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Effective Plea Bargaining Counsel

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ABSTRACT. Fifty years ago, Clarence Earl Gideon needed an effective trial attorney. The Supreme Court agreed with Gideon that the Sixth Amendment guaranteed him the right to counsel at trial. Recently, Galin Frye and Anthony Cooper also needed effective representation. These two men, unlike Gideon, wanted to plead guilty and thus needed effective plea bargaining counsel. However, their attorneys failed to represent them effectively, and the Supreme Court—recognizing the reality that ninety-five percent of all convictions follow guilty pleas and not trials—ruled in favor of Frye and Cooper.

If negotiation is a critical stage in a system that consists almost entirely of bargaining, is there a constitutional right to the effective assistance of plea bargaining counsel? If so, is it possible to define the contours of such a right? The concept of a right to an effective bargainer seems radical, yet obvious; fraught with difficulties, yet in urgent need of greater attention.

In this Essay, I argue that the Court's broad statements in *Missouri v. Frye*, *Lafler v. Cooper*, and its 2010 decision in *Padilla v. Kentucky* about the critical role defense counsel plays in plea negotiations strongly support a right to effective plea bargaining counsel. Any right to effective bargaining should be judged—as other ineffective assistance claims are judged—by counsel's success or failure in following prevailing professional norms. This Essay discusses the numerous professional standards that support the notion that defense counsel should act effectively when the prosecution seeks to negotiate and should initiate negotiations when the prosecution fails to do so, if it serves the client's goals.

The objections to constitutional regulation of plea bargaining include the claims that negotiation is a nuanced art conducted behind closed doors that is difficult to capture in standards and that regulating bargaining will open floodgates to future litigation. While real, these are manageable challenges that do not outweigh the need to give meaning to the constitutional right to effective counsel. After all, in a criminal justice system that is largely composed of plea bargains, what is effective assistance of counsel if it does not encompass effectiveness within the plea negotiation process?

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INTRODUCTION

Charged with a felony in Florida state court, Clarence Earl Gideon needed a lawyer but could not afford one. Although the trial judge sympathized, he believed state law barred him from granting Gideon's request for appointed counsel.[1] At his original trial in 1961,[2] "Gideon conducted his defense about as well as could be expected from a layman," yet the jury convicted and the judge sentenced him to five years in prison.[3] Pursuing his claim of a Sixth Amendment right to appointed counsel up to the Supreme Court, Gideon triumphed: on remand, he got his trial with a defense lawyer who played a critical role.[4] This time, the jury acquitted after deliberating for a little more than an hour.[5]

More than forty years later in different state courts, Galin Frye and Anthony Cooper did not want trials, but like Gideon, they needed effective representation. They wanted to plead guilty and to cut their losses by getting the most favorable sentences possible. Both men had lawyers who failed to serve them in this regard. Frye's attorney neglected to tell him about a favorable misdemeanor plea offer in his felony case, and Cooper's attorney talked him out of accepting a favorable plea offer by giving him bad advice about his chances at trial.[6]

Gideon needed representation at trial. The *Gideon* decision recognized how "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law," and thus "requires the guiding hand of counsel at every step in the proceedings against him."[7] Frye and Cooper needed lawyers focused

1. Gideon v. Wainwright, 372 U.S. 335, 337 (1963) ("The COURT: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case." (quoting a colloquy from Gideon's trial)).

2. ANTHONY LEWIS, GIDEON'S TRUMPET 9 (1964).

3. *Gideon*, 372 U.S. at 337 ("[Gideon] made an opening statement to the jury, cross-examined the State's witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument 'emphasizing his innocence to the charge.'").

4. *Id*. at 344.

5. LEWIS, *supra* note 2, at 237.

6. Missouri v. Frye, 132 S. Ct. 1399, 1404 (2012); Lafler v. Cooper, 132 S. Ct. 1376, 1383 (2012).

7. *Gideon*, 372 U.S. at 345 (quoting Powell v. Alabama, 287 U.S. 45, 68 (1932)). *Gideon* established indigent defendants' right to appointed counsel in a state proceeding; the Court later set out the two-pronged test for analyzing the adequacy of that representation. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (holding that in ineffective assistance of counsel claims, the defendant must show that, first, counsel's representation was

on a different task: counsel who functioned effectively in a plea bargaining system. In three recent decisions, the Court signaled a new era in the constitutional regulation of plea bargaining.[8] *Padilla v. Kentucky* established that defendants in criminal cases have a constitutional right to counsel's advice about the deportation consequences of a conviction.[9] In *Missouri v. Frye*, the Court held that Frye's attorney acted incompetently when he failed to communicate to Frye a plea offer from the prosecution.[10] *Lafler v. Cooper* held that defendants who reject a lenient plea offer and go to trial due to counsel's bad advice, with the result of a harsher sentence, have a potential remedy.[11]

The case holdings thus all relate to an individual's right to information and counseling about a plea offer or guilty plea. They do not examine—and so do not directly establish—a defendant's right to a lawyer who meets minimal constitutional standards for "effective" plea bargaining between the defense attorney and the prosecutor. They regulate only the conversation between defense counsel and the client. For example, *Padilla* established the right to advice about the deportation consequences of a conviction, but did not establish the right to a lawyer who does an effective job avoiding deportation when feasible.

Yet it is difficult to conceive of a meaningful right to counsel if counsel is not required to function effectively in a plea bargaining system. This is precisely Jose Padilla's current situation, having won his ineffective assistance claim.[12] Back in the trial court on the original charges, Padilla's options are clear: he can go to trial or he can negotiate a plea bargain that avoids

incompetent as judged by prevailing professional norms; and, second, this incompetence prejudiced the defendant); Hill v. Lockhart, 474 U.S. 52, 58 (1985) (applying the *Strickland* test to claims of ineffective assistance of counsel in the guilty plea context); *see also* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel.").

8. *See* Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117 (2011) (discussing plea bargaining regulation in wake of *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010)).

9. *Padilla*, 130 S. Ct. at 1478.

10. *Frye*, 132 S. Ct. at 1408.

11. *Lafler*, 132 S. Ct. at 1391. In *Lafler*, the government conceded that defense counsel failed to competently advise the defendant about the wisdom of proceeding to trial and rejecting a lenient plea offer. *Id.* at 1386. Had the Court examined this issue, it would have been a significant analysis of the contours and content of counsel's constitutional duty to advise the client, building on the Court's nascent jurisprudence of client counseling in *Padilla*.

12. Padilla v. Commonwealth, 381 S.W.3d 322, 330 (Ky. Ct. App. 2012).

deportation.[13] For example, a carefully structured plea to felony solicitation under Kentucky state law[14] might allow Padilla to avoid deportation in his California immigration case.[15] Although the Supreme Court did not consider whether trial counsel should have explored such a plea initially, the issue is now squarely presented for Padilla's lawyer. It is hard to imagine any strategic reason that counsel would now fail to seek a plea that might avoid deportation (unless perhaps Padilla instructed counsel that he only wanted a trial). Indeed, the Kentucky Court of Appeals on remand recognized that, "had the immigration consequences of Padilla's plea been factored into the plea bargaining process, trial counsel may have obtained a plea agreement that would not have the consequence of mandatory deportation."[16] Defense counsel's duty to effectively bargain is thus clearly illustrated in instances where defense counsel failed to attempt to bargain around severe collateral consequences that the defendant wished to avoid. Such bargaining is central to counsel's core function, because even the most minor conviction can lead to severe collateral consequences affecting basic facets of daily life such as housing, public benefits, and employment; criminal records are also widely available through a variety of easily accessible databases, so that every contact with the criminal justice system affects individuals' lives in ways unimaginable only a decade ago.[17]

13. The government could decline to reprosecute Padilla on remand, although this seems unlikely.

14. KY. REV. STAT. ANN. § 506.030 (LexisNexis 2008) (defining criminal solicitation).

15. *See* Coronado-Durazo v. INS, 123 F.3d 1322, 1326 (9th Cir. 1997) (holding that solicitation is not a deportable offense under a section of the immigration laws stating that any noncitizen "convicted of . . . any law or regulation . . . relating to a controlled substance . . . may be deported" (citing 8 U.S.C. § 1251(a)(2) (1994)); *see also* DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW & CRIMES § 7:36 n.3 (noting that *Coronado-Durazo*'s solicitation holding should also apply to deportations based on an aggravated felony). Kentucky does not have a misprision felony, which would have been a strong candidate for a plea bargain if all parties agreed that avoiding Padilla's deportation was desirable. *See* Castaneda De Esper v. INS, 557 F.2d 79, 80 (6th Cir. 1977) (holding that a conviction for federal felony of misprision of a conspiracy to possess heroin is not a conviction relating to possession or traffic in narcotic drugs under the former deportation statute). Had Padilla been charged in federal court, he might have avoided deportation if the federal prosecutor had offered a plea to misprision or accessory after the fact. *See Representing Noncitizen Criminal Defendants: A National Guide*, DEFENDING IMMIGRANTS PARTNERSHIP § 4.4 (Apr. 2012), http://www.probono.net/library/attachment.132408.

16. Padilla v. Commonwealth, 381 S.W.3d at 330.

17. *See* MARGARET COLGATE LOVE, JENNY ROBERTS & CECELIA KLINGELE, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE 35-179, 277-341 (2013).

Imagine a jurisdiction where prosecutors regularly negotiate to reduce felony drug possession charges to misdemeanors with nonjail treatment alternatives or probation for first-time offenders. Imagine defense counsel with limited experience in this jurisdiction with a client whose primary concern is avoiding incarceration. Based on this concern, on an official sentencing range for the felony charge extending from probation to years of imprisonment, and on a lack of strong suppression arguments or trial defenses, counsel tells the prosecution the defendant will plead guilty to the felony in exchange for a sentence of probation. The prosecutor agrees, having been ready to accept a misdemeanor plea if asked and having had no intention of seeking jail or prison time in any event. The defendant pleads guilty to the drug felony and is sentenced to probation. Despite the oversimplified facts, one may question whether counsel functioned effectively in the plea bargain system or instead whether counsel saddled the defendant with an unnecessary felony conviction, with all the direct and collateral consequences that follow such a conviction, by failing to take the simple and well-established step of asking for a misdemeanor offer.

The Court's recent plea bargaining jurisprudence "made clear that '*negotiation* of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.'"[18] The cases are also testament to the Court's recognition that "plea bargaining is . . . not some adjunct to the criminal justice system; it *is* the criminal justice system,"[19] and to the reality that ninety-five percent of all convictions follow guilty pleas and not trials.[20] If negotiation is a critical stage in a system that consists almost entirely of bargaining, is there a constitutional right to the effective assistance of plea bargaining counsel? If so, is it possible to define the contours of such a right, even broadly? The concept of a right to an effective bargainer seems radical, yet obvious; fraught with difficulties, yet in urgent need of greater attention. After exploring the jurisprudential support for a right to effective bargaining counsel

18. Missouri v. Frye, 132 S. Ct. 1399, 1406 (2012) (emphasis added) (citing Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010)).

19. *Id.* at 1407 (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)). By exploring the contours and meaning of the right to effective plea counsel in this Essay, I do not mean to approve of a criminal justice system that is a plea-mill system. Indeed, elsewhere I have recently proposed "crashing" the misdemeanor system by offering defendants zealous representation for petty offenses in the lower courts, in the hopes that this would lead to fewer guilty pleas, more trials, and thus pressure on the system so it could no longer tolerate the mass misdemeanor prosecution approach that is so harmful to individuals and society. Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089 (2013).

20. *Padilla*, 130 S. Ct. at 1485.

in the Court's recent plea bargaining decisions, Part I describes several professional standards relating to plea negotiations in order to demonstrate that this area of criminal defense practice has detailed standards that can inform the developing constitutional norms. Part II considers two main obstacles to an attempt to regulate ineffective bargaining counsel as a constitutional matter, namely the arguments that negotiation is an art conducted behind closed doors that is nuanced and difficult to capture in standards and that attempting to regulate bargaining will open floodgates to future litigation. This Part concludes that while constitutional analysis and regulation of the content of plea bargaining poses challenges, these challenges do not outweigh the need to give meaning to the constitutional right to effective bargaining counsel.

I. REGULATING THE PLEA PROCESS IN *PADILLA*, *FRYE*, AND *LAFLER*

In *Padilla*, *Frye*, and *Lafler*, the Supreme Court established a significant body of plea bargaining and guilty-plea jurisprudence grounded in the Sixth Amendment right to the effective assistance of counsel. This Part tells the stories of deficient plea processes in those cases, and then discusses the jurisprudential support they provide for a constitutional right to effective bargaining.

A. The Cases of Jose Padilla, Galin Frye, and Anthony Cooper

Jose Padilla, a lawful permanent resident of the United States, was arrested with a large amount of marijuana in his commercial truck.[21] Although he had children who were U.S. citizens,[22] had served in the Army during Vietnam,[23] and had made only one two-week journey back to his birth country of Honduras during the forty years preceding his arrest,[24] Padilla faced automatic deportation for a felony marijuana trafficking conviction because he was a noncitizen.[25] Unfortunately Padilla did not know this, and pled guilty after his

21. Joint Appendix at 79-80, *Padilla*, 130 S. Ct. 1473 (No. 08-651), 2009 WL 1499270, at *51.

22. Reply Brief of Petitioner at 29, *Padilla*, 130 S. Ct. 1473 (No. 08-651), 2009 WL 2917817, at *13.

23. *Padilla*, 130 S. Ct. at 1477.

24. Padilla v. Commonwealth, 381 S.W.3d 322, 324 (Ky. Ct. App. 2012).

25. *Padilla*, 130 S. Ct. at 1477 & n.1.

trial attorney gave him the patently incorrect advice that he "did not have to worry about immigration status since he had been in the country so long."[26]

In 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.[27] Padilla thus met the first part of the two-pronged test for a Sixth Amendment claim of ineffective assistance of counsel: a demonstration that counsel's acts or omissions were unreasonable under prevailing professional norms.[28] The Court remanded for the state court to determine whether Padilla could demonstrate prejudice and thus meet the second prong.[29]

Recently, Padilla made that showing. The Kentucky Court of Appeals recognized that its task on remand was to analyze prejudice by "determin[ing] whether the defendant's rejection of the plea offer would have been a rational choice, even if not the best choice," and by doing so in the context of "the importance a particular defendant places upon preserving his or her right to remain in this country."[30] The "bargain" Padilla had accepted was dismissal of the charge of failing to have a tax number on his truck if he pled guilty to all other charges with a prosecutorial recommendation of the maximum possible

26. *Padilla*, 130 S. Ct. at 1478 (quoting Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008)). Under federal immigration law, any conviction "relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana" makes an individual deportable. 8 U.S.C. § 1227(a)(2)(B)(i) (2006); *see also id.* § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."); *id.* § 1101(a)(43)(B) (defining "aggravated felony" to mean "illicit trafficking in a controlled substance . . . , including a drug trafficking crime"); 18 U.S.C. § 924(c)(2) (2006) ("For purposes of this subsection, the term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act . . . , the Controlled Substances Import and Export Act . . . , or chapter 705 of title 46.").

27. *Padilla*, 130 S. Ct. at 1486. When "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence," such as in *Padilla*, defense counsel can easily determine that deportation is "presumptively mandatory" and must so counsel the client. *Id.* at 1483. "When the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.*

28. *Id.*; *see also supra* note 7 (discussing the ineffective assistance test first set out in *Strickland v. Washington*, 466 U.S. 668 (1984)).

29. *Padilla*, 130 S. Ct. at 1487.

30. Padilla v. Commonwealth, 381 S.W.3d 322, 329 (Ky. Ct. App. 2012).

sentence of ten years, with five to be served and five probated.[31] The court vacated Padilla's conviction, and remanded his case to the trial court.[32]

Two years later, the Supreme Court returned to constitutional plea regulation. Galin Frye faced felony charges of driving with a revoked license, with a four-year prison maximum. The prosecution sent Frye's lawyer a plea offer letter with two options: a misdemeanor with a recommendation of ninety days in jail (and a statutory maximum of one year), or the charged felony with a recommendation of ten days in jail followed by probation.[33] The offer was open until shortly before Frye's next court date; Frye presumably would have entered the plea at that court date. However, counsel never told Frye about the offer, and it expired. Just before his court appearance, Frye was rearrested for the same offense. Frye eventually pled guilty to felony driving with a revoked license, still unaware of the earlier plea offer; the judge sentenced him to three years in prison.[34] In *Missouri v. Frye*, the Supreme Court held that counsel's failure to communicate the prosecution's formal plea offer violated the Sixth Amendment duty to provide reasonably competent assistance of counsel.[35] The Court remanded to the Missouri state court for a prejudice determination.[36]

In a case decided the same day, the Supreme Court focused on the proper remedy when incompetent plea advice leads a defendant to reject a favorable offer.[37] Anthony Cooper was charged with, among other things, assault with intent to murder. The prosecution initially offered Cooper fifty-one to eighty-five months in prison and dismissal of some of the charges.[38] Cooper told the

31. Brief for Petitioner at 9, Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (No. 08-651), 2009 WL 1497552, at *9 (listing the charges).

32. Padilla v. Commonwealth, 381 S.W.3d at 330-31.

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

34. *Id.* at 1404-05.

35. *Id.* at 1408.

36. The Supreme Court held that Frye met the first part of the prejudice inquiry by demonstrating "a reasonable probability [he] would have accepted the prosecutor's original offer of a plea bargain if the offer had been communicated to him," since he did in fact plead guilty to a felony while unaware of the misdemeanor offer. *Id.* at 1411. But Frye also had to demonstrate a reasonable probability that "the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it." *Id.* at 1409. The Court noted Frye's new arrest after the original plea offer in cautioning that "there is strong reason to doubt the prosecution and the trial court would have permitted the plea bargain to become final." *Id.* at 1411. However, because the prosecutor's ability to withdraw and the trial court's ability to refuse a plea offer is governed by state law, the Court remanded this part of the prejudice inquiry. *Id.*

37. Lafler v. Cooper, 132 S. Ct. 1376 (2012).

38. *Id.* at 1383.

court he was guilty and "expressed a willingness to accept the offer," but ultimately rejected it "after his attorney convinced him that the prosecution would be unable to establish his intent to murder because [the victim] had been shot below the waist."[39] During the trial, Cooper rejected another offer; he was then convicted (despite where the bullet had lodged, which of course was not a defense at all) and was sentenced to 185 to 360 months' imprisonment.[40] The government conceded defense counsel's incompetence, and in *Lafler v. Cooper* the Supreme Court held that Cooper demonstrated prejudice because "but for counsel's deficient performance there is a reasonable probability [Cooper] and the trial court would have accepted the guilty plea," and because going to trial led to a "minimum sentence 3½ times greater than he would have received under the plea."[41] As for the appropriate remedy, the Court ordered the prosecution to re-extend the original offer, with the large and bizarre caveat that the trial judge on remand had broad discretion to accept that offer in whole or in part, or to reject it entirely and "leave the convictions and sentence from trial undisturbed."[42]

While the holdings in *Padilla*, *Frye*, and *Lafler* are relatively narrow, in each case the Court analyzed the claim of ineffective assistance of counsel in the larger context of a criminal justice system that is a plea bargaining system. It is also a system with potentially heavy penal sanctions and myriad severe "collateral" consequences.[43] In such a system, it is hard to conceive of a role for counsel that does not include effective negotiation. It may be difficult to regulate the complex and nonpublic arena of actual plea negotiations,[44] but these three cases lend jurisprudential support to the right to effective bargaining counsel.

39. *Id.*

40. *Id.*

41. *Id.* at 1391.

42. *Id.* As Justice Scalia noted, "the remedy the Court announces—namely, whatever the state trial court in its discretion prescribes, down to and including no remedy at all—is unheard-of and quite absurd for [a] violation of a constitutional right." *Id.* at 1392 (Scalia, J., dissenting).

43. *See* LOVE ET AL., *supra* note 17.

44. *See infra* Part II.

B. Jurisprudential Support for a Right to Effective Bargaining Counsel

Despite its well-deserved description as "seismic,"[45] "a landmark interpretation . . . [that] is long overdue,"[46] and "the case that many believed *Gideon* was meant to be,"[47] *Padilla* was not the first time the Supreme Court regulated plea bargaining and the guilty plea process. In its first forays in the area, the Court focused on due process considerations, in holdings that largely related to what the prosecution and trial judge must or cannot do. Thus, in the 1970s the Court applied a totality-of-the-circumstances test to determine the voluntariness of a guilty plea in one case,[48] and invalidated a bargained-for sentence where the prosecution breached its promises with respect to that bargain in another.[49] Several years later, as guilty plea statistics continued to rise,[50] the Court sounded an accepting note about the "'give-and-take' of plea bargaining" in finding no due process violation where the prosecutor carried out a threat made during plea negotiations to reindict the defendant on more serious charges if he did not plead guilty to the original charges.[51]

In 1985, the Court first applied the Sixth Amendment's test for ineffective assistance of counsel to guilty pleas, bringing defense counsel's behavior squarely into the law of pleas.[52] However, it was not until *Padilla v. Kentucky*

45. McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795 (2011).

46. Bibas, *supra* note 8, at 1118-19.

47. Steven Zeidman, Padilla v. Kentucky*: Sound and Fury, or Transformative Impact*, 39 FORDHAM URB. L.J. 203, 225 (2011).

48. Brady v. United States, 397 U.S. 742, 749 (1970); *see also* Boykin v. Alabama, 395 U.S. 238 (1969) (holding that because guilty pleas involve waiver of constitutional rights, the trial court record must establish voluntariness of plea).

49. Santobello v. New York, 404 U.S. 257, 262 (1971).

50. *See* Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1415 (2003) ("The proportion of guilty pleas has been moving steadily upward for over thirty years, and has seen a dramatic increase of over eleven percentage points just in the past ten years, from 85.4% in 1991 [in federal courts].").

51. Bordenkircher v. Hayes, 434 U.S. 357, 363, 365 (1978). Josh Bowers aptly described the Court's early plea jurisprudence as "invok[ing] a particular fairness principle—the notion of unfair surprise—to determine the constitutionality of a guilty-plea conviction." Josh Bowers, *Fundamental Fairness and the Path from* Santobello *to* Padilla*: A Response to Professor Bibas*, 2 CALIF. L. REV. CIRCUIT 52, 54 (2011), http://www.californialawreview.org/articles/fundamental-fairness-and-the-path-from-santobello-to-padilla-a-response-to-professor-bibas. Bowers sees *Padilla* as similarly concerned with unfair surprise to defendants, and thus consistent with these earlier cases. *Id*.

52. Hill v. Lockhart, 474 U.S. 52, 53 (1985) (declining to rule on Hill's claim that counsel's bad advice about the parole eligibility consequences of his guilty plea violated constitutional

that the Court began to regulate the *content* of defense counsel's conduct in the plea process.[53] Although *Padilla* concerns defense attorneys counseling clients about the deportation consequences of conviction, the decision supports the idea of a constitutional right to effective bargaining. First, the Court noted that it has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."[54] This statement is significant in light of the rule that the right to counsel applies to any "critical stage" of a prosecution.[55] To take *Padilla* at its word, the negotiation of a plea bargain, at least when undertaken, is something that must be carried out in a manner that meets effective assistance norms. In a criminal justice system dominated by plea bargaining, this can also be interpreted to mean that defense counsel may be required to actively pursue the client's goals through effective negotiation,[56] rather than to wait passively for offers from the prosecution.

Second, picking up on earlier decisions' theme of bargaining's "mutuality of advantage,"[57] *Padilla* noted that counsel

> may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.[58]

competence norms, instead holding that Hill failed to demonstrate prejudice from that alleged incompetence); *see also supra* note 7 (describing *Strickland*'s two-pronged ineffective assistance test).

53. Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

54. *Id*. at 1486.

55. United States v. Wade, 388 U.S. 218, 224 (1967).

56. *See* Commonwealth v. Marinho, 464 Mass. 115, 127 (2013) (holding deficient counsel's failure to "explore all alternatives to trial, including the possible resolution of the case through a negotiated plea or admission to sufficient facts" (quoting *Assigned Counsel Manual: Policies and Procedures, Chapter 4*, COMMITTEE FOR PUB. COUNSEL SERVS. 46 (June 17, 2011), http://www.publiccounsel.net/private_counsel_manual/CURRENT_MANUAL_2012/MANUALChap4CriminalStandards.pdf [hereinafter *Assigned Counsel Manual*])).

57. *See* Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978); Brady v. United States, 397 U.S. 742, 752 (1970).

58. *Padilla*, 130 S. Ct. at 1486.

While this discussion appears to be aimed at practical considerations rather than constitutional norms, if creative bargaining to avoid deportation—or to get a lower sentence, or a deferred prosecution—is the professional standard, then it is necessarily part of the constitutional conversation about plea bargaining.[59]

Frye and *Lafler* support the concept of a Sixth Amendment duty of competent bargaining robustly, if indirectly. While the holdings in both cases are relatively narrow,[60] the Court more broadly analyzed defense counsel's duty of competence during the plea bargaining and counseling processes and considered how to determine prejudice following counsel's incompetency in fulfilling those duties. Thus, *Lafler* stated that "[d]efendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process," and that "[d]uring plea negotiations defendants are 'entitled to the effective assistance of competent counsel.'"[61] Similarly, *Frye* noted that *Padilla* "made clear that 'the *negotiation* of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.'"[62] Surely, if the Court meant to limit the right to effective assistance to informing and counseling defendants about formal plea offers the prosecution has extended, it would not have repeatedly used the words "plea bargaining," "plea negotiations," and "negotiation of a plea bargain." Indeed, the dissenting Justices in *Frye* and *Lafler* criticized the Court for the sweeping nature of its entry into plea regulation.[63]

The majority could have drawn a constitutional line between the defense counsel-client conversation and the defense counsel-prosecutor conversation,

59. *See id.* at 1482 ("The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984))); *see also infra* Part I.C (discussing professional standards for plea bargaining).

60. Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012) ("[D]efense 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."); Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012) ("The question for this Court is how to apply *Strickland*'s prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial.").

61. *Lafler*, 132 S. Ct. at 1384 (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

62. *Frye*, 132 S. Ct. at 1406 (emphasis added) (citing *Padilla*, 130 S. Ct. at 1486).

63. *See Lafler*, 132 S. Ct. at 1391 (Scalia, J., dissenting) ("[T]he Court today opens a whole new field of constitutionalized criminal procedure: plea-bargaining law."); *Frye*, 132 S.Ct. at 1413 (Scalia, J., dissenting) (stating that this case "present[s] the necessity of confronting the serious difficulties that will be created by constitutionalization of the plea-bargaining process. It will not do simply to announce that they will be solved in the sweet by-and-by.").

declining to regulate the latter. Instead, the Court's recent plea jurisprudence is firmly grounded in the "reality" of the central role plea bargaining plays in the criminal justice system. *Frye* thus made the uncontroversial but important statement that "[i]n today's criminal justice system . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant."[64] The result of this reality is "that defense counsel have responsibilities in the plea bargain process . . . that must be met to render the adequate assistance of counsel that the Sixth Amendment requires."[65]

Both *Frye* and *Lafler* recognized the right to a remedy when counsel's deficient behavior during the plea process "caused nonacceptance of a plea offer and further proceedings led to a less favorable outcome."[66] Applying this concept to deportation consequences, an individual might claim that "less favorable" includes an outcome that results in a severe collateral consequence when it was reasonably likely that this could have been avoided through "creative bargaining." The Supreme Court recently described such creative bargaining in *Vartelas v. Holder*.[67] Although the issue in the case was whether relevant immigration law applied retroactively to the petitioner's conviction (the Court held that it did not), the Court commented on the content of plea negotiations that could have taken place: "Armed with knowledge that a guilty plea would preclude travel abroad, aliens like Vartelas might endeavor to negotiate a plea to a nonexcludable offense—in Vartelas' case, e.g., possession of counterfeit securities . . . ."[68] In a decision that directly addressed bargaining duties, the Massachusetts Supreme Judicial Court recently found deficient attorney performance where counsel failed to seek a disposition that would have avoided the deportation consequences of the defendant's conviction.[69] In other words, the court held there was a right to effective plea bargaining counsel.

64. *Frye*, 132 S. Ct. at 1407.

65. *Id.*

66. *Lafler*, 132 S. Ct. at 1383.

67. 132 S. Ct. 1479 (2012).

68. *Id*. at 1492 n.10 (2012).

69. Commonwealth v. Marinho, 464 Mass. 115 (2013). Although the court relied on state constitutional standards governing ineffective assistance of counsel, it cited *Padilla*, *Frye*, and *Lafler* in support of its deficient representation holding. *Id.* at 124-27. Ultimately, the court held that Marinho failed to prove prejudice. *Id*. at 129-32.

The Court has long denied any constitutional right to a plea bargain.[70] However, if negotiations take place, and there is a right to counsel at this critical stage,[71] then it logically follows that there is a right to effective bargaining counsel. As *Lafler* analogized, although the "Constitution does not require States to provide a system of appellate review at all," if the State "opts to act" in that field, "it must nonetheless act in accordance with the dictates of the Constitution."[72] Applied to a potential plea bargaining duty, this approach means that when the prosecutor opts to bargain, defense counsel has a constitutional duty to meet minimum Sixth Amendment standards.[73]

Neither lack of a constitutional right to a bargain nor a duty to act effectively when bargaining answers the more difficult question of whether counsel must affirmatively make reasonable efforts to secure a favorable plea offer. In other words, if the prosecutor does not make an offer, must defense counsel take steps to explore the alternatives? It is difficult to conceive of counsel's role, particularly in a system where so many cases are resolved through bargaining, that does not include such a duty. The Court has pointed out that the necessity of and practical purposes served by plea bargaining "presuppose fairness in securing agreement between an accused and a prosecutor."[74] Allowing counsel to function ineffectively in bargaining as a constitutional matter cuts against notions of fairness, and against an

70. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1395 (2012) (Scalia, J., dissenting) ("[T]here is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial." (quoting Weatherford v. Bursey, 429 U.S. 545, 561 (1977))); *cf.* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-4.1(a) (3d ed. 1993), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf [hereinafter ABA PROSECUTION AND DEFENSE STANDARDS] ("The prosecutor should have and make known a general policy or willingness to consult with defense counsel concerning disposition of charges by plea."); ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY § 14-3.1 cmt. 2 (3d ed. 1999), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pleas_guilty.authcheckdam.pdf (stating that "a refusal to negotiate with defendants is inconsistent with the ABA's Prosecution Function Standards and with efficient judicial administration" (citing ABA PROSECUTION AND DEFENSE STANDARDS, *supra*, § 3-4.1(a))).

71. *See supra* note 55 and accompanying text.

72. *Lafler*, 132 S. Ct. at 1387 (citations omitted) (quoting Evitts v. Lucey, 469 U.S. 387, 401 (1985)).

73. Meeting this constitutional floor does not necessarily mean counsel has met professional or ethical duties related to plea bargaining, which may well require more rigorous representation. For example, many professional standards required counsel to advise clients about the deportation consequences of a conviction long before *Padilla* found a Sixth Amendment duty to so advise. Padilla v. Kentucky, 130 S. Ct. 1473, 1482-83 (2010).

74. Santobello v. New York, 404 U.S. 257, 261 (1971).

underlying theme that the bargaining market is free and balanced enough to be an acceptable manner of resolving criminal cases. Further, the lack of a right to have the prosecution make an offer or even engage in plea bargaining underscores the need for defense counsel who is effective at getting the prosecution to the bargaining table when such action is consistent with the client's goals and who is effective in representing the defendant in actual negotiations.

To be sure, the right to effective plea bargaining counsel cannot be based on counsel's ability to secure an actual offer, since the prosecution can refuse a particular proposal from defense counsel and can even refuse to bargain at all in any given case. Rather, the right to effective bargaining should be judged—as other effective assistance claims under *Strickland*'s first prong are judged[75]—by counsel's success or failure in following prevailing professional norms relating to plea negotiations.

C. Prevailing Professional and Ethical Norms on Plea Bargaining

There is an ongoing interaction between the constitutional right to counsel and the other sources that regulate defense counsel's behavior, including professional standards, ethical rules, and informal mechanisms such as common practice. Indeed, constitutional norms incorporate these other regulatory sources by requiring litigants claiming ineffective assistance to demonstrate that counsel's failures violated prevailing professional norms. For example, in *Wiggins v. Smith* the Court looked to "standard practice in Maryland in capital cases at the time of Wiggins' trial," to the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, and to the ABA Standards for Criminal Justice to analyze the claim that counsel's failure to investigate mitigating evidence for Wiggins' capital sentencing hearing was unconstitutionally unreasonable.[76]

There is also an ongoing interaction between the Court's articulation of ineffective assistance norms and defense counsel practice. For example, after the Court held in favor of Wiggins, the defense community responded with a spate of capital mitigation trainings.[77] A similar dialogue took place before and

75. *See supra* note 7 (discussing *Strickland*'s test for ineffective assistance claims).

76. 539 U.S. 510, 524 (2003) ("Counsel's conduct . . . fell short of the standards for capital defense work articulated by the American Bar Association (ABA)—standards to which we long have referred as 'guides to determining what is reasonable.'" (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984))).

77. *See* Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty To Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1116 n.97 (2004)

after the Court's decision in *Padilla v. Kentucky*. Before *Padilla*, a number of professional standards, practice manuals, and other sources recommended that defense counsel advise clients about immigration consequences.[78] After *Padilla* cited those sources in articulating a constitutional duty to advise about deportation, the defense bar, prosecutors, and judges worked to conform to the decision, and professional organizations immediately began to consider changes to their standards.[79] These dynamic interactions between constitutional norms and everyday practice demonstrate the relevance of prevailing professional norms of plea bargaining in determining whether and how to define constitutionally effective plea bargaining counsel. The existence of a variety of professional standards relating to plea bargaining also suggests that, like the Court's regulation of capital mitigation in *Wiggins*, defining the right to counsel to encompass effective bargaining counsel is neither unrealistic nor impossible to achieve.[80]

The content of these nonconstitutional sources on plea bargaining vary widely, but all support a duty to bargain as a core defense function. For example, the ABA's Standards for Criminal Justice—standards the Supreme Court often cites in ineffective assistance decisions[81]—have a section entitled

(noting the capital defense bar's "swift" reaction to *Wiggins* and citing various mitigation trainings).

78. *See Padilla*, 130 S. Ct. at 1482-83 (citing professional standards, practice manuals, defense bar publications, treatises, and scholarly publications in support of holding that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation").

79. *See, e.g.*, *The Fifth National Training on the Immigration Consequences of Criminal Convictions*, DEFENDING IMMIGRANTS PARTNERSHIP, http://defendingimmigrants.org/trainings/item.2587-The_Fifth_National_Training_on_the_Immigration_Consequences_of_Criminal_Con (last visited Feb. 28, 2013) ("This intensive, two-day, tuition-free national training will provide defenders with the tools necessary to comply with *Padilla*, strategies to mitigate immigration consequences and methods to institutionalize *Padilla* advisal in your defender office."); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-5.4(c) (Reporter's Draft 2013) [hereinafter ABA DRAFT PROSECUTION AND DEFENSE STANDARDS] (proposing to amend the standards to recommend consideration of collateral consequences in negotiations).

80. *Cf.* Missouri v. Frye, 132 S. Ct. 1399, 1413 (2012) (Scalia, J., dissenting) (noting "the necessity of confronting the serious difficulties that will be created by constitutionalization of the plea-bargaining process"). The ability to define the right is a good start, but does not ensure that defendants will actually receive effective representation. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

81. *See, e.g.*, Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012); Rompilla v. Beard, 545 U.S. 374, 387 (2005); *Wiggins*, 539 U.S. at 524.

"Duty to Explore Disposition Without Trial."[82] Although the standard states only that "[d]efense counsel *may* engage in plea discussions with the prosecutor,"[83] the commentary describes such discussions as a "significant part of the duty of defense counsel" that "should be considered the norm, and failure to seek such discussions an exception."[84] The nonmandatory language accounts for limited circumstances where a defendant might forgo negotiations for strategic reasons. For example, counsel might advise a client to enter an early guilty plea to the full set of charges in order to foreclose subsequent additional charges on the same set of facts, based on information that opening the case up for plea negotiations might reveal. Or a defendant might instruct counsel that he wants his day in court and will not plead guilty under any circumstances.[85]

The National Legal Aid and Defender Association's Performance Guidelines for Criminal Defense Representation offer detailed guidance on "The Contents of the Negotiations."[86] This guideline covers developing a negotiation plan and strategy and conducting negotiations. Developing the plan calls for awareness of, among other things, the "consequences of conviction such as deportation, and civil disabilities," any "likely sentence enhancements or parole consequences," "the possible and likely place and manner of confinement," and "the effect of good-time credits on the sentence of the client."[87] Strategic considerations call for counsel to be "completely familiar" with "concessions that the client might offer" and "benefits the client might obtain," including: giving up the right to litigate a pretrial motion;

82. ABA PROSECUTION AND DEFENSE STANDARDS, *supra* note 70, § 4-6.1 (stating also that "defense counsel should explore the possibility of an early diversion of the case from the criminal process through the use of other community agencies").

83. *Id.* § 4-6.1(b) (emphasis added).

84. *Id.* § 4-6.1, cmt. A pending draft of the ABA Defense Function Standards revisions makes the duty to bargain, at least for the purpose of avoiding collateral consequences, explicit: "Defense counsel should include consideration of potential collateral consequences in negotiations with the prosecutor regarding disposition and sentence." ABA PROSECUTION AND DEFENSE STANDARDS, *supra* note 79, § 4-5.4(c).

85. *Cf.* Boria v. Keane, 99 F.3d 492, 495 (2d Cir. 1996) (finding ineffective assistance of counsel where a lawyer failed to counsel the defendant "that, although he never even suggested such a thought to [his client], it was [defense counsel's] own view that his client's decision to reject the plea bargain was suicidal").

86. NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION § 6.2 (2011); *see also id.* (noting, in a section entitled "The Plea Negotiation Process and the Duties of Counsel," how "[c]ounsel should explore with the client the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to a trial").

87. *Id.* § 6.2(a).

cooperation in a law enforcement investigation; lack of opposition to bail pending sentence or appeal; the ability to enter a conditional plea, preserving the right to appeal certain issues; and "specific benefits concerning the accused's place and/or manner of confinement."[88] Significantly, the guideline calls for familiarity with local custom: "[C]ounsel should attempt to become familiar with the practices and policies of the particular jurisdiction, judge and prosecuting authority which may affect the content and likely results of negotiated plea bargains."[89] Anthony Amsterdam's *Trial Manual for the Defense of Criminal Cases* offers similarly detailed guidance for plea negotiations.[90]

Local standards may also provide guidance in particular jurisdictions, or demonstrate consensus among jurisdictions. For example, a Massachusetts defender manual states that counsel's plea discussions should include "advocating for language most favorable to the client" in the proffer the prosecution will offer as factual support for the guilty plea.[91] Washington state defender standards describe counsel's "obligation to pursue with the prosecutor and the court 'immigration-safe' dispositions."[92] They also note that, for persistent felony offender representation, "[b]ecause the goal . . . is often settlement, rather than trial, counsel should prepare challenges to each potential 'strike' before the settlement negotiations."[93]

When a client wishes to plead guilty, or when there is a strong likelihood of conviction after trial, it is difficult to imagine effective representation that does not include affirmatively seeking the best plea bargain possible given the circumstances of the case and defendant. This is particularly true in a criminal justice system that punishes many individuals convicted after trial much more harshly than those convicted after a guilty plea, in what has been characterized as a "trial tax."[94] Professional standards offer counsel significant guidance for undertaking negotiation. They also give potential petitioners—and courts—

88. *Id.* § 6.2(b).

89. *Id.* § 6.2(d).

90. ANTHONY AMSTERDAM, 1 TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES §§ 201-219 (5th ed. 1988).

91. *Assigned Counsel Manual*, *supra* note 56, at 14.

92. *Standards for Public Defense Services*, WASH. DEFENDER ASS'N 17 (2006), http://www.defensenet.org/resources/publications-1/wda-standards-for-indigent-defense.

93. *Id.* at 24-25 ("Coming to the negotiation table with as much mitigating evidence as possible is, therefore of paramount importance for persistent offender clients.").

94. Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1158 (2008); *see also* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 531 (2001) (discussing how "[r]aising the threatened sentence . . . increases the threat value of trial, which in turn increases the incentive for the defendant to plead guilty").

significant guidance against which to judge any claim of ineffective bargaining assistance. Indeed, these standards appear to establish the type of "prevailing professional norms" that would support a Sixth Amendment duty to undertake and effectively carry out plea bargaining.

II. OBSTACLES AND PRACTICAL CONSIDERATIONS IN DEFINING EFFECTIVE PLEA BARGAINING COUNSEL

A right to effective plea bargaining counsel remains unsettled and controversial.[95] The Court has yet to take up the issue directly,[96] and scholars have just begun to address regulation of the content of plea negotiations.[97] This Part discusses two main obstacles to the development of the right to effective bargaining counsel: the Court's characterization of plea bargaining as an "art" taking place behind closed doors, and thus difficult to review; and the oft-repeated argument that any extension of effective assistance rights will open the floodgates to litigants seeking to reverse convictions, even if the conviction flows from a bargained-for plea.

A. Plea Bargaining as an Art Conducted Behind Closed Doors

Although *Frye* and *Lafler* centered on the right to counsel during plea bargaining and counseling, neither case required the Court to "define the duty

95. *See, e.g.*, Josh Bowers, Lafler, Frye, *and the Subtle Art of Winning by Losing*, 25 FED. SENT'G REP. 41 (2012) ("It remains to be seen whether the Court in *Lafler* similarly has obliged a defense attorney to push (and how hard?) a defendant to accept a plea bargain (or, for that matter, to push a prosecutor to offer one).").

96. Missouri v. Frye, 132 S. Ct. 1399, 1412 (2012) (Scalia, J., dissenting) ("[N]either the State nor the Solicitor General argued that counsel's performance here was adequate. . . . In other cases, however, it will not be so clear that counsel's plea-bargaining skills, which must now meet a constitutional minimum, are adequate.").

97. *See, e.g.*, Laurie L. Levenson, *Peeking Behind the Plea Bargaining Process*, 46 LOY. L.A. L. REV. (forthcoming 2013), http://ssrn.com/abstract=2188077 ("*Frye* and *Lafler* establish that a defendant has the right to effective assistance during plea bargaining, but the Court did not firmly establish the minimum standards that will satisfy this right."); Jane Campbell Moriarty & Marisa Main, *"Waiving" Goodbye to Rights: Plea Bargaining and the Defense Dilemma of Competent Representation*, 38 HASTINGS CONST. L.Q. 1029, 1042 (2011) (noting, even before the Court decided *Frye* and *Lafler*, how a ''criminal defense attorney . . . may even have a duty to seek out plea negotiations with the prosecution'').

and responsibilities of defense counsel in the plea bargain process."[98] Indeed, the Court noted that defining effective bargaining "is a difficult question":

> "The art of negotiation is at least as nuanced as the art of trial advocacy and it presents questions farther removed from immediate judicial supervision." Bargaining is, by its nature, defined to a substantial degree by personal style. The alternative courses and tactics in negotiation are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process.[99]

Yet, as explored in the preceding Part, effective plea bargaining is not immune to definition or analysis; standards can articulate factors counsel should consider in formulating a negotiation plan and strategy and in actual negotiations. There is also a significant literature on effective negotiation strategies, including in the specific realm of plea bargaining in criminal cases.[100]

Further, characterizing a lawyering skill as an "art" has not previously stopped the Court from regulating counsel's behavior as a constitutional matter. Describing capital sentencing representation as "sufficiently like a trial in its adversarial format and in the existence of standards for decision,"[101] the Court also stated: "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."[102] The Court's response to this problem of evaluation was threefold. First, evaluating counsel's performance with reference to prevailing professional norms offered a comparative reference point. Second, requiring defendants to demonstrate prejudice meant that even unreasonable errors would not disturb an outcome unless those errors "actually had an adverse effect on the defense."[103] Third, ex post evaluation of counsel's behavior must be viewed with heavy deference, and the burden is on defendants to overcome a presumption of strategic rather

98. Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012) ("This case presents neither the necessity nor the occasion to define the duties of defense counsel in those respects, however.").

99. *Id.* at 1408 (quoting Premo v. Moore, 131 S. Ct. 733, 741 (2011)).

100. *See, e.g.*, Dan Orr & Chris Guthrie, *Anchoring, Information, Expertise, and Negotiation: New Insights from Meta-Analysis*, 21 OHIO ST. J. DISP. RES. 597 (2006); Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73 (1995).

101. Strickland v. Washington, 466 U.S. 668, 686 (1984).

102. *Id.* at 693.

103. *Id.*

than inadequate representation.[104] All of these ways to mitigate difficulties of regulating the "art" of trial advocacy apply equally to plea bargaining. To be sure, these three responses to evaluative obstacles have made relief from ineffective assistance generally inaccessible to individual litigants, and *Strickland* and its progeny are deserving of the well-developed body of scholarly critique about the hurdles the doctrine has constructed.[105] However, plea bargaining jurisprudence—like capital mitigation effectiveness jurisprudence before it[106]—serves an important signaling function that can help shape criminal law practitioners' behavior ex ante even where it fails at individual ex post facto regulation.

Although full exploration of the ways in which judicial pronouncements might define and thus shape effective plea bargaining counsel is beyond this Essay's scope, there are several obvious candidates for regulation: failure to seek discovery and to investigate prior to bargaining (which would allow analysis of the egregious practices common in the lower criminal courts, including guilty pleas entered at arraignment after little consultation between client and counsel and little effort at negotiation tailored to the particular client and case);[107] failure to gain knowledge of likely trial outcomes and plea discounts as baselines for negotiation that are then individually tailored; and failure to seek to avoid unnecessary and severe collateral consequences in appropriate cases.[108] Further, although the Court rejected a checklist approach to the analysis of ineffective assistance claims in the trial context,[109] this type of structured evaluation might be appropriate in analyses of plea bargaining.

A more powerful critique of regulating the plea bargaining process is that because bargaining happens off the record between prosecution and defense—and normally outside the defendant's presence—it is difficult to adequately examine any later claim of ineffectiveness in that process.[110] Yet plea

104. *Id.* at 688-90.

105. *See, e.g.*, Bright, *supra* note 80.

106. *See supra* note 77 and accompanying text.

107. *See* Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORD. URB. L.J. 315, 331 n.86 ("Pleas at arraignments fly directly in the face of the lawyer's constitutional and ethical duty to investigate."); *Annual Report 2011*, CRIM. CT. OF THE CITY OF N.Y. 29 (2011), http://www.courts.state.ny.us/courts/nyc/criminal/AnnualReport2011.pdf (reporting that almost half of all New York City misdemeanors are resolved at arraignment).

108. *See supra* notes 16-17 and accompanying text.

109. Strickland v. Washington, 466 U.S. 668, 688 (1984).

110. *See* Premo v. Moore, 131 S. Ct. 733, 745 (2011) ("A trial provides the full written record and factual background that serve to limit and clarify some of the choices counsel made. . . . The

negotiations are not the only facet of criminal defense practice lacking in transparency. Investigations, witness interviews, and other pretrial events happen outside the courtroom and are not usually recorded. Although a later trial might highlight counsel's failures at such tasks, most postconviction proceedings exploring alleged pretrial ineffective assistance would rely heavily on the testimony of counsel and the defendant. Testimony about plea negotiations is no different. This is particularly true because counsel is required to communicate plea offers and discuss negotiation outcomes with the client,[111] meaning that plea discussions will be part of the already regulated conversation between the defendant and counsel.[112] In addition, there are ways to document plea negotiations, including criminal procedure rules requiring offers to be in writing and a practice of putting offers on the record.[113] Just as judges have a post-*Padilla* incentive to inquire whether counsel advised about immigration consequences, they have a post-*Frye* and -*Lafler* incentive to explore whether and how counsel engaged in plea negotiations.[114]

Although it may be hard to regulate plea bargaining, courts have deep institutional competence regulating the activities of actors in the judicial system.[115] The alternative—throwing up one's hands at the difficulty of the task—would essentially result in abdicating responsibility for enforcement of a constitutional right.

added uncertainty that results when there is no extended, formal record and no actual history to show how the charges have played out at trial works against the party alleging inadequate assistance."). Even in *Premo*, a decision that demonstrates great reluctance to regulate plea bargaining, the Court analyzed the defendant's claim of ineffective assistance relating to the plea process under its right to counsel precedents. *Id*. at 746 ("The substantial burden to show ineffective assistance of counsel, the burden the claimant must meet to avoid the plea, has not been met in this case.").

111. *See* Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012) (imposing a duty to communicate offers and discussing professional standards requiring prompt communication and consultation).

112. *See supra* notes 9-11 and accompanying text.

113. *Frye*, 132 S. Ct. at 1409 ("[T]the fact of a formal offer means that its terms and its processing can be documented so that what took place in the negotiation process becomes more clear if some later inquiry turns on the conduct of earlier pretrial negotiations.").

114. Such judicial inquiry will be constrained in jurisdictions with rules barring judicial participating in plea negotiations. *See, e.g.*, FED. R. CRIM. P. 11(c)(1). *But see* VT. R. CRIM. P. 11(e)(1) (allowing judicial participation in plea negotiations if proceedings are recorded); Gibson v. Georgia, 636 S.E.2d 767, 769 (Ga. Ct. App. 2006) (holding that, notwithstanding a court rule barring judicial participation in plea discussions, such participation is allowed so long as it does not become "so great as to render the plea involuntary").

115. *See* Josh Bowers, *Two Rights to Counsel*, 70 WASH. & LEE L. REV. 1133 (2013) (describing plea bargaining law as "extralegal," but noting disagreement with the notion "that plea-bargaining—by virtue of its extralegal status—ought also to fall beyond constitutional regulation").

B. The "Floodgates" Objection to Ineffective Assistance Norms

A common refrain in ineffective assistance cases is that granting the defendant's claim will open the floodgates to future litigation.[116] This argument is emphasized when it comes to the guilty plea process, as the number of potential litigants is so enormous.[117]

There are a number of reasons a right to effective plea counsel will not open the floodgates. First, most defendants who plead guilty do not later challenge that plea, in part because they received a benefit from the bargain. Often, they are long released from any incarceration by the time any ineffective assistance claim would be heard, severely undercutting any incentive to pursue a claim.[118] Second, those considering claims face significant hurdles in overcoming the presumption that counsel acted strategically (and thus competently) and in proving prejudice.[119] The latter requires demonstrating a reasonable likelihood that, absent deficient bargaining, the outcome of the proceeding would have been different—an extremely difficult task.[120] Third, as *Padilla* recently noted, fears of floodgates have not historically been borne out.[121]

CONCLUSION

Gideon's Supreme Court victory was not a foregone conclusion. Indeed, *Gideon* reversed a decision of only twenty-one years earlier denying a federal constitutional right to counsel in state court.[122] *Frye* and *Lafler* have already caused much debate, beginning with Justice Scalia's stinging dissents accusing

116. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1484 (2010) ("We confronted a similar 'floodgates' concern in *Hill* . . . ."); *cf.* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 736-41 (2002) (critiquing the floodgates objection).

117. Brief of Respondent at 35-36, *Padilla*, 130 S. Ct. 1473 (No. 08-651), 2009 WL 2473880, at *35-36.

118. The exception is claims relating to severe collateral consequences, where the defendant will continue to suffer the consequences of the conviction long after the penal sentence ends.

119. *See supra* notes 103-104 and accompanying text.

120. *See, e.g.*, Commonwealth v. Marinho, 464 Mass. 115, 128-32 (2013) (holding that counsel ineffectively bargained but that the defendant failed to prove prejudice).

121. *Padilla*, 130 S. Ct. at 1484-85 ("We have given serious consideration to . . . the importance of protecting the finality of convictions obtained through guilty pleas. We confronted a similar 'floodgates' concern in *Hill,* but nevertheless applied *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty. A flood did not follow in that decision's wake." (citation omitted)).

122. Betts v. Brady, 316 U.S. 455 (1942), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963).

the Court of "embrac[ing] the sporting-chance theory of criminal law, in which the State functions like a conscientious casino-operator, giving each player a fair chance to beat the house, that is, to serve less time than the law says he deserves."[123] Yet as with *Gideon*, the overarching theme of the Court's recent plea bargaining jurisprudence is the need for counsel—and the unfairness of proceeding without effective counsel—in a complex criminal justice system.

Trial convictions may lead to sentences that are technically what "the law says [a defendant] deserves," but legislatures have ratcheted up potential sentences so that bargaining now occurs against the backdrop of extreme outcomes in the absence of a deal.[124] As *Lafler* noted, counsel's incompetence cost Lafler "a plea offer for a sentence the prosecution evidently deemed consistent with the sound administration of criminal justice."[125] Plea bargaining is no sport, at least not for defendants. Rather, it is a serious event that—depending on whether and how it is conducted—can result in a lifelong mark of a criminal record and loss of liberty or even life.

In a plea bargaining system, what is the effective assistance of counsel if it does not encompass effectiveness within the plea negotiation process? The Court has started the difficult and nuanced process of regulating plea bargaining, but much remains to be done to give true content to the meaning of effective plea bargaining counsel.

123. Lafler v. Cooper, 132 S. Ct. 1376, 1398 (2012) (Scalia, J., dissenting).

124. *See* Bowers, *supra* note 115 (manuscript at 32-33) ("[P]lea-bargaining—[is] a domain of unique constitutional control. . . . [that] serves as a welcome counterweight to prosecutor's almost unfettered charging discretion to set starting prices so very high."); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 129 (2005) ("Changes in federal sentencing practices during the 1980s and 1990s increased the certainty and size of the penalty for going to trial, and mightily influenced the guilty plea and acquittal rates during those times."); Richard A. Oppel, Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES, Sept. 25, 2011, http://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html ("In the courtroom and during plea negotiations, the impact of these stricter [sentencing] laws is exerted through what academics call the 'trial penalty.' The phrase refers to the fact that the sentences for people who go to trial have grown harsher relative to sentences for those who agree to a plea."); *see also supra* note 94 and accompanying text.

125. *Lafler*, 132 S. Ct. at 1387 ("The favorable sentence . . . appears to be the sentence [Lafler] or others in his position would have received in the ordinary course, absent the failings of counsel.").