FOR THE SAKE OF PUBLIC POLICY: PLEA BARGAINING DEMANDS SIXTH AMENDMENT PROTECTION DUE TO ITS PREVALENCE AND NECESSITY IN THE JUDICIAL SYSTEM

I. INTRODUCTION

Ninety-seven percent of federal cases are settled by the plea bargaining process.¹ Ninety-four percent of state cases are settled by the plea bargaining process.² While the importance of plea bargaining and its role in the judicial system has long been recognized by the United States Supreme Court, the law governing plea bargaining, specifically the prosecutor’s and defense counsel’s behavior, has failed to fully develop over the past four decades.³ In 2012, the Court took a step forward in developing law that affected the plea bargaining process.⁴ Due to the powerful leverage prosecutors have in the plea bargaining process, this Article suggests the Court appropriately allowed for claims of ineffective assistance of counsel based on the rejection of a favorable plea offer.⁵

This Article will discuss the current role of plea bargaining in the American judicial system as well as how the tests for effective counsel and valid guilty pleas came to govern the claims of interest.⁶ The Background will examine the Court’s opinions in Strickland v. Washington,⁷ Boykin v. Alabama,⁸ and Hill v. Lockhart,⁹ which all helped

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² Frye, 132 S. Ct. at 1407.
⁴ See Frye, 132 S. Ct. at 1410-11 (considering post-conviction relief when defense counsel did not present the plea offer to the defendant); Lafler v. Cooper, 132 S. Ct. 1376, 1384-85 (2012) (contemplating post-conviction relief for a defendant whose counsel had erred in giving legal advice about a plea deal).
⁶ See infra notes 17-160 and accompanying text.
to develop the analysis applied to claims of ineffective assistance of counsel in the plea bargaining stage today. Following the Background, the Argument will discuss the public policy reasons that support the plea bargaining system and why the system ought to remain a part of the American judicial system. Next, the Argument will address the unfair advantage prosecutors have in the plea bargaining system. In considering the unfair advantage, the Court appropriately clarified that a claim for ineffective assistance of counsel could be made if a defendant rejected a favorable plea offer. The Argument will then consider two concerns with the companion cases discussed and suggest possible solutions to limit the unfair advantage prosecutors currently have over defendants during plea bargaining. Finally, the Conclusion will outline why claims of ineffective counsel that result from the rejection of a favorable plea offer are acceptable and appropriate under the current judicial system.

II. BACKGROUND

A. The Role of Plea Bargaining in the Judicial System

*Brady v. United States* was one of the first United States Supreme Court decisions to recognize the importance of plea bargaining in the American judicial system. At the time of *Brady*, over three-fourths of criminal convictions were the result of guilty pleas. Noting the benefits that both the defendant and the State received from the plea bargaining process, the Court opined that negotiating between the State and the defendant was constitutional. In *Santobello v. New York*, the Court went even further and stated that plea bar-

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10. See infra notes 17-160 and accompanying text.
11. See infra notes 167-203 and accompanying text.
12. See infra notes 204-42 and accompanying text.
13. See infra notes 204-42 and accompanying text.
14. See infra notes 245-86 and accompanying text.
15. See infra notes 287-90 and accompanying text.
18. Brady, 397 U.S. at 752.
19. *Id.* In this case, the defendant changed his not guilty plea to guilty after assessing the likely trial outcome and the sentence that would be imposed if he were found guilty. *Id.* The Court distinguished the leniency that comes with a guilty plea from the leniency promised by authorities when trying to obtain a confession. *Id.* While defendants probed for a confession are in a more fragile state, Brady had competent counsel to outline the alternatives of trial or pleading. *Id.* After discussing the alternatives, Brady entered a guilty plea before a judge in open court. *Id.* These circumstances suggested that the plea was entered voluntarily. *Id.* at 754-55.
gaining was an essential component of the judicial system, and when done correctly, plea bargaining should be encouraged.\textsuperscript{21} From a public policy standpoint, the plea bargaining process is not only good for the judicial system but also for defendants and society as a whole.\textsuperscript{22} Sentences are imposed much quicker when a defendant agrees to plea bargain, which may create a sense of security among the public, as opposed to defendants who are out on bail awaiting trial.\textsuperscript{23}

Because the Court’s declaration of the constitutionality of plea bargaining, three themes have emerged.\textsuperscript{24} First, the standard of a voluntary and intelligent guilty plea remains at the crux of the Court’s review in these cases.\textsuperscript{25} The Court also recognized the prosecution’s upper hand and ability to pressure defendants into guilty pleas.\textsuperscript{26} This advantage led the Court to repeatedly emphasize the second theme, the importance of defense counsel during plea bargaining.\textsuperscript{27} The requirement of counsel supports a notion of fairness in the plea bargaining process.\textsuperscript{28} The presence of defense counsel during plea negotiations also increases the likelihood that the defendant will enter his plea knowingly and intelligently.\textsuperscript{29} The last theme presented was the Court’s stressing the importance of plea bargaining and the vital role it plays in the judicial system.\textsuperscript{30} For instance, plea bargaining allows for efficient final dispositions of the great majority of criminal cases and thus saves prosecutorial resources.\textsuperscript{31} The opportunity to plea bargain also allows the defendant to gain some control in the disposition and choose whether to accept a less severe sentence or to pro-

\begin{itemize}
\item \textsuperscript{21} Santobello v. New York, 404 U.S. 257, 260 (1971).
\item \textsuperscript{22} Blackledge v. Allison, 431 U.S. 63, 71 (1977). See Russel D. Covey, \textit{Plea-Bargaining Law After Laffer and Frye}, 51 Duq. L. Rev. 595, 601 (2013) (commenting that “[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.”).
\item \textsuperscript{23} \textit{Blackledge}, 431 U.S. at 71.
\item \textsuperscript{24} Blank, supra note 17, at 2021-23. The three themes include the requirement for a voluntary guilty plea, the presence of defense counsel, and the necessity of the plea bargaining system as a whole. \textit{Id.}
\item \textsuperscript{25} \textit{Id.} at 2021. See generally Wilson v. United States, 162 U.S. 613, 623 (1896) (noting that “the true test of admissibility is that the confession is made freely, voluntarily, and without compulsion, or inducement of any sort.”).
\item \textsuperscript{26} United States v. Mezzanotto, 513 U.S. 196, 209-10 (1995).
\item \textsuperscript{27} Blank, supra note 17, at 2021-22.
\item \textsuperscript{28} Santobello, 404 U.S. at 261. “It is now clear . . . that the accused pleading guilty must be counseled, absent a waiver.” \textit{Id.}
\item \textsuperscript{29} Blank, supra note 17, at 2022.
\item \textsuperscript{30} \textit{Id.} “[P]lea bargaining ‘is not some adjunct to the criminal justice system; it is the criminal justice system.’” \textit{Id.} at 2016 (quoting Robert E. Scott & William J. Stuntz, \textit{Plea Bargaining as Contract}, 101 Yale L.J. 1909, 1912 (1992)).
\end{itemize}
ceed with trial. 32 After the defendant enters a guilty plea, the court cannot impose a harsher sentence than that agreed to per the plea deal. 33 Furthermore, the defendant can avoid extensive financial costs associated with a trial by electing to plea bargain. 34

B. DEFICIENT COUNSEL AND PREJUDICIAL EFFECTS: THE STRICKLAND TEST FOR DETERMINING WHETHER COUNSEL ASSISTED EFFECTIVELY, AS GUARANTEED BY THE SIXTH AMENDMENT

Among other rights, the United States Constitution enumerates the right to counsel in a criminal proceeding. 35 The Sixth Amendment includes the defendant's right to select who will represent him, as well as the guarantee that counsel be qualified. 36 A defendant's claim that counsel is unqualified or ineffective is governed by the United States Supreme Court's decision in Strickland v. Washington, 37 which announced the test for ineffective counsel claims. 38 The ineffective counsel test is a two-prong test that includes a showing of both deficiency and prejudicial effects. 39 In Strickland, the Court articulated Washington had failed to establish his counsel had acted deficiently or caused him to suffer prejudice during the sentencing phase of his trial. 40


35. U.S. Const. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." Id.


38. Strickland v. Washington (Strickland III), 466 U.S. 668, 687 (1984). In his initial proceeding, Washington was indicted on charges of kidnapping and murder. Against the advice of his counsel, Washington waived his right to a jury trial and pled guilty to all charges. Washington rejected his right to have an advisory jury sit at his sentencing hearing and was sentenced by the trial judge (again, against the advice of counsel). The trial judge sentenced Washington to death for three murder charges and the other charges resulted in prison sentences. On appeal to the Florida Supreme Court, each charge and the respective sentences were upheld. Strickland III, 466 U.S. at 672-75.

39. Id. at 687.

40. Id. at 700.
After the Florida Supreme Court affirmed Washington's sentence, Washington filed a writ of habeas corpus in the United States District Court for the Southern District of Florida alleging his counsel had failed to be effective in five ways.\textsuperscript{41} The federal district court only considered whether Washington had been prejudiced by his defense counsel's action or inaction.\textsuperscript{42} Washington did not prove his defense counsel had been ineffective; therefore the federal district court determined Washington failed to show he suffered prejudice due to his counsel's failure to investigate mitigating factors.\textsuperscript{43}

Washington appealed the ruling on the basis that the federal district court employed the wrong test in determining whether his defense counsel had been effective.\textsuperscript{44} The United States Court of Appeals for the Fifth Circuit concluded the federal district court used an improper test to determine if Washington’s counsel had been effective.\textsuperscript{45} The Fifth Circuit remanded and instructed the federal district court to first determine whether the defense counsel’s overall representation in the sentencing proceeding had failed to meet the effective assistance of counsel requirement.\textsuperscript{46} Second, the Fifth Circuit directed that if defense counsel’s assistance demonstrated ineffectiveness, the federal district court should then assess whether Washington was prejudiced by the ineffective assistance of counsel.\textsuperscript{47} The Fifth Circuit noted the federal district court relied only upon the prejudice prong and failed to properly assess the defense counsel's overall representation.\textsuperscript{48} A Fifth Circuit panel of judges remanded and instructed the federal district court to apply its framework to the ineffective counsel claim.\textsuperscript{49} However, the Fifth Circuit then vacated its ruling and reheard the case en banc.\textsuperscript{50} The Fifth Circuit deter-

\textsuperscript{41} Washington v. Strickland (Strickland I), 673 F.2d 879, 885 (5th Cir. 1982). Washington alleged his counsel was ineffective by: (1) failing to obtain or request a psychiatric/psychological evaluation; (2) failing to investigate and present favorable witnesses to attest to Washington's character and background; (3) failing to request a presentence investigation from the trial court; (4) failing to give "a meaningful and factually supported closing argument and sentencing memorandum to the trial judge"; and (5) failing to obtain an independent evaluation of medical reports. Strickland I, 673 F.2d at 885.

\textsuperscript{42} Id. at 894-95.

\textsuperscript{43} Id.

\textsuperscript{44} Id. at 891.

\textsuperscript{45} Id. at 906.

\textsuperscript{46} Id.

\textsuperscript{47} Id. A demonstration of prejudice is proven when the defendant can show "that but for his counsel's ineffectiveness the sentencing phase, but not necessarily its outcome, would have been altered in a way helpful to him." Id.

\textsuperscript{48} Id. at 894-95.

\textsuperscript{49} Strickland III, 466 U.S. at 679.

\textsuperscript{50} Washington v. Strickland (Strickland II), 693 F.2d 1243, 1250 (5th Cir. 1982), rev'd, 104 S. Ct. 2052 (1984). The Fifth Circuit decided to hear the case en banc "in order to determine important questions regarding the duty of trial counsel to investi-
mined counsel was not ineffective for failing to investigate a potential
defense that counsel decided would not be a part of his strategy.\textsuperscript{51} If a
habeas petitioner is making a claim of ineffective assistance of counsel,
he must show a suffering of actual and substantial disadvantage
to his defense.\textsuperscript{52}

The Court granted certiorari to Strickland, an official at the Florida
state prison, and other state officials to review the Fifth Circuit's
ruling.\textsuperscript{53} This case gave the Court the opportunity to officially rule on
the proper standard for determining if counsel had been effective.\textsuperscript{54}
The Court formulated the standard in consideration of the primary
purpose of the Counsel Clause of the Sixth Amendment: to ensure a
fair trial.\textsuperscript{55} The new standard included: (1) a showing that counsel's
performance was deficient, and (2) a determination that the deficiency
prejudiced the defendant.\textsuperscript{56} Only prejudice that led to an unfair trial
would meet the level required by this standard.\textsuperscript{57} Furthermore, the
defendant had the burden of proving both prongs in order to prevail on
an ineffective counsel claim under the Sixth Amendment.\textsuperscript{58}

Since Strickland, the established test for ineffective counsel has
been applied to defendants' claims of ineffective assistance of counsel
during the plea bargaining stage.\textsuperscript{59} The deficiency prong of the test is
satisfied when the defendant proves the advice given by counsel was
outside of the scope of advice other criminal defense attorneys would
have given in the situation.\textsuperscript{60} In the context of plea bargaining, the
prejudice prong of the Strickland test concerns the outcome of the plea
bargaining phase and whether it was affected by counsel's ineffective

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\textsuperscript{51} Id. at 1256.
\textsuperscript{52} Id. at 1250.
\textsuperscript{53} Strickland III, 466 U.S. at 683.
\textsuperscript{54} Id.
\textsuperscript{55} Id. at 686.
\textsuperscript{56} Id. at 687. The Court used a test of reasonableness to determine whether counsel
performed sufficiently. Id. at 688. See Bruce A. Green, The Right to Plea Bargain
With Competent Counsel After Cooper and Frye: Is the Supreme Court Making the Ordinary
Criminal Process "Too Long, Too Expensive, and Unpredictable . . . in Pursuit of
Perfect Justice"?, 51 Duq. L. Rev. 735, 747 (2013) (stating "[c]ourts determine what conduct is reasonable based on ordinary practices in the professional community, which may be codified by standards for criminal defense practice such as those of the American
Bar Association.").
\textsuperscript{57} Strickland III, 466 U.S. at 687.
\textsuperscript{58} Id.
\textsuperscript{59} E.g., Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012); Missouri v. Frye, 132 S. Ct.
1399, 1405 (2012); Padilla v. Kentucky, 559 U.S. 356, 371-73 (2010); Hill v. Lockhart,
\textsuperscript{60} Wiggins v. Smith, 539 U.S. 510, 521 (2003).
assistance. Therefore, a defendant who can prove he would have accepted a plea offer but did not, due to the advice of his counsel, would satisfy the prejudice prong regardless of the fairness of his trial. In addition, the defendant must show the sentence would have been lesser had he accepted the plea offer. To meet the burden of proof, the defendant needs to offer more than bare assertions that had his counsel properly informed him, he would have taken the plea offer. A defendant’s testimony alone is insufficient.

C. A VOLUNTARY AND INTELLIGENT CHOICE: THE TEST FOR DETERMINING WHETHER A GUILTY PLEA IS VALID

While *Strickland v. Washington* established the test for claims of ineffective assistance of counsel under the Sixth Amendment, the United States Supreme Court in *Boykin v. Alabama* set forth the test to determine whether a guilty plea is valid. In *Boykin*, the Court iterated that a guilty plea is valid when it is (1) entered into voluntarily and (2) represents an understanding and intelligent choice by the defendant in consideration of the alternative options available to him.

Boykin had committed a series of armed robberies and was indicted on five charges of common law robbery. Finding Boykin indigent, the court appointed counsel to represent him. Boykin pleaded guilty to all five charges at his arraignment, but the judge failed to assess whether Boykin understood his entered plea. Alabama law provided that a jury would determine the punishment of any defendant who pleaded guilty, and Boykin was sentenced to death on all five counts of robbery.

Boykin appealed to the Alabama Supreme Court, and although defense counsel did not raise the issue, four of the justices considered whether the lower court judge had accepted Boykin’s guilty plea in

65. *Id.*
69. *Boykin*, 395 U.S. at 244.
70. *Id.* at 239.
71. *Id.*
72. *Id.* The record was also void of any indication that Boykin was pleading guilty as part of a trial strategy. *Id.* at 240.
73. *Id.*
compliance with the Constitution. 74 Three of the justices believed the manner of acceptance had been unconstitutional because the record failed to demonstrate that Boykin had entered the guilty plea intelligently and knowingly. 75

The Court granted certiorari to consider the constitutionality of the manner in which Boykin had entered his guilty plea. 76 Ultimately, the Court agreed with the three dissenting justices of the Alabama Supreme Court that the lower court judge had committed plain error when he failed to assure that Boykin had entered the guilty plea intelligently and knowingly. 77 The Court viewed the guilty plea as a conviction in and of itself, and due to this nature, stressed that lower courts must establish voluntariness before a defendant can validly waive a constitutional right. 78 Citing to its decision in Carnley v. Cochran, 79 in which the Court set forth the proper test for waiving the right to counsel, the Court determined the same test must be applied to determine the validity of a guilty plea: whether the defendant intelligently and knowingly entered his plea. 80 The Court expounded on the fact that a guilty plea is equivalent to a conviction and involved the waiver of multiple constitutional rights. 81 With so much at stake for a defendant facing the death penalty, lower courts must discern that the defendant fully understands what he is giving up by electing to plead guilty. 82 The Court reiterated that judges cannot presume a competent waiver from a silent record. 83

In North Carolina v. Alford, 84 the Court opined that an express admission of guilt is not constitutionally required for a sentence to be imposed. 85 The fact that a defendant insisted on his innocence even upon entering his guilty plea did not necessarily mean the guilty plea lacked voluntariness and knowledge. 86 In consideration of the evidence against him and coupled with his counsel’s advice, Alford pled guilty to second-degree murder to avoid the possibility of the death penalty although he insisted he was innocent. 87 The Court looked at

74. Id.
75. Id. at 241.
76. Id.
77. Id. at 242.
78. Id.
81. Id. at 243 (referencing the waiver of the rights against self-incrimination, trial by jury, and to confront one's accusers).
82. Id. at 243-44.
83. Id. at 242.
86. Alford, 400 U.S. at 37.
87. Id. at 28.
the strong evidence against Alford and determined the circumstances of the case demonstrated Alford had intelligently chosen to plead guilty. 88

D. **Hill v. Lockhart: Defendant Claims Guilty Plea Was Involuntary due to Ineffective Assistance of Counsel**

In **Hill v. Lockhart,** 89 the defendant, Hill, had previously entered a guilty plea to first-degree murder and theft of property in Arkansas state court. 90 Hill subsequently petitioned for a writ of habeas corpus from the United States District Court for the Eastern District of Arkansas, claiming his counsel had misled him and failed to tell him that he would not be eligible for parole until serving at least one half of his sentence. 91 The federal district court denied the petition, and the United States Court of Appeals for the Eighth Circuit affirmed. 92 The United States Supreme Court granted certiorari to address the difference in outcomes between **Hill** and a case previously decided by the Fourth Circuit. 93

Hill claimed his guilty plea was involuntary because he was given inaccurate information about his parole eligibility date, which he alleged constituted ineffective assistance of counsel. 94 The Court began by noting that the test for determining the validity of a guilty plea was established in **Boykin v. Alabama** 95 and remained in effect. 96 Next, the Court noted that because Hill's claim that his plea was involuntary was due to ineffective assistance of counsel, the voluntariness of his plea would depend on whether Hill had received competent advice from his defense counsel. 97

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88. *Id.* at 38. Although Alford chose to plead guilty and forego a trial, he accompanied his guilty plea with a denial that he murdered anyone. *Id.* The Court acknowledged that a denial without more would suggest there was a legal dispute between the State of North Carolina and the defendant; however, the State of North Carolina had a strong case based on witness testimony and evidence. *Id.* at 32-33.

91. *Hill,* 474 U.S. at 53.
92. *Id.*
93. *Id.* In **Strader v. Garrison,** the Fourth Circuit determined that counsel was not required to discuss parole eligibility with the defendant, but once counsel has misinformed the defendant on the matter, counsel was deemed ineffective under the Sixth Amendment. *Strader v. Garrison,* 611 F.2d 61, 65 (4th Cir. 1979). Therefore, the Fourth Circuit considered the guilty plea not entered voluntarily and intelligently. *Strader,* 611 F.2d at 65.
94. *Hill,* 474 U.S. at 54-55.
96. *Hill,* 474 U.S. at 56.
97. *Id.* Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of
prong of the *Strickland v. Washington* test, the Court restated that the determination of counsel’s competency was based on an objective standard of reasonableness.\footnote{99}{Id. (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).}

The Court went on to discuss the second prong of *Strickland* and its application to claims of ineffective assistance of counsel that stem from plea bargaining.\footnote{100}{466 U.S. 668 (1984).} Specifically, the Court noted that to prove prejudice resulted from counsel’s incompetency, the defendant must show that the result of the plea process would have been different had defense counsel been competent.\footnote{101}{ Id., 474 U.S. at 57.} The Court held that the *Strickland* two-prong test was applicable to claims of ineffective assistance of counsel that arose out of the plea bargaining process.\footnote{102}{Id.} After applying the test, the Court found the misinformation provided by Hill’s counsel had not caused a difference in outcome, as Hill had failed to allege he would have proceeded to trial had he known the correct information.\footnote{103}{Id.} The Court determined Hill had failed to satisfy the prejudice prong of *Strickland*.\footnote{104}{Id.} Therefore, Hill had not established his counsel was ineffective in accordance with the *Strickland* test, and consequently, he had no basis for a claim that his guilty plea was involuntary.\footnote{105}{Id. at 59.}

The concurring opinion in *Hill* discussed what facts would have led the Court to opine that Hill had suffered prejudice as a result of incompetent counsel.\footnote{106}{Id. at 58.} If Hill’s counsel had been aware of Hill’s prior conviction but told Hill he would be eligible for parole after completing one-third of the sentence, then Hill would have been granted an evidentiary hearing to show counsel had misinformed him about the parole eligibility date.\footnote{107}{Id. at 60.} Due to the failure to allege defense counsel was aware of his prior conviction, the concurring opinion agreed that Hill had failed to satisfy the *Strickland* test.\footnote{108}{Id. at 63.}
E. THE UNITED STATES SUPREME COURT DECISIONS OF LAFLER AND FRYE: A DEFENDANT’S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL MAY BE VIOLATED WHEN COUNSEL’S DEFICIENCY LEADS TO THE REJECTION OF A FAVORABLE PLEA AGREEMENT

Cases like Padilla v. Kentucky\textsuperscript{109} and Hill v. Lockhart\textsuperscript{110} have long established that the defendant’s Sixth Amendment right to effective assistance of counsel expands into the plea bargaining stage.\textsuperscript{111} However, these prior decisions considered the Sixth Amendment’s bearing in the context of accepting a plea bargain; the United States Supreme Court had not yet addressed how to handle claims of ineffective counsel that lead to the rejection of a plea bargain.\textsuperscript{112} In 2012, the Court was given the opportunity to establish that claims of ineffective assistance of counsel could be substantiated when a defendant was led to reject a favorable plea offer.\textsuperscript{113} Upon ruling in Lafler v. Cooper\textsuperscript{114} and Missouri v. Frye,\textsuperscript{115} the Court solidified that the Sixth Amendment right extends to the plea bargaining phase.\textsuperscript{116}

In Lafler, the defendant rejected a plea agreement, which offered a sentence of fifty-one to eighty-five months for pleading guilty.\textsuperscript{117} The defense counsel informed Lafler that the prosecution would be unable to establish the required intent element, so Lafler rejected the plea offer.\textsuperscript{118} The prosecution offered another plea deal on the day of trial, though it was not as favorable as the first, which Lafler rejected as well.\textsuperscript{119} At the conclusion of the trial, Lafler was found guilty and sentenced to prison for 185 to 360 months, the mandatory minimum.\textsuperscript{120} Lafler appealed the decision and claimed his counsel had

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\item \textsuperscript{109} 559 U.S. 356 (2010).
\item \textsuperscript{110} 474 U.S. 52 (1985).
\item \textsuperscript{111} Sidney S. Rosdeitcher, Plea Bargaining and Effective Assistance of Counsel After Lafler and Frye, Brennan Center for Justice (Aug. 29, 2012), http://www.brennancenter.org/analysis/plea-bargaining-and-effective-assistance-counsel-after-lafler-and-frye#.fEBtKFD. See Jenny Roberts, Effective Plea Bargaining Counsel, 122 Yale L.J. 2650, 2657 (2013) (noting “[i]n 2010, the Supreme Court in Padilla v. Kentucky held that criminal defense attorneys have an affirmative constitutional duty to properly advise clients about the near-automatic deportation consequences of a guilty plea.”). The importance of plea bargaining has also been recognized and shaped by other non-judicial legal sources. See generally ABA STANDARDS FOR CRIMINAL JUSTICE 14-3.1 (1999).
\item \textsuperscript{112} Rosdeitcher, supra note 111.
\item \textsuperscript{113} Id.
\item \textsuperscript{114} 132 S. Ct. 1376 (2012).
\item \textsuperscript{115} 132 S. Ct. 1399 (2012).
\item \textsuperscript{116} Rosdeitcher, supra note 111. See generally Stephanois Bibas, Taming Negotiated Justice, 122 Yale L.J. Online 35 (2012), available at http://yalelawjournal.org/2012/06/20/bibas.html (noting plea bargaining has become the norm).
\item \textsuperscript{117} Lafler v. Cooper, 132 S. Ct. 1376, 1383 (2012).
\item \textsuperscript{118} Rosdeitcher, supra note 111.
\item \textsuperscript{119} Lafler, 132 S. Ct. at 1383.
\item \textsuperscript{120} Id.
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been ineffective in advising him to reject the plea offers.121 The state
court rejected Lafler's claim, and the Michigan Court of Appeals and
Michigan Supreme Court affirmed.122

After exhausting his claim in the Michigan court system, Lafler
sought relief in federal district court where he filed a habeas corpus
petition.123 The federal district court found in favor of Lafler and or-
dered the original plea offer be enforced.124 The decision was affirmed
by the United States Court of Appeals for the Sixth Circuit, which
found that the defense counsel's performance was ineffective under
the Strickland v. Washington125 test.126 The Court granted certiorari
so that it could address claims of ineffective counsel that lead to the
rejection of plea offers and how the Strickland test should be
applied.127

The Court first clarified that a defendant would have to show
prejudice resulted from the advice of ineffective counsel and had coun-
sel been competent, the result of the plea bargaining would have been
different.128 More specifically, the defendant must prove that if he
had had the effective assistance of counsel: (1) the prosecution would
have presented the plea offer, (2) the defendant would have accepted
it, and (3) the court would have enforced the terms of the agree-
ment.129 Furthermore, the conviction(s) and sentence imposed by the
plea agreement must have been more favorable than the actual judg-
ment and sentence received.130

The Court rejected all three arguments made on behalf of the pe-
titioner.131 First, while petitioner desired a narrow reading of the
Sixth Amendment, the Court believed the rights under the Sixth
Amendment were applicable at any critical stage in a proceeding, in-
cluding plea bargaining.132 The Court noted the importance of the
Sixth Amendment at the sentencing phase, the post-trial phase, and

121. Id.
122. Id.
123. Id. Lafler again raised his claim that his Sixth Amendment right to effective
counsel had been violated when counsel advised him the prosecution could not prove all
the required elements. Id.
126. Lafler, 132 S. Ct. at 1384.
127. Id.
128. Id.
129. Id. at 1385.
130. Id. The Court noted that this characterization of the requirements to satisfy
the prejudice prong under Strickland had been adopted by several appellate courts and
proved effective. Id.
131. Id. at 1385-88.
132. See id. at 1385 (stating "[t]he constitutional guarantee applies to pretrial criti-
cal stages that are part of the whole course of a criminal proceeding, a proceeding in
deemed the Sixth Amendment was important at pre-trial phases as well.\textsuperscript{133} Second, the Court rejected the petitioner's argument that the \textit{Strickland} test had been reshaped by the \textit{Lockhart v. Fretwell}\textsuperscript{134} decision.\textsuperscript{135} Third, the petitioner argued the Sixth Amendment made certain that a reliable conviction would result from trial, which the Court rejected as reading the Sixth Amendment too narrowly.\textsuperscript{136} Moreover, the Court explained that a defendant's guilt does not take away his rights under the Sixth Amendment and does not preclude him from suffering prejudice due to ineffective counsel during the plea bargaining phase.\textsuperscript{137} The Court asserted the state court had incorrectly analyzed whether the defendant had knowingly and voluntarily rejected the plea when it should have applied the \textit{Strickland} test.\textsuperscript{138} The Court stated that Lafler had satisfied the \textit{Strickland} prongs and remanded the case to the state court to reoffer the plea agreement.\textsuperscript{139}

On the same day the Court decided \textit{Lafler}, it decided \textit{Missouri v. Frye},\textsuperscript{140} in which a defendant did not reject a plea offer; rather his counsel had never informed him of the plea offer.\textsuperscript{141} Therefore, Frye never had the opportunity to enjoy the benefits the offer would have provided.\textsuperscript{142} Without knowledge of the plea offer, which had lapsed, Frye pled guilty and received three years imprisonment from the trial judge.\textsuperscript{143} After learning of the plea offer, which Frye said he would have accepted, he sought post-conviction relief on the basis that his counsel had been ineffective by failing to communicate the plea offer to him.\textsuperscript{144} The state court denied the relief; however, the Missouri Court of Appeals applied the \textit{Strickland} test and opined that because Frye met both prongs, the lower court's decision should be reversed.\textsuperscript{145}

\footnotesize{which defendants cannot be presumed to make critical decisions without counsel's advice.".}

\textsuperscript{133} \textit{Id.} at 1385-86.
\textsuperscript{134} 506 U.S. 364 (1993).
\textsuperscript{135} \textit{Lafler}, 132 S. Ct. at 1386.
\textsuperscript{136} \textit{Id.} at 1387-88.
\textsuperscript{137} \textit{Id.} at 1388.
\textsuperscript{138} \textit{Id.} at 1390. The state court looked at whether the defendant entered the plea knowingly and voluntarily, which determines the validity of a plea (\textit{Boykin} test). \textit{Id.} Instead, the state court should have applied the \textit{Strickland} test, which was the federal law concerning claims of ineffective counsel. \textit{Id.}
\textsuperscript{139} \textit{Id.} at 1390-91.
\textsuperscript{140} 132 S. Ct. 1399 (2012). Frye was charged with a class D felony for driving with a revoked license because it was the fourth time he had been convicted of this particular charge. \textit{Missouri v. Frye}, 132 S. Ct. 1399, 1404 (2012). The class D felony imposed a maximum sentence of four years imprisonment. \textit{Frye}, 132 S. Ct. at 1404.
\textsuperscript{141} Rosdeitcher, supra note 111.
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Frye}, 132 S. Ct. at 1404-05.
\textsuperscript{144} \textit{Id.} at 1405.
\textsuperscript{145} \textit{Id.}
Upon granting certiorari, the United States Supreme Court held that defense attorneys have a duty to communicate to their clients all formal plea offers made by the prosecutor and to explain the terms and conditions of any offers.\textsuperscript{146} Due to defense counsel's failure to communicate the plea offer to Frye, the Court deduced the deficient performance prong of the \textit{Strickland} test was satisfied.\textsuperscript{147} To prove prejudice resulted, Frye had to show: (1) he would have obtained a more favorable outcome by accepting the plea offer rather than by rejecting it and (2) that neither the prosecutor nor the court would prevent the plea agreement from being enforced.\textsuperscript{148} The Court agreed with the state appellate court that Frye would have accepted the plea agreement, as he had pled guilty to the charge without any leniency promised in sentencing.\textsuperscript{149} The Court could not find there was a reasonable probability the plea agreement would have been enforced according to its original offer because Missouri law allowed the prosecutor and/or trial court to withdraw or amend the plea agreement once accepted by the defendant.\textsuperscript{150} The Court vacated the appellate court decision and on remand instructed the appellate court to determine whether the original plea offer would have been given, in which case Frye would have established prejudice.\textsuperscript{151} If the appellate court decided the plea agreement would have been withdrawn or amended by the prosecutor or the court, then no prejudice would have resulted.\textsuperscript{152}

Both \textit{Frye} and \textit{Lafler} were five to four decisions in which the dissent contended a new area of constitutional law, plea-bargaining law, had been created.\textsuperscript{153} The dissent argued the majority opinions failed to provide guidance for lower courts in applying the decisions to future claims of a similar nature.\textsuperscript{154} The lower courts, however, understand the Sixth Amendment has long been applied to the plea bargaining stage and a new rule of constitutional law was not created by the majority's opinions.\textsuperscript{155} Furthermore, while these two decisions did not

\textsuperscript{146} \textit{Id.} at 1408.

\textsuperscript{147} \textit{Id.} at 1409.

\textsuperscript{148} \textit{Id.} at 1410.

\textsuperscript{149} \textit{Id.} at 1411.

\textsuperscript{150} \textit{Id.}

\textsuperscript{151} \textit{Id.}

\textsuperscript{152} \textit{Id.} After Frye had been charged with the class D felony and before he pled guilty, he was caught driving with a revoked license for the fifth time. \textit{Id.} Due to this fact, the Court found it likely that the prosecution or court would have altered the plea agreement. \textit{Id.}

\textsuperscript{153} \textit{Lafler}, 132 S. Ct. at 1398 (Scalia, J., dissenting); Rosdeitcher, supra note 111.

\textsuperscript{154} \textit{Frye}, 132 S. Ct. at 1413 (Scalia, J., dissenting).

\textsuperscript{155} See, e.g., Bowden v. Hobbs, No. 5:13CV00061 DPM/BD, 2013 U.S. Dist. LEXIS 73260, at *6-7 (E.D. Ark. May 1, 2013) (finding the defendant's argument that a new rule of constitutional law had been created by \textit{Lafler} unpersuasive and correctly point-
create new law, the decisions did clarify for the first time that a Sixth Amendment complaint may be made when a favorable plea offer is rejected because of ineffective counsel.\textsuperscript{156} Deference to lower courts will allow for these claims to develop in a more realistic setting, such as courtrooms and with personnel that deal with plea offers on a routine basis.\textsuperscript{157}

The dissent further argued that allowing claims of ineffective assistance of counsel after rejecting a plea offer required defense counselors to possess a constitutionally approved bargaining skill and approach.\textsuperscript{158} The Court addressed a similar argument in 

*Strickland* and instructed lower courts to view claims of ineffective counsel in a light favorable to defense counsel and use a test of reasonableness.\textsuperscript{159} The majority opinions of *Frye* and *Lafler* support this broader assessment of defense counsel’s performance.\textsuperscript{160}

III. ARGUMENT

This Article will now consider why and how plea bargaining has become a staple in the judicial system and demands the protection of the Sixth Amendment.\textsuperscript{161} First, this Argument will detail the public policy arguments in favor of plea bargaining, including the benefits it provides to society, the prosecutor, and the defendant.\textsuperscript{162} Next, this Argument will examine the powerful leverage the prosecutor holds out that the right to effective counsel at the plea bargaining stage had been established by *Hill*; Williams v. United States, 705 F.3d 293, 294 (8th Cir. 2013) (rejecting the defendant’s claim that a new rule of constitutional law was created by the *Frye* and *Lafler* decisions and noting other lower courts have ruled the same way); Ortiz v. Sapers, No. 12-1209, 2013 U.S. Dist. LEXIS 186295, at *20-21 (E.D. Pa. May 30, 2013) (noting that a petitioner for habeas corpus relief based on a claim of ineffective assistance of counsel must prove, (1) that the alleged plea offer was extended to the defendant; and (2) that the defendant was not presented the offer, and had the offer been extended to the defendant, he must show that the court would have accepted the plea).

\textsuperscript{156} See Bibas, supra note 116 (noting that *Lafler* and *Frye* allow for appellate review of claims based on the Sixth Amendment when a defendant rejects a favorable plea offer).

\textsuperscript{157} Compare *Lafler*, 132 S. Ct. at 1389 (explaining that case law will continue to develop and provide guidance for plea bargaining), with Bibas, supra note 116 (discussing the discretion the trial court has to develop workable remedies).

\textsuperscript{158} *Frye*, 132 S. Ct. at 1412-13 (Scalia, J., dissenting).


\textsuperscript{160} Compare id. at 697-88 (noting “the defendant must show that counsel’s representation fell below an objective standard of reasonableness . . . . [more specific guidelines are not appropriate]”), with *Lafler*, 132 S. Ct. at 1384 (stating the Court reiterated the standard of reasonableness was set forth in *Strickland* and noted that defense counsel’s failure to articulate the proper rule rendered his performance deficient in this case; the Court made no mention of the bargaining skills or style used by the defense counsel).

\textsuperscript{161} See infra notes 167-242 and accompanying text.

\textsuperscript{162} See infra notes 167-203 and accompanying text.
over the defendant, thus requiring Sixth Amendment protection be given to the defendant during the plea bargaining process.\textsuperscript{163} Finally, this Argument will review two critiques of the \textit{Lafler v. Cooper}\textsuperscript{164} and \textit{Missouri v. Frye}\textsuperscript{165} decisions and offer some solutions and suggestions to equalize the parties in the plea bargaining process.\textsuperscript{166}

A. \textbf{Public Policy Supports Plea Bargaining}

The plea bargaining system allows for speedy dissolutions, economic savings, and finality.\textsuperscript{167} A general look at the plea bargaining process reveals why it is good from a public policy standpoint, as well as for all who benefit from plea bargaining, including the general public, judges and prosecutors, and defendants.\textsuperscript{168}

1. \textit{Analyzing Plea Bargaining as a Market Transaction: The Easterbrook Theory}

From society’s viewpoint, the plea bargaining process is beneficial as it assures implementation of punishment; whereas if the defendant is acquitted, he will go free.\textsuperscript{169} Under Judge Frank Easterbrook’s Theory, society’s interest in deterring future criminals is also addressed by the plea bargaining process because the prosecutor considers society’s interest in maximizing deterrence by offering plea bargains.\textsuperscript{170} In addition to the realization that plea bargaining allows for less prosecutorial and judicial resources, the Easterbrook Theory recognizes that law enforcement resources are also saved by plea bargaining.\textsuperscript{171} By freeing up more of their resources, law enforcement personnel have the ability to spend more time in the field to deter future crimes.\textsuperscript{172}

\begin{itemize}
\item \textsuperscript{163} See infra notes 204-42 and accompanying text.
\item \textsuperscript{164} 132 S. Ct. 1399 (2012).
\item \textsuperscript{165} 132 S. Ct. 1376 (2012).
\item \textsuperscript{166} See infra notes 245-84 and accompanying text.
\item \textsuperscript{167} Blackledge v. Allison, 431 U.S. 63, 71 (1977).
\item \textsuperscript{168} Blackledge, 431 U.S. at 71.
\item \textsuperscript{169} See Devers, supra note 32, at 1 (discussing the difficulty with predicting what a factfinder will do); Dion, supra note 31, at 159 (noting that “a plea agreement provides a method by which a prosecutor can dramatically increase the rate of successful prosecutions because whenever the defendant pleads guilty, the prosecutor avoids a possible ‘not guilty’ jury verdict”).
\item \textsuperscript{170} See Graham, supra note 34, at 1579-80 (discussing the Easterbrook Theory of plea bargaining and how prosecutors and defendants negotiate and arrive at an agreement); Zacharias, supra note 5, at 1137 (summarizing the Easterbrook Theory that “[b]argaining maximizes deterrence, releases resources, and is not unfair to defendants!”).
\item \textsuperscript{171} Id. at 1138.
\item \textsuperscript{172} Id.
\end{itemize}
While society may worry the worst offenders are let off easy due to plea bargains, serious offenses are much less likely to be resolved by plea agreements than less serious offenses. Some jurisdictions have gone as far as to limit or ban plea bargaining for serious and/or violent crimes, which allows society to benefit from the plea bargaining process but still ensures the interests in deterrence, vengeance, and fairness are met.

2. The Economic Benefits Provided to the Judicial System by Plea Bargaining

Due to increasing indictment numbers and overcrowding, the judicial system benefits from the plea bargaining process. The ability to relieve prosecutorial resources has long been recognized as an important advantage of the plea bargaining process, and with felony indictments increasing three-fold alone, the importance of plea bargaining in the judicial system today cannot be denied. The plea bargaining process also allows prosecutors to ensure punishment even though the case to convict the defendant may be weak. Whereas when the charged offense is easy to prove, the prosecution has less reason to plea bargain, let alone offer a plea deal that is highly beneficial to the defendant. However, due to the offense's easy-to-prove

173. Graham, supra note 34, at 1593 (discussing how murder cases often lead to trials).


175. Compare Oppel, supra note 5 (noting that felony charges have nearly tripled over the past generation), with Dion, supra note 31, at 159 (recognizing that plea bargaining allows prosecutors to "reduce[] the overburdened federal dockets").

176. Compare Blackledge v. Allison, 431 U.S. 63, 71 (1977) (recognizing that plea agreements allowed the judicial system to conserve scarce and vital resources when decided in 1977), with Oppel, supra note 5 (noting the increase in felony charges over the last few decades).

177. Covey, supra note 32, at 1248.

178. Graham, supra note 34, at 1586-87. Graham suggests "reentry by a deported alien" (8 U.S.C. § 1326) is an easily proved crime because: This crime simply requires that the prosecution establish that the defendant alien (1) had been deported from the United States; (2) was later found in the United States; and (3) intended to reenter the United States. The first element is typically established by an order of deportation; the latter two, by testimony to the effect that the defendant subsequently was found in the United States.

Id.
nature, defendants often seize an opportunity to plead before trial in the hope of benefitting from cooperative efforts.\textsuperscript{179}

The plea bargaining system also allows for quick and complete dissolution of the charges, which makes it highly desirable for the prosecutor.\textsuperscript{180} The United States Supreme Court touched on the importance of plea bargaining and the finality it provides in Santobello v. New York,\textsuperscript{181} noting if plea agreements did not have this finality characteristic, trials would be necessary for every charge and judicial expenses would greatly increase.\textsuperscript{182} The Santobello decision revealed the Court's appreciation for the resource-saving virtue of the plea bargaining system.\textsuperscript{183} The Court encouraged plea bargaining as long as the agreement was fair.\textsuperscript{184} The Court continued that if a promise was made on behalf of the prosecution, it must be on the record and fulfilled.\textsuperscript{185} The Santobello opinion properly expressed why the judicial system favors the plea bargaining process.\textsuperscript{186}

The reductions in court expenses and time burdens are two of the greatest public policy arguments for plea bargaining, from both the judicial system's perspective and an economic perspective.\textsuperscript{187} In addition to freeing up what little resources the government may have, plea bargaining also prevents the need to hire many more prosecutors, judges, and court staff, which is not currently possible with most state and federal budgets.\textsuperscript{188} Studies have found that if plea bargaining was banned the number of trials would increase, in turn increasing the government's costs due to: (1) greater time requirement, (2) jury compensation, (3) expert witness testimony, and (4) other trial

\begin{itemize}
  \item \textsuperscript{179} Id. at 1605.
  \item \textsuperscript{180} Dion, supra note 31, at 161.
  \item \textsuperscript{181} 404 U.S. 257 (1971).
  \item \textsuperscript{182} Santobello v. New York, 404 U.S. 257, 260 (1971).
  \item \textsuperscript{183} Santobello, 404 U.S. at 260.
  \item \textsuperscript{184} Id.
  \item \textsuperscript{185} Id. at 261-62; Dion, supra note 31, at 179 (noting “the Supreme Court [in Santobello] held that when a prosecutor fails to abide by the specific terms of a plea agreement, the court may grant the defendant specific performance of the terms of the plea agreement”).
  \item \textsuperscript{186} Compare Santobello, 404 U.S. at 261 (explaining the prompt disposition offered by plea bargaining), with Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (stating the plea bargaining process offers benefits to both the prosecution and the defendant).
  \item \textsuperscript{187} See Santobello, 404 U.S. at 260 (recognizing that a judicial system that did not recognize plea bargaining would require many more judges and courthouses); Covey, supra note 32, at 1247 (discussing how both parties benefit from guilty pleas, but the State's savings are much greater).
  \item \textsuperscript{188} Compare Santobello, 404 U.S. at 260 (detailing additional court personnel that would be required if plea bargaining was not allowed), with Oppel, supra note 5 (noting that the budget for Florida's prosecutor has been cut 20% in four years).
\end{itemize}
costs. In today’s world, a simple case involving a driving under the influence of alcohol (“DUI”) charge often requires an expert’s testimony at trial. For instance, if plea bargaining was limited or banned, the Nebraska judicial system and state budget would have to handle almost 10,000 trials for DUI charges alone.

3. Plea Bargaining Benefits the Defendant by Providing Choice and Predictability

The advantages provided by plea bargaining for the defendant originally stem from the ability to contract. The ability to contract allows the defendant to negotiate and reap financial benefits. While Easterbrook’s Theory touches on the advantages of plea bargaining for the defendant, utilitarian theories center on the premise that all should be free to contract, and plea bargaining allows defendants to do just that. Freedom-to-contract proponents advocate that plea bargaining allows each party to benefit and gain from the agreement. Viewing the plea bargaining process from a contracts perspective is also beneficial for society and the judicial system because it allows for predictability, consistency, and fairness.

The defendant benefits from plea bargaining because it allows him the ability to negotiate and minimize his punishment, by avoiding harsher punishments, which may not be possible if he had proceeded with a trial. The defendant may revoke the agreement and proceed with a trial if the plea agreement is violated or not enforced according to its original terms. Accordingly, the defendant maintains some control and ensures the agreement reached between the prosecutor

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189. Compare Devers, supra note 32, at 3 (discussing studies’ implications that showed an increase in cases going to trial when plea bargaining was eliminated), with Graham, supra note 34, at 1592 (touching on the various costs associated with trials).
190. Graham, supra note 34, at 1592.
191. See Neb. Dep’t of Rds., Nebraska Alcohol-Related Traffic Enforcement and Crashes – 2013, http://www.transportation.nebraska.gov/nohs/areas/allenf.html#stats (last visited Jan. 23, 2015) (finding that in 2013, there were 9,324 DWI, driving while intoxicated, charges in Nebraska and the conviction rate was 93.3%).
192. See Zacharias, supra note 5, at 1146 (referring to Robert Scott and William Stuntz’s thoughts on plea bargaining through a utilitarian perspective).
193. See id. (referencing the Easterbrook Theory and the benefits defendants receive from plea bargaining).
194. Id.
195. Dion, supra note 31, at 204.
196. Id. “By concluding that plea agreements are contracts, courts afford the defendant the protections associated with the judicial determination of the enforceability of the contract.” Id.
197. Id. at 159-60.
and the defendant is followed. Therefore, the defendant often receives a better sentence than he would have received if found guilty at trial.

Not only does the government receive cost benefits from avoiding trials by plea bargains, but the defendant also experiences financial savings by agreeing to a guilty plea. A defendant charged with a simple misdemeanor may find it financially smarter to plead guilty and accept the sentence, rather than bear the costs of a full trial where he may be found guilty. Plea bargaining also allows the defendant to limit his public image and reputation costs associated with charges of immoral crimes.

**B. DUE TO THE UNFAIR BARGAINING POWER PROSECUTORS HAVE, THE UNITED STATES SUPREME COURT APPROPRIATELY CONFIRMED THAT A CLAIM FOR INEFFECTIVE ASSISTANCE OF COUNSEL COULD BE MADE IF IT LED A DEFENDANT TO REJECT A FAVORABLE PLEA OFFER**

The plea bargaining phase is a vital time for the defendant, as it determines either the next step in the proceeding or the consequences for the defendant. Due to the nature of this phase, the United States Supreme Court correctly confirmed the Sixth Amendment right to effective assistance of counsel applied to all parts of the bargaining process, including the rejection of a favorable plea offer. While the plea bargaining phase is a vital opportunity for the defendant, it is also an important time for government dissolution, as over ninety percent of cases conclude at this phase. In fact, the *Missouri v. Frye*  

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199. In re Jermaine B., 81 Cal. Rptr. 2d at 787. "The punishment may not significantly exceed that which the parties agreed upon." *Id.* (quoting People v. Walker, 819 P.2d 861, 867 (Cal. 1991)).


201. See Graham, *supra* note 34, at 1592 (noting the increased costs associated with trials).

202. *Id.*

203. *Id.*

204. Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012). See Devers, *supra* note 32, at 2 (discussing how prosecutorial biases affect the plea offer and how defendants that choose to proceed with trial are more likely to receive a harsher sentence).

205. Compare Hill v. Lockhart, 474 U.S. 52, 57 (1985) (deciding the *Strickland* test is proper for assessing ineffective assistance of counsel claims), with Lafler v. Cooper, 132 S. Ct. 1376, 1384-85 (2012) (recognizing that the Sixth Amendment applies to plea bargaining, including the rejection of a plea offer in which the defendant "must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented [and accepted by] the court" and the defendant would have received a less severe sentence, conviction, or both under the terms of the plea deal).

opinion states that ninety-seven percent of federal cases and ninety-four percent of state cases are settled by a guilty plea.\textsuperscript{208} Competent defense counsel must be present during plea bargaining to safeguard against unfair offers and unsound decisions, thereby upholding the defendant’s Sixth Amendment right to effective assistance of counsel.\textsuperscript{209}

Taking a case to trial is extremely risky for a defendant because: (1) the increased charges the prosecution may assert against him; (2) the increased sentence length and fine amount; and (3) the unlikelihood of being acquitted.\textsuperscript{210} While plea bargaining has been an acceptable part of the judicial system since the 1970s, there has been a substantial increase in the percentage of cases that are resolved by the plea bargaining process since then.\textsuperscript{211} Some legal scholars are attributing this increase to the power tactics the prosecutor now has to force plea agreements, including overcharging the defendant, threatening harsher sentences for proceeding with trial, and withholding information or being vague.\textsuperscript{212}

The ability to overcharge gives the prosecutor the upper hand in plea bargaining as he often will induce the defendant to agree to the plea offer in order to avoid horizontal or vertical overcharging.\textsuperscript{213} Either overcharging practice results in a greater sentence length; thus, the defendant’s inclination to accept the plea offer increases.\textsuperscript{214} Due to mandatory sentencing guidelines, which inflict basically nonnegotiable sentences, the plea bargaining process may be more accurately termed the charge bargaining system because the charge the defen-

\begin{itemize}
\item \textsuperscript{207} 132 S. Ct. 1399 (2012).
\item \textsuperscript{208} Frye, 132 S. Ct. at 1407.
\item \textsuperscript{209} Blank, supra note 17, at 2021-22; Cf. Wilson v. United States, 162 U.S. 613, 623 (1896). While the Wilson Court was considering the Fifth Amendment, it recognized that confessions must be given freely and voluntarily. Wilson, 162 U.S. at 623. The Court appropriately required the same for the entering of guilty pleas to help guard against the prosecutorial power to force plea agreements. Id.
\item \textsuperscript{210} Compare Devers, supra note 32, at 2 (discussing harsher sentences imposed when a defendant opts for trial), with Oppel, supra note 5 (stating, “there was only one acquittal for every 212 guilty pleas or trial convictions in federal district courts[,] whereas [t]hirty years ago, the ratio was one for every 22”).
\item \textsuperscript{211} Oppel, supra note 5 (stating that, “[i]n 1977 . . . the ratio of guilty pleas to criminal trial verdicts in federal district courts was a little more than four to one; by last year, it was almost 32 to one”).
\item \textsuperscript{212} Blank, supra note 17, at 2023 (noting maneuvers employed by prosecutors to exert their power on the defendant); Covey, supra note 32, at 1244 (discussing how plea discounts affect the plea bargaining process); Zacharias, supra note 5, at 1129-31 (recognizing that the parties do not have equal access to information and the discovery process in a criminal case is much different than that in a civil suit).
\item \textsuperscript{213} Covey, supra note 32, at 1254-55. Horizontal overcharging results when the prosecutor charges several counts for the same offense or additional charges of a similar offense. Id. Prosecutors engage in vertical overcharging when they charge a more serious offense that is not adequately supported by the evidence. Id.
\item \textsuperscript{214} Id. at 1255.
\end{itemize}
dant is convicted of will dictate the defendant’s sentence.\textsuperscript{215} Combined with overcharging practices, mandatory sentences passed by state and federal legislatures have played a substantial role in the decrease of trials, as overcharging could be used at the opening of plea negotiations or as a result of failed plea negotiations.\textsuperscript{216} For instance, the prosecutor may come into negotiations threatening to charge the defendant with three offenses when the prosecutor’s objective is to persuade the defendant to agree to plead guilty to only one of those offenses.\textsuperscript{217} Thus the initial overcharging creates great leverage for the prosecutor.\textsuperscript{218} If the prosecutor cannot convince the defendant to accept an initial plea agreement, the prosecutor may also overcharge by increasing the charge and consequently increase the sentence.\textsuperscript{219} The increased charge and sentence that results when the defendant chooses to forego a plea offer and continue with a trial constitutes the trial penalty.\textsuperscript{220} Legal experts view the trial penalty as coercive and as a means to punish the defendant for exercising his constitutional right to a trial.\textsuperscript{221}

The prosecutor may also persuade the defendant to accept a plea deal by withholding information, being vague, or threatening the defendant.\textsuperscript{222} In order for the plea bargaining system to function correctly, any plea agreement should benefit both parties to some extent, although the benefits to the government will likely be greater.\textsuperscript{223}

\textsuperscript{215} Graham, supra note 34, at 1596.

\textsuperscript{216} Oppel, supra note 5. The mandatory sentences have been imposed for many felonies "involving guns, drugs, violent crimes and repeat offenders." \textit{Id.} See also Dion, supra note 31, at 151. "Defendants enter guilty pleas in nearly ninety percent of cases in which the [Sentencing] Guidelines are applicable . . . ." \textit{Id.}

\textsuperscript{217} See Covey, supra note 32, at 1254.

\textsuperscript{218} Id.

\textsuperscript{219} See Oppel, supra note 5. In Florida, Mr. Guthrie was:

accused of beating his girlfriend and threatening her with a knife, the prosecutor offered him a deal for two years in prison plus probation. Mr. Guthrie rejected that, and a later offer of five years, because he believed that he was not guilty. . . . But the prosecutor’s answer was severe: he filed a more serious charge that would mean life imprisonment if Mr. Guthrie is convicted . . . .

\textit{Id.}

\textsuperscript{220} \textit{Id.}; see also Devers, supra note 32, at 2. "[T]he majority of evidence illustrates that those who accept a plea are likely to receive a lighter sentence compared with those who opt for trial." \textit{Id.}

\textsuperscript{221} Oppel, supra note 5.

\textsuperscript{222} See Zacharias, supra note 5, at 1129-34 (discussing how prosecutors do not have to divulge all known information to defendants before making a plea agreement and how prosecutors utilize threats of pretrial punishment to coerce defendants into accepting plea agreements); see also Devers, supra note 32, at 2 (noting that prosecutors utilize threats when evidence is weak).

\textsuperscript{223} Compare Zacharias, supra note 5, at 1138 (explaining "Frank Easterbrook’s more sophisticated account argues that the plea-bargaining system releases law enforcement resources in a way that enables prosecutors to maximize deterrence, while at the same time being fair to defendants (i.e., because they benefit from bargains.").", \textit{with}
However, when the prosecutor is allowed to withhold information, threaten the defendant, and utilize other coercive tactics, the plea bargaining system is not functioning as a just system but rather as a one-sided transaction.\textsuperscript{224} In such a malfunctioning system, the rationale underlying the utilitarian theory, which advocates plea bargaining because of the mutual benefits it provides to each party, is lost.\textsuperscript{225} A prosecutor that withholds information generates deficient representation on behalf of the defendant and prevents the parties from arriving at a mutually beneficial plea agreement.\textsuperscript{226}

If the plea bargaining system is to remain a vital part of the judicial system, then measures must be taken to ensure the accused receives good and accurate advice, as guaranteed by the Constitution.\textsuperscript{227} The penalties of rejecting a plea agreement have become so extreme that innocent defendants are being coaxed into pleading guilty to avoid the risks and harsher sentences associated with conviction at trial.\textsuperscript{228} To bring balance back to the plea bargaining process, the defendant and his counsel must have access to accurate information.\textsuperscript{229} This affects the advice given by counsel and the defendant’s decision to accept or deny any plea offer.\textsuperscript{230} The defendant may feel he is being forced into a plea agreement; however, he has a choice in determining whether a plea agreement or a trial is the right path, as both can carry different value and meaning to the defendant.\textsuperscript{231}

\textsuperscript{224} Covey, supra note 32, at 1247 (discussing plea bargaining benefits for prosecutors including the greater costs and resources saved).

\textsuperscript{225} Zacharias, supra note 5, at 1146-47.

\textsuperscript{226} Id.

\textsuperscript{227} Compare United States v. Hernandez, 450 F. Supp. 2d 950, 975 (N.D. Iowa 2006) (noting the validity of the reasoning of Wanatee v. Ault, and Wanatee v. Ault, 39 F. Supp. 2d 1164 (N.D. Iowa 1999) (stating “counsel’s duty to inform the defendant of the law applicable to the defendant’s case, so that the defendant can evaluate a plea offer.”), with U.S. Const. amend. VI. (outlining the defendant’s rights in criminal prosecutions).

\textsuperscript{228} Covey, supra note 32, at 1245.

\textsuperscript{229} Compare Zacharias, supra note 5, at 1149 (noting that prosecutors are likely to take advantage of information that is unknown to the defendant to gain a guilty plea), with Devers, supra note 32, at 1 (analyzing research studies showing discrepancies in sentencing outcomes due to prosecutorial discretion).

\textsuperscript{230} See Zacharias, supra note 5, at 1166. “The prosecutor cannot remedy the situation simply by adjusting the plea offer, for it is the defendant’s participation that is key.” Id.

\textsuperscript{231} Graham, supra note 34, at 1593.

For a defendant, a trial may represent the only way to gain a public hearing on an asserted defense, showcase what the defendant believes to be an unjust law,
To facilitate the defendant's voice in the plea bargaining system, both parties must respect the defendant's right to and need for competent counsel.\textsuperscript{232} However, many things may prevent the defendant from receiving adequate legal advice from counsel, including: (1) underfinanced public defender's offices, (2) caseload pressures, or (3) defense counsel's desire to avoid trials in general.\textsuperscript{233} An underfinanced defender's office results in decreased resources, time, and ability to try cases, which means the defendant may feel pressured from counsel to settle.\textsuperscript{234} Defense counsel may also have a financial incentive to advocate for a plea agreement, when he is paid a single, advanced fee, though it may not be in his client's best interest.\textsuperscript{235} When these financial aspects are combined with great caseloads, the incentive to encourage a plea agreement is strong, although the plea agreement may not represent the defendant's best interest.\textsuperscript{236}

Extension of the Sixth Amendment right may also restore some of society's faith in the judicial system, as society has viewed the plea bargaining process as disparate and secretive.\textsuperscript{237} American society has long regarded the right to be heard in one's defense as fundamental for a just system; however, plea agreements subvert this right and can leave many questions unanswered.\textsuperscript{238} While plea bargaining had long been kept under wraps, it is now an apparent part of the judicial system.\textsuperscript{239} The secrecy lies not in the process itself but in how the

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\textsuperscript{232} Compare Strickland \textit{III}, 466 U.S. 668, 686 (1984) (noting that both parties' conduct could result in an ineffective assistance of counsel claim when the State interferes and affects defense counsel's ability to be effective or when defense counsel cannot provide "adequate legal assistance" (quoting Cuyler v. Sullivan, 446 U.S. 335, 344 (1980)), \textit{with} U.S. \textit{Const.} amend. VI (outlining the defendant's rights in criminal proceedings, including the right "to have the Assistance of Counsel for his defense").

\textsuperscript{233} Oppel, supra note 5; see also Zacharias, supra note 5, at 1176 (stating "[o]ther defense counsel may act upon institutional preference for plea over trial because of case load pressures, a desire to build a continuing relationship with prosecutors for other cases, laziness, risk averseness, or a need to maintain a good record of disposing of cases!").

\textsuperscript{234} See Oppel, supra note 5 (noting a decrease in trials due to underfinanced public defenders' offices).

\textsuperscript{235} Zacharias, supra note 5, at 1175-76.

\textsuperscript{236} Compare Oppel, supra note 5 (recognizing that plea bargaining is a cheap alternative to trial), \textit{with} Zacharias, supra note 5, at 1175-76 (noting the defendant's interest is not always defense counsel's priority when financial incentives are available for pleading).

\textsuperscript{237} Covey, supra note 32, at 1256-57.

\textsuperscript{238} Alschuler, supra note 36, at 678.

\textsuperscript{239} Blackledge, 431 U.S. at 76 (elaborating on the previously secretive nature of plea bargaining and how it is now a more recognizable process).
process works, which causes concern for the public. Both the defendant and the State have an interest in assuring the presence of competent defense counsel to avoid a later determination that the guilty plea was invalid due to incompetent counsel. Competent defense counsel can then protect society’s interest in producing a more uniform plea bargaining system by not allowing the prosecutor to take advantage of the defendant or to conceal misconduct.

C. CONSTITUTIONALLY DEFINED BARGAINING SKILLS AND A FLOOD OF LITIGATION

Critics of the Missouri v. Frye243 and Lafler v. Cooper244 majority opinions have raised two superficial arguments. One opposing argument is that the Lafler and Frye decisions require constitutionally defined behavior standards for both the prosecutor and defense counsel when plea bargaining.246 However, an ethical obligation to behave responsibly has already been recognized per the Model Rules of Professional Conduct.247 The companion opinions also provide some insight as to what effective assistance would entail, including: (1) was defense counsel informed and knowledgeable of the charges, (2) did defense counsel outline the consequences of conviction, and (3) did defense counsel investigate the evidence.248 In deciding constitutional

240. Compare id. (touching on the secretive nature plea bargaining once had), with Zacharias, supra note 5, at 1178 (noting criticism that plea bargaining covers up misconduct).

241. Compare Santobello v. New York, 404 U.S. 257, 261 (1971) (noting the defendant must be counseled when entering a guilty plea to ensure fairness in the agreement), with Zacharias, supra note 5, at 1180 (discussing that when the prosecutor and defense counsel are on equal grounds, both “will make decisions based on their own side’s best interest”).

242. Compare Zacharias, supra note 5, at 1127 (discussing that “society is better off when prosecutors are self-conscious about their ends”), with Santobello, 404 U.S. at 261, 264 (noting the defendant must be counseled when entering a guilty plea to ensure fairness in the agreement and if the Court determines the plea was obtained unfairly, through ignorance, or by fear, the Court will vacate the guilty plea) and Alachuler, supra note 36, at 653 (finding that trial convictions imposed 136% harsher sentences on defendants than those received from prosecutors through pre-trial proposals).


244. 132 S. Ct. 1376 (2012).

245. See Covey, supra note 22, at 609 (noting Justice Scalia’s dissenting opinion that suggests counselor’s plea bargaining behavior will have to meet constitutional requirements); Roberts, supra note 111, at 2673 (addressing the “Floodgates” objection to the companion cases).

246. Covey, supra note 22, at 609.

247. Id. (referring to Model Rules of Prof’l Conduct R. 3.8(D) (2012), which requires prosecutors to “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense”).

248. Covey, supra note 22, at 611. See Green, supra note 56, at 750 (stating “[t]o give accurate advice, the lawyer will ordinarily have to interview the client, review dis-
norms in regards to mitigating evidence in capital sentencing cases, the United States Supreme Court in *Wiggins v. Smith*249 considered common practices, the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, and the American Bar Association Standards for Criminal Justice.250 In *Padilla v. Kentucky*,251 the Court also considered multiple nonconstitutional sources for determining whether the defense counsel had properly informed the defendant about immigration consequences.252 The previous two examples suggest the Court may look to multiple sources on plea bargaining to further define the parameters of counselor’s behavior in determining a claim for ineffective assistance of counsel during the plea bargaining phase.253 Thus, prosecutors and defense counsel need not worry that the Court will create new and incredible standards, but should look to sources that are already available and influential in the legal field to outline the proper behavior in the plea bargaining process.254

Critics also argue that the *Lafler* and *Frye* opinions will lead to a flood of litigation.255 Similarly, the dissenting opinion in *Lafler* overlooked the fact that the Court expanded the *Strickland* test to the plea bargaining stage in its *Hill*256 opinion.257 However, the Court has not witnessed an influx of ineffective assistance of counsel claims since it first decided *Strickland v. Washington*258 in 1984.259 The Court suggested lower courts adopt measures to prevent meritless claims if such a flood of claims should occur.260 The majority of offenders who

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250. Roberts, supra note 111, at 2665.
252. Roberts, supra note 111, at 2666.
253. Compare id. at 2665-66 (outlining the Court’s use of ethical rules, professional standards, and common practice to develop constitutional norms), with Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012) (noting the importance of the “codified standards of professional practice” in determining the standard by which to judge counsel’s performance).
255. Roberts, supra note 111, at 2673.
257. Compare Lafler v. Cooper, 132 S. Ct. 1376, 1393 (2012) (Scalia, J., dissenting) (referring to *Strickland III* and the Sixth Amendment’s purpose to ensure a fair trial), with 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.”).
260. Id.
choose to plead guilty receive a substantial benefit, so they are unlikely to challenge their pleas and flood the judicial system with Sixth Amendment claims. Also, defendants may be discouraged from challenging their plea because of the overwhelming hurdles the Strickland test imposes. First, courts provide great deference to defense counsel’s strategic decisions and behavior. Second, courts typically assume defense counsel’s questionable behavior did not greatly influence the jury’s verdict or the defendant’s choice to plead guilty. Therefore, the number of defendants who successfully demonstrate both prongs of the Strickland test is exceedingly low.

D. Solutions and Suggestions for Combating Prosecutors’ Unfair Advantage and Ensuring a Fair Bargaining System

Prosecutors are charged with the professional responsibility to administer justice. Because prosecutors are keepers of the justice system, it is appropriate that prosecutors should also be responsible for ensuring justice is met during the plea bargaining stage. To assist the prosecutor in his pursuit to administer justice in the plea bargaining process, the prosecutor would benefit if he chose a theory on which to base his plea deals. Theories to justify plea bargaining are broken into two categories: (1) just result theories and (2) resource or efficiency theories. By utilizing a theory from either category,

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261. Roberts, supra note 111, at 2673.
262. Id.
263. Green, supra note 56, at 749.
264. Id.
265. Id. at 748.
266. Zacharias, supra note 5, at 1123.

[The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger, 295 U.S. at 88.
268. Zacharias, supra note 5, at 1126.
269. Id. at 1137-38. Just result theories center on the notions that:
1. Bargains reflect what would happen at trial. 2. Prosecutors (P) can take equitable factors into account in deciding upon a combined guilt and sentence plea. 3. P can equalize among Defendants (D) and limit the effect of unfair legislation. 4. Bargaining empowers the participants. [While resource or efficiency theories consider that] 5. Bargaining is inevitable/people would do it anyway. 6. Bargaining saves resources. 7. Bargaining maximizes deterrence,
the prosecutor is more likely to offer a fair and appropriate plea deal when he is confronted with a defendant who has ineffective counsel, as opposed to taking advantage of the defendant’s unequal bargaining position.\textsuperscript{270} The prosecutor can strengthen his commitment to following his chosen theory by publishing his guidelines and establishing supervisory boards to ensure the theory is being followed.\textsuperscript{271} The declaration of the prosecutor’s chosen theory may benefit the defendant and his counsel, as well as inspire society’s confidence in the plea bargaining process.\textsuperscript{272}

In addition to adhering to a particular theory, the prosecutor may benefit by putting bans and limits on offenses that can be resolved by plea bargaining.\textsuperscript{273} Prosecutorial departments that utilize these bans typically prohibit prosecutors from offering plea deals for serious or violent offenses.\textsuperscript{274} Bans allow the prosecutor to display his commitment to seek greater punishment for serious offenses and prevent the prosecutor from taking advantage of ineffective defense counsel.\textsuperscript{275} Defense counsel should also take a proactive role in protecting the client’s interests by investing time in the study of plea bargaining and negotiation tactics.\textsuperscript{276} The American Bar Association’s Standards for Criminal Justice and the National Legal Aid and Defender Association’s Performance Guidelines for Criminal Defense Representation are two resources that provide guidance on plea bargaining.\textsuperscript{277} Locally established defense counsel standards regarding plea bargaining could also be established to guide defense counselors in their plea bargaining efforts.\textsuperscript{278} For instance, a defender manual published in Massachusetts, which describes defense counsel’s obligations in the context of plea bargaining, stresses defense counsel’s duty to ensure

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releases resources, and is not unfair to Ds. 8. Bargaining makes both parties better off than would proceeding to trial.
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\textit{Id.}

270. \textit{Id.} at 1165.

271. \textit{Id.} at 1185.

272. \textit{Id.} at 1186, 1188-89. “[M]aking the choice among the viable plea-bargaining theories itself helps produce some of the theories’ goals: It promotes reasonable, efficient, and consistent treatment of defendants. In the complicated world of criminal process, perhaps that is the closest to justice that we can come.” \textit{Id.} at 1189.

273. \textit{See} Graham, \textit{supra} note 34, at 1593 (discussing that serious crimes will not be resolved by plea deal).

274. \textit{See id.} (explaining murder cases are more likely to go to trial).

275. \textit{See id.} (noting prosecutors’ desires to appear committed to enforcing particular laws).

276. \textit{Compare} Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012) (discussing the complexity of negotiation styles and tactics), \textit{with} Roberts, \textit{supra} note 111, at 2666-67 (stating “[t]he content of these nonconstitutional sources on plea bargaining vary widely, but all support a duty to bargain as a core defense function”).


278. \textit{Id.} at 2668.
the defendant receives the most favorable language possible in the plea agreement.\textsuperscript{279}

Legislatures can also be a combative force against the unfair advantage the prosecutor has in the plea bargaining process.\textsuperscript{280} While the majority of passed laws are never reconsidered by legislatures, the data associated with any offense and plea bargaining is relatively easy to attain.\textsuperscript{281} If legislatures were more inclined to review and reconsider previously passed laws, they could assess whether laws are repetitive, add something new, or are employed simply as bargaining chips by prosecutors.\textsuperscript{282} In addition to reviewing and reconsidering previously passed laws, legislatures could also prescreen new laws in an attempt to determine how the new law will be utilized and what it will add to the current list of offenses.\textsuperscript{283} A prescreening law was passed in Colorado in 2011, which requires all new crimes be accompanied by information to determine whether the new crime is punishable under a current law, how the new crime compares to current laws, and a prediction of the frequency of the behavior the new crime will address.\textsuperscript{284} Prescreening laws are not a complete answer to the unfair prosecutorial advantage but these laws do highlight that legislatures could combat this issue.\textsuperscript{285}

IV. CONCLUSION

Public policy clearly supports the plea bargaining process; however, public policy does not favor a bargaining system in which the defendant is at the mercy of the prosecutor.\textsuperscript{286} Due to the prevalence of plea bargaining, the plea bargaining phase of litigation deserves to

\textsuperscript{279} Id.

\textsuperscript{280} Graham, supra note 34, at 1627. “Legislatures influence plea bargaining through the superstructure of crimes and sentencing rules that they devise. Less obviously, through [society’s] values, beliefs, and priorities, the general public contributes to the commoditization of certain crimes and defendants—while expecting customized justice for individuals charged with other offenses.” Id.

\textsuperscript{281} Id. “One can discern with relative ease how often prosecutors charge a crime; the circumstances in which it has been charged; the plea bargains the crime has produced, and the sentences associated with those deals; the frequency with which a charge goes to trial; and the outcomes in these trials.” Id.

\textsuperscript{282} Id. at 1627-28.

\textsuperscript{283} Id. at 1626.


\textsuperscript{285} See Graham, supra note 34, at 1628-29 (noting prescreening laws would allow legislatures to better understand and estimate which new crimes would be utilized by prosecutors to force plea deals).

\textsuperscript{286} Compare Blackledge v. Allison, 431 U.S. 63, 71 (1977) (noting the policy reasons for plea bargaining) and Zacharias, supra note 5, at 1138 (discussing the resources that are saved due to plea bargaining) and Dion, supra note 31, at 161 (noting the finality aspect plea bargaining provides), with Oppel, supra note 5 (noting “that prosecutors have grown more powerful than judges”).
be monitored to ensure a just result for both the prosecutor and the defendant.\textsuperscript{287} To ensure a just result, courts ought to hear Sixth Amendment claims that are based on counsel's incompetence during the plea bargaining process, which may have resulted in the defendant's rejection of a favorable plea offer.\textsuperscript{288}

This Article found that the plea bargaining process has become indispensable to the judiciary system; therefore, the United States Supreme Court correctly confirmed the extension of ineffective assistance of counsel claims to the plea bargaining stage was necessary to protect the defendant's rights.\textsuperscript{289} The Article also offered suggestions and solutions to ensure plea bargaining resulted in a just outcome, which included: (1) choosing either a just results theory or a resource and efficiency theory to guide the prosecutor in his plea bargaining attempts; (2) banning or limiting which offenses can be resolved by plea bargains; (3) recommending defense counselors dedicate time to perfect their plea bargaining skills; and (4) encouraging legislative action to reduce the prosecutor's upper hand in the bargaining process.\textsuperscript{290} The plea bargaining process is now a vital part of the American judicial system but is far from perfect as it currently stands. Therefore, a coordinated effort by prosecutorial departments, defense counselors, courts, and legislatures could greatly improve the system and allow for more just results.

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\textsuperscript{287} Compare Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (giving the statistics of plea bargains in state and federal courts), \textit{with} Zacharias, \textit{supra} note 5, at 1123 (noting the prosecutor's goal is to see justice is done).

\textsuperscript{288} See \textit{e.g.}, Frye, 132 S. Ct. at 1405 (noting that competent counsel is to be available at all critical stages of litigation, which includes plea bargaining); Lafler v. Cooper, 132 S. Ct. 1376, 1385 (2012) (discussing what a defendant must show in order to prevail on a claim of ineffective assistance of counsel that resulted in the rejection of a favorable plea).

\textsuperscript{289} See \textit{supra} notes 169-242 and accompanying text.

\textsuperscript{290} See \textit{supra} notes 266-85 and accompanying text.