judicial overreach and ensuring defense counsel does not overlook opportunities to advocate for a favorable outcome.

The second requirement, that the defendant showed a clear interest in plea negotiations, ensures that defense counsel's actions or inactions can be appropriately evaluated within the context of the defendant's demonstrated interests. Adequate advocacy by defense counsel is best achieved if a defendant's interests are known. When defendants clearly express an interest in negotiating a plea, they provide their counsel with the necessary direction to pursue the best possible outcomes on their behalf. But defense counsel should not be expected to assume a defendant's preferences absent a voiced interest in negotiating. Even though many defendants may prefer the certainty and potentially reduced penalties associated with plea bargains, others may opt for a jury trial in hopes of acquittal. Consequently, defense counsel might reasonably pass up plea

bargaining and prioritize other valid defense strategies if a defendant does not declare their wish to engage in such discussions[78], even if the prosecution invites negotiation. Requiring defendants to prove they expressed an interest in plea bargaining places the burden on the defendant to show that counsel was aware of their interests yet failed to act appropriately.

The third requirement, that the defendant's request to negotiate was unreasonably denied, certifies that IAC claims are grounded in significant and demonstrable deficiencies in counsel's performance. The *Strickland* Court made a clear point that "[j]udicial scrutiny of counsel's performance must be highly deferential," as it is easy for defendants to claim in hindsight that counsel's actions were unreasonable after an adverse outcome at trial.[79] The Court affirmed that strategic decisions made by counsel must therefore be presumed reasonable, considering there are numerous ways to provide effective assistance under a given set of circumstances.[80] Validating IAC claims solely based on an interest in bargaining from both parties without this presumption could otherwise lead to defense attorneys making decisions to avoid potential IAC claims rather than to provide the best outcome for defendants.[81]

To remain consistent with *Strickland*'s deferential assessment of counsel's performance, the burden of proving unreasonableness should fall on the defendants. As such, defendants must demonstrate that counsel's failure to engage in plea negotiations was a clearly unreasonable omission unsupported by a strategic purpose to satisfy the third requirement and prevail in their IAC claims. However, this deferential assessment should not shield counsel from accountability in cases of blatant deficiencies. The engagement in fraud, mistake, or misrepresentation is inherently unreasonable and directly conflicts with the principles of fairness that support the integrity of the judicial system.[82] Thus, per se ineffective assistance should be established when counsel's failure to negotiate stems from fraud, mistake, or misrepresentation. This approach

upholds the adversarial and strategic nature of plea bargaining. Requiring defendants to prove clear unreasonableness respects counsel's autonomy to make decisions based on their professional judgment without constant fear of IAC claims. At the same time, by recognizing certain conduct as per se ineffective assistance, it gives defendants a fair opportunity to validate IAC claims in cases of egregious and substantial injustices.

IV. CONCLUSION

Strickland emphasizes that the ultimate benchmark for judging any claim of ineffectiveness must be whether counsel's conduct undermined the proper functioning of the adversarial process to the extent that the trial cannot be relied on as having produced a just result.[83] Since criminal cases are predominantly resolved through plea bargains, it is imperative that assessments of IAC claims consider the broad ranges of instances—both before, during, and after plea negotiations—in which deficient counsel assistance may result in prejudicial outcomes for defendants. The proposed dual-pathway standard aligns with this principle, ensuring that the Sixth Amendment's guarantee of effective representation for defendants is preserved at all critical stages of criminal proceedings.

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

[2] Wan, *The Unnecessary Evil of Plea Bargaining: An Unconstitutional Conditions Problem and a Not-So-Least Restrictive Alternative*, 17 U.S.C. REV. L. & SOC. JUST. 1, 51 (2007).

[3] *Id.* at 41.

[4] Lahny R. Silva, *Right to Counsel and Plea Bargaining:* Gideon*'s Legacy Continues*, 99 Iowa L. Rev. 2219, 2241 (2014).

[5] *Id.* at 2223

[6] Strickland v. Washington, 466 U.S. 668, 685 (1984).

[7] *Id.* at 687-88.

[8] Missouri v. Frye, 566 U.S. 134 (2012).

[9] Lafler v. Cooper, 566 U.S. 156 (2012).

[10] Justin F. Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, 14 U. PA. L. REV. 1161, 1191 (2012).

[11] United States v. Pender, 514 F. App'x 359 (4th Cir. 2013) (per curiam).

[12] Byrd v. Skipper, 940 F.3d 248 (6th Cir. 2019).

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

[14] Davis v. United States, No. 20-11149 (11th Cir. 2020) (per curiam).

[15] Silva, *supra* note 4, at 2222.

[16] U.S. Const. amend. VI.

[17] Silva, *supra* note 4, at 2221.

[18] *Id.* at 2222.

[19] 466 U.S. at 668.

[20] *See id.* at 685 ("That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command").

[21] *Id.* at 686.

[22] *See id.* at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim").

[23] *Id.* at 688.

[24] *Id.* at 694.

[25] Alex C. Werner, *Pleading With the Past: Assessing State Approaches to* Lafler *and* Frye*'s Counterfactual Prejudice Prong*, 121 COLUM. L. REV. 411, 418 (2021).

[26] 466 U.S. at 689.

[27] Werner, *supra* note 25, at 415.

[28] Missouri v. Frye, 566 U.S. 134, 143 (2012).

[29] *See* Lafler v. Cooper, 566 U.S. 156, 177 (2012) (Scalia, J., dissenting) ("the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel"); *see also Frye*, 566 U.S. at 143 ("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").

[30] *See Lafler*, 566 U.S. at 177 (Scalia, J., dissenting) ("the right to counsel does not begin at trial. It extends to 'any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial'").

[31] Werner, *supra* note 25, at 420.

[32] Silva, *supra* note 4, at 2235; *See also* Strickland v. Washington, 466 U.S. 668, 688 (1984) ("From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution").

[33] *Id.* at 2226.

[34] *Id.*

[35] *Lafler*, 566 U.S. at 168; *see also* Missouri v. Frye, 566 U.S. 134, 142 (2012) (holding defendants have a Sixth Amendment right to counsel that extends to the plea-bargaining process).

[36] *Lafler*, 566 U.S. at 164-68.

[37] United States v. Pender, 514 F. App'x 359, 361 (4th Cir. 2013) (per curiam).

[38] 514 F. App'x 359

[39] Byrd v. Skipper, 940 F.3d 248 (6th Cir. 2019).

[40] *Pender*, 514 F. App'x 359; *Byrd*, 940 F.3d 248.

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

[42] Davis v. United States, No. 20-11149 (11th Cir. 2020) (per curiam).

[43] *Id.*

[44] *Ramirez*, 751 F.3d 604.

[45] *Davis*, No. 20-11149, slip op. at 5; *Ramirez*, 751 F.3d at 608.

[46] *See* Strickland v. Washington, 466 U.S. 668, 691 (1984) ("In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments").

[47] Wan, *supra* note 2, at 49.

[48] Missouri v. Frye, 566 U.S. 134, 148 (2012) ("a defendant has no right to be offered a plea").

[49] *Id.* at 40.

[50] Silva, *supra* note 4, at 2233.

[51] Lafler v. Cooper, 566 U.S. 156, 168 (2012) ("It is, of course, true that defendants have "no right to be offered a plea ... nor a federal right that the judge accept it").

[52] Wan, *supra* note 2, at 49.

[53] Silva, *supra* note 4, at 2232.

[54] *See* Missouri v. Frye, 566 U.S. 134, 143 (2012) ("the plea-bargaining process is often in flux, with no clear standards or timelines and with no judicial supervision of the discussions between prosecution and defense").

[55] *Id.*

[56] *See Frye*, 566 U.S. at 143 ("the plea-bargaining process is often in flux, with no clear standards or timelines and with no judicial supervision of the discussions between prosecution and defense").

[57] 90 to 95 percent of both federal and state court cases are resolved through plea bargaining. Lindsey Devers, Research Summary: Plea and Charge Bargaining, 3 (2011)

[58] Strickland v. Washington, 466 U.S. 668, 685 (1984) ("The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled").

[59] 466 U.S. at 686.

[60] Byrd v. Skipper, 940 F.3d 248, 260 (6th Cir. 2019).

[61] *Id.*

[62] *Id.*

[63] *See generally* Ramirez v. United States, 751 F.3d 604 (8th Cir. 2014); *see also generally* Davis v. United States, No. 20-11149 (11th Cir. 2020) (per curiam).

[64] Lafler v. Cooper, 566 U.S. 156, 174 (2012).

[65] *Id.*

[66] *Id.* at 168 (2012); *See also* Missouri v. Frye, 566 U.S. 134, 148 (2012) ("a defendant has no right to be offered a plea").

[67] *Frye*, 566 U.S. at 144.

[68] Silva, *supra* note 4, at 2223.

[69] Werner, *supra* note 25, at 421.

[70] Strickland v. Washington, 466 U.S. 668, 685 (1984).

[71] *See* Ramirez v. United States, 751 F.3d 604, 609-10 (8th Cir. 2014) (Bye, J., dissenting) (disagreeing with the majority's interpretation of *Frye* by limiting the requirement of effective counsel to instances where formal plea offers were extended, emphasizing that effective counsel is required during the entire plea negotiation process, not just during formal negotiations or offers).

[72] *See generally* Lafler v. Cooper, 566 U.S. 156 (2012); *see also generally* Missouri v. Frye, 566 U.S. 134 (2012).

[73] *Lafler*, 566 U.S. 156, 164-68.

[74] *Id.* at 175 (Scalia, J., dissenting)

[75] *Ramirez*, 751 F.3d at 609-10 (Bye, J., dissenting) (internal quotations omitted).

[76] *Lafler*, 566 U.S. 185 (Scalia, J., dissenting)

[77] *See* Davis v. United States, No. 20-11149 (11th Cir. 2020) (per curiam). The defendant was convicted at trial on all counts and sentenced to 1,917 months of imprisonment. The defendant claimed that his trial counsel was ineffective for failing to pursue a plea deal and adequately advise him of the consequences of not pleading guilty, yet they did not allege that the government showed interest in negotiating a plea deal. The court denied the IAC claim because prejudice was not demonstrated under the Strickland test. Under the proposed alternative standard, the defendant would similarly fail to prevail in their IAC claim since they could not demonstrate that the prosecution extended an invitation to negotiate a plea offer to satisfy the first requirement.

[78] Strickland v. Washington, 466 U.S. 668, 681 (1984).

[79] *Id.* at 689.

[80] *Id.* at 681.

[81] *See Id.* at 690 ("Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.")

[82] *See e.g.* Byrd v. Skipper, 940 F.3d 248 (6th Cir. 2019).

[83] *Strickland*, 466 U.S. at 688.