PLEADING WITH THE PAST: ASSESSING STATE APPROACHES TO *LAFLER* AND *FRYE*'S COUNTERFACTUAL PREJUDICE PRONG

*Alex C. Werner**

Plea bargaining dominates the modern criminal justice system. Constitutional safeguards, however, have only slowly followed this fundamental shift in criminal adjudication. In Missouri v. Frye *and* Lafler v. Cooper*, the Supreme Court extended the Sixth Amendment's right to counsel to situations in which deficient counsel leads a defendant to forgo a beneficial plea agreement. The Court's test left state court systems, however, with the difficult burden of assessing how the defendant, the trial court, and the prosecution might have behaved in a counterfactual world with adequate counsel. This Note distinguishes two fundamental approaches to these counterfactual questions: a "burden" approach demanding defendants provide evidence as to how each party would have acted, and a "presumption" approach that presumes the normal course of action would be approval of an accepted plea by all relevant parties. Looking to case law in two state jurisdictions, this Note concludes that each state system primarily follows either the presumption or the burden approach. This Note argues that, particularly with respect to questions of how the trial court and prosecution would have acted, the presumption approach provides the clearest path to the truth and best serves the values underpinning the Sixth Amendment's right to effective counsel.*

* J.D. Candidate 2021, Columbia Law School. The author would like to thank Professor Daniel Richman for his guidance and the staff of the *Columbia Law Review* for their exceptional editorial assistance. Special thanks to Kristy Blackwood for her patience and support during the writing of this Note.

INTRODUCTION

Today, the American criminal justice system is a system of pleas. Despite a traditional focus on trial-based protections for criminal defendants, most cases in our criminal justice system, at both the federal and state levels, result in pretrial plea bargains and eventual guilty pleas.[1] In spite of an increasing acceptance of guilty pleas as the standard method of adjudication, however, the protections offered to the accused during the crucial pleading stage remain relatively sparse in contrast to the broad and well-developed safeguards provided during trial.[2]

---

1. See Sourcebook of Criminal Justice Statistics Online, tbl.5.22.2010, Univ. at Alb., https://www.albany.edu/sourcebook/pdf/t5222010.pdf [https://perma.cc/L8KK-YBMX] (last visited Oct. 13, 2020) (showing more than ninety-seven percent of convicted defendants in federal district courts in 2010 were convicted by plea); Sourcebook of Criminal Justice Statistics Online, tbl.5.46.2006, Univ. at Alb., https://www.albany.edu/sourcebook/pdf/t5462006.pdf [https://perma.cc/P5ZA-YGMT] (last visited Oct. 13, 2020) (showing ninety-four percent of state felony convictions to be the result of guilty pleas). But see Andrew Manuel Crespo, The Hidden Law of Plea Bargaining, 118 Colum. L. Rev. 1303, 1378 n.223 (2018) (arguing that, properly accounting for dismissals, state guilty plea rates range from fifty-six percent to eighty-seven percent).

2. See, e.g., Stephanos Bibas, Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection, 99 Calif. L. Rev. 1117, 1119 (2011) (arguing that scant pleading protections belie the hope of the Supreme Court that "shadows cast by trials . . . regulate plea outcomes, even though few defendants dare[] risk the huge penalties for going to trial"); Corinna Barrett Lain, Accuracy Where It Matters: *Brady v. Maryland* in the Plea Bargaining Context, 80 Wash. U. L.Q. 1, 2 (2002) (noting that only "[a] few select rights traditionally associated with trial are so essential . . . that defendants retain them even

The Supreme Court acknowledged as much in 2012 in *Missouri v. Frye*[3] and *Lafler v. Cooper*,[4] in which it examined claims of ineffective assistance of counsel at the pleading stage. Unlike in prior cases heard by the Court regarding effective counsel at the pleading stage,[5] in these cases the appellants sought not to vacate their guilty pleas but to instead accept plea agreements that had lapsed[6] or been rejected[7] due to ineffective counsel. In *Frye* and *Lafler*, the Court grounded its opinions in the overwhelming dominance of guilty pleas in our current criminal justice system and the resulting need for appropriate protections for defendants.[8]

This Note examines *Frye* and *Lafler*'s application of ineffective assistance of counsel (IAC) doctrine to cases in which defendants allege that plea offers were refused or forgone due to incompetent defense counsel. By applying *Strickland v. Washington*'s prejudice prong[9] in this new context, the decisions posed new counterfactual questions regarding the hypothetical actions of courts and prosecutors, creating in turn new challenges and complications for courts. This Note assesses the potential approaches to these complications. To illuminate and inform the analysis, this Note looks to how select state courts have interpreted the malleable instructions left by the Supreme Court in *Lafler* and *Frye* and identifies two fundamental approaches used. The first approach, in which courts require a defendant to affirmatively prove that the prosecutor would have maintained an offered plea and that the trial court would have accepted it, is referred to as the "burden" approach. By contrast, courts using the "presumption" approach rely on the fact that most plea offers are neither revoked by offering prosecutors nor rejected by trial courts absent unusual circumstances and presume that the defendant would have successfully obtained an accepted plea agreement.

Part I traces the development of Sixth Amendment doctrine that led to the *Frye* and *Lafler* decisions. Section I.A provides a short history of

---

though they choose to plea bargain"); John Rappaport, Unbundling Criminal Trial Rights, 82 U. Chi. L. Rev. 181, 181–85 (2015) (describing the process of plea bargaining as one in which defendants fundamentally trade their trial rights, either wholesale or piecemeal, in exchange for reduced sentencing exposure).

3. 566 U.S. 134 (2012).

4. 566 U.S. 156 (2012).

5. E.g., Padilla v. Kentucky, 559 U.S. 356 (2010) (granting relief to a defendant who pleaded guilty without being informed of the immigration consequences of his resulting conviction); Hill v. Lockhart, 474 U.S. 52 (1985) (rejecting a defendant's attempt to vacate his guilty plea due to ineffective assistance of counsel in informing him of his parole eligibility).

6. *Frye*, 566 U.S. at 147.

7. *Lafler*, 566 U.S. at 160.

8. See id. at 169–70 (noting that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas"); *Frye*, 566 U.S. at 143–44 (arguing that "plea bargains have become so central to the administration of the criminal justice system" that defense counsel responsibilities under the Sixth Amendment must extend into the pleading stage).

9. 466 U.S. 668, 687 (1984).

Sixth Amendment jurisprudence and explores the contemporary IAC test established by *Strickland*.[10] Section I.B continues by looking at the initial application of IAC claims to the pleading context by the Supreme Court in *Hill v. Lockhart*,[11] *Padilla v. Kentucky*,[12] and then *Frye* and *Lafler*. Section I.C introduces the Court's brief instructions regarding *Strickland*'s prejudice prong as applied in *Frye* and *Lafler*.

Part II considers the doctrinal changes brought about in *Frye* and *Lafler* and examines applications of the cases in state court systems. Section II.A focuses on the new counterfactual questions created in *Frye* and *Lafler* to determine prejudice for claims in which a defendant can show that inadequate counsel led to a forgone plea offer (with better terms) that the defendant would have otherwise accepted. The Supreme Court asked reviewing courts to assess (1) whether the court would have accepted a particular plea agreement and (2) whether the prosecutor would have revoked the deal prior to the plea's entry.[13] This Note compares these new questions to the existing inquiry used in IAC claims at the pleading stage, in which courts considering vacating a guilty plea ask whether a defendant truly would not have pleaded guilty with effective counsel and would have instead proceeded to trial.[14] Section II.B then explores the two major potential approaches to the new questions: the "burden" approach and the "presumption" approach. Section II.C looks to a range of state court decisions made since *Frye* and *Lafler* and considers how the standard laid out by the Supreme Court has (or has not) influenced state jurisprudence. This section examines decisions that discuss these new prejudice questions across two major state jurisdictions—Georgia and Florida—and assesses whether a presumption or burden approach is utilized in each.

Part III then evaluates whether either the presumption or burden approach is better suited to be a general rule in such cases, noting the difficulties faced by defendants making IAC claims based on forgone guilty pleas. This Part argues that both a commonsense understanding of how offered plea agreements function and the asymmetry between information possessed by defendants and by prosecutors suggest that a presumption approach more accurately evaluates potential prejudice to a defendant. As a result, the presumption approach strikes a better balance between protecting a defendant's constitutional right to effective counsel and avoiding windfalls of leniency to undeserving defendants.

---

10. Id.

11. 474 U.S. 52 (1985).

12. 559 U.S. 356 (2010).

13. See *Frye*, 566 U.S. at 147–48.

14. See, e.g., *Hill*, 474 U.S. at 59 ("[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.").

I. THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

This Part briefly traces the history of the right to counsel under the Sixth Amendment, focusing on the emergence of the right to effective counsel and examining in depth the controlling test, set forth by *Strickland v. Washington*, for adjudicating such claims.[15] This Part then looks to the application of *Strickland*'s effective counsel test in the context of forgone guilty pleas and explores the *Lafler* and *Frye* decisions.

A. *The Sixth Amendment Right to Effective Counsel and* Strickland v. Washington

Despite its grounding in the Sixth Amendment, the right to effective counsel is a relatively new facet of Supreme Court jurisprudence. Beginning with *Strickland*, the Supreme Court has provided broad but significant guidance for lower courts attempting to assess whether deficient performance of counsel has infringed upon defendants' constitutional rights. Ineffective assistance of counsel claims now span conduct far beyond the trial stage, posing difficult questions for evaluating courts.[16]

1. *The Development of the Right to Effective Counsel.* — The Sixth Amendment guarantees to the accused in criminal prosecutions the right "to have the Assistance of Counsel for his defence."[17] The precise meaning of this provision and its implications for defendants have shifted significantly from the earliest interpretations. Initially, this provision was viewed as primarily protecting the right of defendants to retain counsel of their choosing.[18] Over time, however, this clause has eventually been understood to protect other aspects of a broader right to counsel.

In *Powell v. Alabama*, the Supreme Court recognized a right for capital defendants, incapable of defending themselves or otherwise retaining counsel, to be appointed counsel by the court.[19] This right was later

---

15. 466 U.S. at 687 (setting forth the two-prong test under which a defendant must prove deficient performance of counsel and prejudice).

16. Claims of ineffective assistance of counsel create thorny problems in areas such as pretrial discovery and, as addressed in this Note, the pleading stage. See infra sections I.B–.C; see also Robert R. Rigg, The T-Rex Without Teeth: Evolving *Strickland v. Washington* and the Test for Ineffective Assistance of Counsel, 35 Pepp. L. Rev. 77, 104–05 (2007) (arguing that increased scrutiny of alleged failures to investigate during discovery was driven by the use of professional standards as "evaluative tool[s] rather than mere 'guidelines'"); 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, 1109–21 (2004) (comparing over time the Supreme Court's treatment of IAC claims for failure to investigate and arguing that more exacting standards have been driven by shifting professional norms).

17. U.S. Const. amend. VI.

18. See, e.g., Andersen v. Treat, 172 U.S. 24, 29 (1898) (describing the petitioner as contending that "he was denied the 'assistance of counsel for his defense,' that is, the assistance of counsel of his own selection").

19. 287 U.S. 45, 71 (1932) ("[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense . . . it is the duty of

broadened by the Court to apply generally to federal defendants in *Johnson v. Zerbst*,[20] and then to state felony proceedings in the landmark case of *Gideon v. Wainwright*.[21]

These cases, however, focused on the presence of counsel rather than addressing the adequacy of counsel's performance. In *Strickland v. Washington*, the Court addressed for the first time the standard of effectiveness that must be met for a defendant to have received constitutionally adequate counsel.[22] The Court emphasized the critical importance of counsel in leveling the playing field for criminal defendants, noting that "[t]he right to counsel plays a crucial role in the adversarial system . . . since access to counsel's skill and knowledge is necessary to accord defendants the ' . . . opportunity to meet the case of the prosecution' to which they are entitled," and thus that "[t]he Sixth Amendment . . . envisions counsel[] playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to . . . an attorney . . . who plays the role necessary to ensure that the trial is fair."[23] The Court centered the resulting standard on what it saw as the purpose of the Sixth Amendment: confidence in a just result.[24]

Having underscored the importance of effective counsel to just criminal proceedings, the Court laid out a two-prong test for claims of ineffective assistance of counsel. A defendant must first show that counsel's performance was deficient, using a "proper measure of . . . reasonableness under prevailing professional norms."[25] The Court cautioned against an overly strict retrospective assessment of counsel's performance, urging

---

the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . . .").

20. 304 U.S. 458, 462–63 (1938) ("The Sixth Amendment . . . [recognizes] that the average defendant does not have the professional legal skill to protect himself . . . [and] withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." (citation omitted)).

21. 372 U.S. 335, 344 (1963) ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.").

22. 466 U.S. 668, 683 (1984) ("The petition presents a type of Sixth Amendment claim that this Court has not previously considered in any generality . . . . [T]he Court has never directly and fully addressed a claim of 'actual ineffectiveness' of counsel's assistance . . . .").

23. Id. at 685 (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 275 (1942)); see also McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("[T]he right to counsel is the right to the effective assistance of counsel.").

24. *Strickland*, 466 U.S. at 686 ("[W]e must take its purpose—to ensure a fair trial—as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."). The Court made clear its view that a "fair trial" was "one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." Id. at 685. The Court aimed, then, to ensure that counsel was adequate to provide such adversarial testing.

25. Id. at 688.

instead "highly deferential" scrutiny in order to avoid "the distorting effects of hindsight."[26] The Court placed the burden on defendants to prove deficiency of counsel, holding that "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."[27]

Second, the Court held that "deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."[28] Outside of special circumstances (such as a conflict of interest[29]), defendants must affirmatively prove prejudice by demonstrating that ineffectiveness "actually had an adverse effect on the defense."[30] Such an adverse effect must be sufficient to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[31] In opting for a standard of reasonable probability, the Court explicitly rejected an "outcome-determinative" standard that would have "impose[d] a heavier burden on defendants."[32]

The Court also left lower courts substantial leeway in deciding claims of ineffective assistance of counsel.[33] Above all, the Court urged that the "ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged," rather than an application

---

26. Id. at 689.

27. Id. at 690.

28. Id. at 692. The prejudice requirement was justified as the best way to ensure a fair trial, defined as one with a reliable result. Id. at 687 ("[T]he defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.").

29. See Cuyler v. Sullivan, 446 U.S. 335, 349–50 (1980) (holding that a defendant with potentially conflicted counsel must show that their counsel's alleged conflict "*actually affected* the adequacy of [their] representation" (emphasis added)); infra note 37 (describing the presumption of prejudice recognized in a limited set of circumstances).

30. *Strickland*, 466 U.S. at 693.

31. Id. at 694.

32. Id. at 693–94, 697. The Court, however, also seemingly rejected an approach based on fundamental fairness, noting instead that the Sixth Amendment serves only to ensure a "fair trial," defined earlier in the opinion as one with a reliable verdict. See id. at 689 ("[T]he purpose of the effective assistance guarantee . . . is not to improve the quality of legal representation . . . . The purpose is simply to ensure that criminal defendants receive a fair trial."); see also supra notes 24, 28. Despite this explicit disavowal of an outcome-determinative test, many courts and commentators still describe *Strickland*'s prejudice prong as such. See, e.g., Michael T. Fisher, Note, Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line, 88 Colum. L. Rev. 1298, 1306 (1988) ("Courts were quick to see that the outcome-determinative prong of the *Strickland* standard for testing ineffective assistance of counsel could conveniently be applied . . . ."); see also Kristin Traicoff, Article, Closing Two Doors: How Courts Misunderstand Prejudice Under *Olano* and *Strickland*, Crim. Just., Winter 2007, at 24, 25–26 (explaining the "troubling" way that some courts conflate *Strickland*'s IAC prejudice standard with an outcome-determinative plain error prejudice standard).

33. *Strickland*, 466 U.S. at 688–89 ("More specific guidelines are not appropriate.").

of "mechanical rules."[34] The Court also noted that courts denying a defendant relief need not determine whether each prong had not been met if they could more easily find that any one prong had not been met.[35]

*2. Ineffective Assistance of Counsel Claims Post-*Strickland.[36] — *Strickland*'s test remains the controlling standard for ineffective assistance of counsel.[37] In the decades since *Strickland*, commentators have argued that the strict nature of its test has resulted in a dearth of successful IAC claims.[38] Some criticism has focused in particular on the ways in which the prejudice prong's high bar might result in no relief even in the face of striking attorney incompetence.[39] Such concerns channel Justice Marshall's

34. Id. at 696. Importantly, however, one must remember that the Court defined fairness by the reliability of the verdict. See supra notes 24, 28.

35. *Strickland*, 466 U.S. at 697.

36. This Note uses the name of the defendant in reference to full case names, rather than the warden or state official (who will likely appear in many more cases). But for cases with well-established short forms referencing the state official, such as *Strickland* or *Lafler*, this Note defers to the established usage.

37. On the same day that it decided *Strickland*, the Supreme Court also held in *United States v. Cronic* that when counsel is denied entirely at critical stages of trial, or provided but under conditions so inimical to performance of counsel that adversarial testing of the prosecution's case is impossible, prejudice can instead be presumed rather than proven through discussion of specific acts. 466 U.S. 648, 662 (1984) ("[O]nly when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial."). But cases decided on the basis of the per se prejudice standard are rare, and many involve extreme circumstances such as defense counsel sleeping during trial. See, e.g., United States v. Ragin, 820 F.3d 609, 619 (4th Cir. 2016) (finding per se prejudice when counsel slept through a significant portion of trial); Burdine v. Johnson, 262 F.3d 336, 349 (5th Cir. 2001) (same); Tippins v. Walker, 77 F.3d 682, 690 (2d Cir. 1996) (same).

38. See, e.g., Stephen F. Smith, Taking *Strickland* Claims Seriously, 93 Marq. L. Rev. 515, 526 (2009) ("In light of *Strickland*, it comes as no surprise that successful ineffectiveness claims were rare, in capital and noncapital cases alike, over the ensuing decades."); see also Stephanos Bibas, The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel, 2004 Utah L. Rev. 1, 1 [hereinafter Bibas, Psychology of Hindsight] ("Courts rarely reverse convictions for ineffective assistance of counsel, even if the defendant's lawyer was asleep, drunk, unprepared, or unknowledgeable." (citing Marc L. Miller, Wise Masters, 51 Stan. L. Rev. 1751, 1786–87 & nn.165–170 (1999) (reviewing Malcolm M. Feeley & Edward L. Rubin, Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons (1998)))).

39. See, e.g., Richard L. Gabriel, The *Strickland* Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process, 134 U. Pa. L. Rev. 1259, 1271 (1986) ("[T]he difficult burden of proving prejudice that the Court in *Strickland v. Washington* places on the defendant allows a court to sweep attorney incompetence under the rug of a conviction that was affirmed because a defendant could not prove prejudice."); Jeffrey L. Kirchmeier, Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the *Strickland* Prejudice Requirement, 75 Neb. L. Rev. 425, 439 (1996) ("[T]he prejudice test adopted by the Court in *Strickland* placed substantial emphasis on whether the defendant was factually culpable and insufficient emphasis on whether the defendant received a fair trial and was legally guilty." (citing Martin C. Calhoun, Note, How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims, 77 Geo. L.J. 413, 428–29 (1988))); see also supra notes 24, 28, 32.

dissent in *Strickland*, in which he criticized the majority's prejudice standard as overly focused on reliability of convictions instead of ensuring "fundamentally fair procedures."[40] To Marshall, the right to effective assistance of counsel represented a constitutional right "so basic to a fair trial that . . . infraction can never be treated as harmless error."[41] Rather than focusing on reliability, then, Marshall advocated for a fairness-centric approach to ensuring effective counsel.

As IAC claims unfolded post-*Strickland*, commentators disputed whether *Strickland*'s protections should be directed at ensuring the reliability of convictions or instead toward basic fairness and due process.[42] Guidance from the Court following *Strickland* was mixed, with some cases suggesting the right to effective counsel served to protect a broader procedural fairness and yet another set of cases describing a narrower protection aimed at ensuring reliable trials.[43] Prior to *Frye* and *Lafler*, the underlying purpose of the right to effective counsel was up for debate.

B. *Ineffective Assistance of Counsel Claims in the Pleading Context*

1. Hill v. Lockhart. — Only a year after *Strickland*, the Court addressed the claim of a defendant seeking to vacate a guilty plea due to ineffective assistance of counsel in *Hill v. Lockhart*.[44] The Court held that *Strickland*'s "same two-part standard . . . [is] applicable to ineffective-assistance claims arising out of the plea process."[45] In the context of challenged guilty pleas, *Strickland*'s prejudice requirement asks a defendant to "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty."[46] The Court held that, in many cases, the inquiry would "closely resemble the inquiry engaged in by courts reviewing . . . convictions obtained through a trial," thus mirroring *Strickland*'s usual application in the trial context.[47]

---

40. *Strickland*, 466 U.S. at 711 (Marshall, J., dissenting) ("The majority contends that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney. I cannot agree.").

41. Id. at 711–12 (internal quotation marks omitted) (quoting Chapman v. California, 386 U.S. 18, 23 (1967)).

42. See Justin F. Marceau, Embracing a New Era of Ineffective Assistance of Counsel, 14 U. Pa. J. Const. L. 1161, 1171 (2012) ("[O]ver the years the right to counsel cases have exhibited . . . a duality, at times embracing a robust approach to fairness . . . and at other times announcing a rigidly trial-centered approach to the right that focuses on accuracy and the fairness of the trial itself.").

43. See id. at 1173–82 (exploring a line of Supreme Court decisions that "support[] the view that the right to counsel serves goals beyond safeguarding against trial unfairness or verdict unreliability"); id. at 1183–91 (outlining a line of cases that revolved instead around "a trial-centered conception of the right to counsel").

44. 474 U.S. 52, 53 (1985).

45. Id. at 57.

46. Id. at 59.

47. Id.

For the Court, the error of counsel in *Hill* was insufficient to fulfill *Strickland*'s prejudice prong because the defendant did not allege that, had he received proper advice of counsel, he would not have pleaded guilty and would instead have proceeded to trial.[48] The petitioner put forth "no special circumstances" that might show that he "placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty."[49] As a result, the petitioner "failed to allege the kind of 'prejudice' necessary to satisfy the second half of the *Strickland v. Washington* test."[50] The Court thus extended *Strickland*'s potential protections (as well as its burdens) into the pleading stage but did not find the defendant in *Hill* deserving of relief.

2. Padilla v. Kentucky. — In 2010, the Court further extended *Strickland* into the pleading stage in *Padilla v. Kentucky*.[51] The defendant, Jose Padilla, pleaded guilty to a charge of transporting marijuana under the alleged impression (provided by his counsel) that such a plea would not incur immigration consequences.[52] The Supreme Court of Kentucky held that the Sixth Amendment did not offer Padilla relief because deportation was only a collateral consequence of his conviction.[53] The U.S. Supreme Court overturned the decision, recognizing the "unique nature of deportation" as a particularly severe consequence.[54]

In *Padilla*, the Court reaffirmed the importance of counsel during the pleading stage, holding 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."[55] The Court's recognition of the importance of the pleading stage in *Padilla* meant embracing a broader conception of the right to counsel. Instead of ensuring the accuracy of a guilt/innocence determination, the Court sought to "ensure that no criminal defendant—whether a citizen or not—is left to the 'mercies of incompetent counsel.'"[56] While the Court did not address the question of prejudice in

---

48. Id. at 60 ("[I]n the present case we conclude that petitioner's allegations are insufficient to satisfy the *Strickland v. Washington* requirement of 'prejudice.' Petitioner did not allege . . . that, had counsel correctly informed him . . . he would have pleaded not guilty . . . .").

49. Id.

50. Id.

51. 559 U.S. 356 (2010).

52. Id. at 359.

53. Id. at 359–60.

54. Id. at 365–66 ("We have long recognized that deportation is a particularly severe 'penalty' . . . intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation . . . [a]nd, importantly, recent changes . . . have made removal nearly an automatic result for a broad class of . . . offenders." (citations omitted) (quoting Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893))).

55. Id. at 373.

56. Id. at 374 (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

Padilla's case, it affirmed the notion that the right to effective counsel promised more than effective counsel at trial proceedings alone.[57]

C. Lafler, Frye, *and Ineffective Assistance of Counsel for Lapsed and Rejected Plea Offers*

In 2012, the Court addressed IAC claims in the context of forgone plea agreements in *Missouri v. Frye*[58] and *Lafler v. Cooper*.[59] Both cases involved defendants who claimed that ineffective counsel led them to forgo offered plea deals.[60] In both cases, the Court held that the right to effective counsel protected defendants in situations in which prejudice manifested through a failure to obtain an offered plea bargain, even where the convictions and sentences being challenged arose through fair proceedings (i.e., fair trial proceedings, as in *Lafler*, or a subsequent valid guilty plea, as in *Frye*).[61]

In *Lafler*, the defendant, Anthony Cooper, rejected an offered plea agreement after his attorney allegedly convinced him that, because the purported victim had been shot below the waist, the government could not prove intent to murder.[62] Cooper, having rejected an offer for a dismissal of two out of the four total charges and a recommended sentence of roughly four to seven years, went to trial instead and was convicted on all four counts and sentenced to between fifteen and thirty years.[63] The Michigan courts rejected Cooper's IAC claim, holding his rejection of the

---

57. See id. at 369 (leaving the question of prejudice for the Kentucky courts to answer in the first instance). The Court subsequently held that, even absent a viable defense, a defendant could be prejudiced by forgoing the option to go to trial based on erroneous immigration advice. See Lee v. United States, 137 S. Ct. 1958, 1966–67 (2017) (noting that the subjective nature of motivations to plead guilty or proceed to trial might lead to decisions based on more than simply minimizing time of imprisonment).

58. 566 U.S. 134 (2012).

59. 566 U.S. 156 (2012).

60. Id. at 160, 163–64 ("In contrast to *Hill*, here the ineffective advice led not to an offer's acceptance but to its rejection. Having to stand trial, not choosing to waive it, is the prejudice alleged."); *Frye*, 566 U.S. at 138–39 ("This case arises in the context of claimed ineffective assistance that led to the lapse of a prosecution offer . . . that offered terms more lenient than the terms of the guilty plea entered later.").

61. *Lafler*, 566 U.S. at 169 ("[H]ere the question is not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it . . . . [A] reliable trial [may] not foreclose relief when counsel has failed to assert rights that may have altered the outcome."); *Frye*, 566 U.S. at 144 ("In order that these benefits [of plea bargaining] can be realized, however, criminal defendants require effective counsel during plea negotiations. 'Anything less . . . might deny a defendant "effective representation by counsel at the only stage when legal aid and advice would help him."'" (quoting Massiah v. United States, 377 U.S. 201, 204 (1964))).

62. *Lafler*, 566 U.S. at 161; Cooper v. Lafler, No. 06–11068, 2009 WL 817712, at *3 (E.D. Mich. Mar. 26, 2009).

63. *Lafler*, 566 U.S. at 161.

offer to be knowing and intelligent. Cooper then filed for federal habeas relief.[64]

The Supreme Court held that Cooper satisfied both parts of *Strickland*'s test.[65] Before the Court, both parties agreed that the performance of Cooper's counsel was deficient.[66] As a result, the Court's focus was squarely on *Strickland*'s prejudice test within the novel context of forgone plea agreements.

The Court rejected the government's contention that "[a] fair trial wipes clean any deficient performance . . . during plea bargaining," instead noting that in this context, the aim must be to ensure not the accuracy of the trial verdict but instead the fairness of the pretrial proceedings.[67] The Court held that the prevalence of plea bargains in today's criminal justice system meant that "the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences."[68] Finding that Cooper satisfied the prejudice prong, the Court held that a defendant forgoing an offered plea agreement "may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence."[69]

The Court held that, in situations where defendants alleging a forgone plea agreement satisfied both prongs of *Strickland*'s test, trial courts should be afforded broad discretion in shaping a remedy.[70] The Court laid out two considerations that, along with the general discretion offered to trial courts, could permissibly shape remedies: First, courts could take into account a defendant's earlier willingness (or unwillingness) to accept responsibility.[71] Second, courts need not ignore information concerning the crime that was discovered after the plea offer was made.[72]

In *Frye*, the defendant alleged that deficient performance of counsel led him to forgo a plea offer with terms better than those of the guilty plea

---

64. Id. at 161–62.

65. Id. at 174.

66. Id.

67. Id. at 169–70 ("The goal of a just result is not divorced from the reliability of a conviction; but here the question is not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it, which caused the defendant to lose benefits . . . ." (citation omitted) (citing United States v. Cronic, 466 U.S. 648, 658 (1984))).

68. Id. at 170.

69. Id. at 166.

70. Id. at 170–71 ("In some cases, the sole advantage a defendant would have received under the plea is a lesser sentence . . . . [T]he court may exercise discretion in determining whether the defendant should receive the term . . . offered in the plea, the sentence he received at trial, or something in between."); id. at 171–72 ("In implementing a remedy . . . the trial court must weigh various factors; and the boundaries of proper discretion need not be defined here. Principles elaborated over time in decisions of state and federal courts, and in statutes and rules, will serve to give more complete guidance . . . .").

71. Id.

72. Id.

he eventually made.[73] The government charged Galin Frye with driving with a revoked license and offered him plea agreements with recommended sentences of ten days and ninety days, but Frye's counsel never conveyed either offer to him.[74] Prior to his preliminary hearing, Frye was arrested again for driving with a revoked license and ended up pleading guilty with no underlying plea agreement.[75] Following this plea, the court sentenced Frye to three years in prison.[76]

The Court emphasized that *Frye* presented a different legal question than *Hill* and *Padilla* had, because "[i]n the instant case . . . the challenge is not to the advice pertaining to the plea that was accepted but rather to the course of legal representation that preceded it with respect to other potential pleas and offers."[77] Acknowledging the State of Missouri's concerns that such claims would be difficult to adjudicate and unfair to states, the Court nonetheless found consideration of relief necessary given the predominant role that guilty pleas play in the modern criminal justice system.[78]

After finding that nonconveyance of an offer constituted deficient performance under *Strickland*, the Court turned to *Strickland*'s prejudice prong. Within this context, the Court interpreted the prejudice prong to require a showing that the defendant "would have accepted the offer to plead pursuant to the terms earlier proposed."[79] In addition, the Court held that defendants must also show a reasonable probability that "neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented."[80] The Court remanded the case to the lower courts due to a finding that "there is strong reason to doubt the prosecution and the trial court would have permitted the plea bargain to become final" in light of Frye's intervening charge.[81]

Contemporaneous scholarship highlighted how the decisions expanded the scope of potential relief for defendants into previously uncharted territory.[82] In particular, the description of prejudice in *Frye* appears to

---

73. Missouri v. Frye, 566 U.S. 134, 138–39 (2012).

74. Id.

75. Id. at 139.

76. Id.

77. Id. at 141–42.

78. See id. at 143 ("[T]he prosecution has little or no notice if something may be amiss and perhaps no capacity to intervene . . . . [Y]et [the State's contentions] do not suffice to overcome a simple reality. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."); see also supra notes 1–8 and accompanying text.

79. *Frye*, 566 U.S. at 148.

80. Id.

81. Id. at 149–50.

82. See, e.g., Russell D. Covey, Plea-Bargaining Law After *Lafler* and *Frye*, 51 Duq. L. Rev. 595, 597 (2013) ("The Court's frank recognition of the central role of plea bargaining in the criminal justice system, and the accompanying need to establish constitutional baselines to regulate it, suggest a potential jurisprudential turning point."); Richard E.

suggest that (at least within the pretrial context) any additional length of time in prison might be enough to satisfy the prejudice prong, instead of requiring a showing that the defendant might have avoided conviction.[83] Some scholars expressed skepticism that the courts would actually follow through on this expansive interpretation of *Strickland*'s prejudice prong, given the potential for massively increased caseloads and long-running concern for the finality of convictions.[84] Other scholars took objection to the possibility that, despite findings of deficient performance and prejudice, the discretion afforded to courts in the remedy stage meant a defendant might possibly still be offered no functional relief.[85]

II. DECIDING THE COUNTERFACTUAL: APPROACHES TO THE PREJUDICE PRONG IN *FRYE* AND *LAFLER*

This Part examines the application of *Strickland*'s prejudice prong to forgone guilty pleas in *Frye* and *Lafler* and explores how state courts have attempted to follow the sparse guidance offered by the two decisions. This Part is divided into three sections. The first section looks to the *Frye* and *Lafler* majorities' treatment of the prejudice question and examines the language used to define the prong in this context. This section also discusses Justice Scalia's dissent in *Frye* and assesses its critique of the majority's approach to the prejudice prong as well as its predictions about the difficulty the Court's proposed approach would face in practice.

Myers II, The Future of Effective Assistance of Counsel: Rereading *Cronic* and *Strickland* in Light of *Padilla*, *Frye*, and *Lafler*, 45 Tex. Tech L. Rev. 229, 230 (2012) (arguing that the decisions "squarely place the courts in the business of regulating the attorney-client advising relationship"); id. at 238–40 (noting concerns by prosecutors that defense attorneys would intentionally seed the record with poor counsel to seek relief). But see Darryl K. Brown, *Lafler*, *Frye* and Our Still-Unregulated Plea Bargaining System, 25 Fed. Sent'g Rep. 131, 133 (2012) ("*Lafler* and *Frye* add only that defendants must have minimally competent attorneys in this unregulated market for criminal judgments . . . . [L]ittle more is required for competence than informing a defendant of a plea offer and not providing misadvice . . . .").

83. See Myers, supra note 82, at 241–42; cf. Marceau, supra note 42, at 1173–82.

84. See Myers, supra note 82, at 242 ("The alternative, and more likely, outcome . . . is maintaining a high prejudice standard, which will allow courts to set performance standards in what are essentially dicta while denying defendants relief."). The *Frye* and *Lafler* decisions also fueled a larger debate about whether or not, even given the increasing importance of the pleading stage to criminal adjudications, more significant reforms should be taken to overhaul the plea-bargaining system. See, e.g., Cynthia Alkon, The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of *Lafler* and *Frye*, 41 Hastings Const. L.Q. 561, 564–65, 620–21 (2014) ("*Lafler* and *Frye* represent a step forward . . . . However, this recognition seems unlikely . . . to cause the Court to look at the serious structural issues that call into question the fundamental fairness of plea bargaining.").

85. See Albert W. Alschuler, *Lafler* and *Frye*: Two Small Band-Aids for a Festering Wound, 51 Duq. L. Rev. 673, 675–76 (2013) ("The . . . thing that astonishes me about *Lafler* and *Frye* is that the . . . five justices[,] . . . [w]hile acknowledging that your constitutional rights were violated, . . . would allow the judge who tried and sentenced you to do nothing about it.").

The second section isolates two distinct theoretical approaches to the Court's version of the prejudice test. A "presumption" approach infers from an offer itself that, under normal circumstances, a prosecutor would not revoke an offered agreement nor would a court typically reject an accepted agreement. By contrast, under a "burden" approach, defendants must meet the burden of making an affirmative showing of "reasonable probability" that the court would have accepted the offered plea and that the prosecutor would not have revoked it rather than relying on any inference.

The third section examines the approaches employed in two state jurisdictions—Georgia and Florida—with relatively developed bodies of case law and attempts, where possible, to identify one of the two aforementioned approaches in the analyses used.

A. Frye *and* Lafler*'s Counterfactual Prejudice Prong*

In *Frye* and *Lafler*, the Court identified a three-part test for assessing prejudice at the pleading stage. The first question paralleled the existing question posed by *Hill v. Lockhart*: How would the defendant have acted with effective counsel? In the pleading context, this requires a showing by the defendant that he would have accepted the offer in question.[86] But the subsequent two questions, asking first if the prosecution would have maintained an offered plea agreement and then if a court would have accepted the offered terms, presented novel counterfactual inquiries into the potential actions of the prosecution and the trial court.[87]

In *Lafler*, the Court decided how to apply *Strickland*'s prejudice test where ineffective assistance led to rejection of a plea offer and the defendant was convicted at the resulting trial.[88] The Court rejected the Solicitor General's argument that no prejudice sufficient to satisfy *Strickland* could exist when a defendant was subsequently convicted at a fair trial.[89] Instead, the Court held that a defendant, denied effective counsel while considering an offered plea agreement, can show prejudice "if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence."[90]

In *Frye*, the Court looked instead at a situation in which a defendant rejected better terms before later pleading guilty and found that the circumstances offered "strong reason to doubt the prosecution and the trial court would have permitted the plea bargain to become final."[91] Noting that a prosecutor can withdraw an accepted plea in Missouri, the Court held that "given Frye's new offense for driving without a license . . . [,]

86. *Frye*, 566 U.S. at 148.
87. Id.
88. Lafler v. Cooper, 566 U.S. 156, 163 (2012).
89. Id. at 164.
90. Id. at 168.
91. *Frye*, 566 U.S. at 150.

there is reason to doubt that the prosecution would have adhered to the agreement or that the trial court would have accepted it . . . ."[92] The Court remanded these questions back down to the Missouri courts to decide in the first instance.[93]

In his dissent in *Frye*, Justice Scalia noted what he saw as the underlying accuracy and fairness of the proceedings that led to Mr. Frye's conviction and focused particular attention on the challenges that the Court's instructions on prejudice left behind.[94] He decried the Court's test as "a process of retrospective crystal-ball gazing posing as legal analysis" that demonstrated "how unwise it is to constitutionalize the plea-bargaining process."[95] He concentrated criticism on the two new questions, wherein courts "must estimate whether the prosecution *would have withdrawn the plea offer*[,] [a]nd . . . estimate whether the trial court *would have approved* the plea agreement. These last two estimations may seem easy in the present case . . . but they assuredly will not be easy in the mine run of cases."[96]

Justice Scalia then pushed back on the majority's assumption that "in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains" in a way that might easily answer these questions.[97] Instead, he argued, "[v]irtually no cases deal with the standards for a prosecutor's withdrawal from a plea agreement beyond stating the general rule that a prosecutor may withdraw any time prior to, but not after, the entry of a guilty plea" and "cases addressing trial courts' authority to accept or reject plea agreements almost universally observe that a trial court enjoys broad discretion."[98]

As a result, in Justice Scalia's view, the majority's "*assumption* would better be cast as an optimistic *prediction* of the certainty that will emerge, many years hence, from our newly created constitutional field of plea-bargaining law."[99] Even after the development of more substantial standards, significant discretion would remain and thus "make a defendant's constitutional rights depend upon a series of retrospective mind-readings as to how that discretion, in prosecutors and trial judges, *would have been* exercised."[100]

---

92. Id. at 151.

93. Id.

94. See id. at 152–53 (Scalia, J., dissenting) ("Here it can be said not only that the process was fair, but that the defendant acknowledged the correctness of his conviction. Thus . . . this is an *a fortiori* case . . . . The Court acknowledges . . . that Frye's conviction was untainted by attorney error . . . .").

95. Id. at 154.

96. Id.

97. Id. at 149.

98. Id. at 154 (citing United States v. Kuchinski, 469 F.3d 853, 857–58 (9th Cir. 2006); State v. Banks, 135 S.W.3d 497, 500 (Mo. Ct. App. 2004)).

99. Id. at 155.

100. Id.

This Note will attempt to assess the merits of Justice Scalia's criticism of these counterfactual questions. In particular, one must examine whether the Court's so-called prediction has borne out, and if so, how the approach reached by courts has vindicated (or failed to vindicate) the Court's attempt to protect a defendant's right to effective counsel at the pleading stage.

B. *Presumption or Burden? Approaching the Counterfactual Challenge*

The Court's decisions in *Frye* and *Lafler* left significant uncertainty in their wake. The Court defined two new counterfactual questions to be used in the prejudice prong for forgone pleas: first, whether a prosecutor would have revoked an offered and accepted plea prior to entry, and second, whether a trial court would have approved an accepted and entered plea.[101] In asking these new questions, however, the Court left sparse guidance for courts below on how to actually answer these questions. After describing the range of different state rules that might play into answering such questions, the Court noted in *Frye* that "[i]t can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains . . . . [I]t should not be difficult to make an objective assessment as to whether or not a particular fact . . . would suffice . . . to cause prosecutorial withdrawal or judicial nonapproval . . . ."[102] According to the Court, the determination of a "reasonable probability that the outcome of the proceeding would have been different absent counsel's errors" should proceed through this framework.[103]

This language is worth unpacking. One reading of the Court's language suggests that the Court's approach might find most offered pleas to be acceptable to the court and the prosecutor. The Court begins by noting that actors in jurisdictions are likely to understand "the boundaries of acceptable plea bargains."[104] Moreover, the Court's outline of the inquiry, searching for facts that would "suffice . . . to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain," appears to imply a starting point of prosecutorial and judicial acceptance.[105] The Court also framed its analysis of the case at hand by noting that, given the fact of

---

101. This Note describes these questions—asking about the actions of the prosecutor and the judge—as new, while the question of whether a defendant would have accepted a plea with proper counsel is more closely tied to *Hill*'s question of whether a defendant would have rejected a plea with proper counsel. See supra notes 44–50 and accompanying text.

102. *Frye*, 566 U.S. at 149–51.

103. Id. at 149.

104. Id.

105. Id. ("[I]n most instances it should not be difficult to make an objective assessment as to whether or not *a particular fact or intervening circumstance would suffice*, in the normal course, *to cause* prosecutorial withdrawal or judicial nonapproval of a plea bargain." (emphasis added)). But see Myers, supra note 82, at 242 (expressing skepticism that the Court would embrace such a broad interpretation of the prejudice prong).

Frye's intervening additional offense prior to the hearing at which the plea would have been accepted, "there is reason to doubt" that the prosecutor and trial court would have maintained the plea agreement.[106] Using this language, the Court seems to suggest that in the typical case, an absence of contrary facts might imply approval by a court and offering prosecutor.

The Court's language, however, can also be read as placing an affirmative evidentiary burden on the defendant. Foremost, the Court does so by placing new showings of the prejudice prong within the existing language of *Strickland*, stating that a defendant must show "a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented."[107] The Court even emphasized that such a showing was of "particular importance" because defendants have no right to be offered a plea agreement.[108] By choosing to situate the new counterfactual questions within the existing *Strickland* and *Hill* contexts in which defendants must bear the affirmative evidentiary burden, the Court arguably implied that defendants would be required to bear a similar burden in these novel contexts as well.[109]

The two approaches represent two fundamentally distinct ways to interpret the guidance offered by the Court for these new counterfactual questions. The "presumption" approach recognizes that, as a general rule, most offered plea agreements that are accepted by defendants are also maintained by prosecutors (who are themselves interested in securing guilty pleas) and accepted by trial courts. As a result, it offers a presumption to defendants that would support a finding for relief (on a silent record with respect to the two novel prejudice questions) even absent concrete evidence. The "burden" approach, by contrast, would situate the language of *Frye* within the line of traditional doctrine from *Strickland* to *Hill* and demand the presentation of actual affirmative evidence before granting any relief.

These approaches can also be applied to the question that existed pre-*Lafler* and *Frye*: namely, whether the defendant seeking to vacate a guilty plea would *not* have pleaded guilty if provided adequate counsel and would have instead proceeded to trial. Many courts continue to approach this question of the defendant's hypothetical behavior using the traditional burden approach established in *Hill*. But the novel questions in *Frye* and *Lafler* pose greater difficulty for courts (as well as defendants seeking evidence) by asking how the court and prosecutor would have acted.[110]

---

106. See *Frye*, 566 U.S. at 151; see also supra notes 91–93 and accompanying text.

107. *Frye*, 566 U.S. at 148.

108. Id.

109. Id. ("This application of *Strickland* to the instances of an uncommunicated, lapsed plea does nothing to alter the standard laid out in *Hill* . . . [in which] the defendant will have to show 'a reasonable probability that, but for counsel's errors, he would not have pleaded guilty . . . .'" (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985))).

110. See infra Part III and notes 198–199.

C. *State Approaches*

In order to understand the consequences of the Court's guidance in *Frye* and *Lafler*, this Note considers the resulting case law as developed in state courts. The primary reason for this choice is the overwhelming proportion of felony convictions that take place in state court systems. For example, according to the Bureau of Justice Statistics, only around six percent of felony convictions in 2006 took place in the federal court system, with the remaining convictions in state systems.[111] Moreover, under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), state court systems are offered significant deference during habeas review of convictions.[112] The types of IAC claims seen here will generally be assessed as part of habeas or other collateral review. AEDPA's added deference functionally grants state court systems greater latitude in interpreting the broad language of *Frye* and *Lafler*, and, subject to less scrutinizing review, such systems might therefore vary significantly in their interpretations.[113] This Note examines state decisions through the lens of the court systems of two states: Georgia and Florida.

It is worth noting a few methodological challenges posed by conducting this survey of state approaches. First, and most directly, it is difficult to access significant amounts of state trial-level records. As a result, this Note looks primarily to intermediate appellate courts, both for the analysis in their opinions and for the information that their opinions provide about trial-level opinions in the courts below. This risks a potential

---

111. Sean Rosenmerkel, Matthew Durose & Donald Farole, Jr., DOJ, Bureau of Just. Stat., Felony Sentences in State Courts, 2006—Statistical Tables 2 (2009), https://www.bjs.gov/content/pub/pdf/fssc06st.pdf [https://perma.cc/6RQU-ELGM] (last updated Nov. 22, 2010) ("State courts accounted for the vast majority of all felony sentences . . . during 2006 . . . . [F]ederal courts sentenced about . . . 6% of the combined state and federal total.").

112. Pub. L. No. 104-132, 110 Stat. 1214, 1219 (1996) (codified as amended in scattered sections of 28 U.S.C.); see also 28 U.S.C. § 2254(d) (2018) (establishing a standard of review for federal courts reviewing state decisions in which relief should be granted only where said decision is "contrary to, or involved an unreasonable application of, clearly established Federal law" or involved an "unreasonable determination of the facts"); Larry Yackle, AEDPA Mea Culpa, 24 Fed. Sent'g Rep. 329, 332 (2012) (describing § 2254(d)(1) as "AEDPA's most important provision").

113. See Evan Tsen Lee, The Theories of Federal Habeas Corpus, 72 Wash U. L.Q. 151, 154 (1994) (describing a "deterrence theory" of federal habeas review in which readily available review "encourages greater effort by state judges to toe the constitutional line"); Adam N. Steinman, Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA's Standard of Review Operate After *Williams v. Taylor*?, 2001 Wis. L. Rev. 1493, 1518–20 (arguing that result-deference in federal habeas review under AEPDA might minimize state court incentives to conduct thorough analysis). But see Brecht v. Abrahamson, 507 U.S. 619, 636 (1993) ("[W]e discount petitioner's argument that courts will respond . . . by violating their Article VI duty to uphold the Constitution. Federalism, comity, and the constitutional obligation of state and federal courts all counsel against any presumption that a decision of this court will 'deter' lower federal or state courts." (citation omitted)).

selection bias in cases described—it is possible that many successful cases are resolved by decision or agreement at the trial level and never reach the intermediate courts that constitute the major source of data for this Note. This risk is further compounded by an inability to access trial-level records to confirm or deny, in detail, the similarity or disparity in the composition of cases across different state systems.

Second, the process of searching for state cases risks a selection bias in terms of the state systems examined. Multiple factors suggest that the number of available cases both decided in the state (appellate) courts and turning on the novel prejudice questions[114] might be relatively low: the relative recency of the Court's decisions in *Frye* and *Lafler*; the slow path that such cases might take to reach the appellate courts and complete review; and the strict nature of *Strickland*'s test for deficient performance, through which many courts might more easily dispense with a case.[115] The main criterion used to select state systems for study was the volume of pertinent cases available. As a result, the selected systems might skew toward states with larger criminal caseloads, even when adjusting for total population.[116] In turn, state systems with higher rates of criminal conviction might share other attributes that could skew the approach of state judges or the types of cases brought and thus examined.[117]

---

114. By "novel prejudice questions," this Note refers to the questions about the acts of the court and the prosecution, rather than the hypothetical acts of the defendant. See supra notes 101–103 and accompanying text.

115. See supra notes 25–27 and accompanying text; see also William S. Geimer, A Decade of *Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel, 4 Wm. & Mary Bill Rts. J. 91, 114–22 (1995) (criticizing the performance prong of *Strickland* as overly burdensome and unfounded in its assumptions). Recall that a court can avoid analyzing the complicated prejudice prong in such situations if it can find that the deficient performance prong is not met. See supra note 35 and accompanying text.

116. Some evidence suggests that the selected states represent state court systems with higher rates of felony conviction when controlling for population. See generally Sarah K.S. Shannon, Christopher Uggen, Jason Schnittker, Melissa Thompson, Sara Wakefield & Michael Massoglia, The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010, 54 Demography 1795 Online Res. 1, tbl.S9 (2017), https://static-content.springer.com/esm/art%3A10.1007%2Fs13524-017-0611-1/MediaObjects/13524_2017_611_MOESM1_ESM.pdf [https://perma.cc/A2J5-8BGX] (estimating that Georgia and Florida have the highest percentage population of persons convicted of felonies).

117. Factors such as ideology and demographics may shape both state policies that lead to increased incarceration and the reasoning or approaches taken by the average judge within a state system. For further discussion of the potential connection between ideology and criminal sentencing, see, e.g., Garrick L. Percival, Ideology, Diversity, and Imprisonment: Considering the Influence of Local Politics on Racial and Ethnic Minority Incarceration Rates, 91 Soc. Sci. Q. 1063, 1064 (2010) (examining a range of studies and finding that "there is clear evidence that political forces cause states to incarcerate at widely different rates" and that "researchers have demonstrated a relationship between ideological conservatism and governments' rate[s] of incarceration"). See generally David A. Bowers & Jerold L. Waltman, Do More Conservative States Impose Harsher Felony Sentences? An Exploratory Analysis of 32 States, 18 Crim. Just. Rev. 61 (1993) (finding that public ideology has a significant effect on sentencing of non-homicide violent offenders); David F.

These concerns notwithstanding, the limited scope of this Note's inquiry provides reason to look past some of the methodological risks. This Note's approach is not outcome-oriented, but instead approach-based. By focusing on the approaches taken by court systems and their similarities and differences, rather than examining the rate at which they grant relief, this Note aims to avoid significant selection bias problems and draw attention to the contrast between the different potential approaches available to and used by state courts.

1. *Georgia.* — Georgia's case law reveals a state court system that has adopted a presumption approach on the novel prejudice questions while maintaining existing doctrine on the question of the defendant's actions.

In *Gramiak v. Beasley*, the Georgia Supreme Court first directly applied *Lafler* and *Frye* to its existing IAC jurisprudence, finding that "*Lafler* added criteria to the prejudice analysis for rejected plea offers that this Court had set forth in [*Lloyd v. State*[118]] and [*Cleveland v. State*[119]]."[120] In *Lloyd* and *Cleveland*, the Georgia Supreme Court recognized ineffective assistance of counsel claims from defendants that had forgone plea agreements and held that a defendant need only prove that, but for counsel's errors, he would have accepted an offered plea agreement (despite the additional protections offered by fair trial).[121] *Beasley* centered on a claim by Isaac Beasley that, had he been properly advised that he faced a mandatory life sentence if convicted on one of the charges facing him, he would have accepted an offered plea agreement for a twenty-year sentence.[122] Instead of accepting the offer, Beasley proceeded to trial where he was convicted on four charges, receiving a life sentence and concurrent time.[123] After affirming the lower court's finding of deficient performance, the Georgia Supreme Court began by asking whether the plea in question would have been presented to the court (i.e., both whether Beasley would have accepted the plea and whether the prosecution would not have withdrawn the plea).[124]

The court brushed aside the possibility of withdrawal of the offer, finding that "the record reflect[ed] no intervening circumstances that might have prompted the State to withdraw its plea offer since the plea

---

Greenberg & Valerie West, State Prison Populations and Their Growth, 1971–1991, 39 Criminology 615 (2001) (assessing the impact of political conservatism on state imprisonment rates).

118. 373 S.E.2d 1 (Ga. 1988).

119. 674 S.E.2d 289 (Ga. 2009).

120. Gramiak v. Beasley, 820 S.E.2d 50, 57–58 (Ga. 2018).

121. *Cleveland*, 674 S.E.2d at 291–92 ("[T]he proper question at the prejudice step is whether Cleveland demonstrated that, but for counsel's deficient performance, there is a reasonable probability that he would have accepted the State's plea offer."); *Lloyd*, 373 S.E.2d at 3.

122. *Beasley*, 820 S.E.2d at 53.

123. Id.

124. Id. at 54–55.

hearing was held immediately prior to the trial's commencement."[125] Thus, the Georgia Supreme Court strongly suggested that a *lack* of reasons for withdrawal of an offer might sustain an inference that a prosecutor would not have withdrawn a plea.

The court was more exacting, however, in its analysis of Beasley's potential acceptance of the offer. Noting that "[n]o direct evidence was presented to the habeas court on this issue," the court held that "[a]rguments and representations made in court briefs . . . do not constitute record evidence to support a finding of fact."[126] The court cited its pre–*Frye* and *Lafler* decisions, *Lloyd* and *Cleveland*, and suggested that "contemporaneous evidence" might be necessary "to substantiate a defendant's post hoc assertion that he would not have pleaded guilty but for his attorney's deficiencies in adequately representing him at the plea stage."[127] The court did suggest, however, that "[t]he significant difference between the . . . punishment offered by the State versus the mandatory life sentence Beasley faced if convicted . . . serves as additional evidence that could support an inference . . . that Beasley would have accepted the plea offer."[128] Still, the court found such "scant evidence" insufficient to justify a finding in either direction on the question of whether Beasley would have rejected the offer with proper counsel, and remanded the case for a factual finding.[129]

Turning to the final question of whether a trial court would have accepted a plea, the court recognized that "[m]aking such a showing [that the court would have accepted the plea] may be difficult . . . because it requires a prediction about what the trial court would have done had the defendant accepted the plea offer."[130] The court emphasized that the trial court below had been informed of the terms of the offer made, and "did not indicate it would have accepted the recommended sentence if Beasley had entered a guilty plea, but also expressed no concern about the plea offer."[131] Moreover, the trial court initially sentenced the defendant to the same ten years that would have been recommended in the event of an accepted offer, before being advised that the conviction carried a mandatory life sentence.[132]

The Georgia Supreme Court found this degree of evidence made it "possible to conclude that the trial court would have accepted the offered guilty plea" and emphasized that, as with showings that a defendant would have accepted a plea offer, the necessary probability shown "needs only be

125. Id. at 55.
126. Id.
127. Id. at 55–56.
128. Id. at 56–57.
129. Id. at 57.
130. Id. at 58.
131. Id.
132. Id.

sufficient to undermine the confidence that the plea would not have been approved."[133] But the court nevertheless left to the habeas court the actual finding of whether there was a reasonable probability that the trial court would have accepted the plea and emphasized that if Beasley "cannot establish a reasonable likelihood that the trial court would have accepted the offered guilty plea, then . . . Beasley fails to demonstrate prejudice."[134] In *Beasley*, then, the court appeared to endorse inferences in favor of the defendant regarding the actions of the court and prosecutor, but maintained a particular need for concrete evidence with respect to whether a defendant would have pleaded guilty if presented with an offer.

In 2019, in *Yarn v. State*, the Georgia Supreme Court found that the defendant failed to show prejudice based on his trial counsel's failure to inform him of the sentencing consequences of rejecting a plea.[135] Relying on *Beasley*, the court rejected Deondray Yarn's attempts to argue that enough evidence, including the disparity in sentence length between plea and sentence at trial and the fact that Yarn's accomplices accepted plea agreements, supported an inference that he would have accepted the plea offer.[136] In particular, the court emphasized that Yarn had not "offered . . . direct evidence at the motion for new trial hearing that he would have accepted the plea offer . . . rather, he makes this assertion for the first time on appeal."[137] Thus, "[b]ecause there [was] no *record evidence* that Yarn would have accepted the plea offer had he been told the difference between consecutive and concurrent sentences," his claim failed.[138] The court did not address the questions of prosecutorial withdrawal or acceptance of the plea by the court, but underscored the need for affirmative evidence on the question of the defendant's actions.[139]

In *Jacobs v. State*, its most recent case addressing IAC in the pleading context, the Georgia Supreme Court denied relief to a defendant convicted of murdering her husband and claiming prejudice based on counsel's failure to convey a potential plea offer.[140] The court found that, whether or not the disputed plea offer actually existed, Jacobs could not demonstrate prejudice given her adamant insistence prior to trial that she was innocent and acting in self-defense.[141]

In sum, then, the Georgia Supreme Court's limited treatment of these questions suggests an approach that treats differently the counterfactual questions posed by asking if a defendant would have accepted and

133. Id.
134. Id.
135. 826 S.E.2d 1, 6 (Ga. 2019).
136. Id. at 7.
137. Id.
138. Id. (emphasis added).
139. See id.
140. 832 S.E.2d 363, 366–67 (Ga. 2019).
141. Id.

successfully entered a guilty plea. In *Beasley*, the court suggested that both the silence of the record and certain facts about the nature of the offer (for example, its temporal proximity to trial or its short sentence length in comparison to the sentencing exposure faced at trial) might support inferences in favor of the defendant that the court would have accepted a plea without prosecutorial withdrawal.[142] In *Beasley*, *Yarn*, and *Jacobs*, however, the court distinguished the question of whether a defendant would have pleaded guilty to an offered plea, explicitly asking for contemporaneous evidence showing a willingness to plead guilty at the time of the decision.[143] The Georgia Supreme Court, then, appears ready to accept regularity as a basis for inference in favor of defendants regarding institutions such as the court or the prosecutor, but has demanded a more searching inquiry and evidence regarding the defendant's own potential actions.

Georgia's intermediate appellate courts have followed the guidance of the state's supreme court in applying *Frye* and *Lafler*'s prejudice questions while demonstrating flexibility to adapt to the case at hand. In *Daniel v. State*, a panel of the Georgia Court of Appeals rejected a trial court's finding that a defendant would not have accepted an offered plea deal had he properly understood the sentencing implications at play.[144] Matthew Daniel's counsel failed to advise him that, as a recidivist, he would necessarily be ineligible for parole if convicted, and Daniel alleged that he would have accepted an offered plea agreement had he been provided competent counsel.[145] The Georgia Court of Appeals rejected the trial court's "circular logic" that Daniel's decision not to plead guilty in the face of trial counsel's advice suggested he would not have pleaded guilty with proper advice.[146] Noting that Daniel eventually offered to plead guilty to one of the charges, the court also held that "although Daniel thought he would win at trial, he did not understand the gravity of the risk of losing at trial . . . . [W]hen asked if he would have accepted the State's offer had he understood . . . Daniel responded, 'Yes, ma'am. I believe I would have.'"[147] The court held that this constituted a sufficient showing of amenability to the State's plea offer and remanded for findings on acceptance by the court and withdrawal by the prosecution.[148]

In *State v. Lexie*, the Georgia Court of Appeals upheld a decision granting relief to a defendant claiming that he had rejected a plea due to pressure from his unduly confident counsel.[149] After Raynard Lexie asked his lawyer how confident he should be that a jury would acquit him, Lexie's

142. See supra notes 130–134 and accompanying text.

143. See supra notes 126–129, 135–141 and accompanying text.

144. 803 S.E.2d 603, 608 (Ga. Ct. App. 2017).

145. Id. at 606.

146. Id. at 608.

147. Id.

148. Id.

149. 771 S.E.2d 97, 101 (Ga. Ct. App. 2015).

counsel told him that "if he lost the case, he would turn in his bar card."[150] Addressing the prejudice prong as established by *Frye*, the court held that sufficient objective evidence, including testimony from both Lexie and his counsel as well as a letter from Lexie on the date of the hearing, demonstrated that Lexie would have accepted the deal with effective counsel.[151] The Court of Appeals also upheld the trial court's ruling regarding acceptance of the plea by the trial court and adherence by the prosecutor, finding no clear error in a decision in which "the trial court found 'no reason evident from the record that the State's offer in this case would not [have] been acceptable . . .' and 'no indication that the State would not have adhered to the agreement.'"[152] The Court of Appeals emphasized that "the record lacks any evidence to indicate the State would not have gone through with its offer," and that the prosecutor's willingness to keep the plea offer open for a few days "support[ed] an inference that the State intended to follow through on its offer."[153] In granting relief, the Court of Appeals used the absence of evidence that either the trial court or prosecutor would have prevented entry of the plea, in combination with standard pleading procedures, to sustain a showing that the plea agreement would have been entered.

In *Walker v. State*, the Georgia Court of Appeals denied relief to a defendant claiming that he had rejected a plea bargain before fully understanding his sentencing exposure.[154] A year earlier, the same court had vacated and remanded Harden Walker's case for reconsideration of his IAC claim, finding "no support in the record" for the trial court's finding that Walker had rejected the twenty-year plea agreement even after learning he faced a life sentence.[155] On remand, the trial court again denied Walker relief and he appealed.[156] The Court of Appeals deferred to the trial court's factual finding that Walker had not established a likelihood that he would have taken the plea, noting that Walker had made no attempts to reopen the offered plea agreement upon learning that he faced a potential life sentence.[157] The court also pointed out that the State's offer had itself been made under the mistaken impression that Walker faced a twenty-year maximum, which created doubt that "once the State disabused itself of this notion[,]the prior offer or, for that matter, any offer for less than a life sentence, would still be considered by the State."[158] In assessing the counterfactual questions, then, the court relied

150. Id. at 99.
151. Id. at 101.
152. Id. (alteration in original).
153. Id.
154. Walker v. State (*Walker II*), 816 S.E.2d 849, 850–51 (Ga. Ct. App. 2018).
155. See Walker v. State (*Walker I*), 801 S.E.2d 621, 624–27 (Ga. Ct. App. 2017).
156. *Walker II*, 816 S.E.2d at 850.
157. Id. at 851.
158. Id.

on unusual circumstances to find that the proffered agreement might not have been entered even if accepted.

Georgia's intermediate courts have utilized a nuanced approach to the counterfactual questions posed by IAC claims in the pleading context. In *Lexie*, the court leveraged the absence of evidence suggesting an objection by the prosecution or judge in favor of the defendant.[159] In *Walker*, however, the court adapted to the case at hand, using the particular facts of the case (including the prosecution's mistaken understanding at the time of offer) to find against the defendant.[160] In sum, Georgia's court system has adopted a "presumption" approach to the new counterfactual questions of court and prosecutorial acceptance of offered pleas, allowing defendants to prevail in the absence of evidence to the contrary while still maintaining the burden of an affirmative showing for defendants' own counterfactual actions.

2. *Florida.* — In contrast to Georgia's approach, Florida's courts appear to impose an evidentiary obligation on defendants through a burden approach.

In *Alcorn v. State*, the Florida Supreme Court integrated the Supreme Court's instructions in *Frye* and *Lafler* into its existing ineffective assistance of counsel jurisprudence.[161] The defendant, Tommy Lee Alcorn, rejected a plea agreement under the mistaken impression that his maximum exposure was thirty years instead of a life sentence, but was denied relief below because he had received only a thirty-year sentence.[162]

Under prior Florida law, IAC claims based on rejected plea agreements required proving: (1) counsel's failure to convey an offer; (2) that the defendant would have accepted the plea in question; and (3) that acceptance of the plea would have resulted in a lesser sentence than the one actually imposed.[163] Notably, controlling Florida precedent explicitly rejected consideration of whether or not the trial court would have actually accepted the plea in question.[164] In doing so, the Florida Supreme Court opted to follow courts that had "noted that due to the speculative nature of this counter-factual inquiry, it would be extremely difficult to resolve" and argued that "[t]he burden may not be justifiable . . . considering the gravity of the constitutional right . . . ."[165]

---

159. See supra notes 149–153 and accompanying text.

160. See supra notes 154–158 and accompanying text.

161. Alcorn v. State (*Alcorn II*), 121 So. 3d 419 (Fla. 2013).

162. Alcorn v. State (*Alcorn I*), 82 So. 3d 875, 879 (Fla. Dist. Ct. App. 2011).

163. See Cottle v. State, 733 So. 2d 963, 966 (Fla. 1999).

164. See id. at 969 ("We agree with . . . decisions rejecting a requirement that the defendant must prove that a trial court would have actually accepted the plea arrangement offered . . . . Those courts have correctly noted that any finding on that issue would necessarily have to be predicated upon speculation.").

165. Id. at 968.

Thus, in *Alcorn*, the Florida Supreme Court adapted its earlier position to accommodate *Frye* and *Lafler* and embraced the addition of new inquiries into the trial court and prosecution's hypothetical actions.[166] Finding that the United States Supreme Court had "rejected the . . . principle . . . that a defendant need not establish that the trial court would have accepted the plea agreement," the court held that the "additional requirements imposed by *Frye* and *Lafler* apply in Florida" and stressed that Florida grants discretion both to prosecutors in revoking offered plea agreements and to courts in rejecting accepted agreements.[167] Without a trial court finding on these necessary questions for prejudice, the court in *Alcorn* remanded for further proceedings.[168]

While *Alcorn* remains the Florida Supreme Court's only treatment of the matter, Florida's intermediate District Courts of Appeal have decided a significant number of relevant cases. In them, one can begin to see the doctrinal impact of *Frye* and *Lafler* in the Florida court system.

In *Odegaard v. State*, Florida's Second District Court of Appeal considered the case of a defendant who had been encouraged to take an open plea by his counsel without being advised that he potentially faced consecutive sentencing.[169] The court found sufficient evidence that trial counsel may not have warned Odegaard of his maximum sentencing exposure through consecutive sentencing, and thus remanded the case to the lower court for a determination of prejudice.[170]

The concurring opinion by Judge LaRose explored the development of Florida's law on the prejudice question, and noted with seeming concern that "anchored to *Lafler* and *Frye*, *Alcorn* apparently imposes an expanded inquiry."[171] Rejecting the criticism of the novel prejudice questions leveraged by Justice Scalia in *Frye*, Judge LaRose argued that due to *Strickland*'s use of mere reasonable probability, courts "need not plumb the ether to determine whether the defendant would have accepted the plea . . . [nor] even [find] that the defendant more likely than not would have accepted the plea. Rather, the probability . . . need be only sufficient to undermine confidence that he would have rejected the plea . . . ."[172] While Judge LaRose's opinion did not carry the weight of the majority, the opinion suggested that at least one judge in Florida's intermediate courts preferred a presumption approach, even for the question of a defendant's acceptance of the plea.

In practice, however, the application of *Alcorn*'s shift suggests that Judge LaRose's initial concern may have been justified and that his

166. *Alcorn II*, 121 So. 3d at 429–32.

167. Id. at 430–31.

168. Id. at 433.

169. 137 So. 3d 505, 506–07 (Fla. Dist. Ct. App. 2014).

170. Id. at 507–09.

171. Id. at 511 (LaRose, J., concurring).

172. Id. at 511–12.

proposed presumption approach has been rejected by many of his colleagues. Several cases in the intermediate Florida courts have reviewed and denied motions for relief (and remanded so said motions can be amended) on the basis of facial insufficiency because the motions do not address the new prejudice questions.[173] The language in these decisions, while not dispositive, suggests the imposition of an affirmative burden on defendants.

In *Meara v. State*, the Fourth District Court of Appeal denied relief to a defendant in a case where the evidence strongly supported an inference that the prosecution would have withdrawn its offer.[174] The court found that, given that David Meara's own motion showed that the prosecution's offer was meant to obtain testimony from Meara against his codefendants, the plea deal would have been withdrawn after the prosecutor's office obtained an agreement with a defendant in an unrelated case for testimony against Meara and his codefendants in the case at hand.[175] The Fourth District Court of Appeal demonstrated in *Meara* that it can identify the evidence needed to distinguish cases undeserving of relief, even under a potential presumption approach.

For many relevant cases, however, it is not obvious when and why relief is being denied. In *Parenti v. State*, Jeffrey Parenti's counsel mistakenly informed him that he faced only fifteen years of sentencing exposure.[176] Parenti rejected an offer for seven years of prison, and after trial, the State moved to sentence him under a habitual offender statute whereupon he was sentenced to thirty years in prison.[177] The intermediate court reversed the trial court's finding with respect to deficient performance and remanded for a finding on prejudice.[178]

Despite prevailing on the deficient performance prong, however, Parenti appears to have lost in the trial court, presumably on the prejudice prong. Parenti's case next appears as a one-word unpublished disposition, affirming the denial of his Rule 3.850 motion[179] for collateral relief.[180]

---

173. See, e.g., Armstrong v. State, 148 So. 3d 124, 126 (Fla. Dist. Ct. App. 2014) ("[T]he defendant must demonstrate [the *Alcorn* prongs] . . . . Armstrong failed to allege that the prosecutor would not have withdrawn the offer and that the court would have accepted it, prongs two and three of *Alcorn*."); Ramos v. State, 141 So. 3d 643, 645 (Fla. Dist. Ct. App. 2014) ("His claim is also facially insufficient under *Alcorn* because he does not state that the prosecutor would not have withdrawn the offer and that the court would have accepted it.").

174. 154 So. 3d 368, 369 (Fla. Dist. Ct. App. 2014).

175. Id.

176. 225 So. 3d 949, 950 (Fla. Dist. Ct. App. 2017). The State also initially informed Parenti that he faced only fifteen years. Id.

177. Id.

178. Id. at 952.

179. Fla. R. Crim. P. 3.850.

180. Parenti v. State, 264 So. 3d 177 (Fla. Dist. Ct. App. 2019) (unpublished table disposition).

This pattern—an initial remand from the intermediate court with seemingly high chances of eventual relief, followed by a per curiam denial of a motion to vacate a sentence—occurs in several cases.[181] The Florida intermediate courts often use language that suggests a presumption approach, signaling that an absence of countervailing evidence might be sufficient to justify relief.[182] But scarcely any successful cases are litigated on the prejudice prong—instead, most seemingly meritorious cases with prejudice questions are remanded to the trial courts to assess prejudice and next appear as denials of relief affirmed in one-word opinions.[183]

Selection bias and skew may play a significant role in this pattern, so caution is necessary. Some number of defendants may secure relief at the trial level, and the state might not appeal those decisions. One can also imagine cases in which the trial court unearths new evidence on remand that fundamentally alters the likely analysis of the prejudice prong. Still, the stark nature of the pattern and the lack of available countervailing examples suggest that the counterfactual prejudice questions pose a significant obstacle for defendants in Florida seeking relief. While the language employed by Florida's court system may sound in a presumption approach, the pattern of outcomes appears to place a substantial affirmative burden on defendants regarding the counterfactual prejudice questions.

A look at two federal habeas cases reviewing Florida courts on these questions further points to a burden approach deployed by the Florida court system while also highlighting inconsistency even in federal court responses. In *Green v. Attorney General*, a federal habeas court reviewed the denial of relief in a case in which defense counsel failed to convey a plea and the State conceded deficient performance of counsel and all of the prejudice prongs other than acceptance of the plea by the court.[184] Finding that the state court's reliance on the judge's statements at sentencing was unreasonable in light of the drastically different context that would have resulted if the plea had been accepted, the court held that

---

181. E.g., Clark v. State, 279 So. 3d 128 (Fla. Dist. Ct. App. 2019) (unpublished table disposition); Clark v. State, 236 So. 3d 481 (Fla. Dist. Ct. App. 2018); Jacques v. State, 227 So. 3d 592 (Fla. Dist. Ct. App. 2017) (unpublished table disposition); Jacques v. State, 193 So. 3d 1065 (Fla. Dist. Ct. App. 2016).

182. See, e.g., *Clark*, 236 So. 3d at 483 ("Nothing in the present record suggests that the prosecutor would have withdrawn the offer or that the trial court would have rejected it."); *Jacques*, 193 So. 3d at 1066 ("His motion satisfied the elements of *Alcorn v. State* . . . . There was no indication that the prosecutor would have withdrawn the plea or the trial court would have rejected it.").

183. See supra note 181 and accompanying text.

184. 193 F. Supp. 3d 1274, 1276 (M.D. Fla. 2016) ("The only element in dispute is whether it is reasonably probable that the state court would have accepted the plea agreement and sentenced Green in accordance with its terms . . . ."). Note that the trial court's denial of the motion resulted in a per curiam affirmation at the appellate level, much like the other state cases reviewed. Green v. State, 139 So. 3d 891 (Fla. Dist. Ct. App. 2014) (unpublished table disposition).

the state court's denial was objectively unreasonable.[185] Reviewing de novo whether the state court would have entered the plea, the federal habeas court explicitly drew on the "modern reality" of plea bargaining to hold that the agreement would have been entered by the court.[186] In doing so, the court noted the familiarity between prosecutor's offices and judges, judicial deference to prosecutorial recommendations, and the strong incentives for courts to accept plea agreements.[187]

In contrast, in *George v. Jones*, a federal habeas court affirmed a Florida state trial court's denial of a claim of ineffective assistance.[188] The court in *George* quoted from the state trial court's order, in which the trial court denied the defendant's claim on the prejudice prong in part because the assigned judge testified that he would have to speculate in order to assess his own hypothetical actions.[189] Despite citing *only* the trial judge's apparent expression of ambivalence and uncertainty on this point, the state trial court found the defendant failed to meet his burden regarding this prong. The federal habeas court upheld the decision, stating that "[b]y [the judge's] own testimony, [the judge] could not testify affirmatively that he would have [accepted the plea]."[190] These two cases, and more,[191] demonstrate the deployment of two distinct approaches to

---

185. *Green*, 193 F. Supp. 3d at 1283 ("The sentencing court's primary decision was whether to sentence Green to fifteen years as requested by the State, twelve months . . . or something in between. If the plea . . . had been consummated . . . [t]he primary decision would have been whether to accept the plea agreement . . . ."); id. at 1283–84 ("Rejecting a defendant's request for a particular sentence is not the same as rejecting a plea agreement specifying the same sentence . . . . The context of the two situations is too dissimilar to apply the sentencing judge's comments . . . .").

186. Id. at 1287.

187. Id. at 1287–88 ("[T]he State would not have made Green an offer it believed would not be accepted by the court . . . . Courts are generally aware that[,] early in a case, the attorneys have more information . . . . [T]herefore, the judge is likely to defer . . . . Furthermore, the incentive for courts to accept . . . is great."); cf. supra notes 104–105 and accompanying text.

188. No. 17-14005-Civ-ROSENBERG, 2018 WL 10647359, at *14 (S.D. Fla. Jan. 30, 2018). Note that the trial court's denial of the motion resulted in a per curiam affirmation at the appellate level, much like the other state cases reviewed. George v. State, 205 So. 3d 606 (Fla. Dist. Ct. App. 2016) (unpublished table disposition).

189. *George*, 2018 WL 10647359, at *15 ("[T]he Defense . . . failed to establish this prong . . . . [T]he assigned trial judge[] testified . . . two times that it would be 'speculation' on his part as to whether he would have accepted this plea offer, because it was a hypothetical (now) and because 'it never happened.' . . . Pure speculation . . . is all this is . . . ." (internal quotation marks omitted) (quoting State v. George, No. 08-4289CFA (Fla. Cir. Ct. 2008))).

190. Id. ("The court also correctly found petitioner had not demonstrated . . . that even if the court had been presented with the 52-month plea offer, that it would have, in fact, accepted the plea offer.").

191. See, e.g., Owens v. Sec'y, Dep't of Corr., No. 4:16cv467-MW/CAS, 2017 WL 8894609, at *5 (N.D. Fla. Nov. 30, 2017) ("Petitioner offers no explanation . . . why he infers the court would have 'certainly' accepted the offer, other than the offer . . . from 'the lead prosecutor.' The court is not bound by plea negotiations . . . . There is no record support of a reasonable probability that the trial court would have accepted a . . . deal." (citations omitted)).

these novel questions even in federal courts, as well as the burden placed on defendants by Florida courts with respect to these questions.

The varied approaches of different state court systems suggest that the new questions posed by *Frye* and *Lafler* have sown confusion and resulted in disparate state applications. One must acknowledge the distinct possibility that defendants in state systems (comprising the vast majority of felony defendants in the United States)[192] are offered significantly different protections for their right to effective counsel at the critical pleading stage because of differing interpretations of Supreme Court precedent.

III. THE PRESUMPTION APPROACH AND THE PROMISE OF THE SIXTH AMENDMENT

This Part reexamines the presumption and burden approaches and argues that the presumption approach, by offering defendants a rebuttable presumption for *Frye* and *Lafler*'s new counterfactual questions, best engenders the fundamentally fair proceedings the *Frye* and *Lafler* decisions aspire to facilitate.[193] In light of the inconsistent application of *Frye* and *Lafler* in state systems,[194] clear guidance instructing state courts could establish a uniform presumption approach.

For *Frye* and *Lafler*'s new inquiries into the behavior of the court and prosecution, a presumption in favor of relief for the defendant, rather than an affirmative evidentiary burden, is better for several distinct reasons. First, on a pragmatic level, information and resource asymmetries between defendants and state prosecutors mean that prosecutors will generally be far more able to prove that a given plea offer would have been revoked or rejected by the court than a defendant will be able to prove that it would have been accepted. A rebuttable presumption would not provide an automatic guarantee of relief for defendants but would instead only demand information from prosecutors rather than defendants. Second, the effects of trial and conviction, when viewed by an adjudicating court through hindsight, produce prejudice against the defendant and warrant a presumption in the defendant's favor. Third, the right to effective assistance of counsel is a fundamental right, and its protection is critical for our system of justice. Protecting this right is especially key in the increasingly central arena of negotiated plea agreements.

---

192. See supra note 111 and accompanying text.

193. See supra notes 61–82 and accompanying text; see also Marceau, supra note 42, at 1216–17 ("In the wake of *Frye* and *Lafler*, courts must be guided by the insight that the purpose of the right to counsel is not merely to ensure a fair trial. No longer is the fairness of the conviction or the reliability of the trial dispositive . . . .").

194. See supra section II.C and accompanying text.

A. *Information and Resource Asymmetries*

A presumption approach best accounts for the information and resource asymmetries between a convicted defendant and a prosecutor's office or state attorney general defending a conviction. Significant literature has addressed the role that information asymmetries can play in facilitating or discouraging settlements between parties.[195] In the context of criminal trials, existing scholarship has argued that information asymmetries might benefit not only defendants, who may know more about their true guilt or innocence, but also prosecutors, who coordinate the primary evidence-gathering efforts of authorities and possess deep knowledge of the legal aspects of the case.[196]

When addressing the first prejudice question (i.e., whether a defendant would have pleaded guilty), both defendants and prosecutors possess roughly equal ability to access potential evidence in their favor. The defendant, arguing about factors that may have led them to plead guilty, is closer to much of the potential evidence (such as personal communications) than the prosecution and is, for example, able to waive privilege over attorney-client communications. Moreover, as with guilt and innocence in normal plea bargaining, the defendant may know the ultimate truth behind the government's claims.[197] Prosecutors, however, investigate and conduct discovery that leads to much of the documented evidence in a given case and also possess any records or documentation of the plea-bargaining process.[198] The prosecution has full access to the

195. See, e.g., Lucian Arye Bebchuk, Litigation and Settlement Under Imperfect Information, 15 RAND J. Econ. 404, 414 (1984) ("The main concern of this article has been the effects of an information asymmetry . . . . [T]he presence of such an asymmetry might influence parties' litigation and settlement decisions[] and . . . lead to a failure to settle."); Bernardo S. Silveira, Bargaining with Asymmetric Information: An Empirical Study of Plea Negotiations, 85 Econometrica 419, 423 (2017) (noting numerous potential sources of asymmetric information in plea bargaining and arguing that discovery does an imperfect job at eliminating information asymmetry).

196. See David Bjerk, Guilt Shall Not Escape or Innocence Suffer? The Limits of Plea Bargaining when Defendant Guilt Is Uncertain, 9 Am. L. & Econ. Rev. 305, 308 (2007) (attempting to model optimal prosecutor behavior under the assumption that defendants possess better knowledge of their guilt and thus their chances for success at trial); Ion Meyn, Discovery and Darkness: The Information Deficit in Criminal Disputes, 79 Brook. L. Rev. 1091, 1093 (2014) (arguing that the existing scheme that denies a defendant formal investigative powers "results in a factual deficit that undermines the legitimacy of outcomes"); Daniel C. Richman, Bargaining About Future Jeopardy, 49 Vand. L. Rev. 1181, 1203–07 (1996) (considering defendant knowledge of uncharged conduct and exploring how risks surrounding disclosure create barriers to global settlements); Stephen J. Schulhofer, Plea Bargaining as Disaster, 101 Yale L.J. 1979, 1983 (1992) (noting that information problems can lead to conviction of innocent defendants who are risk averse and settle).

197. See Bjerk, supra note 196, at 308.

198. The *Frye* and *Lafler* decisions—and the potential need they create for evidence and clarity around the plea-bargaining process—might themselves spur a shift toward better recordkeeping and documentation of plea bargaining. See, e.g., Laurie L. Levenson, Peeking Behind the Plea Bargaining Process: *Missouri v. Frye* & *Lafler v. Cooper*, 46 Loy. L.A. L. Rev. 457, 487 (2013) ("[T]o ensure that a defendant will not be able to reverse his

history of how its office has handled similar situations. The question of a defendant's hypothetical actions, then, presents a more level playing field and therefore might be best answered under the existing burden approach seen in current state applications.[199] Still, one might persuasively argue that defendants deserve the benefit of a presumption even regarding their own acceptance of a plea. The counterfactual nature of the inquiry, as well as game theory–based bargaining incentives for defendants to act confident of acquittal even when considering settlement, should at least lend courts pause in assessing hypothetical actions through the lens of uninformed behavior.[200]

Regardless, applying a presumption approach to the new counterfactual questions presents fewer concerns and addresses a greater need. Prosecutors are "repeat players" in local court systems—they naturally participate in a high volume of cases and observe patterns of behavior, both within their offices and from judges and defendants.[201] Moreover, the institutional processes of the prosecutor's office offer predictability and potential documented evidence that can support or negate arguments about how the office might have acted in particular circumstances. Consequently, a typical prosecutor's office will be much better equipped to provide convincing and affirmative evidence regarding the likely counterfactual actions of institutional actors than defendants or their

---

conviction . . . prosecutors should document all plea offers, their expiration dates, and whether they are binding on the court. Then the prudent prosecutor may ask for written confirmation that the offer has been shared with the client."); Stephanie Stern, Note, Regulating the New Gold Standard of Criminal Justice: Confronting the Lack of Record-Keeping in the American Criminal Justice System, 52 Harv. J. on Legis. 245, 250–65 (2015) (arguing that enhanced recordkeeping is critical to fulfilling the promise of *Frye* and *Lafler* and suggesting that the executive, the judiciary, and the legislature could each individually pursue recordkeeping reforms). See generally Joel Mallord, Putting Plea Bargaining on the Record, 162 U. Pa. L. Rev. 683 (2014) (advocating for the creation of a record of plea bargaining and negotiation by requiring the defense bar to create a record suitable for appeal).

199. See, e.g., Jacobs v. State, 832 S.E.2d 363, 366–67 (Ga. 2019) (applying a burden approach to the defendant's claim that she would have pleaded guilty with effective counsel).

200. See, e.g., Daniel v. State, 803 S.E.2d 603, 608 (Ga. Ct. App. 2017) (rejecting the "circular logic" used by the lower court and arguing that Daniel's actions signaling innocence as he proceeded to trial did not provide evidence that he would have asserted his innocence and forgone a plea with effective counsel). See generally Kelsey S. Henderson & Lora M. Levett, Plea Bargaining: The Influence of Counsel, *in* 4 Advances in Psychology and Law 73 (Brian H. Bornstein & Monica K. Miller eds., 2019) (explaining how, according to the shadow-of-the-trial theory, defendants assess their own chances of success at trial in deciding whether to plead guilty).

201. See Stephanos Bibas, Rewarding Prosecutors for Performance, 6 Ohio St. J. Crim. L. 441, 447 (2009) (describing public defenders, in contrast to private counsel, as "repeat players" better situated to "intuit violations of courthouse norms" and "well-placed to spot patterns and trends"); Deirdre M. Bowen, Calling Your Bluff: How Prosecutors and Defense Attorneys Adapt Plea Bargaining Strategies to Increased Formalization, 26 Just. Q. 2, 5–6, 22 (2009) (detailing an ethnographic exploration of the negotiation process between prosecutors and defense attorneys in Seattle and observing that "shared history appears to assist in the bargaining process").

counsel. The state also possesses more available resources to gather such information than a likely imprisoned defendant seeking collateral review of a conviction.[202]

As a result of the above factors, a prosecutor's office is substantially more likely than a defendant to be able to produce evidence of the truth, whatever it may be. In addition, prosecutors possess significant leverage through charging discretion and can use this leverage to pressure innocent defendants who might otherwise stand trial to plead guilty.[203] Defendants who fail to accept a plea offer might thus be subjected to a significant charging penalty. A presumption-based approach offers the best method for promoting truth-seeking within our system of pleas and ensuring "fair" outcomes, even as viewed through *Strickland*'s reliability lens.[204]

B. *Prejudicial Effects of Ensuing Events*

In *Frye*, the Court cited scholarship that highlighted the significant sentencing penalty facing criminal defendants who decide to go to trial and argued that it was the result of statutory penalties designed to enable plea bargaining.[205] But other analyses of the trial penalty phenomenon trace the sentencing penalty to the bias incurred by the trial process itself—by prosecutorial design, trials explore the defendant's supposed guilt in detail and put forth facts that make the defendant look more culpable and less sympathetic than had they simply pleaded guilty.[206]

---

202. The state is also well positioned to leverage the use of this general information in defending more than one conviction, and thus its expenditure of resources and effort might be more efficient from a system-based perspective.

203. See, e.g., Daniel Richman, Fifteen Years of Supreme Court Criminal Procedure Work: Three Constitutional Brushes, *in* Néo ou Rétro Constitutionnalismes? Mises en Perspective de la Démocratie Constitutionnelle Contemporaine 41, 59–65 (Olivier Cayla & Jean-Louis Halpérin eds., 2019) [hereinafter Richman, Fifteen Years] (noting that prosecutors possess "bargaining leverage created by . . . the (increasingly broad) array of charging possibilities" that may permissibly be used to coerce guilty pleas); see also William J. Stuntz, Plea Bargaining and Criminal Law's Disappearing Shadow, 117 Harv. L. Rev. 2548, 2556–58 (2004) ("[G]iven the array of weapons the law provides, prosecutors are often in a position to dictate outcomes . . . . The law serves only to define her opportunities. And she generally has more opportunities than she needs.").

204. See supra notes 24, 28, 32; see also, e.g., Smith, supra note 38, at 519 ("The Constitution is concerned about the level of competence of defense attorneys only to the extent attorney performance threatens the ability of the judicial system to reach accurate and reliable results in criminal cases.").

205. Missouri v. Frye, 566 U.S. 134, 144 (2012) ("[Defendants] who do take their case to trial and lose receive longer sentences . . . because the longer sentences exist on the books largely for bargaining purposes." (internal quotation marks omitted) (quoting Rachel E. Barkow, Separation of Powers and the Criminal Law, 58 Stan. L. Rev. 989, 1034 (2006))).

206. See Jeffery T. Ulmer & Mindy S. Bradley, Variation in Trial Penalties Among Serious Violent Offenses, 44 Criminology 631, 636–37 (2006) (arguing that trials bring out bad facts that "increase perceived blameworthiness" and are otherwise "covered up, or at least [do] not have as much visceral impact, in a guilty plea agreement"); see also David

This same influence would be at play in the minds of the prosecutor and the trial judge when, in a *Frye* or *Lafler* situation, they are asked to assess their hypothetical actions had the defendant accepted an offer. Where ineffective counsel causes a defendant to proceed to trial rather than take a plea agreement, the trial creates a psychological bias that might well influence even good-faith testimony from the prosecutor or recollections from a judge during proceedings for collateral relief. Simply asking them to forget the details of trial is not an easy task.[207] Prior proceedings might subtly influence the testimony of each with respect to their counterfactual actions, potentially leading prosecutors or courts to suggest that they would have objected to plea agreements more often than may be accurate.[208] Indeed, this logic mirrors the very reasons that the Supreme Court urged deference to trial counsel in order to avoid the imposition of hindsight bias.[209] Much as courts look with skepticism upon defendants who proceed to trial and, after conviction, claim that they would have acted differently, courts might look skeptically upon prosecutors' claims that they would have revoked offered pleas after success at trial.

Correcting for this bias may appear in tension with the Court's instruction in *Lafler* that a court need not disregard "information concerning the crime that was discovered after the plea offer was made"

Brereton & Jonathan D. Casper, Does It Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts, 16 Law & Soc'y Rev. 45, 68 (1982) ("[T]he trial is likely to . . . provid[e] the sentencer with much more detail about the nature of the harm done by the defendant. [This] may militate against the leniency that often attends the privacy and flexibility of the plea bargain."). Of course, the airing of these facts is, in many ways, the point of trial in the first place. Nonetheless, from a counterfactual perspective, defendants may be worse off having exposed their sentencer to a detailed exploration of the facts allegedly underpinning their culpability.

207. See Bibas, Psychology of Hindsight, supra note 38, at 5 ("[M]erely telling someone about a cognitive bias or asking her to try harder is ineffective to correct that bias. Nor does practice make perfect . . . . [E]xperience and expertise may moderate, but do not eliminate, cognitive biases." (footnote omitted)).

208. One can imagine that this bias might also play a powerful role in the minds of trial judges in the process of crafting case-by-case remedies called for in *Lafler*. See supra notes 70–72 and accompanying text.

209. See Strickland v. Washington, 466 U.S. 668, 689 (1984). But see Bibas, Psychology of Hindsight, supra note 38, at 2–3 ("Psychologists have repeatedly found that . . . people tend to think the eventual outcome was inevitable all along . . . . [L]ooking back at a final result, courts might regard that outcome as inevitable . . . . [P]eople tend to interpret new evidence so as to confirm their initial judgments."). But the Court's decision in *Lockhart v. Fretwell* suggests that the Court has qualms about embracing "what if?" scenarios when they seem to benefit defendants while running counter to justice. See 506 U.S. 364, 366–71 (1993) (denying relief to a defendant for ineffective assistance where defense counsel failed to make an objection based on law that, though sound at the time, was overturned shortly thereafter); see also Jennifer N. Foster, Note, *Lockhart v. Fretwell*: Using Hindsight to Evaluate Prejudice in Claims of Ineffective Assistance of Counsel, 72 N.C. L. Rev. 1369, 1391–94 (1994) (exploring the tension between *Strickland*'s cautions against hindsight and *Fretwell*'s use of hindsight to determine a lack of prejudice).

in crafting a remedy.[210] Prior to consideration of remedy, however, a court must determine if a defendant is worthy of relief. Putting in place a system that accounts for potential cognitive bias is different from asking courts to undertake the "difficult" task of restoring the defendant and prosecution to their "precise [prior] positions."[211] The Court's language suggests that it is more concerned with the difficulty of such a rewinding exercise than it is unfazed by the problems posed by such information. Lastly, the fact that this information is already accounted for in the remedy stage should encourage minimizing its impact in the prejudice stage—truly influential or shocking information revealed will still play an important role in the court's crafting of a tailored remedy and need not deny defendants relief outright.[212] A system that offers a presumption in favor of the defendants at least attempts to account for the intractable bias entailed by asking such counterfactual questions.

C. *The Role of Justice*

A presumption approach is preferable because it best furthers the objectives of the *Frye* and *Lafler* decisions by offering relief to defendants serving longer terms of incarceration due to ineffective assistance of counsel.[213] In *Frye*, the Court acknowledged the difficulties that this extension of effective assistance of counsel law would pose for state actors.[214] But the Court still found that, because of the overwhelming prominence of plea bargaining and the concrete impact it has on the sentences served by defendants, it would be "insufficient simply to point to the guarantee of a fair trial as a backstop."[215] Indeed, the Court held that "[i]n today's criminal justice system, therefore, the negotiation of a plea bargain . . . is almost always the critical point for a defendant."[216] The decision's rhetoric and reasoning suggest that the Court extended the Sixth Amendment's protections into this realm precisely because not doing so risked significant prejudice for blameless defendants subject to deficient counsel.[217] Avoiding such harm is a worthy priority.

Moreover, the presumption approach squares with our intuitive understandings of how plea offers operate. Prosecutorial offices pursue plea agreements with defendants because those agreements are desirable

---

210. See Lafler v. Cooper, 566 U.S. 156, 171–72 (2012).

211. See id. ("The time continuum makes it difficult to restore the defendant and the prosecution to the precise positions they occupied prior to the rejection of the plea offer, but that baseline can be consulted in finding a remedy . . . .").

212. See id. at 170–72; see also United States v. Morrison, 449 U.S. 361, 364–65 (1981) ("Our approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances . . . .").

213. See supra note 61 and accompanying text.

214. See supra note 78 and accompanying text.

215. Missouri v. Frye, 566 U.S. 134, 143–44 (2012).

216. Id. at 144.

217. See supra notes 67–68, 78 and accompanying text.

to the office in certain situations.[218] Moreover, prosecutors pursue agreements within an institutionalized setting, in which plea agreements are reached through a presumably regular and repeated process with corresponding oversight and accountability. By contrast, defendants are more likely to be differentially situated and motivated, and thus exhibit idiosyncratic behavior as a result. Consider defendants who have proven: (1) the likely existence of an offer by the prosecution; (2) a personal willingness to accept the offer; and (3) that their counsel's deficient performance denied them the chance to accept the offer. One can assume most of these defendants are deserving of relief absent strong differentiating facts to the contrary. A presumption approach preserves the ability for strong facts to play a role in a particular case while aligning doctrine with commonsense intuitions.

D. *Counterarguments*

One might make several counterarguments against the presumption approach. First, one might object due to administrability concerns, finding that a loosening of the prejudice standard would lead to a flood of claims of last resort.[219] But the stringent standard set by the other portions of the *Strickland* test, especially the deficiency prong, significantly eases this concern.[220] The difference in these approaches will only swing the result in cases where counsel is found constitutionally deficient under the deferential *Strickland* test, and where a lack of evidence makes it difficult for each side to substantiate arguments on the prejudice prong or the balance of the evidence is particularly close. Where either side can leverage significant evidence in their favor, the result of the proceedings would be the same under either approach.[221] Such a presumption can

---

218. See Schulhofer, supra note 196, at 1987 ("Both the chief prosecutor . . . and her assistants have numerous incentives . . . . [S]he will want to ensure settlement, even if this requires overly generous plea offers.").

219. See supra notes 94–100 and accompanying text. See generally 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 (2013) (exploring the concerns raised by Justice Scalia regarding the administrability of the *Lafler* and *Frye* standards and assessing the burden the decisions place on the criminal justice system).

220. See supra notes 25–27, 115 and accompanying text; see also Brown, supra note 82, at 133 (detailing the high bar defendants face in proving deficient performance). The severity of *Strickland*'s doctrine left many scholars skeptical that *Frye* and *Lafler* would lead to many cases of relief. See Stephanos Bibas, Incompetent Plea Bargaining and Extrajudicial Reforms, 126 Harv. L. Rev. 150, 161 (2012) (arguing that "as a practical matter, *Lafler* and *Frye* are unlikely to free many prisoners" because "defendants will find it very hard to satisfy both *Strickland*'s performance and prejudice prongs under *Lafler* and *Frye*—just as they do under *Strickland* itself"); Richman, Fifteen Years, supra note 203, at 64 ("There is little reason to believe that many defendants will get the benefit of the slender doctrinal path to relief offered by *Lafler* and *Frye*.").

221. For practical reasons, one would expect the party leveraging substantial evidence on these questions to be the prosecutor. See supra section III.A.

always be rebutted. The sum number of cases affected, even across state and federal court systems, would be unlikely to significantly impact the system in a broader sense.

Second, one might be concerned about upsetting the finality of guilty pleas or verdicts, and about providing potential windfalls to undeserving defendants more generally. Some defendants might be able to gamble for acquittal at trial before receiving the benefits of previously offered plea agreements. Again, however, the high bar that defendants must hurdle to prevail in the other portions of *Strickland*'s test suggest that few truly undeserving defendants will garner relief.[222] Moreover, the malleable remedy offers another safeguard by allowing courts to craft relief in a way that avoids overly rewarding undeserving defendants.[223] While disturbing convictions is undesirable in a vacuum, it is routinely done in the interests of vindicating justice for individuals or supporting a system that promotes broader justice (such as in cases involving exclusionary evidentiary rules).[224]

Third, one could object to creating a system in which courts will have to craft yet more case-by-case remedies in order to offer relief.[225] In short, the messiness of *Lafler* and *Frye*'s options for remedies might give some pause. But given the countervailing individual rights at stake and society's interest in maintaining a system that administers justice, the messiness of the world of remedies seems an acceptable price to pay (and a world that the *Frye* and *Lafler* decisions explicitly endorsed).

CONCLUSION

In *Frye* and *Lafler*, the Supreme Court emphasized that our criminal justice system is one predominated by guilty pleas.[226] The statistics bear out this conclusion.[227] In crafting protections for defendants at the pleading stage, however, the Court left substantial leeway for lower federal courts

222. See supra note 220; see also Green, supra note 219, at 756 ("Other than in rare cases . . . where egregious and potentially fatal errors demonstrably were made, most such claims will be dismissed quickly based on the reasonableness of counsel's performance, lack of prejudice . . . , or both.").

223. See supra notes 70–72, 85 and accompanying text.

224. See, e.g., Mapp v. Ohio, 367 U.S. 643, 659 (1961) ("The criminal goes free, if he must, but it is the law that sets him free.").

225. See supra notes 70–72 and accompanying text; see also Jenia Iontcheva Turner, Effective Remedies for Ineffective Assistance, 48 Wake Forest L. Rev. 949, 951–53 (2013) (arguing that the remedy prong's discretionary balancing approach is inconsistent with other Sixth Amendment doctrine and should instead "aim to restore the defendant as fully as possible to the position he occupied before being prejudiced by his counsel's incompetence"); Matthew T. Ciulla, Essay, *Lafler v. Cooper*'s Remedy: A Weak Response to a Constitutional Violation, 92 Notre Dame L. Rev. Online 172, 185–86 (2017) (noting that the Court's guidance on remedies creates "incongruent results" and criticizing the potential for no functional remedy to be offered at all).

226. See supra note 8 and accompanying text.

227. See supra note 1 and accompanying text.

and state courts to decide how functional such protections would be in practice. Given the significant portion of criminal cases moving through state courts rather than the federal system, it is important to consider how the Supreme Court's guidance has affected state doctrine. Examining the effects of *Frye* and *Lafler* in practice, interpretation of the counterfactual prejudice questions allows state systems a choice between a presumption approach favoring defendants in the absence of countervailing evidence, and a burden approach that creates substantial hurdles for defendants. State approaches are mixed. Courts that place an affirmative evidentiary burden on defendants to prove the counterfactual acts of judges and prosecutors, though following a reasonable interpretation of the Court's text in both decisions, erect a system that makes relief for even meritorious claims so difficult that it fails to fulfill the spirit of the two decisions. The Court and state systems should establish a presumption approach that recognizes the importance of counsel in the central arena of plea bargaining.