
COMMENT

PUTTING PLEA BARGAINING ON THE RECORD

JOEL MALLORD[†]

INTRODUCTION	684
I. THE LEGAL BACKGROUND OF PLEA BARGAINING AND INEFFECTIVE ASSISTANCE OF COUNSEL.....	686
A. <i>Ineffective Assistance of Counsel</i>	686
B. <i>Ineffective Assistance in Plea Bargaining</i>	688
II. <i>LAFLE</i> R, <i>FRYE</i> , AND THE AFTERMATH.....	690
A. <i>The Lafler and Frye Decisions</i>	690
B. <i>The Landscape After Lafler and Frye</i>	692
1. The He-said/she-said Phenomenon	693
2. Deference to the Strategic Conduct of the Defense Lawyer.....	695
3. Evidentiary Difficulties in the Prejudice Prong of the <i>Strickland</i> Test.....	696
C. <i>Is This a Real Problem?</i>	698
III. THE DUTIES OF DEFENSE COUNSEL IN PLEA BARGAINING	699
A. <i>Investigation</i>	700
B. <i>Negotiation</i>	701
C. <i>Client Communication</i>	704
IV. JUSTIFYING A NEW RECORD	705
A. <i>The Duty to Preserve Issues for Appeal</i>	706
B. <i>The Duty of Zealous Advocacy</i>	707
C. <i>Justifying the Burden on Defense Lawyers</i>	708

[†] Editor-in-Chief, Volume 162, *University of Pennsylvania Law Review*. J.D. Candidate, 2014, University of Pennsylvania Law School; B.S., 1998, University of California at Los Angeles. I would like to thank Professors Louis Rulli and Stephanos Bibas, who provided much-needed guidance throughout the writing process, and *University of Pennsylvania Law Review* editors Luke Eldridge and Kaytlin Roholt, whose work thoroughly improved this Comment.

D. <i>Documentation as Mistake-Proofing</i>	709
V. ALTERNATIVE SOLUTIONS	710
A. <i>Procedural Change</i>	710
1. Likelihood of Relief on Valid Claims	712
2. Likelihood of Relief on Invalid Claims	712
3. Effect on Justice System Resources	713
B. <i>Shifting the Burden</i>	714
1. Likelihood of Relief on Valid Claims	714
2. Likelihood of Relief on Invalid Claims	714
3. Effect on Justice System Resources.....	715
4. Likelihood of Implementation.....	716
VI. THE RECORD	716
A. <i>The Contents of the Record</i>	716
B. <i>The Courts' Use of the Record</i>	717
C. <i>What Happens When the Record Is Inaccurate?</i>	718
CONCLUSION.....	718

INTRODUCTION

More than a decade ago, Rolando Stockton rejected a plea bargain that came with a ten-year prison sentence, opting instead to take his chances at trial.¹ The trial went badly. After being found guilty on several drug and firearm charges, Stockton received a forty-year prison sentence.² From an objective point of view, Stockton should have taken the deal; rejecting it cost him thirty years of freedom. In postconviction proceedings, Stockton proffered a reason for his poor judgment: his lawyer failed to disclose to him the maximum sentence he faced at trial and the advantages of the ten-year deal.³ In spite of his admittedly hazy memory of the events, the lawyer disagreed, claiming he told Stockton that the plea deal was a “good offer.”⁴ Without clear evidence, the reviewing court sided with Stockton’s lawyer.⁵ On that finding, Stockton lost his claim, and he is still serving his initial sentence today.⁶

¹ United States v. Stockton, No. 99-0352, 2012 WL 2675240, at *4 (D. Md. July 5, 2012).

² *Id.* at *1.

³ *Id.* at *4.

⁴ *Id.* at *10.

⁵ *Id.* at *9, *11 (holding that, at the very least, Stockton’s lawyer did not misadvise Stockton about the maximum sentence he faced at trial and that he adequately presented the terms of the plea deal to Stockton).

⁶ *Id.* at *14.

Under the recent Supreme Court decisions in *Lafler v. Cooper*⁷ and *Missouri v. Frye*⁸, defense counsel has a duty to inform and reasonably advise clients about plea offers from the prosecution, so that defendants do not forego favorable plea bargains due to the ineffective assistance of their counsel. Yet the story above demonstrates a fundamental problem with these new duties: the lack of a record of the plea bargaining process makes them unenforceable. Without such a record, the defendants, who bear the burden of proof in Sixth Amendment ineffective assistance of counsel claims,⁹ have no evidence to support claims of defective advice. Their hopes thus rest on the cooperation of the very lawyers they accuse of being ineffective. When combined with the other difficulties inherent in establishing an ineffective assistance of counsel claim, this problem renders the new right toothless.

In this Comment, I propose that the criminal defense bar adopt a practice of recording the plea bargaining process in order to better protect defendants' Sixth Amendment rights. I begin in Part I with a brief background of Sixth Amendment right-to-counsel jurisprudence, the plea bargaining process, and the evolution of the Supreme Court's views on these topics. More specifically, Part I illustrates how the Court has gradually expanded the right to counsel, acknowledged the normative role of plea bargaining in criminal justice, and moved away from the notion that the criminal justice system's only guarantee is the right to a fair trial.

In Part II, I review *Lafler*, *Frye*, and the application of these cases in the lower courts. That review illustrates the evidentiary problems confronting defendants who claim ineffective assistance of counsel in the plea bargaining process. More pointedly, the review shows how defendants asserting such claims are often at the mercy of their defense attorneys, whose accounts of disputed events typically determine how the cases are decided.

In Part III, I summarize the basic functions of defense counsel during the plea bargaining process, by consulting the standards set forth by the

⁷ 132 S. Ct. 1376, 1385 (2012) (holding that there may be relief when a defendant demonstrates, among other things, "that but for the ineffective advice of counsel there is a reasonable probability that the . . . defendant would have accepted the plea").

⁸ 132 S. Ct. 1399, 1408 (2012) ("This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.")

⁹ See *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986) ("[D]efendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy.") (citing *Strickland v. Washington*, 466 U.S. 668, 668-69 (1984)).

American Bar Association (ABA)¹⁰ and the National Legal Aid & Defender Association.¹¹ Ultimately, I suggest that these standards should be the baseline against which courts measure the adequacy of counsel's assistance in Sixth Amendment claims.

I argue in Part IV that requiring criminal defense lawyers to document plea bargain offers and their related advice is the best solution to this evidentiary problem. Support for my proposal is found in defense lawyers' basic duties to preserve issues for appeal and to advocate zealously for their clients. Such a record would not only facilitate appellate court review of ineffective assistance of counsel claims, but would also reduce the likelihood of defense lawyers committing errors in the first place and, as a result, would reduce the number of ineffective assistance of counsel claims litigated. Although the proposed record would add to the criminal defense counsel's workload, it would be worthwhile when properly tailored to high-risk cases. In Part V, I analyze two other possible solutions and conclude that the proposed record is superior to both. Finally, in Part VI, I provide a brief proposal of the record's contents and discuss how courts may use it in practice.

I. THE LEGAL BACKGROUND OF PLEA BARGAINING AND INEFFECTIVE ASSISTANCE OF COUNSEL

A. *Ineffective Assistance of Counsel*

For much of the country's history, the Sixth Amendment right to counsel only protected criminal defendants' right to hire attorneys if they so desired.¹² These rights were expanded in the landmark case *Gideon v. Wainwright*, in which the Court held that the Sixth Amendment guaranteed government-provided counsel to indigent felony defendants.¹³ But the early right to counsel came with no guarantees as to the quality of representation.

¹⁰ ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY § 14-3.2 (3d ed. 1999) [hereinafter ABA Standards].

¹¹ Nat'l Legal Aid & Defender Ass'n, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION §§ 6.1-6.4 (1995) [hereinafter NLADA GUIDELINES], available at http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines#sixone.

¹² See William M. Beaney, *The Right to Counsel: Past, Present, and Future*, 49 VA. L. REV. 1150, 1151-52 (1963) (contrasting the Sixth Amendment with the English common law's "reluctan[ce] to allow even retained counsel in all felony cases until 1836").

¹³ See 372 U.S. 335, 344 (1963) (concluding that the right to government-appointed counsel for indigent defendants is "fundamental and essential to fair trials"). The Court had previously held that the Due Process Clause demanded representation in certain egregious circumstances. See *Powell v. Alabama*, 287 U.S. 45, 65 (1932) (holding that a judge must appoint counsel in criminal prosecutions of particularly vulnerable defendants in capital cases).

In the *Gideon* era, the Court granted relief only where counsel was so deficient as to make the trial a “farce and mockery of justice.”¹⁴ Successful litigation of these claims was predictably rare. Like much of the expansion of defendants’ rights, the relaxation of this standard started in the lower courts.¹⁵ By the early 1980s, many circuits had already adopted a reasonableness test for the assistance of counsel. The Supreme Court followed suit with its decision in *Strickland v. Washington*.¹⁶

Strickland set out the modern two-pronged test for ineffective assistance of counsel claims. First, “the defendant must show that counsel’s performance was deficient.”¹⁷ The Court made it clear that this prong would be difficult to establish, noting that “[j]udicial scrutiny of counsel’s performance must be highly deferential.”¹⁸ The Court held that a defendant could only satisfy this prong by showing that “counsel’s representation fell below an objective standard of reasonableness,” measured by prevailing professional norms and professional standards put forth by the ABA and other organizations.¹⁹ Any conduct that may be justified as strategic in nature would almost certainly fail to satisfy this demanding standard.²⁰

Second, “the defendant must show that the deficient performance prejudiced the defense.”²¹ This standard requires a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”²²

Since the *Strickland* decision, claims of ineffective assistance of counsel have become the most common ground for relief sought in habeas petitions. One 2007 study found in a random sample that eighty-one percent of habeas petitions in capital cases and fifty percent in noncapital cases included at least one claim of ineffective assistance of counsel.²³ By

¹⁴ See 3 CHARLES ALAN WRIGHT & SARAH N. WELLING, FEDERAL PRACTICE AND PROCEDURE § 627, at 673 n.6 (2011) (noting that “th[is] phrase appears to have originated with Judge Thurman Arnold in *Diggs v. Welch*, 148 F.2d 667 (App. D.C. 1945)”).

¹⁵ See *Wainwright v. Sykes*, 433 U.S. 72, 117 n.16 (1977) (Brennan, J., dissenting) (“A majority of courts have now passed beyond the standard of attorney competence embodied in the so-called ‘mockery’ test, which abdicates any judicial supervision over attorney performance so long as the attorney does not make a farce of the trial.”).

¹⁶ 466 U.S. 668 (1984).

¹⁷ *Id.* at 687.

¹⁸ *Id.* at 689.

¹⁹ *Id.* at 687-89.

²⁰ *Id.* at 690-91 (“[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . .”).

²¹ *Id.* at 687.

²² *Id.* at 694.

²³ NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE

extrapolation, the study indicated that over ten thousand habeas petitions raise ineffective assistance of counsel claims each year.²⁴ Yet only 0.3 % of the noncapital petitions resulted in an evidentiary hearing.²⁵ Even more alarming, only one of the 2384 noncapital cases in the sample group obtained relief on an ineffective assistance of counsel claim.²⁶ These numbers reflect that an ineffective assistance of counsel claim is, at best, only a tiny glimmer of hope for the convicted.

B. *Ineffective Assistance in Plea Bargaining*

Plea bargains account for approximately ninety-five percent of criminal convictions.²⁷ Typically, plea bargains are agreements between prosecutors and defendants through which defendants receive reductions in punishment and prosecutors save the time and resources required to try cases. Prosecutors enjoy a great deal of discretion over the charges they bring and the sentences they recommend. Specifically, as part of the plea bargaining process, the prosecutor may offer to: (a) not bring additional charges, or move to dismiss charges already filed; (b) recommend, or agree not to oppose, the defendant's request that a particular sentence or sentencing range is appropriate, or that a particular Sentencing Guidelines provision, policy statement, or sentencing factor does or does not apply; or (c) agree that a particular sentence or sentencing range is appropriate, or that a particular Sentencing Guidelines provision, policy statement, or sentencing factor does or does not apply.²⁸ Defendants have fewer bargaining chips, but they may, for instance, agree to cooperate against other criminal suspects in

PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, 28 (2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf>.

²⁴ This figure assumes that the number of habeas petitions has remained consistent since 2010, when the federal courts received over 20,000 petitions. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2011 ANNUAL REPORT OF THE DIRECTOR 126 tbl.C-2 (2011), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf>.

²⁵ KING ET AL., *supra* note 23, at 36.

²⁶ *Id.* at 52. The rate of relief in capital cases was much higher, where 12.4 percent of non-transferred habeas cases resulted in some form of relief. It is unclear how many of these cases successfully raised ineffective assistance of counsel claims. *Id.* at 51.

²⁷ See LINDSEY DEVERS, U.S. DEP'T OF JUSTICE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 1 (2011), available at <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> ("[S]cholars estimate that about 90 to 95 percent of both federal and state court cases are resolved through the [plea bargaining] process.").

²⁸ FED. R. CRIM. P. 11(C)(1)(A)-(C).

exchange for a more favorable deal.²⁹ The parties may strike a plea agreement at nearly any stage during the course of criminal proceedings, from before the filing of charges through jury deliberations.³⁰

Traditionally, courts and academics paid little attention to the plea bargaining process, instead trusting that the “shadow of the trial” ensured the fairness of the resulting deals.³¹ Under this theory, the backstop of a jury trial guarantees that defendants can only benefit from a plea bargain—otherwise, they simply would reject the offers.³² A fair trial is the only guarantee the state provides; when defendants waive that right, they voluntarily take themselves outside of the state’s protection.³³

Over the past thirty years, however, the Supreme Court has gradually acknowledged the prominence of plea bargaining and has extended Sixth Amendment protection to certain aspects of the process. The Court first extended the Sixth Amendment to protect defendants against deficient counsel who misled them into entering a guilty plea.³⁴ This extension of Sixth Amendment protection was consistent with the Court’s concern for the right to a jury trial. Where a person conceded that right on unreasonable advice, the Court indicated that it would step in.³⁵

In 2010, the Court proceeded along the same paradigm in deciding *Padilla v. Kentucky*.³⁶ In *Padilla*, the Court held that defense counsel is required to inform defendants of the possibility of deportation prior to their entering a guilty plea.³⁷ The Court, motivated by its concern with protecting a

²⁹ See HARRY I. SUBIN ET AL., *THE CRIMINAL PROCESS: PROSECUTION AND DEFENSE FUNCTIONS* 139-41 (1993) (discussing the ways in which defendants can secure more favorable plea bargains by agreeing to cooperate with prosecutors).

³⁰ *Id.* at 131 (“[P]lea agreements can occur at almost any point in the process.”).

³¹ See, e.g., Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 310 (1983) (arguing that the free market approach to plea bargaining ensures the best results and that “there is no reason to think that plea bargaining regulations could do better”).

³² See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1124, 1125 (2011) (noting the traditional view that “regulation of trials should theoretically protect plea-bargaining defendants” who “can decide for themselves when bargains serve their interests”).

³³ See *id.* at 1124 (describing the traditional notion held by the courts that “[f]or the shadow of trial to work, defendants need know only that they are giving up their trial rights”).

³⁴ See *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (holding that the two-part *Strickland* test “applies to challenges to guilty pleas based on ineffective assistance of counsel”).

³⁵ To that end, the Court held that the defendant could only show prejudice if he could prove that he would have *gone to trial* but for his counsel’s deficient performance. *Hill*, 474 U.S. at 59 (“[T]he defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”).

³⁶ 130 S. Ct. 1473 (2010).

³⁷ *Id.* at 1486 (“[W]e now hold that counsel must inform her client whether his plea carries a risk of deportation.”).

defendant's right to a jury trial, once again indicated that it was willing to step in to ensure that defendants did not waive their right to a trial due to inadequate advice from their counsel.³⁸ Nevertheless, prominent criminal law scholars characterized the decision as a shift in Supreme Court criminal law jurisprudence toward the recognition of plea bargaining "as the norm."³⁹ It was not until *Missouri v. Frye* and *Lafler v. Cooper*, however, that the shift became clear.

II. LAFLETER, FRYE, AND THE AFTERMATH

A. *The Lafler and Frye Decisions*

The Supreme Court's decisions in *Lafler* and *Frye* are important not because they will change the outcome of many ineffective assistance of counsel claims (they will not), but because through these decisions the Court finally disconnected the Sixth Amendment's right to counsel from its right to a fair trial. As a result of these decisions, a defendant's Sixth Amendment rights are now deemed to have been violated when ineffective assistance of counsel causes him to go to trial rather than accept a favorable plea offer.

Lafler v. Cooper concerned a defendant who had been charged with, among other crimes, assault with intent to murder.⁴⁰ The defendant admitted his guilt to the Court and told his lawyer that he wanted to take the prosecution's plea bargain offer, whereby he would face a likely sentence of fifty-one to eighty-five months in exchange for pleading guilty.⁴¹ His lawyer, however, advised him that the prosecution would be unable to prove his intent to murder, as he had shot the victim below the waist.⁴² On that faulty advice, the defendant rejected the plea bargain offer and went to trial. He was convicted and the court sentenced him to 185 to 360 months' imprisonment, a range 300 percent higher than that of the plea bargain.⁴³

In responding to the defendant's federal habeas petition, the State of Michigan predictably relied upon the proposition that had seemingly driven the Court's jurisprudence to that point: "the sole purpose of the Sixth

³⁸ Although the Court held that the defense attorney's performance was deficient, it did not grant relief to Padilla. Instead, the Court remanded the case in order to determine whether Padilla suffered any prejudice due to his counsel's deficiency. *Id.* at 1487.

³⁹ See Bibas, *supra* note 32, at 1137 (arguing that *Padilla* represented a "large shift[] in the landscape," whereby "the Court's frame of reference now treats bargaining as the norm").

⁴⁰ *Lafler v. Cooper*, 132 S. Ct. 1376, 1383 (2012).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

Amendment is to protect the right to a fair trial.”⁴⁴ The Court, however, disagreed and, in a marked departure from its previous interpretations of the Sixth Amendment, held that “[t]he constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel’s advice.”⁴⁵ In short, the Court finally rejected the fictitious notion that a fair trial remediated any and all pretrial errors. The Court then elaborated a standard of review for situations in which defendants claimed that ineffective assistance of counsel led them imprudently to reject a plea bargain offer:

[A] defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed.⁴⁶

After determining that the defendant had satisfied this standard, the Court ordered the State of Michigan to reoffer the plea bargain to the defendant and allowed the state trial court to exercise its discretion in determining whether and how much of the plea agreement it would be willing to accept.⁴⁷

In *Missouri v. Frye*, the defense attorney failed to convey the prosecution’s two plea bargain offers, both of which offered highly favorable reductions in the severity of the defendant’s punishment, to the defendant.⁴⁸ Frye had been charged with driving with a revoked license.⁴⁹ Since he had been convicted of the same offense three times before, Frye faced up to four

⁴⁴ *Id.* at 1385; see also Brief for the Petitioner at 11, *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) (No. 10-209) (“*Strickland* and its progeny make clear that when a court reviews a trial-court criminal proceeding, a fair trial is the main event; alleged error that does not impact a trial’s reliability does not implicate the Sixth Amendment.”).

⁴⁵ *Lafler*, 132 S. Ct. at 1385.

⁴⁶ *Id.* In creating this standard, the Court relied upon the established standard for defendants who claimed to have entered a guilty plea because of ineffective assistance of counsel. That standard, articulated twenty-seven years earlier in *Hill v. Lockhart*, required a petitioner to demonstrate a reasonable probability that he would have rejected a guilty plea offer if not for the deficient conduct of his lawyer. 474 U.S. 52, 59 (1985).

⁴⁷ *Lafler*, 132 S. Ct. at 1391.

⁴⁸ *Missouri v. Frye*, 132 S. Ct. 1399, 1404 (2012).

⁴⁹ *Id.*

years' imprisonment if convicted again.⁵⁰ However, Frye seemingly caught a break when the prosecutor sent the defense counsel a letter outlining two possible plea bargains, one of which was an offer to reduce the charge to a misdemeanor with a ninety-day recommended sentence in exchange for a guilty plea.⁵¹ But the offer, which the defense attorney never presented to Frye, expired six weeks later.⁵² Frye went on to plead guilty without any underlying bargain, and the court sentenced him to three years in prison.⁵³ The Supreme Court held that the defense counsel's failure to communicate the prosecution's plea bargain offer was a violation of the defendant's right to effective assistance of counsel.⁵⁴

B. *The Landscape After Lafler and Frye*

The cases that have followed *Lafler* and *Frye* demonstrate the futility of defendants' new Sixth Amendment rights.⁵⁵ The burden placed on appealing defendants has proven exceedingly difficult to meet for several reasons. First, scant evidence causes most cases to turn into he-said/she-said disputes

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 1404-05.

⁵⁴ *Id.* at 1408 ("This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.").

⁵⁵ The Supreme Court recently had an opportunity to address some of the issues described in this Comment, but, as expected, it declined to do so. In *Burt v. Titlow*, decided while this Comment was in production, the Court reversed a Sixth Circuit decision that a lawyer provided ineffective assistance when his client, Titlow, withdrew from a favorable plea deal on his advice. No. 12-414, slip op. at 3 (U.S. Nov. 5, 2013). Titlow was convicted of first-degree murder after bypassing a plea deal for manslaughter. *Id.* at 2. Titlow appealed her conviction to the Michigan Court of Appeals, which affirmed the conviction and held that the lawyer's advice was reasonably based on Titlow's protestations of innocence. *Id.* at 3. Titlow then filed a habeas petition, upon which the District Court applied AEDPA's deferential standard to uphold the state court's decision denying her relief. *Id.* The Sixth Circuit, noting that Titlow's lawyer explained at the hearing to withdraw the plea that the decision to withdraw was based on the sentencing range of the plea, and not Titlow's innocence, reversed the District Court. *Id.* The Supreme Court reversed the Sixth Circuit, however, noting that (1) federal courts must show deference to state court findings of fact and (2) Titlow bore the burden of showing that her lawyer provided inadequate advice; she did not meet this burden. *Id.* at 8-10.

Burt v. Titlow presented the same fundamental problem addressed in this Comment. There was simply no record of the lawyer's advice. The decision to proceed to trial looked like a terrible one, but Titlow could not show that she made it based on her lawyer's advice. Justice Sotomayor, in her concurrence, even suggested that Titlow could have prevailed had she "made a better factual record." *Id.* at 2 (Nov. 5, 2013) (Sotomayor, J., concurring). In this Comment, I suggest that the criminal defendant is the wrong party to look to for good documentation. Instead, the court should look to defense counsel for a record of effective assistance.

between defendants and their attorneys. Second, courts generally find lawyers to be more credible than convicted criminals, and defendants have little evidence to overcome that presumption. Furthermore, courts defer to defense lawyers' conduct if it can be characterized as reasonably strategic behavior. Finally, even if defendants can convince a court that they received deficient counsel, they still need to show that the deficiency prejudiced the outcome of the proceedings.⁵⁶ All of this amounts to a difficult burden, even when defense counsel cooperates, and an impossible one otherwise.

1. The He-said/she-said Phenomenon

In the plea bargaining context, the typical ineffective assistance of counsel claim asserts that the lawyer gave the defendant faulty advice that led him to reject a favorable plea bargain offer. These types of claims usually implicate either the counsel's investigation or advice. Both investigation and advice occur privately and off the record, and are therefore difficult for courts to review.⁵⁷ In practice, defendants can only hope that their lawyers remember the disputed issues and confess their mistakes rather than try to justify them as valid strategic decisions. Another phenomenon exacerbates this difficulty: When the advice is alleged to be egregiously flawed, and the resulting injustice commensurately more severe, courts may find it difficult, without evidence, to believe that the lawyer would make such an error. However, when the alleged error is less egregious, and its occurrence is therefore more plausible, it is much more likely that courts will deem the advice to have been within the realm of valid strategy or to have had no effect on the outcome of the proceedings.

The case of *United States v. Stockton*,⁵⁸ described in the introduction of this Comment, illustrates the he-said/she-said phenomenon. In that case, the defendant, Rolando Stockton, was offered two plea bargains, both of which called for a sentence of no more than ten years' imprisonment in return for a guilty plea.⁵⁹ On appeal, Stockton claimed that he rejected these offers because he believed, based on his lawyer's erroneous advice, that he faced no more than ten years' imprisonment if he was convicted at trial.⁶⁰

⁵⁶ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

⁵⁷ See Gerard E. Lynch, Frye and Lafler: *No Big Deal*, 122 YALE L.J. ONLINE 39, 42 (2012), <http://yalelawjournal.org/2012/06/21/lynch.html> (arguing that the lack of a record may lead more defendants to allege ineffective assistance of counsel in plea bargaining, but that the history of similar claims regarding off-the-record trial activities indicates that these claims are unlikely to be successful).

⁵⁸ No. 99-0352, 2012 WL 2675240 (D. Md. July 5, 2012).

⁵⁹ *Id.* at *4.

⁶⁰ *Id.*

The lawyer, however, claimed that he reviewed the offer line by line with his client and advised Stockton that it was a “good offer.”⁶¹ Even though the decision to go to trial was objectively bad, and one that no reasonable, well-informed individual would make, the court still found that “Trial Counsel reviewed the plea agreement letter in at least sufficient detail to include a review of the statement therein of the maximum potential sentence faced.”⁶² The court gave the lawyer the benefit of the doubt, and Stockton lost his appeal.⁶³

This outcome is far from unique. A Connecticut appellate court, for example, recently denied petitioner Dario Bertotti’s claim that his lawyer, without consulting him, rejected a plea agreement that offered an eight-year sentence. His lawyer’s actions caused him to go to trial, where the court sentenced Bertotti to twelve years’ imprisonment.⁶⁴ Bertotti’s sister corroborated his account of the events.⁶⁵ His lawyer, however, argued that Bertotti rejected the offer because he thought he would receive a more lenient sentence after trial due to his cooperation with the authorities.⁶⁶ No record existed to validate either side’s assertions. Even so, the court sided with the lawyer, finding that Bertotti rejected the plea agreement even after the lawyer advised him that “the state had a strong case and that [he] should accept the state’s offer”⁶⁷

These cases typify the evidentiary burden faced by defendants seeking to vindicate their Sixth Amendment rights under *Lafley* and *Frye*. Where the lawyer’s testimony contradicts the facts alleged by the defendant, the defendant is unlikely to win his case.⁶⁸

⁶¹ *Id.* at *10.

⁶² *Id.* at *8.

⁶³ *Id.* at *14.

⁶⁴ *Bertotti v. Comm’r of Correction*, 44 A.3d 892, 895 (Conn. App. Ct. 2012).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Even when the lawyer *agrees* with the defendant as to his deficient conduct, the court may nonetheless find that the uncontroverted testimony is not credible. *See, e.g., Merzbacher v. Shearin*, 706 F.3d 356, 361-62, 365 (4th Cir. 2013) (describing a state court’s finding that the defendant’s lawyer had committed perjury when she testified that she had never conveyed a plea bargain offer to her client, even though there was “not a shred of evidence that [the defendant]’s lawyers counseled him about the plea”). *But see Satterlee v. Wolfenbarger*, 453 F.3d 362, 364 (6th Cir. 2006) (finding the defendant’s story more credible than the defense lawyer’s because it was supported by testimony from his mother and the prosecution).

2. Deference to the Strategic Conduct of the Defense Lawyer

The next hurdle faced by the defendant is proving that the deficient conduct of the lawyer was actually unreasonable, rather than merely a suboptimal strategic move. This difficulty is ubiquitous in *Strickland* cases, even those outside of the plea bargaining context. The *Strickland* standard is highly deferential to the lawyer, establishing a presumption of reasonableness that the defendant must overcome.⁶⁹ The key inquiry is whether the attorney properly investigated the circumstances of his client's case prior to making a strategic decision.⁷⁰ If the dispute concerns the strategic decision rather than the adequacy of the preceding investigation, the defendant will have a difficult time overcoming the presumption of reasonableness accorded to his lawyer's choices. That deference spells the demise of most ineffective assistance of counsel claims, regardless of the context.

In *Johnson v. United States*, a federal district court in Iowa found the defense counsels' behavior "troubling" when they failed to tell their client, who faced the death penalty, that her only reasonable option was to take a plea agreement to life imprisonment.⁷¹ Specifically, the court chastised the lawyers for failing to marshal evidence that would convince their client about the wisdom of accepting such a plea and for failing to enlist family members to help convince the defendant to take the agreement.⁷² Instead, the lawyers took a wait-and-see approach to the case, ostensibly hoping that evidentiary issues would force the prosecutor's hand.⁷³ Ultimately, this proved to be a poor strategy, and the defendant was convicted and sentenced to death.⁷⁴ The court found that "[b]eing very troubled with these circumstances, however, is short of finding that her trial counsel's performance in these respects was professionally incompetent."⁷⁵

Many such cases are lost in the gray area between poor strategy and professional incompetence. While this would be expected if the purpose of the ineffective assistance of counsel action were disciplinary (i.e., focused on the

⁶⁹ *Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (internal citation and quotation marks omitted)).

⁷⁰ See, e.g., *Worthington v. Roper*, 631 F.3d 487, 502 (8th Cir. 2011) (noting that the defense counsel's reasonable investigation of mental health evidence established a presumption of reasonableness regarding his decision not to mount a mental health mitigation case).

⁷¹ 860 F. Supp. 2d 663, 782 (N.D. Iowa 2012).

⁷² *Id.*

⁷³ *Id.* at 780-81.

⁷⁴ *Id.* at 680.

⁷⁵ *Id.* at 782.

lawyer), it is less sensible when the purpose is to ensure that defendants receive adequate representation. Nevertheless, this is a very real hurdle to Sixth Amendment claims.

3. Evidentiary Difficulties in the Prejudice Prong of the *Strickland* Test

A defendant who is able to overcome the deficient-conduct prong of the *Strickland* test must then satisfy the prejudice prong by establishing a reasonable probability that, but for the deficient lawyering of his counsel, the outcome of the proceedings would have been different.⁷⁶ In the *Lafler-Frye* paradigm, a defendant must demonstrate that he would have taken a plea bargain and that the court would have accepted the terms of the plea bargain.⁷⁷ Here, a defendant faces the inevitable evidentiary (and psychological)⁷⁸ barriers of proving hypotheticals.

First, a defendant must prove that, if not for the ineffective assistance of his counsel, he would have accepted the plea bargain that he ultimately declined. Defendants most often attempt to prove this through their personal testimony, simply asserting that they would have accepted the offers. However, this testimony is obvious, and courts are apt to find it self-serving.⁷⁹ Other than personal testimony, a defendant can usually point only to the objective superiority of the plea agreement he turned down. Specifically, the defendant would argue that the plea agreement was so far superior to going to trial that any reasonable person would have taken the offer, had he been provided sound advice from counsel. Yet courts offer no presumption of reasonableness to the criminal defendant. Courts look only to subjective evidence to determine what a particular defendant would have done had he been given effective counsel.

Even if a defendant can convince the court that he would have accepted the plea bargain, he may have to prove that the offer was still open at the time of his attorney's deficient lawyering. In *Tucker v. Clarke*, a federal

⁷⁶ *Strickland v. Washington*, 466 U.S. 668, 673 (1984).

⁷⁷ *Lafler v. Cooper*, 132 S. Ct. 1376, 1385 (2012).

⁷⁸ One such psychological barrier is the confirmatory bias, by which judges might view outcomes as being inevitable and discount the possible difference effective counsel could have made. See generally Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 3 (2004).

⁷⁹ See, e.g., *Packer v. United States*, No. 08-153, 2012 WL 3580520, at *4 (S.D. Ala. July 16, 2012) ("Here, Packer's self-serving declaration notwithstanding, the weight of the evidence indicates that . . . Packer strongly advocated . . . his innocence and his aversion to pleading guilty for any reason in this Court."). Courts have a good reason to be suspicious—many defendants would presumably lie in order to reduce their sentence. However there are certainly some defendants who would have actually accepted the plea agreement that was offered to them.

district court in Virginia denied relief to the petitioner who alleged that his attorney failed to communicate his acceptance of a plea deal to the prosecutor.⁸⁰ Noting that the defendant only decided to accept the plea deal during jury deliberations, the court held that the defendant failed to meet his burden of proving that the prosecution's offer was still open.⁸¹ The court cited no evidence that the offer was closed, but it nevertheless found that "Tucker has not demonstrated that the Commonwealth would have accepted his agreement"⁸² While this is an exceptional case—defendants rarely accept plea deals during jury deliberations—it demonstrates courts' willingness to construe events in ways that increase defendants' evidentiary burdens. In theory, a court could presume in almost every case that the prosecution rescinded its plea offer before the defendant's hypothetical acceptance, and the defendant would be hard-pressed to prove otherwise.

Defendants face a similar difficulty when their lawyers fail to initiate negotiations with the prosecution over potential plea bargains. Even though such a failure may at times rise to deficient counsel, the absence of any evidence that the prosecution would have agreed to a deal is dispositive. In one recent New York state court case, a defendant, after being counseled by his lawyer, accepted the prosecution's plea offer and agreed to serve a one-year sentence in exchange for pleading guilty to attempted assault.⁸³ On appeal, the defendant argued that his lawyer was deficient during plea negotiations for not requesting a sentence of 364 days, since such a sentence would have saved the defendant from automatic deportation.⁸⁴ Although it seems plausible that the prosecutor might have agreed to such a deal, the court was ultimately "not persuaded that the District Attorney would have consented to a sentence of even one day less than one year in jail."⁸⁵

These examples show that the prejudice prong of the *Strickland* test presents real difficulties for defendants seeking relief for ineffective assistance of counsel in plea bargaining. When combined with courts' deference to lawyers' strategic decision-making and the he-said/she-said phenomenon, the burden placed on defendants is nearly insurmountable.

⁸⁰ No. 2:12- 00040, 2012 WL 3985516, at *3-4 (E.D. Va. Aug. 1, 2012).

⁸¹ *Id.*

⁸² *Id.* at *4.

⁸³ *People v. Castillo*, No. 1690-03, 2012 WL 1570975, at *1-2 (N.Y. Sup. Ct. 2012).

⁸⁴ *Id.* at *4.

⁸⁵ *Id.* at *5-6.

C. *Is This a Real Problem?*

The mere existence of a difficult evidentiary burden does not prove that defendants who have valid ineffective assistance of counsel claims are losing in court. It may be that defense lawyers are always forthcoming when confronted with allegations of deficient conduct and that the he-said/she-said phenomenon is indicative not of injustice or untruthful lawyers, but of desperate defendants seeking to undo their own mistakes.⁸⁶ Indeed, it is impossible to know how often valid ineffective assistance of counsel claims are lost due to malfeasance, bias, or poor memory on the part of the defense lawyer. Determining the number of valid claims that fail for these reasons, much like figuring out how many innocent defendants are convicted, is an exceedingly difficult task; the same deficiencies that led the court to the wrong ruling prevent a conclusive post-hoc review.⁸⁷ Yet, just like the innocence question, certain facts make it apparent that the problem exists.

First, there have been a number of cases in which defendants have successfully established ineffective assistance of counsel in plea bargaining. *Lafler* and *Frye* are but two prominent examples.⁸⁸ These cases establish with certainty that defense counsel at times provides ineffective assistance in plea bargaining. The only questions that remain are how often this occurs and whether or not the current system adequately addresses these valid claims.

Second, the sheer volume of criminal cases belies the assertion that defense lawyers never misrepresent—due to dishonesty, bias, or just a foggy

⁸⁶ See, e.g., *Diggs v. Welch*, 148 F.2d 667, 670 (D.C. Cir. 1945) (“The opportunity to try his former lawyer has its undoubted attraction to a disappointed prisoner. In many cases there is no written transcript and so he has a clear field for the exercise of his imagination. . . . To allow a prisoner to try the issue of the effectiveness of his counsel under a liberal definition of that phrase is to give every convict the privilege of opening a Pandora’s box of accusations which trial courts near large penal institutions would be compelled to hear.”).

⁸⁷ See Beth Schwartzapfel & Hannah Levintova, *How Many Innocent People are in Prison?*, MOTHER JONES (Dec. 12, 2011, 8:10 AM), <http://www.motherjones.com/politics/2011/12/innocent-people-us-prisons> (describing the difficulties in determining the rate of false convictions).

⁸⁸ Others include *United States v. Mooney*, 497 F.3d 397 (4th Cir. 2007); *Maples v. Stegall*, 427 F.3d 1020 (6th Cir. 2005); *Cerda v. Hedgpetch*, 744 F. Supp. 2d 1058 (C.D. Cal. 2010); *United States v. DeSimone*, 736 F. Supp. 2d 477 (D.R.I. 2010); and *United States v. Winsor*, 675 F. Supp. 2d 1069 (D. Or. 2009). These cases and numerous others are detailed in TERESA L. NORRIS, SUMMARIES OF PUBLISHED SUCCESSFUL INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS POST-*WIGGINS v. SMITH* 352-54 (2013), available at http://www.capdefnet.org/hat/uploadedfiles/public/helpful_cases/ineffective_assistance_of_counsel/IAC%20Post-Wiggins%203-21-13.pdf.

memory—the events that occur during plea negotiations.⁸⁹ In light of the millions of criminal cases each year, the notion that all lawyers freely confess their mistakes is unrealistic. In fact, it may be that the most ineffective lawyers are the most likely to resist admitting their mistakes.⁹⁰ Given the enormous volume of cases, the known occurrence of defective counseling, and the high possibility of lawyers' noncooperation, there are certainly some valid Sixth Amendment claims that are defeated in postconviction proceedings.

Even if this is a rare occurrence, something I concede only for the sake of argument, the stakes are high enough to warrant a response. The system severely punishes criminal defendants who bypass plea bargain offers. One federal district court judge found that sentences in the District of Massachusetts after trial are, on average, five hundred percent more severe than the sentences available in plea negotiations.⁹¹ To make matters worse, the odds are stacked against the defendant if he decides to go to trial because the great majority of criminal trials result in convictions.⁹² Therefore, there is much riding on the decision to accept or reject a plea bargain. Given the importance of this decision, even a low number of cases presents a large enough problem to warrant protective measures.

III. THE DUTIES OF DEFENSE COUNSEL IN PLEA BARGAINING

To address ineffective assistance of counsel in the context of plea bargaining, it is first necessary to understand the role that counsel plays in the process. In this Part, I summarize the duties of defense counsel in the plea bargaining context. To do so, I will examine existing standards for defense

⁸⁹ There were over twenty million felony, misdemeanor, and other criminal cases reported by state courts alone in 2010. See *Criminal Caseloads Continue to Decline*, COURT STATISTICS PROJECT, <http://www.courtstatistics.org/Criminal/20121Criminal.aspx> (last visited Jan. 24, 2014).

⁹⁰ Deficient conduct that implicates the lawyer's fitness may expose him to potential disciplinary action, giving the lawyer an even stronger incentive not to admit an error that cannot otherwise be proven. See generally Ellen Henak, *When the Interests of Self, Clients, and Colleagues Collide: The Ethics of Ineffective Assistance of Counsel Claims*, 33 AM. J. TRIAL. ADVOC. 347, 356-58 (2009) (discussing the intersection between ineffective assistance of counsel claims and possible ethical violations).

⁹¹ *Berthoff v. United States*, 140 F. Supp. 2d 50, 67-69 (D. Mass. 2001) (noting that “[a]s a practical matter this means, as between two similarly situated defendants, that if the one who pleads and cooperates gets a four-year sentence, then the guideline sentence for the one who exercises his right to trial by jury and is convicted will be twenty years”).

⁹² See CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000) (reporting that “[a]pproximately 9 in 10 Federal defendants and 3 in 4 State defendants in the 75 largest counties [in the United States] were found guilty”).

counsel, such as those of the ABA and the NLADA. A synthesis of these standards reveals three main categories of tasks that defense counsel usually undertakes during the plea bargaining process: investigation, negotiation, and client communication. The defense lawyer employs each of these in an effort “to seek the lawful objectives of his client.”⁹³

A. Investigation

Thoroughly investigating a defendant’s case is one of the most basic, yet important, responsibilities of a defense lawyer.⁹⁴ Defense counsel must conduct a thorough investigation before he advises his client or negotiates with the prosecutor regarding plea agreements.⁹⁵ The scope of investigation depends on the individual case, but organizations like the NLADA have promulgated broadly applicable standards to which I refer.

The defense lawyer’s first investigative responsibility is to characterize the consequences of going to trial. If the decision to accept a plea bargain is to be viewed as a cost–benefit analysis, then the consequences of trial represent an entire side of the equation. The NLADA lists six pieces of information that the lawyer should ascertain:

- (1) the maximum term of imprisonment and fine or restitution that may be ordered, and any mandatory punishment or sentencing guideline system;
- (2) the possibility of forfeiture of assets;
- (3) other consequences of conviction such as deportation, and civil disabilities;
- (4) any possible and likely sentence enhancements or parole consequences;
- (5) the possible and likely place and manner of confinement;
- (6) the effect of good-time credits on the sentence of the client and the general range of sentences for similar offenses committed by defendants with similar backgrounds.⁹⁶

⁹³ MODEL CODE OF PROF’L RESPONSIBILITY, DR 7-101(A)(1) (1980).

⁹⁴ See ABA STANDARDS, *supra* note 10, § 4-4.1(a) (“Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. . . . T[h]is duty to investigate exists regardless of the accused’s admissions or statements to defense counsel of facts constituting guilt or the accused’s stated desire to plead guilty.”).

⁹⁵ The Supreme Court offered as much over sixty years ago: “Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered.” *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948).

⁹⁶ NLADA GUIDELINES, *supra* note 11, at § 6.2.

Second, the lawyer should investigate the probability of the client's conviction. Understanding the likelihood of conviction is an essential component to understanding whether or not a defendant should take a plea deal. For example, a defendant may face the death penalty, but if there were no possibility of conviction, then it would be a poor decision to accept a plea bargain. This duty to investigate means "explor[ing] all avenues leading to facts relevant to the merits of the case," making "efforts to secure information in the possession of the prosecution and law enforcement authorities," and doing these things without regard to whether the defendant has confessed guilt or expressed a desire to plead guilty.⁹⁷ Even a guilty defendant is entitled to the lawyer's best efforts to secure the most favorable deal.

These first two steps provide the basis for determining the likelihood and severity of possible trial outcomes. The lawyer and client will later measure these against the plea bargain offer. But this is not the end of the investigation. The lawyer should also investigate the historical plea bargain outcomes of similarly situated defendants, determining the "going rate," or the "county-specific range of acceptable sentences for a given offense."⁹⁸ This knowledge can be incredibly important during the negotiation process.⁹⁹ While experienced defense lawyers, or "repeat players," might have developed an understanding of such going rates, inexperienced lawyers should seek historical data and advice from more experienced peers to determine how a given deal measures up against those typically offered under similar circumstances.

B. *Negotiation*

After conducting a thorough investigation of the case against the defendant, the defense attorney should then prepare to negotiate with the prosecution in order to secure the best possible outcome for her client.¹⁰⁰

⁹⁷ ABA STANDARDS, *supra* note 10, § 4=4.1(a).

⁹⁸ PETER F. NARDULLI ET AL., *THE TENOR OF JUSTICE: CRIMINAL COURTS AND THE GUILTY PLEA PROCESS* 208 (1988).

⁹⁹ This knowledge is an even more critical area of investigation for inexperienced defense attorneys. For instance, one such attorney offered the following account of his early years: "Yeah, I got burned a number of times. I had a case where my guy got six months in jail. Now, with the same case I would get a suspended sentence. You've just got to learn through experience what a case is worth." MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* 76 (1978).

¹⁰⁰ *See* TED A. DONNER, *ATTORNEY'S PRACTICE GUIDE TO NEGOTIATIONS* § 13:1 (2012) ("[A]n 'effective' negotiator is one who can maximize his or her client's return, maintain a positive relationship with the opposition and still maintain the dignity of the profession.").

Prosecutors have broad discretion to enter into plea deals,¹⁰¹ and they have an interest in avoiding costly trials, which means that they are often willing to negotiate. Defining the standards for how defense lawyers should go about plea negotiations, however, is a difficult endeavor because lawyers all have their own styles.¹⁰² Courts should therefore look beyond most strategic or behavioral peculiarities.¹⁰³ To complicate matters further, while a good attorney might skillfully secure a plea bargain that meets or exceeds the going rate, the failure of a lesser attorney to do so is not per se evidence of ineffective assistance.

The first requirement of negotiating is that the defense lawyer must represent his client's interests.¹⁰⁴ The lawyer should consult with the client to ensure a mutual understanding of the client's plea bargaining goals and the lawyer's role in achieving those goals.¹⁰⁵ Only after this consultation has occurred should the lawyer attempt to negotiate the client's desired result.¹⁰⁶

If the prosecution has not yet broached the subject of a plea bargain, the defense attorney should initiate negotiations when it is advantageous to do so. For example, a defense attorney should seek a deal quickly if it becomes evident that his client's case will weaken over time.¹⁰⁷ Notably, the lawyer should make this assessment without regard to the client's proclamations of

¹⁰¹ See FED. R. CRIM. P. 11(c)(1) (authorizing the prosecutor to negotiate a plea bargain with defense counsel and detailing what a plea agreement may contain).

¹⁰² For a discussion of the different ways some attorneys go about negotiations, see DONNER, *supra* note 100, § 13:1 (“[S]ome will find they work best when they have the opportunity to meet with the other side, learn their interests and explore ways to establish mutual trust. Others will be more comfortable behind a desk, where they can limit their interactions to the occasional email or phone call. In the end, there is nothing inherently right or wrong about either approach, or most any other for that matter. There are bound to be stylistic differences among virtually everyone who involves themselves in negotiations.”).

¹⁰³ See, e.g., *Premo v. Moore*, 131 S. Ct. 733, 741 (2011) (“The art of negotiation is at least as nuanced as the art of trial advocacy There are, moreover, special difficulties in evaluating the basis for counsel's judgment: An attorney often has insights borne of past dealings with the same prosecutor or court”).

¹⁰⁴ See DONNER, *supra* note 100 (“[T]he attorney who seeks to represent someone's interests in negotiation must be aware of, and understand those interests.”).

¹⁰⁵ See NLADA GUIDELINES, *supra* note 11, § 6.1(a) (“Counsel should explore with the client the possibility and desirability of reaching a negotiated disposition of charges rather than proceeding to a trial”).

¹⁰⁶ See *id.* § 6.1(b) (“Counsel should ordinarily obtain the consent of the client before entering into any plea negotiation.”).

¹⁰⁷ If the lawyer expects the prosecution to discover additional evidence that strengthens the case against the client, then he can expect that the prosecutor, as a rational bargainer, will offer less attractive deals as this evidence is uncovered. On the other hand, if the lawyer expects to uncover additional exculpatory or mitigating evidence, then it may be best to wait to negotiate.

innocence or guilt, which may have little relationship to the strength of the case on either side.¹⁰⁸

Once negotiations are in progress, the lawyer should continuously evaluate the options available to his client in order to determine whether a particular plea offer is favorable. Decision analysis¹⁰⁹ presents a helpful tool to approach this assessment. Under that analysis, the lawyer would weigh the terms of the deal against the probability and severity of the various trial outcomes. For instance, if a client faces a ninety percent chance of conviction at trial with a likely sentence of ten years, then a plea bargain offering a nine-year sentence is objectively reasonable.¹¹⁰ Anything more than nine years would be unfavorable to the defendant. Thus, the lawyer should negotiate a deal that, at a minimum, meets this criterion.

Finally, the lawyer should compare any plea bargain offer to the going rate to ensure that his client is receiving a historically equitable deal. If plea bargaining is now the norm, then the going rate indicates a just sentence, and the lawyer should resist or counter any proposal that exceeds that rate.¹¹¹ In such cases, the lawyer might draw the prosecutor's attention to previous deals and propose adjustments based on case-specific details.

¹⁰⁸ Whether the client, in private, claims to be innocent or guilty does not change the objective evidentiary circumstances of the case or govern the course of plea negotiations. Of course, a plausible claim of innocence may indicate that future investigation will lead to additional exculpatory evidence. This factor weighs in favor of holding off on plea negotiations. See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1937 (1992) ("The likelihood that D will be convicted is (one hopes) strongly correlated with D's actual guilt or innocence: in general, innocent defendants can more easily find evidence that exonerates them (or that casts doubt on the government's theory of the case) than guilty ones can.").

¹⁰⁹ See generally Ronald A. Howard, *Decision Analysis and Law*, 22 CARDOZO L. REV. 1595 (2001) (providing a background of the history of decision analysis and its applicability to law). See also *Decision Analysis*, WIKIPEDIA, http://en.wikipedia.org/wiki/Decision_analysis (last visited Jan. 24, 2014) (providing a general discussion on decision analysis).

¹¹⁰ See George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 1069 (2000) ("If the defendant regards his chances of acquittal at trial to be, say, thirty percent, he normally will demand in exchange for his guilty plea a deduction of about thirty percent from the sentence he would have faced had he gone to trial and lost."). Consequences other than incarceration should be measured either alongside or within the decision analysis. If such factors are measured within the decision analysis, then each consequence should be normalized to reflect its value in terms of imprisonment. For example, deportation may be the equivalent of five years in prison. Thus, a five-year prison sentence with a deportation consequence would have the same value as ten years in prison.

¹¹¹ See Bibas, *supra* note 32, at 1140 ("The going rate amounts to equal treatment, not some unfair advantage over others. Once one stops viewing trials as setting the normal and normative baseline, one need not denigrate good defense lawyering as thwarting normal, just outcomes.").

C. Client Communication

The third major aspect of the defense lawyer's role in the plea bargaining process is effective communication with the client. Specifically, the lawyer must listen to his client's wishes and must ensure that his client has a full understanding of the relevant circumstances.

First, the lawyer "should explore with the client the possibility and desirability of reaching a negotiated disposition of the charges."¹¹² Some clients may wish as a matter of principle to plead not guilty and may be opposed to any plea bargain offer, regardless of the objective reasonableness of such an offer. The overwhelming majority, however, will wish to secure a good plea bargain offer rather than risk the possibility of receiving a severe punishment at trial.¹¹³

Next, the lawyer should "keep the client fully informed of any . . . negotiations and convey . . . any offers"¹¹⁴ It was this very duty that the defense lawyer in *Frye* neglected to fulfill.¹¹⁵ A defendant is entitled to be informed of all plea bargain offers and to decide whether to accept or reject those offers.¹¹⁶ The lawyer may think that the offer is lousy, but the decision to reject it belongs to the client alone.

Finally, the lawyer must ensure that her client comprehends the decision to accept or reject any plea bargain offer. The lawyer should "make certain that the client understands the rights he will waive by entering the plea . . . ; the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences . . . ; and the nature of the plea hearing."¹¹⁷ The lawyer should communicate in nontechnical language,¹¹⁸ keeping in mind that "even the intelligent and educated layman has small and sometimes no skill in the science of the law He requires the guiding hand of counsel at every step of the proceedings"¹¹⁹ This "guiding hand" should avoid treating the duty to inform the client as a formality, and instead should invest the necessary time and effort to make

¹¹² NLADA GUIDELINES, *supra* note 11, § 6.1(a).

¹¹³ This result is evident in that the overwhelming majority of criminal cases end in a guilty plea.

¹¹⁴ NLADA GUIDELINES, *supra* note 11, § 6.1(c).

¹¹⁵ See *supra* note 54 and accompanying text.

¹¹⁶ See *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) ("[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution . . .").

¹¹⁷ NLADA GUIDELINES, *supra* note 11, § 6.4(a).

¹¹⁸ See *Bibas*, *supra* note 32, at 1155 (suggesting that plain English summaries of plea agreements may improve a defendant's understanding of those agreements).

¹¹⁹ *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

certain that the client truly understands each aspect of the critical decision to accept or reject a plea bargain offer.

Finally, the lawyer must give appropriate advice to the client. Authorities differ as to the extent that defense lawyers should direct their clients to a decision. Lower courts have held that lawyers need not advise clients to make a certain decision regarding a plea offer, provided that they inform the clients of the relevant information on the legal issues at stake.¹²⁰ The Supreme Court would most certainly endorse this position.¹²¹ However, some scholars and practitioners argue that effective defense counsel should encourage—aggressively, at times—defendants to make the decision that is in their best interests.¹²² These scholars and practitioners argue that in practice many defendants, unable to fully comprehend the options in front of them, look to their lawyers to tell them what to do.¹²³ Ultimately, I find this argument compelling—even if the judicial system allows otherwise, an effective lawyer will steer clients to the decision that is in their best interests.

IV. JUSTIFYING A NEW RECORD

As the chief advocates for defendants' rights, defense attorneys should be especially concerned with the apparent difficulties in vindicating defendants' Sixth Amendment right to effective counsel in the plea bargaining context. Although some scholars have proposed changes to the law or to criminal procedure that would make it easier for defendants to vindicate these rights,¹²⁴ courts are far from adopting such suggestions. The criminal

¹²⁰ See, e.g., *United States v. Stockton*, No. 99-0352, 2012 WL 2675240, at *12 (D. Md. July 5, 2012) (holding that a defense lawyer was not required to advise his client that he should accept an offer of ten years' imprisonment even though the client faced a possible life sentence and the prosecution had a strong case).

¹²¹ See *Bibas*, *supra* note 32, at 1139 (documenting the Supreme Court's continued focus on whether the defendant made the decision to accept or reject a plea bargain "knowingly").

¹²² See, e.g., Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 *YALE L.J.* 1179, 1310 (1975) (recounting one public defender's claim that "[a] lawyer shirks his duty when he does not coerce his client").

¹²³ See Gabriel Hallevy, *The Defense Attorney as Mediator in Plea Bargains*, 9 *PEPP. DISP. RESOL. L.J.* 495, 514 (2009) ("[I]t ought to be pointed out that, while the prosecutor has the professional expertise necessary to arrive at a plea bargain because of operating as an experienced and professional advocate, the defendant has to rely on a defense attorney. The defendant does not, as a rule, have the tools necessary to handle the information to which he is exposed and to know whether that information is all the information he needs to know. In such cases, the defendant will probably partially or fully relinquish personal autonomy and right to self-determination, either openly or confidentially.").

¹²⁴ See, e.g., *Bibas*, *supra* note 32, at 1153-59 (suggesting that the court adopt a regulatory regime that would require written plea agreements, standardized terminology in plain English, a

defense bar should thus take measures to protect defendants who fail to take advantage of favorable plea bargain opportunities due to deficient representation. I am proposing that the bar adopt a standard record that would document the terms of each plea offer and the defense lawyer's assessment of those offers. Requiring defense counsel to do so is consistent with two well-known duties of defense counsel: the duty to preserve issues for appeal and the duty to advocate zealously on behalf of clients. Furthermore, such a record would serve as a mistake-proofing device that would help reduce many of the errors that create ineffective assistance of counsel claims in the first place. Although this proposed solution would add work to an overloaded profession, it is nevertheless worthwhile if properly framed.

A. *The Duty to Preserve Issues for Appeal*

A record of the plea bargaining process is consistent with the preexisting duty to preserve issues for appeal. The ABA maintains that “[d]efense counsel should take whatever steps are necessary to protect the defendant’s rights of appeal.”¹²⁵ This duty generally entails raising objections at appropriate times in trial and meeting the procedural requirements to perfect an appeal.¹²⁶

In this context, the client does not lose his right to raise an ineffective assistance of counsel claim when he forgoes a favorable plea bargain opportunity; rather, he loses the realistic possibility of meeting the high burden of proof associated with such a claim because there will undoubtedly be no record of what transpired between him and his attorney. Unless the lawyer accurately recalls the events in question and speaks openly about those events, the failure to document the plea bargaining process effectively disables a client’s potential Sixth Amendment claim.¹²⁷ In other words,

“cooling period,” and *contra proferentum* review); Emily Rubin, *Ineffective Assistance of Counsel and Guilty Pleas: Toward a Paradigm of Informed Consent*, 80 VA. L. REV. 1699, 1711-18 (1994) (proposing a substantive legal change in which the court would presume prejudice wherever the defendant’s plea bargain decision was not properly informed).

¹²⁵ ABA STANDARDS, *supra* note 10, § 4-8.2(b).

¹²⁶ *See, e.g.*, *Theus v. United States*, 611 F.3d 441, 448 (8th Cir. 2010) (“Theus suffered prejudice as a result of his counsel’s failure to raise either in the district court or on direct appeal the district court’s error in imposing a ten-year mandatory minimum sentence for a quantity of cocaine that required only a five-year minimum sentence.”).

¹²⁷ *See, e.g.*, *United States v. Stockton*, No. 99-0352, 2012 WL 2675240, at *4 (D. Md. July 5, 2012) (noting that the attorney’s memory of the events was “sketchy”); *see also* GA. ASS’N OF CRIMINAL DEF. LAWYERS, IF INEFFECTIVE ASSISTANCE OF COUNSEL REARS ITS UGLY HEAD, HERE’S HOW TO APPROACH IT, *available at* <http://www.gacdl.org/zoomdocs/articles/article-ineffective%20assistance%20of%20counsel.htm> (last visited Jan. 24, 2014) (recommending

while the failure to keep a record of the plea bargaining process does not result in a procedural default, it has the same result. Therefore, the spirit of the duty to preserve issues for appeal should also compel defense lawyers to create an evidentiary record that their clients may need in order to prevail on those appeals.

B. *The Duty of Zealous Advocacy*

A record of the plea bargaining process is also consistent with a defense attorney's duty to advocate zealously on behalf of his clients.¹²⁸ This duty "is treated as a professional virtue and even as an obligation of an ethical attorney toward his or her client in all of the extant ethical codes."¹²⁹ In the plea bargaining context, this duty calls for the defense lawyer to safeguard the client against the attorney's own possible biases. The justice system's incentive structure threatens to bias the defense lawyer at two points. First, the justice system can lead lawyers to give biased advice regarding whether or not a defendant should accept or reject a plea bargain offer.¹³⁰ For example, time and money concerns often encourage lawyers to push for plea agreements, and defense lawyers' varying degrees of comfort in the courtroom compounds this potential bias.¹³¹ By documenting objective criteria to help defendants make plea decisions, a proper record would serve to protect clients from lawyers' conscious or subconscious desire to push them toward a certain result.¹³²

The system also promotes defensive responses to ineffective assistance of counsel claims. When a lawyer is accused of incompetence by a former client, it is predictable that he would become defensive.¹³³ While this may

that the appellate lawyer confront trial counsel with a trial record rather than relying on the latter's memory).

¹²⁸ See MODEL RULES OF PROF'L RESPONSIBILITY EC 7-19 (1980) ("The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.").

¹²⁹ JOHN M. BURKOFF, CRIMINAL DEFENSE ETHICS § 5:2 (2d ed. 2013).

¹³⁰ See Alschuler, *supra* note 122, at 1180 ("Today's guilty-plea system leads even able, conscientious, and highly motivated lawyers to make decisions that are not really in their clients' interests.").

¹³¹ *Id.* at 1182 (noting that some defense attorneys view guilty pleas as a "quick buck").

¹³² This record would also provide a basis for reviewing whether a defense lawyer was deficient in encouraging a defendant to plead guilty as well.

¹³³ Peter A. Joy & Kevin C. McMunigal, *Confidentiality and Claims of Ineffective Assistance*, 25 CRIM. JUST. 42, 42 (2011) ("Almost every defense lawyer eventually faces an ineffective assistance of counsel claim from a former client A common reaction is to be defensive and view the former client as an adversary."); see also Henak, *supra* note 90, at 348-49 (2009) ("For the lawyer against whom the claim is being brought, the possibility of having to handle requests for the file, dealing with inquiries from the prosecutor or the postconviction attorney, testifying at any

be a natural reaction on the part of a defense lawyer, it harms the interests of the defendant, who stands no chance of prevailing without the cooperation of his former lawyer. It is easy to imagine that a lawyer would argue that his actions were part of a reasonable strategy, or that he would misrepresent (perhaps unconsciously) the events to make his conduct sound reasonable. Since even good lawyers are tempted—during plea bargaining and when responding to ineffective assistance of counsel claims—to act in a manner that is biased against their clients' interests, the duty of zealous advocacy calls for lawyers to implement measures to protect their clients. A plea bargaining record would be a significant step in this direction.

C. *Justifying the Burden on Defense Lawyers*

The benefits of this proposed record must be weighed against its effect on the workload of the criminal defense bar. The extra work caused by the proposed record may decrease the amount of time that defense attorneys could spend with clients, which is a drawback that could possibly outweigh the benefits of implementing such a record. The Bureau of Justice Statistics estimated that in 2007 there were 15,000 full-time public defenders in the United States who were assigned over 5.5 million cases in total.¹³⁴ That means that each defender received on average 367 cases that year, or about one case per day.¹³⁵ Public defender systems, which are chronically underfunded, often depend on the rapid disposition of cases in order to get through their tremendous case loads. As a result, the majority of these cases are resolved through a plea agreement after just three or fewer meetings between the defendant and his lawyer.¹³⁶

In order to minimize the impact on already limited public defender resources, I propose a plea bargaining form that lawyers would be able to complete while conducting their standard investigative duties. The form should document the important aspects of the lawyer's plea negotiations, research, and advice. For the majority of cases that are settled quickly through a plea bargain, the lawyer would complete only one form, which he could easily do while conducting the basic research that should accompany

evidentiary hearings, and interacting with former clients who are now *pro se*, invokes an understandable desire to protect one's self, and one's professional image, within the legal community.").

¹³⁴ LYNN LANGTON & DONALD J. FAROLE, JR., BUREAU OF JUSTICE STATISTICS SELECTED FINDINGS: PUBLIC DEFENDER OFFICES, 2007—STATISTICAL TABLES 1 (2010).

¹³⁵ Of course, the number of cases processed by an individual defender may vary greatly from the average.

¹³⁶ See HARLOW, *supra* note 92, at 8 (reporting that over seventy percent of state inmates with public counsel talk to their lawyers three times or fewer before disposition of the case, most of which are guilty pleas).

any plea deal.¹³⁷ If the average public defender has one case per day, this form's impact should be negligible.¹³⁸ It should also be noted that prosecutors who conduct plea bargain negotiations with unrepresented defendants are already expected to create such a record.¹³⁹

Furthermore, the record would conceivably reduce the amount of time spent by the lawyer in ineffective assistance of counsel proceedings. Without such a record, a lawyer might otherwise be required to participate in lengthy evidentiary proceedings and write new accounts of the disputed conduct. The record would provide an evidentiary basis for quickly disposing of ineffective assistance of counsel claims. Given the volume of such claims, this reduction in workload could be quite significant.

Finally, the criminal defense bar could adapt the proposed plea bargaining record to accomplish its purpose without placing a heavy burden on defense lawyers. It may be that certain classes of cases present fewer opportunities for error or less severe consequences, and that these cases call for less documentation. For instance, the proposed record may be limited to felonies or crimes with severe collateral consequences like deportation. It is also possible that some plea bargains occur with such regularity that the record can be pre-populated with much of the required information. In short, once the defense bar commits to adopting a record of plea bargaining, it can tailor the record to its efficient uses.

D. Documentation as Mistake-Proofing

The proposed record would do more than simply streamline the post-conviction review of ineffective assistance of counsel claims; the record would also help to standardize defense lawyers' work by providing a roadmap of best practices and creating a strong disincentive for corner

¹³⁷ An investment in automation and data management would reduce the time required to compile the information requested by the form. For instance, a database of past plea agreements would enable the defender to quickly ascertain the going rate for a particular charge and the historical sentencing practices. An automated system might also flag possible collateral consequences and sentencing enhancements that may apply. See Bibas, *supra* note 32, at 1158 (proposing the adoption of computer programs and checklists in order to improve defense lawyering). These initiatives would require some investment, but they would probably save resources in the long run.

¹³⁸ More time would be required if lawyers are not accustomed to investigating the information needed to fill out the form. However, since the lawyer and client require the information requested by the form in order to make an intelligent and informed decision on whether or not to accept a plea bargain, the form does not add frivolous work, but rather guarantees that attorneys are fulfilling their basic responsibilities.

¹³⁹ See ABA STANDARDS, *supra* note 10, at § 3-4.1(b) ("Where the defendant has properly waived counsel, the prosecuting attorney may engage in plea discussions with the defendant, although, where feasible, a record of such discussions should be made and preserved.").

cutting—lawyers would know that judges might scrutinize their work later. The proposed record would ensure that defense lawyers investigate the circumstances of their clients' cases and any potential plea offers. Furthermore, the form would help the lawyer and client weigh all of the relevant information before deciding whether to accept or reject an offer. It would juxtapose the pros and cons of a given plea offer for an easy evaluation. Researchers have found that similar decision aids are an effective way to reduce errors in the workplace.¹⁴⁰ In short, such a record ensures that defense lawyers accurately research the options and consider their advice to their clients. Thus, the proposed record would do more than improve the client's chances of ultimately prevailing on a valid Sixth Amendment claim; it would also help reduce the very infractions that led to those claims.

V. ALTERNATIVE SOLUTIONS

Apart from the record I propose, there are a number of other possible ways to address the evidentiary difficulty in ineffective assistance of counsel claims relating to plea bargains. In this Part, I evaluate two such alternatives. First, I examine a procedural approach—enhancing judicial oversight of the plea bargaining process. Then, I evaluate a substantive option—a burden-shifting approach where defense lawyers would be required to prove effective assistance when defendants challenge particularly egregious decisions. I evaluate these approaches against four criteria: (1) the likelihood of relief to valid claims; (2) the likelihood of relief to invalid claims; (3) the effect on courts' and attorneys' workloads; and (4) the ease of implementation. I conclude that, while the other changes may help in theory, the most realistic hope for defendants is for criminal defense lawyers to adopt a plea bargaining record.

A. Procedural Change

The criminal justice system's roots as an adversarial process have colored the way most courts approach plea bargaining. Concerned that they might unduly alter the balance of power, courts have tended to leave parties to reach an agreement by their own devices.¹⁴¹ However, plea bargaining need

¹⁴⁰ See Douglas M. Stewart & John R. Grout, *The Human Side of Mistake-Proofing*, 10 PROD. AND OPERATIONS MGMT. 440, 455 (2001) (describing various techniques to prevent human error in the workplace).

¹⁴¹ See Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1059 (1976) ("The general consensus seems to be that trial judges should not participate in the pretrial negotiations that currently lead the overwhelming majority of American criminal defendants to plead guilty rather than exercise the right to trial.").

not be an adversarial process; the goals of the parties may indeed align. Prosecutors do not necessarily strive for the harshest punishments, but often for results they perceive to be “good enough.”¹⁴² Similarly, defendants do not necessarily seek acquittal, but often quick and fair dispositions.¹⁴³ A system predicated on a zero-sum concept of bargaining, where every benefit to one side equals harm to the other, therefore fails to capture the realities of the modern judicial system. Given the realities of our modern system, plea bargaining might be improved by the involvement of a third party who could help the prosecutor and defendant realize their aligned interests.¹⁴⁴ Here, I evaluate the idea of judicial review of plea bargain offers at the time of the colloquy or at the start of trial.

One way to implement this concept is to require the judge to conduct a more searching inquiry into the plea bargaining process before allowing the defendant to go to trial. Yet this approach runs into an early problem. Although defendants would in theory be better protected if judges reviewed the plea bargain offers and defendants’ decisions to reject them, judges are traditionally discouraged from involving themselves in plea negotiations because of the concern that they would unduly influence the process. There is good reason for this concern: Judges have at times pressured defendants to accept plea bargain offers.¹⁴⁵ Defendants are hesitant to go against the recommendation of a judge, who they see as an authority figure and who will preside over their trial and ultimately sentence them if they are convicted. And judges themselves often have a strong incentive to encourage plea bargains rather than trials: clearing their dockets. Thus, allowing the trial judge to weigh in on plea bargaining decisions may present more issues than it would resolve. To avoid these concerns, a separate arbiter might preside over the plea negotiations and conduct gateway reviews before cases go to trial. This person may be, but need not be, a separate judge who would not preside over a trial in the case that plea negotiations failed. Since the

¹⁴² See HEUMANN, *supra* note 99, at 103 (discussing the goals of prosecutors during plea negotiations).

¹⁴³ See *id.* at 69 (discussing the goals of defense lawyers during plea negotiations and during trial).

¹⁴⁴ Though I limit this discussion to judicial oversight of plea bargaining, increased prosecutorial involvement with the defendant during plea negotiations may also be positive. For instance, plea bargaining conferences where prosecutors can present the merits of offers directly to defendants and dispel defense lawyers’ misunderstandings may help prevent poor decisions to reject offers. I do not fully consider this option here because, while potentially beneficial in reducing *Lafler*-type cases, it does not address the problem in those cases that remain—there is still no record of defense counsel’s advice.

¹⁴⁵ For an example of judicial overinvolvement in the plea bargaining process, see *Louisiana v. Bouie*, 817 So. 2d 48 (La. 2002).

mediator's absence from downstream proceedings would reduce the risk of future bias, this arrangement would avoid the problems associated with the involvement of the trial judge.

1. Likelihood of Relief on Valid Claims

This arrangement would be an improvement over the current system in terms of providing relief to those defendants who bypassed a favorable plea deal due to bad advice from their attorneys. Mediators can readily review the substance of cases and plea bargain offers to determine whether the decision to turn down an offer made sense. When such decisions appear irrational, they can discuss them with the parties to ensure that defendants were informed of the relevant factors in their decisions. Apart from the ignominy of the ineffective assistance of counsel proceeding, lawyers may see this type of hearing as supportive rather than accusatory. Therefore, they may be more open about their representation. One difficulty may arise when decisions are predicated on confidential client information. For instance, a guilty defendant who knows that police are likely to find additional evidence may wish to accept a plea bargain, but the lawyer would be barred from disclosing this to the mediator. Nevertheless, these issues are less likely to arise with defendants who reject plea bargains—incriminating knowledge is typically a reason to accept a deal, not to reject it. Furthermore, the mediator need not inquire into *all* of the factors in a decision in order to ensure that the decision was an informed one. The mediator's reiteration of the reasons why the decision appears irrational on its face would help to ensure that the defendant understood the costs of the decision. Thus, this solution is more likely than the current system to give relief to the right people.

2. Likelihood of Relief on Invalid Claims

This arrangement might also be effective at avoiding the inappropriate granting of relief on invalid claims. First, such a review would minimize frivolous claims because defendants have less incentive to falsely blame lawyers at this stage, where the trial outcome remains unknown. In other words, little is likely to have changed since the defendant declined the plea offer. By holding the hearing before the trial, parties are encouraged to seek the right decision, not the reversal of a bad trial result. However, there may remain a concern that the mediator would attempt to induce the defendant to accept a plea. This undue influence would be particularly dangerous if the mediators are judges whose dockets benefit from a system that encourages

plea bargains. Nevertheless, the fact that different judges would preside over the trials would reduce the pressure faced by defendants to comply with mediators' wishes—if they decline a plea bargain, they no longer have to face that mediator. This issue might also be alleviated if mediators were selected from a pool of retired judges, civil judges, or practicing attorneys.

3. Effect on Justice System Resources

The biggest challenge to this arrangement is that it would add another step to the pretrial process, thereby creating an additional burden on the system. In particular, identifying, training, and paying a pool of mediators certainly would prove to be a costly venture. To minimize these costs, courts would need to tailor the new system. It would help that only those defendants intending to go to trial would be required to appear before a mediator. Nevertheless, while far fewer defendants go to trial than plead guilty, this system would still result in a high case load for mediators.¹⁴⁶ To help address this issue, the reviews may be limited to only the most severe cases (e.g., felony defendants facing over five years' imprisonment). These cases constitute a small portion of the criminal proceedings but the bulk of ineffective assistance of counsel claims.¹⁴⁷ Therefore, this approach would yield a high bang for the system's buck. Furthermore, the overhead costs associated with implementing this system would be at least partially offset by the downstream reduction in ineffective assistance of counsel claims.

Overall, the implementation of a pre-trial hearing before a neutral mediator would be an effective way of addressing ineffective assistance of counsel in plea bargaining, and thus of protecting defendants and reducing frivolous claims. However, it would require significant monetary expenditure and a fairly dramatic shift in the way things are currently done. The implementation hurdles are impossibly high—the change would require a massive effort on the part of court systems whose diffuse structure resists change. In the end, such a system is a good theoretical solution that unfortunately would prove impractical given the realities of our modern judicial system. Therefore, the onus remains on the criminal defense bar to do what it can.

¹⁴⁶ For defendants pleading guilty, the same benefit may be attained by increasing the scope of the plea colloquy to include a substantive “fairness” review of the deal.

¹⁴⁷ See KING ET AL., *supra* note 23, at 19-20 (noting that many of the most serious cases result in ineffective assistance of counsel claims).

B. *Shifting the Burden*

Another alternative solution to the problem at hand is one where defense lawyers would at times bear the burden of proving that they provided effective assistance of counsel. As I have discussed, the high burden of proof placed on defendants is often responsible for defeating defendants' claims because of the lack of a plea bargaining record. In order to combat this issue, the system could shift the burden of proof to the criminal defense lawyer when the decision to reject a plea bargain offer was clearly contrary to the best interests of the defendant. In other words, if no reasonable person would have made the decision under the circumstances, then the lawyer would have to prove that he properly informed the defendant of the factual and legal circumstances, leaving the court to conclude that the defendant was actually unreasonable and not just misinformed.

1. Likelihood of Relief on Valid Claims

It is clear that this proposal would benefit some defendants with valid claims. By shifting the burden to lawyers, the he-said/she-said problem would cut in favor of the defendants. Yet, although it sounds sweeping, this proposal may actually be underinclusive. By restricting the burden-shift to egregious cases, two risks are introduced. First, courts may wrongly determine that unreasonable decisions were reasonable. It may be that courts import an improperly low view of criminal defendants' sophistication, such that objective reasonableness is determined from the perspective of a person of less than ordinary intelligence. The change would thus leave untouched some noticeably poor decisions. Second, the rule would not benefit those defendants whose decisions were within the range of reasonableness but still not the ones they would have made upon receiving proper advice. For example, if a plea bargain would have resulted in a two-year reduction of a ten-year sentence, the court may find that the decision to reject the plea was not egregious. But if the person only rejected it because of his counsel's bad advice, his entitlement to relief is no different than one whose injury was more severe. It is clear that more defendants would have access to relief under this regime than under the current system, but the solution would be less effective than the proposed plea bargaining record.

2. Likelihood of Relief on Invalid Claims

This burden-shifting proposal also has a real risk of being overinclusive. It goes without saying that some defendants will make decisions regarding plea offers that are objectively unreasonable. In fact, the burden-shifting

proposal might even give such defendants a perverse incentive to unreasonably reject favorable plea offers and go to trial since they would later have an opportunity to have that decision reviewed under a relatively favorable standard if they are eventually convicted. On the other hand, the burden-shifting proposal might cause lawyers to change their practices in order to prevent this result. The incentives are difficult to predict. Some lawyers may be encouraged to create a record of advice when they believe that their client is making an unreasonable choice. This would be appropriate for lawyers who want to ensure that the truth (and their performance) is vindicated in court. Other lawyers might find that their clients' best interests are served by avoiding such a record. By failing to create a record, the lawyer could ensure that the client has the opportunity to challenge the decision later, thereby giving him another proverbial bite at the apple. This is, however, a dim and (hopefully) inaccurate view of defense lawyers. Some of this risk would also be allayed by the prosecutor's expected response to the burden-shifting proposal. Since the prosecutor has the greatest interest in maintaining the conviction, he would probably adjust his practice to make sure that the defendant knows what is in his best interest. This may result in a better flow of information from prosecutor to defendant and more documentation of plea bargain offers and outcomes.

3. Effect on Justice System Resources

It is unclear what this proposal would do to the workload of the justice system. On the one hand, the rule could spur prosecutors and defense lawyers to document better the circumstances surrounding unreasonable decisions to reject favorable plea offers (for instance, where the defendant goes against advice of counsel). This shift would probably entail only a minor increase in workload, and if adopted broadly, it would prevent the overinclusiveness that could result in an increase of frivolous ineffective assistance of counsel claims. On the other hand, if defense lawyers determined it would be better to leave open the clients' possible challenges, and prosecutors were unable to obtain the justification needed to defend their convictions, then the floodgates may be opened to frivolous claims. I suspect, however, that courts would guard against this result by curtailing the decisions found to be objectively unreasonable. In the end, I predict that this burden-shifting proposal would not dramatically affect the workload of courts or lawyers.

4. Likelihood of Implementation

Finally, the likelihood of implementation of this proposal is low. Federal courts would only adopt this burden-shifting proposal if the Supreme Court mandated it. While state courts may effect the change under state law, they have rarely shown any motivation to take defendants' rights beyond those prescribed by the Constitution. Ultimately, given the uncertain response of defense lawyers, prosecutors, and courts to this proposed change, and the unlikelihood that such a change can be effected at all, I conclude that this option is inferior to my proposal that the criminal defense bar adopt a plea bargaining record.

VI. THE RECORD

A. *The Contents of the Record*

Having argued that the criminal defense bar should adopt a record of the plea bargaining process to protect defendants' Sixth Amendment rights, and that other solutions are either impractical or inferior, I now propose the possible contents of that record. The overarching objective is to create a record that captures the elements of a lawyer's investigation and advice that defendants often challenge in ineffective assistance of counsel claims, while minimizing the time required to complete it. Therefore, the record should consist of at least three primary sections: expected trial outcome, terms of the plea bargain deal, and an evaluation of options. These are the key inputs into the defendant's decision to accept or reject a plea bargain deal—and those most needed to review a lawyer's advice after the fact.

The first section of the proposed form—the expected trial outcome—should include an evaluation of known evidence and the perceived likelihood of conviction on each charge. A lawyer would be able to quickly complete this section when the case is airtight or the defendant concedes guilt. It should also include the likely sentence the defendant would face and any possible collateral consequences. This structure would ensure that the defendant understands the probable outcome of a decision to turn down a plea and go to trial.

The second section—the evaluation of the plea agreement—should contain the charges offered by the prosecution as part of the plea offer, any recommended sentences that would be a part of the offer, and any collateral consequences that might flow from accepting the offer. These are essential ingredients of the offer and should be easy to determine. In this section, the lawyer should also document an assessment of the going rate for similarly

situated defendants. Here, the lawyer should attempt to identify the typical plea bargain that is offered to defendants in similar cases. This information allows the defendant to make a proper assessment of the prosecution's offer.

Finally, after investigating and documenting this information, the lawyer should advise the client as to the best course of action. He should record whether he advises the client to accept or reject the plea bargain offer and the rationale for that advice. The rationale should usually be rooted in the information captured on the form. For instance, if the plea bargain offer is superior to the likely outcome of a trial, and it compares favorably to other plea bargains that have been offered to defendants in similar cases, then the lawyer can record that information and advise the client to accept the plea offer. After completing the record, the lawyer should provide one copy to the client and should keep the other copy in his files. Due to confidentiality concerns, the lawyer should keep the record private until he becomes involved in an ineffective assistance of counsel claim.¹⁴⁸

B. *The Courts' Use of the Record*

As a general matter, the record should remain a confidential communication between a lawyer and his client up until the point that confidentiality is waived by the ineffective assistance of counsel claim. When the client presses his claim, he may either present the record as evidence of the defective advice, or argue that the record misrepresented the advice actually given by the lawyer.

The court would assess the record to see whether the written analysis of the plea deal is defective on its face. If so, the defendant will have met his burden under the first *Strickland* prong, provided that the defect rises to the level of ineffectiveness. If the defect makes the advice and the resultant decision sufficiently suspect, then a finding of prejudice is appropriate.

If, on the other hand, a review of the record indicates that the lawyer adequately investigated the circumstances and provided reasonable advice, then the claim is defeated. Thus, the record does nothing to change the *Strickland* analysis. Instead, it provides what should in most cases be a more reliable account of what actually happened, so that the court can more accurately decide the case.

¹⁴⁸ The lawyer must also provide the record to the client upon request. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 46 (2000) ("On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse.").

C. *What Happens When the Record is Inaccurate?*

When the record is inaccurate—for example, the lawyer told the client something different from what he wrote—it will be nearly impossible for the defendant to prevail. In that case, a he-said/she-said dispute would likely end the claim. But that is hardly a fatal flaw in this proposal: that is the fate of most every case in the present system anyway. So, defendants are, in the overwhelming majority of cases, no worse off because of the record. On the other hand, if the lawyer corroborates—rather than contests—the defendants' assertions that the advice differed from that recorded on the form, it may be slightly more difficult to convince a court that the advice was deficient than it would be without a contradictory record. I contend that these cases are likely to be extremely rare. Lawyers are unlikely to advise clients in a manner that contradicts the record they create to document that advice, and if they do so, it will be rare that they will admit it and that courts will fail to credit that admission.

CONCLUSION

The Supreme Court's decisions in *Lafler v. Cooper* and *Missouri v. Frye* were a step forward in protecting citizens' Sixth Amendment rights. The decisions represented the Court's first overt recognition that the Sixth Amendment right to counsel is distinct from the right to a fair trial, extending to plea bargaining even when the defendant receives a fair trial. However, the right to be informed of, and properly advised on, plea bargain offers is far less meaningful when its vindication depends upon counsel's good will and good memory in later ineffective assistance of counsel proceedings.

In order to secure the rights of their clients, the criminal defense bar should adopt a standard record of the plea bargaining process. Such a practice is consistent with the lawyer's duties to preserve issues for appeal and to advocate zealously on behalf of her client. Further, it would provide a roadmap for the lawyer to ensure adequate investigation and advice and would discourage corner cutting. Even though the record would be additional work for defense lawyers, the bar can tailor it to minimize the impact. The criminal defendant is truly at the mercy of the defense lawyer, and the good advocate should seek to guarantee the rights of her clients.