

TRUTH, JUSTICE, AND THE AMERICAN STYLE PLEA BARGAIN

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INTRODUCTION

The aspirations of the criminal legal system are sometimes unclear. Truth or factual accuracy is one aim and justice, a balancing of interests, is another. So it is that the Supreme Court has enlivened this debate through the prism of American-style plea bargaining.¹ In the course of two decisions reassessing the proper standard for evaluating ineffectiveness of counsel in the plea negotiation context, the Justices spoke to the core division in the administration of criminal law: pretrial settlement versus fair trial, right to counsel versus due process.² The outcome analysis that insures the integrity of plea bargaining is focused on the fulfillment of an extra-constitutional practice, since there is no constitutional right to a plea offer.³ And it calls for compromising the truth of the

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¹ See *Lafler v. Cooper*, 132 S. Ct. 1376, 1397–98 (2012) (Scalia, J., dissenting); see generally Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 35–39 (2004) (noting that the American plea negotiation is essentially an outgrowth of its adversarial system of justice, as opposed to an inquisitorial framework, whose aim is resolution and settlement of conflicts).

By definition, American plea bargaining, assumes an adversarial conception of criminal procedure as a dispute between two parties facing a passive decision-maker. It makes sense in a dispute model that the parties be allowed to reach an agreement over a plea bargain. That is, the parties may negotiate in order to reach such an agreement, and if the parties agree that the dispute is over, the decision-maker should not have any power (or only a relatively minor and formal power) to reject this decision.

Id. at 35–36.

² See *Missouri v. Frye*, 132 S. Ct. 1399, 1404, 1407–08 (2012); *Lafler*, 132 S. Ct. at 1384; see generally Gregory G. Sarno, Annotation, *Adequacy of Defense Counsel's Representation of Criminal Client Regarding Guilty Pleas*, 10 A.L.R.4TH 8 (1981) (providing a collection and analysis of state and federal decisions regarding the adequacy, competency, or effectiveness of defense counsel's representation of a criminal defendant in plea bargaining).

³ See *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977) (“[T]here is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial.”); *Lynch v. Overholser*, 369 U.S. 705, 719 (1962).

case through a plea agreement to lesser charges in most instances or to negotiated facts. On the other hand, the trial process leads to an approximate legal truth without the market place concessions of a bargain.⁴ But the balance between justice and truth depends on the nature of the proceeding and the extent to which they are aimed at resolution or fact-finding.

In the 2011 term, the Supreme Court decided two cases, *Missouri v. Frye* and *Lafler v. Cooper*, which highlighted whether the Sixth Amendment right to counsel safeguarded the integrity of the trial or encompassed non-trial facets such as the plea bargain.⁵ This line of decisions has been followed most recently by *Burt v. Titlow*,⁶ which further defined the role of postconviction record-making in assessing the fundamental question: Did the right to effective assistance of counsel protect the *accuracy of the verdict* or the *fairness of the process*?⁷

Underlying the Justices debate over the constitutionality of plea bargaining are the core values of truth seeking in the justice system. It pits the notion of the plea bargain's fact-confirming role against the trial's fact-finding function. Indeed, the hierarchy of accuracy in criminal cases has been changing.⁸ Pretrial

⁴ At trial, truth is shaped by the rules of evidence, the resources for mustering proof, and the adversarial advocacy that puts a premium on strategy, persuasiveness, and preserving error around the fence line of "reasonable doubt."

⁵ See *Frye*, 132 S. Ct. at 1404; *Lafler*, 132 S. Ct. at 1384; see generally Ken Strutin, *Negotiating Justice: The New Constitutional Spectrum of Plea Bargaining*, LLRX (May 19, 2013), <http://www.llrx.com/features/negotiatingjustice.htm> (providing a comprehensive collection of case law and scholarship concerning the Supreme Court's *Frye* and *Lafler* decisions).

⁶ *Burt v. Titlow*, 134 S. Ct. 10 (2013).

⁷ See *id.* at 17–18. Notably, while the appeals in each case focused on the competency of defense counsel's conduct or advice, they did not address the role of attorneys as information creators. There is an unresolved dilemma in an adversarial system that sees truth as the product of conflict or compromise. On the one hand, it forces defense lawyers and prosecutors into forging legal fictions for plea bargains or conforming fact-finding at trial to constitutional priorities. Thus, the attorney's power to investigate and present information, a truth seeking operation, is hindered by the nature of pretrial justice. And this problem is further magnified postconviction, where there is no right to counsel. See generally Ken Strutin, *Post-Conviction Justice in the Information Age: The Trial Never Ends*, N.Y.L.J., Nov. 19, 2013, at 5, 9 (discussing the impact that the information age has had on postconviction pro se practice) [hereinafter *Post-Conviction Justice in the Information Age*]; Ken Strutin, *Post-Conviction Representation, Pro Se Practice and Access to the Courts*, LLRX (Feb. 19, 2013), <http://www.llrx.com/features/representationprosecourtaccess.htm> (providing a comprehensive collection of case law and scholarship concerning postconviction representation and pro se practice after the first appeal) [hereinafter *Post-Conviction Representation*].

⁸ See generally Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1587–92 (2005) (describing the increasing accuracy of law enforcement investigation and the declining confidence in trial accuracy driven by the Innocence Movement and revisionism in forensic science).

investigations are undergoing reforms in response to wrongful convictions and reexaminations of forensic science.⁹ At the same time the accuracy and reliability of the trial as the final arbiter of correctness, and its ability to purge investigative shortfalls, has been diminished.¹⁰ Lastly, the system's overarching emphasis on pleas versus trials suggests that the focus is now plainly on outcome—compromise and convenience rather than truth, if ever truth were the goal.

From arrest to resolution, every choice of the accused results in the assertion or waiver of an essential right. And, the decision to plead guilty waives the right to have the charges proved beyond a reasonable doubt, a conviction without trial.¹¹ Indeed, it is the choice of the accused to forgo the crucible of the trial for the compromise of the plea bargain.¹² Still, ineffective assistance of counsel deprives the defendant of making an informed, knowing, and voluntary choice by corrupting the process of information acquisition and exchange.¹³ The damage can be so severe that even

⁹ See generally *id.* at 1613–42 (recommending reforms to improve the pretrial investigatory process).

¹⁰ See Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911, 914–19 (2012) (summarizing the current mottled state of adversarial justice and the impediments to accuracy and truth); see generally Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 144–49 (2011) (using experimental psychology to assess the fact-finding accuracy of criminal trials).

¹¹ Moreover, state court pleas are federalized by the waiver of federal constitutional rights under the Fifth and Sixth Amendments—(1) privilege against self-incrimination, (2) right to a jury trial and, (3) right to confrontation. See *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). The plea is a waiver of essential federal rights, governed by federal standards, and hence voluntariness is critical to protecting those interests. *Id.* at 242–43 (“Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality.”); see generally NEW YORK CRIMINAL PRACTICE § 12.07[5] (Barry Kamins et al. eds., 2d ed. 2013) (discussing waiver of a defendant’s constitutional rights at allocution). The plea by negotiated waiver has the potential to foreclose defense rights, unrelated to jurisdiction or right to counsel, concerning the charging instrument, preliminary hearing, grand jury indictment, speedy trial, double jeopardy, statute of limitations, discovery and suppression motions or decisions, evidentiary rulings, in limine motions, prior bad acts or convictions, disqualification of prosecutor’s office, recusal of the judge, official misconduct, and appeal. *Id.* § 12.11. Interestingly, competency is not waived, despite the practice of accepting *Alford* pleas. *Id.* The question now raised in the aftermath of the recent Supreme Court decisions on plea bargaining is the propriety of seeking a waiver of ineffectiveness of counsel and other fundamental rights that ought to survive a plea waiver. See discussion *infra* note 85.

¹² See *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (“[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.”)

¹³ See *Boykin*, 395 U.S. at 243 n.5. The Court pointed out that the values statutorily codified in Federal Rules of Criminal Procedure 11(b)(2) governing voluntariness in entering a plea mirrored the due process requirements. See generally ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY § 14-1.5, at 61–64 (3d ed. 1999) (discussing the standard for

a fair trial cannot restore or validate the loss of the right to choose. A plea to the charge without concessions, without education, without information as to collateral consequences or punishment options or outcomes of conviction arises from ineffective counsel and the failure of due process.¹⁴ Until recently, the U.S. Supreme Court paid scant interest to the bread and butter of criminal justice, but it is now focusing its full attention on the discount window.

The preference for certainty over accuracy detracts from truth-finding, which has no end. Thus, finality has become an end in itself, preserving the integrity of the trial by limiting postconviction analyses. So the presumption of innocence finishes with conviction; and the sanctity of the conviction is embodied in finality, the presumption of guilt. And yet, the diminishing returns of finality have resulted in the growth of mass incarceration, wrongful incarceration, and the costs they incur.¹⁵

“Determining Voluntariness of Plea”).

¹⁴ Acknowledging the difficulty with the direct/collateral analysis of plea consequences in general and immigration in particular highlighted in *Padilla v. Kentucky*, federal and state courts have backed away from a stark definition of collateral consequences. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010); see generally George L. Blum, Annotation, *Construction and Application by State Courts of Supreme Court’s Ruling in Padilla v. Kentucky*, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), *That Defense Counsel Has Obligation to Advise Defendant That Entering Guilty Plea Could Result in Deportation*, 74 A.L.R.6TH 373 (2012) (describing divergent court interpretations of *Padilla* in determining the obligations to advise, and whether the *Padilla* decision could be applied retroactively or not). Thus, as to the unique risks of deportation, an appellate court might choose a case-by-case rather than a categorical approach to right to counsel and due process claims. Compare *People v. Ford*, 657 N.E.2d 265, 268 (N.Y. 1995) (holding risk of deportation as purely collateral), with *People v. Peque*, 3 N.E.3d 617, 621 (N.Y. 2013) (holding risk of deportation as consequential and requiring advisement from the court). In some aspects the *Peque* decision shows the theoretical underpinnings and debates that came to the surface in *Lafler* and *Frye*. *Peque*, 3 N.E.3d at 622 (“[T]o overturn his or her conviction, the defendant must establish the existence of a reasonable probability that, had the court warned the defendant of the possibility of deportation, he or she would have rejected the plea and opted to go to trial.”) In one sense they went further by founding their decision on due process, not the right to counsel, but retreated to the familiar right to trial remedy when a plea went awry. *Id.* at 621 n.1. In essence, they elevated the right, but not the remedy. See N.Y. CRIM. PROC. LAW § 220.50(7) (McKinney 2014) (codifying the duty of judicial advisement for non-citizens entering guilty pleas, but failure to warn did not undermine the plea’s voluntariness or validity of conviction).

¹⁵ See generally Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the “Interests of Finality,”* 2013 UTAH L. REV. 561, 581–83. In the course of Professor Kim’s critique of finality, he identified the key values of postconviction review, asserting that it

“provides oversight of trial courts and authoritative interpretations of the law so that the law is applied uniformly in all courts [consistency]. It allows the judiciary to correct its own legal mistakes [accuracy], helping to ensure that the state deprives defendants of their liberty only in accordance with the law [legitimacy]. When new evidence of innocence surfaces, posttrial review can help set an innocent person free.”

Id. at 566.

Through the prism of recent Supreme Court plea bargaining decisions this Article examines their implications for the competing goals of truth versus process. Part I frames the argument about the nature of criminal justice and the tension between fact-finding trials and resolution making plea negotiations. Then, those values are scrutinized in the context of three recent and watershed Supreme Court decisions: Part II *Missouri v. Frye*, Part III *Lafler v. Cooper*, and Part IV *Burt v. Titlow*. Lastly, Part V considers the lessons of wrongful incarceration as guideposts to align accuracy with certainty in the administration of justice.

I. TRUTH OR CONSEQUENCES: THE AIMS OF JUSTICE

The accused has a fundamental right to a choice, whether to plead guilty or to go to trial. It is the sanctity of that choice that spurred the Supreme Court to screen plea negotiations through the lens of *Strickland v. Washington*'s¹⁶ ineffectiveness of counsel standard.¹⁷ There is also the exoteric acknowledgement that plea bargaining is the mainstay of criminal adjudications, a chief product of American justice. So it is that the defense lawyer's role as information creator, rights negotiator, and client advocate are taking center stage in the first act of criminal adjudication. Still, there are tensions between the interests served by a trial verdict and a plea bargain, the cognitive dissonance between accuracy of outcome and the fairness of process as the proper end of justice.

The plea bargain is a non-constitutional, statutory right¹⁸ to what is essentially a contract of adhesion offered by the prosecution,¹⁹

¹⁶ *Strickland v. Washington*, 466 U.S. 668 (1984).

¹⁷ See *id.* at 687 ("First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the 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. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.").

¹⁸ See *Mabry v. Johnson*, 467 U.S. 504, 507 (1984). In assessing a defendant's right to specific performance based on acceptance of a plea offer that was then withdrawn by the prosecution, the Supreme Court emphasized the importance of the conviction as a predicate for a due process violation, stating, "[a] plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution." *Id.* at 507–08.

¹⁹ See generally *Bordenkircher v. Hayes*, 434 U.S. 357, 358–59 (1978) (holding that a prosecutor's plea offer, accompanied by a threat to reindict defendant as recidivist unless it was accepted, did not fall outside constitutional boundaries).

solicited or crafted by defense counsel,²⁰ and subject to judicial veto.²¹ It is confined to a short menu of plea options independent of a bargain, which are limited to pleading to the top counts of the indictment, *nolo contendere*, or not guilty by reason of insanity (mental disease or defect).²² And even a bargained for plea must fit within the statutory guidelines for lesser included offenses, which further restrict the options for conviction and sentence. Moreover, a plea bargain can encompass matters not before the court, such as dismissing open cases, recommending concurrent time to prison sentences or parole or probation violations. Hence, there are many non-factual motivations for pleading guilty unrelated to the truth of the case—most of which concern proportionality of crime to punishment or to proof. Nonetheless, the factors militating in favor of pleas are often systemic: risk avoidance, conservation of prosecution and court resources (trials, hearings, and motions),²³

There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise. We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment.

Id. at 365.

²⁰ Defense counsel plays a part in responding to or formulating a plea bargain that would address the concerns of the defendant and still satisfy the requirements of the pleading and sentencing statutes.

²¹ Trial judges have independent responsibility and authority apropos the acceptance of a plea agreement. Their chief role in the negotiation is their sentence promise or cap, which is independent of recommendations by either party. Still, courts are constrained against blanket policies concerning acceptable plea bargains or sentence practices. Indeed, the tension that can arise between the charging function of the prosecution and the approval and sentencing discretion of judges sometimes has to be resolved under the separation of powers—leaving defendants in the crossfire. *See, e.g.,* *Donnaruma v. Carter*, 969 N.Y.S.2d 755, 757 (Sup. Ct. 2013) (“[A] statement of a district attorney declining continued prosecution of a criminal case does not divest the court of jurisdiction or otherwise impose a mandatory duty upon the court to dismiss the case, even where the criminal defendant consents to dismissal. However, the trial court cannot order the district attorney to call witnesses at a suppression hearing or enforce such an order through contempt.”); John Caher, *Impasse Between Judge, D.A. Reaches Appeals Panel*, N.Y.L.J., Nov. 25, 2013, at 2. The appellate argument of the *Donnaruma* case before the appellate division raised concerns over the “legal limbo” of the defendants in a criminal case that the prosecution did not want to pursue, but might be ordered to, or face contempt of court. *Id.* For the most part, the court must stand apart from the plea negotiation. The court cannot compel a plea reduction or oppose a decision not to go forward with the prosecution.

²² There are also uncounseled or *pro se* pleas that are a category unto themselves.

²³ *See generally* *Santobello v. New York*, 404 U.S. 257, 259 (1971) (holding that a replacement prosecutor who violated a plea agreement by recommending the maximum sentence, instead of remaining silent, violated due process rights of defendant who entered plea based on this representation). The court held the prosecutor responsible, saying, “this

docket backlogs, and efficiency and timeliness of dispositions.²⁴

Plea bargains ask the defendant to conduct an entire trial in their heads and to judge themselves after some brief legal instruction.²⁵ Thus, the myth underlying plea bargains is that the accused is in the best position to adjudicate their own thoughts and actions even when they extend beyond their experience and knowledge.²⁶ The guilty plea cancels the presumption of innocence and becomes proof beyond a reasonable doubt. And yet, this same testificant whose credibility would be mercilessly assailed on cross-examination at trial is for the sake of procedure vested with the qualifications of judge, jury, prosecutor, and defense counsel.²⁷ Thus, by definition, the plea process is less true than the trial. While the accuracy rates of trials have been called into question, the crucible of the witness chair is infinitely more revealing than the self-assessment of the pleader allocuting from the bar.

The chief problems that afflict the reliability of a trial's outcome also impinge on the accuracy of the plea allocution,²⁸ in addition to

record represents another example of an unfortunate lapse in orderly prosecutorial procedures, in part, no doubt, because of the enormous increase in the workload of the often understaffed prosecutor's offices. The heavy workload may well explain these episodes, but it does not excuse them." *Id.* at 260. The trial court's decision to impose the sentence, regardless of the recommendation, did not insulate the prosecutorial error, and thus the remedy on remand would either be specific performance or withdrawal of the plea. *Id.* at 262-63.

²⁴ See generally *Brady v. United States*, 397 U.S. 742, 751-52 (1970) (describing the factors favoring the "mutuality of advantage" for the prosecution and defense to dispose of the majority of cases by plea bargaining). Also, other less typical interests include encouraging cooperation from defendants in exchange for recommendations of leniency, sparing the victim of certain offenses the trauma of testifying, and marshalling resources for high profile or serious cases.

²⁵ The criminalization of human actions is based first on the risk assessment by the legislature. Then the accused must intuit the legislative intent behind the penal code before judging their guilt or innocence or plausible defenses. And the lawmakers' prescriptive risk assessment is not always easy to understand. See Brenner M. Fissell, *Abstract Risk and the Politics of the Criminal Law*, 51 AM. CRIM. L. REV. 657, 667-668 (2014). Mr. Fissell undertakes an exploration of the problematic nature of "abstract endangerment" statutes and the presumed correctness of the legislature's risk assessment analysis, stating that "many of the same deficiencies that taint individual risk assessments are also present (and are often more aggravated) when a collective political body makes determinations." *Id.* at 657-658.

²⁶ See Deborah Davis et al., *Disputed Interrogation Techniques in America: True and False Confessions and the Estimation and Valuation of Type I and II Errors*, in *CONTROVERSIES IN INNOCENCE CASES IN AMERICA* (S. Cooper ed., 2013); Cara Laney & Elizabeth F. Loftus, *Recent Advances in False Memory Research*, 42 S. AFRICAN J. PSYCHOL. 137, 138 (2013); Bi Zhu et al., *Brief Exposure to Misinformation Can Lead to Long-Term False Memories*, 26 APPLIED COGNITIVE PSYCHOL. 301, 306 (2012).

²⁷ See John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 479 (2008).

²⁸ See JON B. GOULD ET AL., U.S. DEPT OF JUSTICE, *PREDICTING ERRONEOUS CONVICTIONS: A SOCIAL SCIENCE APPROACH TO MISCARRIAGES OF JUSTICE* 7 (2012). This study points out

the unique factors associated with the plea option. A well-counseled defendant might consider the weight of the evidence, credibility of witnesses, legal argument, and viable defenses—all of which militate in favor of legal truth. But without adequate investigation and legal analysis, the decision to plead or to go to trial will be poorly made—pitting against each other the competing values of personal truth, the need to confess or to be vindicated, and the systemic values of equal justice, legal truth, and administrative necessity.

The plea decision is based on provable and defensible realities. While the terms are negotiated by the lawyers in most cases, the defendant is the decider who must play out the entire trial in her imagination and filter her knowledge of the facts through the penal code, criminal procedure, and evidence law, as well as forensic science. And the experience of her attorney is the knowledge filter that must accurately relay the elements of the offense, the merits of the prosecution's case, the attitude of the judge on law and punishment, the defenses available and their likelihood of success, as well as any legal issues related to the defendant's perception and competency.²⁹

When the defendant decides to plead guilty she enters a new phase. The plea allocution is a staged-confession or a whittled down trial.³⁰ Proof beyond a reasonable doubt is concentrated into the defendant's acceptance of guilt and the waiver of her trial rights.³¹

the need for "increased attention to the failing dynamics of the criminal justice system." *Id.* at iii. Seven key factors were identified: "(1) mistaken eyewitness identification; (2) false confessions; (3) tunnel vision; (4) perjured informant testimony; (5) forensic error; (6) prosecutorial error; and (7) inadequate defense representation." *Id.* at 7. In addition, the authors noted the role of race, the perception of justice portrayed in the media, and the inadequacy of postconviction remedies. *Id.*

²⁹ See generally Gregory G. Sarno, Annotation, *Degree of Mental Competence, Required of Accused Who Pleads Guilty, Sufficient to Satisfy Requirement, of Rule 11 of Federal Rules of Criminal Procedure, That Guilty Pleas Be Made Voluntarily and with Understanding*, 31 A.L.R. FED. 375, 388–89, 422 (1977) (examining the efforts of defense attorneys to ensure defendants are competent to understand the charges against them); J.A. Connelly, Annotation, *Propriety of Criminal Trial of One Under Influence of Drugs or Intoxicants at Time of Trial*, 83 A.L.R.2D 1067 (2002) (summarizing cases in which defendants' competency is at issue regarding their ability to stand trial and receive effective assistance of counsel, inter alia).

³⁰ See *Kercheval v. United States*, 274 U.S. 220, 223 (1927) ("A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence.")

³¹ Nolo contendere pleas exemplify the Supreme Court's focus on practice over formalism in adjudicating guilt. Indeed, the nolo plea is a tacit acknowledgment of sufficient personal responsibility to warrant punishment based on circumstantial confession without an overt admission or denial of guilt. See *North Carolina v. Alford*, 400 U.S. 25, 32–33, 37 (1970)

Thus, the plea is mainly in the defendant's control, while the trial would be in her lawyer's. Entering the plea rests on the defendant's ability to allocute and to respond correctly as part of the court's colloquy; while the trial would have depended on the rules of evidence, procedure and counsel's skills at persuasion and usually without defendant's testimony. So it is that the influences that result in a plea will be different from those that compel the trial track, and neither is based on the objective truth but rather legal compromise. Pretrial innocence and guilt are legal commodities, situational legal truths. And their reality depends on public policy, proof, proper allocation of risks and benefits to the prosecution and the defendant, and judicial economy.

Indeed, the paths of the plea offer and trial are complicated by the interaction of human and legal factors.³² The defendant, who possesses direct evidence, might be factually innocent, factually guilty or incompetent to self-assess, e.g., suffering from a mental disease or defect, amnesia or drug or alcohol addiction, or simply unapprehending of the significance of the event in the legal scheme. Every defendant shares the fear of a wrongful conviction, whether they are in fact innocent or guilty, still both are entitled to fundamental fairness. And without fairness, the strength of the prosecution's case and the availability of excuses or justifications cannot be evaluated. Thus, the choice to plead guilty and waive the right to trial might be of convenience, necessity, or inevitability. Indeed, the plea itself might be a legal fiction made compulsory by legal realities.³³

("Although denying the charge against him, he [Alford] nevertheless preferred the dispute between him and the State to be settled by the judge in the context of a guilty plea proceeding rather than by a formal trial. Thereupon, with the State's telling evidence and Alford's denial before it, the trial court proceeded to convict and sentence Alford for second-degree murder."). The admission of guilt was not a constitutional predicate for a court to punish a defendant. *Id.* at 37. And waiving the right to trial forestalled due process objections, as "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *Id.* Thus, the "factual basis for the plea," whether or not supplied by the defendant, can extinguish protestations of innocence. *Id.* at 38. In effect, it reduced the plea event from existential to evidentiary status.

³² See 1 ANTHONY G. AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES § 202, at 340–43 (5th ed. 1988) (describing the factors that enter into a defendant's decision whether to plead guilty, ranging from strategic and evidentiary to personal and pragmatic).

³³ See Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1119–20, 1136–37 (2008); Stephanos Bibas, *Exacerbating Injustice*, 157 U. PA. L. REV. PENNUMBRA 53, 54 (2008) (responding to Bowers' article); see generally John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty* 21 (Cornell Legal Studies Research Paper July 11, 2012), available at <http://papers.ssrn.com/sol3/papers.cfm?abstractid=2103787> (discussing cases where factually

Plea bargains are essentially built-in leniency, the reward for judicial economy and the minimization of risk for the accused. While trials have been called to task for their approach to factual analysis and the accuracy of convictions, the plea forestalls all criticism because the accused is allocuting or confessing voluntarily and the facts are stipulated and re-scripted. So the question must be asked: Wherein does justice lie when legal truth is sacrificed to legal expediency?

II. *MISSOURI V. FRYE*: A TALE OF TWO PLEAS

Galin Frye was a repeat offender.³⁴ He had three convictions for driving with a revoked license, and in 2007 he was arrested again on the same charge.³⁵ Under Missouri law, he faced a class D felony and maximum of four years in prison.³⁶ About three months later, the prosecution sent a written offer to Frye's attorney: (1) plea to felony charge and sentence recommendation of ten days in jail (shock time) or (2) plea to misdemeanor and sentence recommendation of ninety days in jail.³⁷ Both offers were set to expire on December 28th.³⁸ Frye's lawyer did not convey the offers to his client, and they expired.³⁹

While Frye's preliminary hearing on this case was pending, he was arrested on a new charge for driving with a revoked license.⁴⁰ As to the original charge, he waived the hearing, pled guilty to the first offense, a class D felony, without any agreement, and, based on the prosecution's recommendation, the judge sentenced him to three years in prison.⁴¹

In a state court postconviction motion, Frye raised ineffectiveness of counsel apropos the failure to advise him of the plea offer.⁴² He testified that he would have accepted the misdemeanor offer if he had known about it.⁴³ The lower court denied his motion, but the decision was reversed by the Missouri Court of Appeals.⁴⁴ They

innocent defendants plead guilty).

³⁴ *Missouri v. Frye*, 132 S. Ct. 1399, 1404 (2012).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 1404–05.

⁴² *Id.* at 1405.

⁴³ *Id.*

⁴⁴ *Id.*; see also *Frye v. State*, 311 S.W.3d 350, 353, 361 (Mo. Ct. App. 2010), *vacated*, 132 S.

decided that Frye met the burden of demonstrating a Sixth Amendment violation under *Strickland*.⁴⁵ The trial record showed that Frye's attorney was deficient due to a failure to communicate the plea offer.⁴⁶ This failure caused prejudice since it compelled Frye to plea to a felony, which exposed him to state prison time, and to forgo the misdemeanor option, which he would have accepted.⁴⁷ Thus, the Missouri Court of Appeals declared the guilty plea withdrawn and remanded the case to the trial judge in order to permit Frye his choice of going to trial or entering into a new plea bargain with the prosecution.⁴⁸ Following this decision, the Supreme Court granted the State's petition for certiorari to resolve the proper application of *Strickland* to plea negotiation and defendant's decision making.⁴⁹

The Sixth Amendment requires the presence of counsel at all "[c]ritical stages" of criminal adjudication, e.g. arraignment, post-indictment interrogation, and lineups.⁵⁰ Writing for the majority, Justice Kennedy had no trouble identifying pretrial plea negotiation as a critical stage protected by the right to counsel.⁵¹ And as such, the plea bargain demanded the effective assistance of counsel.⁵² The Court's analysis was founded on two cases involving misadvice and inadequate advice.⁵³

In *Hill v. Lockhart*,⁵⁴ defense counsel misinformed his client about the amount of time he had to serve before becoming parole eligible

Ct. 1399, 1411 (2012).

⁴⁵ *Frye*, 132 S. Ct. at 1405.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* In granting certiorari, the Court also asked the parties to brief and argue this additional point: "What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?" *Missouri v. Frye*, 131 S. Ct. 856, 856–57 (2011).

⁵⁰ *Frye*, 132 S. Ct. at 1405.

⁵¹ *See id.* Among the cases noted by the Court, Justice Kennedy cited *Argersinger v. Hamlin*, in which the Court held that the right to court-appointed counsel applied to the trial of any petty or misdemeanor offense risking jail time. *Argersinger v. Hamlin*, 407 U.S. 25, 36–37 (1972). In that decision, Justice Douglas further commented on the need for attorney representation at the plea stage:

"Beyond the problem of trials and appeals is that of the guilty plea, a problem which looms large in misdemeanor as well as in felony cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution."

Id. at 34.

⁵² *Frye*, 132 S. Ct. at 1405.

⁵³ *Id.*

⁵⁴ *Hill v. Lockhart*, 474 U.S. 52 (1985).

by overlooking his status as a second felony offender.⁵⁵ Applying *Strickland*'s two-part test to "challenges to guilty pleas based on ineffective assistance of counsel," relief was denied because the petitioner, William Lloyd Hill, did not claim that he would have pursued trial instead of pleading guilty or the presence of special circumstances such as undue emphasis on parole eligibility in the decision-making process.⁵⁶ Reiterating the application of *Strickland* to plea negotiation, the Court in *Padilla v. Kentucky* held that defense counsel had a duty to correctly advise the defendant about the immigration consequences of his guilty plea, namely the risk of deportation—leaving open the question of establishing prejudice.⁵⁷ Both decisions illustrated the application of *Strickland* to the plea event and claims raised postconviction.⁵⁸

The attorneys in *Hill* and *Padilla* tainted the plea process with inaccurate information, underestimating a sentence calculation in one case and the risk of deportation in the other.⁵⁹ In *Frye*, the problem was not with advice that related to an accepted plea, but the lawyer's omission of information that foreclosed the existence of a plea bargain.⁶⁰ Thus, Justice Kennedy articulated the distinction between outcome and process: "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 plea offers."⁶¹ In other words, it was how the plea was handled rather than the substantive advice about its effects that was determinative in *Frye*.

In most plea cases, such as *Hill* and *Padilla*, a record had been made before a judge attesting to the defendant's understanding of the offer, the options, and the rights being waived.⁶² In those cases, the pleas had been accepted, albeit based on mistaken advice, and entered in court where some safeguards existed—most notably a

⁵⁵ *Id.* at 54–55.

⁵⁶ *Id.* at 53, 58, 60.

⁵⁷ *Padilla v. Kentucky*, 559 U.S. 356, 373–74 ("In sum, we have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel. The severity of deportation—the equivalent of banishment or exile,—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation." (citations omitted) (quoting *Delgado v. Carmichael*, 332 U.S. 388, 390–91 (1947))).

⁵⁸ *Frye*, 132 S. Ct. at 1406.

⁵⁹ *Id.* at 1405–06.

⁶⁰ *Id.* at 1404.

⁶¹ *Id.* at 1406.

⁶² *Id.*; see also ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY § 14-1.7, at 70 (3d. ed. 1999) (describing what should be contained in the record when a defendant enters a guilty plea).

record of what happened. Misunderstandings and even misadvice might have been remedied, while the defendant was in the dock.⁶³ The distinction, then, was between misinformation (bad choice) and no information (no choice). Thus, while misadvice can be remedied in the courtroom during the plea colloquy, a bargain discarded in a lawyer's office cannot.⁶⁴ The safeguards that attend proceedings before a judge do not filter through to pretrial negotiations between the prosecution and defense counsel or meetings that occur between defense counsel and the accused.⁶⁵ The attorney-client discussions are usually unrecorded and under the umbrella of privilege.⁶⁶

Still, legal reality has shifted. The vast majority of criminal convictions are now the results of pleas, not trials. For all constitutional intents and purposes, the plea has become the trial. According to the Bureau of Justice Statistics cited by the Supreme Court, guilty pleas represent annually ninety-seven percent of federal and ninety-four percent of state convictions.⁶⁷ Thus, the Court was compelled to declare:

The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.⁶⁸

In fact, Justice Kennedy went on to cite sources that point out how the criminal justice system has adapted to promote plea negotiation. For instance, legislatures enact a wide range of sentences to encourage reductions for pleas and leave open the threat of maximums for exercising the right to trial.⁶⁹ In addition,

⁶³ *Frye*, 132 S. Ct. at 1406–07.

⁶⁴ *Id.*

⁶⁵ *See id.*

⁶⁶ *Id.* at 1407 (“This underscores that the plea-bargaining process is often in flux, with no clear standards or timelines and with no judicial supervision of the discussions between prosecution and defense. Indeed, discussions between client and defense counsel are privileged. So the prosecution has little or no notice if something may be amiss and perhaps no capacity to intervene in any event.”).

⁶⁷ *Id.*; see also James R. Acker & Catherine L. Bonventre, *Protecting the Innocent in New York: Moving Beyond Changing Only Their Names*, 73 ALB. L. REV. 1245, 1259 (2010).

⁶⁸ *Frye*, 132 S. Ct. at 1407.

⁶⁹ *Id.* The majority opinion cited these authorities to affirm the essential role that plea bargaining has in the justice system and the manipulation of sentencing options to promote early disposition, albeit against the grain of fair and balanced sentencing that should not objectively affect the outcome. *Id.* (citing Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1033–34 (2006); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

the states' procedure laws create an assortment of charging instruments of comparable flexibility for plea reductions preindictment, even to misdemeanors like the untransmitted offer made to Frye. Still, even though pleading instruments, grand jury indictments, and sentences are set by statute, the plea bargain process is still largely unregulated and unattended by the court.

While plea reduction is advantageous to prosecutors husbanding resources and defendants who might be risk adverse,⁷⁰ it is also a compromise that undercuts a fair and objective conviction and sentencing—legal truth is thus reduced for convenience into social insurance. An innocent, almost innocent, or imperfectly guilty defendant might take a plea or sentence reduction to avoid the fate of a long punishing prison term imposed after trial.⁷¹ Moreover, the high risk of wrongful conviction is a serious concern for defendants as highlighted by exonerations from the Innocence Movement, which often occur years, even decades, after judgment, if ever.⁷² The accuracy rate of the criminal justice system factors into every decision. Even those who are to some degree factually guilty of something might fear to exercise their right to pursue an excuse or

⁷⁰ *Frye*, 132 S. Ct. at 1407–08 (“To note the prevalence of plea bargaining is not to criticize it. The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties. In order that these benefits can be realized, however, criminal defendants require effective counsel during plea negotiations.”).

⁷¹ Blume & Helm, *supra* note 33, at 29; see Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer's Growing Anxiety About Innocence Projects*, 13 U. PA. J.L. & SOC. CHANGE 315, 324 (2010) (“The dominance of the rhetoric of innocence also comes at the expense of the not-quite-so-innocent but equally unfairly treated. Examples of the not-quite-so-innocent run the gamut. There are criminal defendants who are guilty of something but not the worst thing they are charged with. There are defendants who are guilty of something other than what they are charged with. There are defendants who committed the crime charged but with significant mitigating or extenuating circumstances. There are defendants who committed the crime but they had never done anything like this before, they lost control in a trying situation. There are defendants who committed the crime and it is no wonder in view of how they came into the world and what they endured after. There are defendants who committed the crime and have no excuse whatsoever but, as death penalty lawyer Bryan Stevenson says, ‘[e]ach of us is more than the worst thing we ever did.’”); Ken Strutin, *The Age of Innocence: Actual, Legal and Presumed*, LLRX (May 5, 2011), <http://www.llrx.com/features/ageofinnocence.htm>.

⁷² See BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 6–7 (Harv. U. Press 2011) (analyzing the first two hundred and fifty DNA exonerations); INNOCENCE PROJECT, LESSONS NOT LEARNED 7–16 (2009), http://www.innocenceproject.org/docs/NY_Report_2009.pdf (analyzing twenty four New York wrongful conviction cases); *Actual Innocence Awareness Database*, TARLTON L. LIBR., <http://tarlton.law.utexas.edu/research-tools/current-awareness-services/actual-innocence#> (last visited Aug. 16 2014); see generally *About the Registry*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Aug. 16, 2014) (cataloging wrongful convictions since 1989).

justification defense. The certainty of a plea overrides the potentiality of a trial, or even a suppression hearing. The low odds of successful postconviction review, sentence reduction on appeal, or early release on parole also militate against the litigation option.⁷³ Overall, the integrity of the adjudication process, the perceived and actual fairness of how it operates, plays a major role in defense strategy and decision making. And it tips the scales of justice from factual accuracy or truth to procedural and economic pragmatism.

Moreover, the plea bargain allocution becomes the new fact-finding event, a modified confession that is first cousin to the allegations in the indictment. Both factual guilt and sentencing terms can be negotiated and adjusted based on the range of statutory guidelines for lesser-included offenses and plea reductions, provided the trial is waived.⁷⁴ If not, the trial locks defendants into the top counts of the indictment and their associated mandatory minimums.⁷⁵ In addition, the commitment of resources and uncovering of aggravating evidence will harden the prosecutor's sentencing position after conviction—also reducing the likelihood of habeas relief or parole release later on.

Recognizing without resolving the cognitive dissonance created by a plea bargaining system, Justice Kennedy went on to address the role of counsel in this process. He began by sounding a cautionary note against dictating guidelines for the “art of the deal”:

Bargaining is, by its nature, defined to a substantial degree

⁷³ While innocent, or less than fully guilty, persons might plead guilty or be convicted after a trial; their chances at getting released on parole are slim if they protest their innocence—with few exceptions. See, e.g., Frances Robles, *Parole Set in '95 Case Amid Doubts on Inquiry*, N.Y. TIMES, Nov. 2, 2013, at A1 (noting that Brooklyn District Attorney's Conviction Integrity Unit investigation of NYPD detective introduced doubts about interrogation of parolee twenty years earlier and, along with other exculpatory evidence, convinced the Parole Board to release him). Thus, a new wrinkle in postconviction review is the potential for parole release based evidence of actual innocence, which might not have succeeded on appellate or habeas corpus review. Moreover, since the parole proceeding is an administrative review and not a judgment of the facts, the prosecutor might nonetheless oppose release. *Id.*; see Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 129–30 (2004). Thus, even expressions of innocence can become commodities depending on the proceeding and the interests at stake.

⁷⁴ In some instances, where there are statutory restrictions preventing an amenable plea bargain, some prosecutors and defense attorneys enter into agreements to try nonjury cases on stipulated facts, thus bringing the charge and sentence within the desirable range. See Jay M. Zitter, Annotation, *Guilty Plea Safeguards as Applicable to Stipulation Allegedly Amounting to Guilty Plea in State Criminal Trial*, 17 A.L.R.4TH 61 (1982).

⁷⁵ Moreover, the jury instructions and lesser included offenses that will apply at trial might influence pre-verdict plea bargaining analysis. See generally Jay M. Zitter, Annotation, *When Should Jury's Deliberation Proceed From Charged Offense to Lesser-Included Offense*, 26 A.L.R.5th 603 (1995).

by personal style. The alternative courses and tactics in negotiation are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process.⁷⁶

Thus, this phase of representation remains unregulated and unreviewed for now, except to the basic notion of effective assistance of counsel:

[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. . . . When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires.⁷⁷

Communication and explanation of the offer were paramount duties already found in ABA standards, codes of professional conduct, and state court decisions.⁷⁸ Without undertaking to define the precise standards or norms for negotiation practices, Justice Kennedy made important observations about safeguarding the process through formalization, e.g., record making, and taking steps to curtail "late, frivolous, or fabricated claims."⁷⁹ Of course, this concern about false or unsubstantiated claims suggests that any new ground for overturning a conviction has to be tempered by the belief that it will be abused. It is this inherent bias, underlying the Antiterrorism and Effective Death Penalty Act (AEDPA)⁸⁰ for instance, which might foretell the high burden and suspicious eye that will be cast on claims in habeas courts where they will be first adjudicated on remand.⁸¹

⁷⁶ *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012).

⁷⁷ *Id.*

⁷⁸ *Id.*; see Ken Strutin, *Client Communication: An Essential Element of Criminal Defense Practice*, N.Y. ST. B.J., Mar.–Apr. 1996, at 24.

⁷⁹ *Frye*, 132 S. Ct. at 1408–09.

⁸⁰ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. See generally Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. J. CONST. L. 1219 (2012); Shon R. Hopwood, *Slicing Through the Great Legal Gordian Knot: Ways to Assist Pro Se Litigants in Their Quest for Justice*, 80 FORDHAM L. REV. 1229 (2011); Thomas C. O'Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 HARV. C.R.-C.L. L. REV. 299 (2006).

⁸¹ See, e.g., Daniel B. Wood, *Why O.J. Simpson Was So Eager to Take Stand in New Trial*, CHRISTIAN SCI. MONITOR, May 15, 2013, at 13. Mr. Simpson challenged his 2008 Nevada armed robbery conviction based on ineffectiveness of counsel in the handling of the plea

Overall, there are several key considerations. First, a “formal offer” implied documentation that can be reviewed later.⁸² Second, rules could be enacted to require that offers should be made in writing “to ensure against later misunderstandings or fabricated charges.”⁸³ Finally, such offers should be put on the record in open court at the pleading or pretrial stages.⁸⁴ Some of this required record-making already occurs in some jurisdictions, which the Court noted, and to some extent has been an informal practice among defense counsel conscious of ineffectiveness and malpractice claims.⁸⁵ In reality only the most basic information can be put on the record without invading the defense camp or creating a conflict of interest.⁸⁶ At a minimum, when the prosecutor puts an offer on the record it puts the client on notice that one exists, which directly addresses the communication deficiency in *Frye*.⁸⁷ The merits of the advice to be given were left for another day.

Having met the first prong of *Strickland*, the Court considered the prejudice to be shown from the failure to relay a plea bargain,

negotiation. *See id.* A chief issue in the postconviction fact-finding hearing will be credibility. “Simpson’s claim of ineffective assistance of counsel ‘will predictably devolve into a “he said, he said,” conflicting, fact-based narrative by Simpson and his former attorney,’ says Professor Pugsley, [professor at Southwestern Law School in Los Angeles].” *Id.*

⁸² *Frye*, 132 S. Ct. at 1409.

⁸³ *Id.*

⁸⁴ *Id.* Another issue to be addressed will be how plea bargains might be documented in local courts or courts that are not of record, and whether current practices are adequate for review purposes under *Frye*.

⁸⁵ *Id.* There are also issues related to the ethics of conditioning plea bargains on waivers of ineffectiveness of counsel or of collateral remedies (such as appeal waiver). *See* Nat’l Ass’n of Criminal Def. Lawyers Ethics Advisory Comm., Formal Op. 12-02 (2012) (“It is the opinion of the NACDL Ethics Advisory Committee that, aside from whether the courts might approve such waivers, the rules of professional ethics prohibit a criminal defense lawyer from signing a plea agreement limiting the client’s ability to claim ineffective assistance of counsel. The lawyer has a conflict of interest in agreeing to such a provision because it becomes a prospective limiting of liability. Therefore, the lawyer is duty-bound to object to portions of a plea agreement that limit [28 U.S.C. §] 2255 claims and refuse to assent to such an agreement with such language in it.”); *United States v. Ky. Bar Ass’n*, 2014 Ky. LEXIS 340 (Sup. Ct. Ky. Aug. 21, 2014) (upholding constitutionality and validity of Ky. Bar Ass’n Ethics Op. E-435 interdicting ineffective assistance of counsel waivers in plea agreements under the state’s Rules of Professional Conduct; includes collection of ethics opinions from other states. *Id.* at 15-16 n.37-40); *see generally* Kristine Cordier Karnezis, Annotation, *Validity and Effect of Criminal Defendant’s Express Waiver of Right to Appeal as Part of Negotiated Plea Agreement*, 89 A.L.R.3d 864 (1979).

⁸⁶ *See, e.g., United States v. Nelson*, 732 F.3d 504, 519 (5th Cir. 2013) (holding that testimony of former defense counsel concerning content of non-record plea discussions violated attorney-client privilege and right to counsel, but was harmless error). *See also* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 10-456 (2010) (“Disclosure of Information to Prosecutor When Lawyer’s Former Client Brings Ineffective Assistance of Counsel Claim”).

⁸⁷ *Frye*, 132 S. Ct. at 1409.

resulting in a lapse or rejection of the offer. First, the defendant had to show “reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel.”⁸⁸ Second, they must establish “a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law.”⁸⁹ Finally, under these circumstances, “it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.”⁹⁰

The new application of *Strickland* hinges prejudice on a choice of plea options, not between plea and trial.⁹¹ The whole approach, premised on the idea that there is no right to a plea offer, created a mental nunc pro tunc asking the defendant to put everyone back in the place they were before the damage was done.⁹² Despite being deprived of the plea choice, it was the defendant who had the burden to reconstruct the thinking of the prosecutor and the judge—showing a “reasonable probability” that the plea could and would be offered again and that the trial court would accept it, and that it was most advantageous (reduced charge or sentence).⁹³ Of course, the continued sustainability of the plea agreement depends on many factors that might have changed since the original offer and the postconviction restoration of the option.⁹⁴

In Frye’s case, the deficient performance of counsel, the first *Strickland* prong, had been satisfied—there was no evidence in the record that his attorney had made any effort to communicate the offer or that Frye had prevented him from doing so.⁹⁵ Thus, the Missouri Court of Appeals properly found that his attorney’s conduct did not meet an “objective standard of reasonableness.”⁹⁶ However, the state court misread the prejudice analysis under

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 1409–10 (contrasting Frye’s predicament with the holding in *Hill* in which forfeiture of the trial option in favor of the plea was the harm, and thus, *Hill*’s prejudice analysis was limited to its facts and not the only choice in evaluating pretrial dispositions).

⁹² *Id.* at 1410.

⁹³ *Id.*

⁹⁴ *Id.* (“So in 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.”).

⁹⁵ *Id.*

⁹⁶ *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

Strickland.⁹⁷ After showing that he would have accepted the plea offer by virtue of the fact the he pled to the charge without a sentencing commitment,⁹⁸ Frye had two hurdles to overcome unacknowledged by the state appeals court—the “reasonable probability” of the prosecution reoffering the bargain and the court’s acceptance, both of which were questions of state law.⁹⁹ Under state law, the prosecution had broad discretion to withdraw the offer, while the court’s options were subject to debate.¹⁰⁰ Thus, the Supreme Court remanded the case back to the Missouri Court of Appeals to resolve the last two elements of the prejudice analysis, which seemed dubious in view of Frye’s new intervening arrest.¹⁰¹

In this case, the plea bargain appeared to be the better option. But there will be plenty of instances where it might not be depending on the defendant’s situation at the time. For instance, a plea might mean being sentenced to a lengthy term of probation opening the door to future violations and resentencing, when a short finite incarceration might have presented fewer risks. Or they might want to risk trial because a plea will mean instant revocation of parole, probation, or deportation or because it will become the predicate for enhancement or impeachment at an upcoming trial or factor into open cases. Frye might have wanted to fold the new arrest into a revised plea bargain, which would have been preferable to facing the charges separately. This is the decision that defendants must make *nunc pro tunc*.

Moreover, Frye must show that the prosecutor would not have withdrawn the offer and that the judge would not have rejected it. Asking them to ignore the intervening plea to the charge and the

⁹⁷ *Frye*, 132 S. Ct. at 1410–11.

⁹⁸ *Id.* at 1411. The Court did point out that this would not be the sine qua non of proof of defendant’s willingness to accept an unknown plea offer:

It may be that in some cases defendants must show more than just a guilty plea to a charge or sentence harsher than the original offer. For example, revelations between plea offers about the strength of the prosecution’s case may make a late decision to plead guilty insufficient to demonstrate, without further evidence, that the defendant would have pleaded guilty to an earlier, more generous plea offer if his counsel had reported it to him.

Id. And since the state court correctly concluded that Frye would have accepted the plea under these facts, this element of the analysis was open to further elaboration in future cases. *Id.*

⁹⁹ *Id.* The scope of the prosecutor’s and judge’s discretion are subject to state law and hence ripe areas for reform in light of this decision. *Id.* “A State may choose to preclude the prosecution from withdrawing a plea offer once it has been accepted or perhaps to preclude a trial court from rejecting a plea bargain.” *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

new arrest, which occurred in this case, is like trying to unring a bell. Since the defendant had not accepted the offer, he had no grounds to seek specific performance. From the perspective of a reviewing court, everything was in play. The prosecutor had no obligation to offer a plea or the court to endorse it. The defendant's postconviction willingness to accept a plea offer that he never knew about was not a *de facto* acceptance. Hence, none of those protections applied.

Justice Scalia, dissenting, upheld the banner for originalism by reading the *Strickland* rule as preserving a fair trial-centered jurisprudence.¹⁰² Since there was no right to a plea offer, and the plea entered was free of attorney error, Frye's right to "fundamental fairness" had not been tainted.¹⁰³ In other words, he was the beneficiary of a fair and due process. Indeed, Frye's guilty plea validated the process. Accordingly, the lost advantage of an optional plea reduction did not detract from the defendant's procedural or substantive rights.¹⁰⁴

The dissenters, Justices Scalia, Thomas, Alito, and Chief Justice Roberts, accused the majority of standing reason on its head by applying an "outcome-based test for prejudice," thus opening the door to constitutional error based solely on the suggestion of a different disposition.¹⁰⁵ And they feared that this decision would create an unnecessary and burdensome "constitutionalization of the plea-bargaining process."¹⁰⁶ Defining defense counsel's "plea-bargaining skills" or the measure of their adequacy and second guessing the thought processes of prosecutors and judges retrospectively would generate uncertainty and much collateral litigation.¹⁰⁷ In essence, Justice Scalia and the dissenters saw the Sixth Amendment as the guarantor of fair convictions, not fair bargaining.¹⁰⁸ And the remedy for errors in plea negotiation should

¹⁰² *Id.* at 1412 (Scalia, J., dissenting).

¹⁰³ *Id.* ("In *Lafler* [*v. Cooper*, 132 S. Ct. 1376 (2012)], all that could be said (and as I [Scalia, J.] discuss there it was quite enough) is that the *fairness* of the conviction was clear, though a unanimous jury finding beyond a reasonable doubt can sometimes be wrong.").

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1413.

¹⁰⁷ *Id.* at 1412–13 ("What if an attorney's 'personal style' is to establish a reputation as a hard bargainer by, for example, advising clients to proceed to trial rather than accept anything but the most favorable plea offers? It seems inconceivable that a lawyer could compromise his client's *constitutional rights* so that he can secure better deals for other clients in the future; does a hard-bargaining 'personal style' now violate the Sixth Amendment?").

¹⁰⁸ *Id.* at 1414.

be delegated to the tailor-made “sub-constitutional remedy” of legislative enactments or court rules.¹⁰⁹ So it is that this split in the Court’s philosophy and the discretion to regulate the plea process will continue to be debated as plea negotiation ineffectiveness cases are vetted under this remodeled *Strickland* interpretation.

The following year, the Missouri Court of Appeals put these guidelines into practice.¹¹⁰ First, they found that the prosecution had the option to withdraw a plea offer, notwithstanding its acceptance by the defendant, before it went to the judge.¹¹¹ Thus, court acceptance of the plea arrangement became the threshold.¹¹² Of course, the unreasonable refusal to keep the offer open or to reoffer the bargain might raise a question of prosecutorial vindictiveness, and hence due process, not addressed by the appeals court.¹¹³

Only the trial court’s acceptance of the agreement would have provided the basis for a claim of a breach.¹¹⁴ At the same time, the trial judge had unlimited discretion to agree, to refuse, or to reject a plea bargain.¹¹⁵ And the terms could not be altered by the court; either it was embraced in toto or not at all.¹¹⁶ Therefore, the only room for discretion in the execution of the plea agreement once accepted was in the sentence.¹¹⁷

The state motion court had not addressed the newly minted

¹⁰⁹ *Id.*

¹¹⁰ *Frye v. State*, 392 S.W.3d 501, 504–05 (Mo. Ct. App. 2013).

¹¹¹ *Id.* at 505–06.

¹¹² *Id.* at 506 (“[T]he few cases in Missouri which permit a defendant to claim a breach of a plea agreement involve circumstances where a plea based on an agreement *has been accepted by the court*, and the State then fails to perform at sentencing as required in the plea agreement.” (citation omitted)).

¹¹³ *Id.* at 505 n.6; *see generally* Michael A. DiSabatino, Annotation, *Retrial on Greater Offense Following Reversal of Plea-Based Conviction of Lesser Offense*, 14 A.L.R.4TH 970 (1982) (“This annotation collects and analyzes both state and federal cases which have discussed whether a defendant may properly be tried on a higher charge after he has succeeded in getting his plea-based conviction of a lesser charge set aside.”); John S. Herbrand, Annotation, *What Constitutes Such Discriminatory Prosecution or Enforcement of Laws as to Provide Valid Defense in Federal Criminal Proceedings*, 45 A.L.R. FED. 732 (1979) (“This annotation collects and analyzes those cases in which the federal courts determined whether there existed such discriminatory prosecution or enforcement of laws as to constitute a valid defense in a federal criminal proceeding.”).

¹¹⁴ *Frye*, 392 S.W.3d at 506.

¹¹⁵ *Id.* at 506.

¹¹⁶ *Id.* at 507.

¹¹⁷ *Id.* at 507 n.7 (“The trial court may, however, have discretion with respect to the disposition of an offense, depending on the type of plea agreement reached. And, if a trial court signals an intent to reject plea agreements under Rule 24.02 (d)(1)(A), (C), or (D), the defendant must be given a chance to withdraw the plea, and advised that if he persists in pleading guilty, the disposition may be more or less favorable than that contemplated by the plea agreement.” (citation omitted)).

Strickland components of plea bargain viability based on anticipating prosecutorial and judicial discretion.¹¹⁸ Since the Missouri appeals court did not have the fact-finding power of de novo review, the case had to be remanded for an “evidentiary” hearing.¹¹⁹ And on the question of proof, it was noted by the Missouri Court of Appeals that the new pending charge, which could have been a game-changer, might not have been factored into the original plea bargain analysis.¹²⁰ In all likelihood, it probably did not come to light until after Frye’s guilty plea and sentence were a fait accompli.¹²¹

Nonetheless, the first *Strickland* prong having been satisfied became law of the case.¹²² If the motion court finds that the second prong has also been met, it will have to select the appropriate remedy, notwithstanding the conviction.¹²³ The plea entered did not erase the constitutional infirmity of the plea negotiation.

Finally, due to the new guidelines unknown at the time of the original plea, Frye will have the option to ask for an evidentiary hearing to introduce proof on the issues related to the prejudice prong as well as prosecutorial and judicial embracement of the plea bargain.¹²⁴ And this new “*Frye*” hearing will invite questions about the burdens of proof, sufficiency of evidence, and the implementation of the remedy in light of postplea incarceration and behavior.¹²⁵

¹¹⁸ *Id.* at 507.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 508 n.8 (“[T]he additional charge was not received until after the expiration of the Offer, and the record does not indicate whether the State or the trial court knew of the additional charge on the date Frye pled guilty and was sentenced. We observed in [the earlier *Frye* case] that the available record did not suggest that Frye’s new charge was discussed or disposed at the time of his guilty plea, perhaps indicating that the State and the trial court were unaware of the new charge.” (citations omitted)).

¹²¹ *Id.*

¹²² *Id.* at 508 n.9. Frye had shown that his trial lawyer did not communicate the plea offer, established his performance was deficient under *Strickland*, and that there was a reasonable probability that he would have accepted the offer. Thus, all that remained for the motion court to decide was the “reasonable probability” that the prosecution would not have withdrawn their offer and that the judge would have accepted it. *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *See* *Pepper v. United States*, 131 S. Ct. 1229, 1242–43 (2011) (discussing the role of rehabilitation evidence when a case is remanded for resentencing); *see generally* Ken Strutin, *Rehabilitation and the Science of Second Chances*, N.Y.L.J., July 24, 2012, at 5 (discussing the role rehabilitation plays in resentencing).

III. THE *LAFLE*R CURVE

At its core, Frye represented a plea for plea remedy to a fatal constitutional error. But the companion case presented a different kind of trade. It might seem inconceivable that a defendant who received a fair trial can be heard to complain because he lost an opportunity for a favorable plea bargain, but this was the issue at the heart of *Lafler v. Cooper*.¹²⁶

Anthony Cooper had been charged with assault with intent to murder after allegedly firing a gun at the complainant, Kali Mundy.¹²⁷ Missing a potentially fatal headshot, he chased after Mundy and ended up shooting her in the buttocks, hip and abdomen.¹²⁸ In addition to the top count, Cooper faced a number of other felony and misdemeanor charges and treatment as a habitual offender.¹²⁹ Unlike Frye who pled guilty without knowing that there was a better offer on the table, Cooper received two plea offers at different times from the prosecution and expressed a willingness to plead guilty.¹³⁰ However, relying on his lawyer's advice Cooper rejected them based on the idea that the State could not prove "intent" to murder since Mundy had been shot below the waist.¹³¹ A third, less amenable, offer made on the first day of trial was also turned down.¹³² Cooper was convicted on the entire indictment and sentenced to 185 to 360 months in prison.¹³³

The crux of Cooper's postconviction challenge was ineffectiveness of counsel based on his attorney's bad advice to forgo a plea offer and sentence recommendation of fifty-one to eighty-five months and instead go to trial.¹³⁴ The trial court rejected his arguments and the Michigan Court of Appeals affirmed the conviction based on his "knowingly and intelligently" rejecting the first two plea offers.¹³⁵

Cooper renewed his ineffectiveness claim in federal court under 28 U.S.C. § 2254.¹³⁶ Following AEDPA standards, the federal judge granted a conditional writ because the Michigan appeals court

¹²⁶ *Lafler v. Cooper*, 132 S. Ct. 1376, 1382–83 (2012).

¹²⁷ *Id.* at 1383.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* ("On two occasions, the prosecution offered to dismiss two of the charges and to recommend a sentence of 51 to 85 months for the other two, in exchange for a guilty plea.").

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* Leave to appeal to the Michigan Supreme Court had been denied. *Id.*

¹³⁶ *Id.*

misapplied *Strickland* and *Hill*.¹³⁷ To answer the violation, the court ordered “specific performance” of the original plea offer along with the fifty-one to eighty-five months sentence recommendation.¹³⁸ On appeal the Sixth Circuit upheld the decision finding that even “full deference,” required by the AEDPA, to the state court’s interpretation of federal law was wrong on both prongs of the *Strickland* analysis.¹³⁹ First, the attorney’s advice evaluating the evidence and discouraging the plea offer was incorrect.¹⁴⁰ And second, Cooper was prejudiced by the loss of the plea bargain.¹⁴¹ The Supreme Court accepted the case for review and added another point for consideration that became the crux of their decision: “What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?”¹⁴²

The Supreme Court reiterated that defendants had the right to effective assistance of counsel at the plea negotiation stage.¹⁴³ And the first prong of the *Strickland* test had been met by agreement of the parties that defense counsel’s advice to reject the two plea offers for the reason that respondent Cooper would not have been convicted at trial was deficient.¹⁴⁴

Thus, the decisive issue on this appeal was how to interpret the second prong, the prejudice analysis, under *Strickland* when the harm done by rejection of the plea offer, due to misadvice, was followed by a fair trial.¹⁴⁵ This put Cooper in the unenviable position of arguing that going to trial was harmful. While it seems

¹³⁷ *Id.* at 1383–84.

¹³⁸ *Id.* at 1384.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Lafler v. Cooper*, 131 S. Ct. 856, 856 (2011) (granting certiorari).

¹⁴³ *Lafler*, 132 S. Ct. at 1384.

¹⁴⁴ *Id.* Due to the agreement of both parties on this point, the Court did not analyze it further. But this left open the question of when an “erroneous strategic prediction” about the chances at trial amounted to ineffective assistance. *Id.* at 1391. In addition, the Supreme Court at some point will have to settle on a line dividing the metrics of advice-giving from strategic decision making. To start, there are cases such as *Boria v. Keane*, in which the Second Circuit found ineffective assistance of counsel because Oscar Boria’s attorney “never gave his client any advice or suggestion as to how to deal with the People’s offered plea bargain.” *Boria v. Keane*, 99 F.3d 492, 497–98 (2d Cir. 1996). Boria had been convicted after trial and had already served six years in prison, twice as long as the maximum penalty of the original sentence offer, when his case reached the federal appeals court. *Id.* at 499. Therefore, the remedy chosen was to let the conviction stand and to resentence Boria to time served. *Id.*

¹⁴⁵ *Lafler*, 132 S. Ct. at 1384.

counterintuitive, the Justices were forced to resolve whether a full and fair trial whitewashed ineffective assistance of counsel at the plea negotiation stage. Citing *Frye*, Justice Kennedy began with an outcome analysis, i.e., “the outcome of the plea process would have been different with competent advice.”¹⁴⁶ In the *Hill* scenario, the defendant had to show that going to trial was preferable to having entered an ill-considered plea.¹⁴⁷ Unlike *Hill*, who lost his chance at a trial, *Cooper* had to prove that after having received a trial, the unfairness was in the lost plea opportunity.

In this setting, *Cooper* had to demonstrate that

but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed.¹⁴⁸

Notably, the Sixth Circuit had followed this test, as other jurisdictions have, without burdening the operations of the justice system.¹⁴⁹

The State of Michigan took the view that trials cleanse all pretrial sins.¹⁵⁰ But the State’s interpretation of the Sixth Amendment, constrained by trial fairness, was rejected by the majority. Justice Kennedy explained that the right to effective assistance of counsel encompassed pretrial, trial, sentencing, and appeal.¹⁵¹ The values being preserved went beyond fair trial to fair process.¹⁵² In *Cooper*’s

¹⁴⁶ *Id.* (citing *Missouri v. Frye*, 132 S. Ct. 1399, 1405–06 (2012)).

¹⁴⁷ *Lafler*, 132 S. Ct. at 1384–85.

¹⁴⁸ *Id.* at 1385.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1385–86 (“The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel’s advice. This is consistent, too, with the rule that defendants have a right to effective assistance of counsel on appeal, even though that cannot in any way be characterized as part of the trial.”).

¹⁵² *Id.* at 1386.

The Court of Appeals for the Fourth Circuit held that the simultaneous presence of these two witnesses violated Rule 6(d), and that even though the petit jury subsequently returned a verdict of guilty against defendants, the verdict must be set aside on any count that corresponds to a “tainted” portion of the indictment. We believe that the petit jury’s verdict of guilty beyond a reasonable doubt demonstrates *a fortiori* that there was probable cause to charge the defendants with the offenses for which they were convicted.

case, the trial verdict resulted in a sentence inflation of three hundred percent. For the Supreme Court this constituted sufficient harm: “Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence.”¹⁵³

The Court then addressed the State’s argument that in order to show ineffective assistance of counsel there had to be loss of a substantive or procedural right.¹⁵⁴ Indeed, the majority acknowledged that the outcome was not always determinative without a “legitimate” prejudice, thus forestalling windfalls based on counsel’s refusal to misread the law or employ unorthodox legal strategies.¹⁵⁵ But Justice Kennedy rejected Michigan’s rationale. Cooper complained that his lawyer failed to live up to a proper constitutional standard.¹⁵⁶ The respondent had lost the benefit of the bargain directly due to overstated legal advice about his chances. And a perfectly good plea offer and sentence reduction were rejected. The majority clarified this pretrial scenario:

If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown 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.¹⁵⁷

Plea bargaining was a discretionary and a firmly established part of the criminal justice system, but not a right.¹⁵⁸ Thus, without the offer of a plea or its approval by the court, no prejudice arose.¹⁵⁹ However, once the government undertook to incorporate plea negotiation into the system, like the appellate process, the right to

Therefore, the convictions must stand despite the rule violation. *United States v. Mechanik*, 475 U.S. 66, 67 (1986). Thus, the principal exception was when the trial served to cure the non-trial error.

¹⁵³ *Lafler*, 132 S. Ct. at 1386.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1386–1387 (citing *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993); *Nix v. Whiteside*, 475 U.S. 157, 175 (1986)). *Lafler* cited these cases for the proposition that they modified Strickland’s prejudice prong by illustrating that outcomes were not determinative unless there was merit to the underlying error. *Lafler*, 132 S. Ct. at 1386, 1387. However, the Supreme Court was adamant that *Fretwell* did not add or change the Strickland prejudice analysis. *Id.*

¹⁵⁶ *Lafler*, 132 S. Ct. at 1387 (“Here, however, the injured client [Cooper] seeks relief from counsel’s failure to meet a valid legal standard, not from counsel’s refusal to violate it.”).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

effective assistance of counsel joined it.¹⁶⁰

Finally, Michigan fell back on its trial-centric argument that the Sixth Amendment was intended to protect the reliability of convictions, not plea bargains.¹⁶¹ Nonetheless, *Strickland* was a process-oriented standard, which focused on the effect of ineffective counsel on the “adversarial process” in undermining a “just result.”¹⁶² Justice Kennedy highlighted this distinction:

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 he would have received in the ordinary course but for counsel’s ineffective assistance.¹⁶³

Again, it was the process as a “whole” that was the proper subject of review. In other words, the Sixth Amendment’s right to effective assistance of counsel had to be upheld for the benefit of the innocent and the guilty alike.¹⁶⁴ So a reliable trial did not preclude finding that a defendant’s attorney did not act competently or in a way that would have changed the outcome.¹⁶⁵

The sum of the State’s position, as noted above, was that a fair trial absolved defense counsel of all errors occurring at the pleading stage.¹⁶⁶ Yet, this conflicted with the real nature of the justice system as perceived by the Supreme Court, for the most part, as “a system of pleas, not a system of trials.”¹⁶⁷ Thus, the right to counsel

¹⁶⁰ *Id.* The Court cited the requirement of effective assistance of counsel on appeal, an optional procedure, that once exercised must align with other constitutional practices. *Id.* (citing *Evitts v. Lucey*, 469 U.S. 387, 393 (1985); *Douglas v. California*, 372 U.S. 353, 355 (1963)).

¹⁶¹ *Lafler*, 132 S. Ct. at 1387.

¹⁶² *Id.* at 1388.

¹⁶³ *Id.* (citations omitted).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* The majority pointed to the Supreme Court’s decision in *Kimmelman v. Morrison*, where the defense attorney’s neglect to make a Fourth Amendment challenge to the evidence by a suppression motion was a cognizable ground for seeking habeas relief:

“The constitutional rights of criminal defendants,” the Court observed [in *Kimmelman*], “are granted to the innocent and the guilty alike. Consequently, we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt.” The same logic applies here [in *Lafler*]. The fact that respondent is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney’s deficient performance during plea bargaining.

Id. at 1388 (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 380 (1986)).

¹⁶⁶ *Lafler*, 132 S. Ct. at 1388.

¹⁶⁷ *Id.* Justice Kennedy again cited the statistics referred to in *Frye*, showing that a majority of convictions in the federal and state systems were the result of pleas. *Id.*

had to be viewed through this prism, the centrality of plea negotiation and the consequent convictions and sentences.¹⁶⁸

Acknowledging the reality of the justice marketplace, the Court had to next address the appropriate remedy where pleas displaced trials and sentences were more bargain than condign punishment. Justice Kennedy was careful to point out that remedying Sixth Amendment violations required calibration matched to the harm without overcompensating the defendant with a windfall.¹⁶⁹ The trial, like an election, should not be casually overturned. Thus, in the setting where a defendant missed a plea opportunity and went to trial, the two options for relief were either restoration of the sentence bargain or the plea bargain. The sentence bargain put the entire decision in the judge's hands. In this situation, the plea promise would have been to the same charges that the defendant would have faced at trial. The only benefit would have been the sentence promise by the court, albeit with or without input from the prosecution.¹⁷⁰ It would be incumbent on the defendant at a postconviction evidentiary hearing to demonstrate that there was a reasonable probability that notwithstanding ineffective assistance of counsel he would have pled guilty. And if successful, the judge then would be tasked with imposing the sentence recommended by the prosecution, the same sentence imposed at trial, or split the difference.¹⁷¹

The other choice was more complicated. In instances where a plea reduction was involved and the sentencing laws locked the court into a range dependent on that reduction, resentencing alone would be insufficient. Thus, the court might need to order the prosecution to reoffer the plea bargain before deciding on an appropriate sentence, after vacating the trial conviction and penalty.¹⁷² Both the pure resentencing and the plea bargain resentencing would rely on the trial judge's discretion on remand.¹⁷³

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 1388–89.

¹⁷⁰ *Id.* The prosecution's sentence recommendation can be an important inducement to accepting a plea, but it is not decisive for the court, which can consider a wide variety of information before making a commitment or final imposition of sentence.

¹⁷¹ *Id.* The Supreme Court did not raise the need for the defendant to prove that the prosecution would have reasserted its original sentence recommendation or speculate on what would happen if at the postconviction stage the government withdrew its support or asked for a longer sentence. See generally Kurtis A. Kemper, Annotation, *Propriety of Sentencing Judge's Imposition of Harsher Sentence than Offered in Connection with Plea Bargain Rejected or Withdrawn Plea by Defendant—State Cases*, 11 A.L.R.6TH 237 (2006).

¹⁷² *Lafler*, 132 S. Ct. at 1389.

¹⁷³ *Id.*

While not engaging in a sentencing guideline type of analysis, the Supreme Court did identify a couple of salient factors: (1) the defendant's willingness to plead guilty and "accept responsibility"; (2) discretionary consideration of the status quo ante of the case before plea bargain rejection;¹⁷⁴ and (3) measures to interdict "late, frivolous, or fabricated" claims based on error-free buyer's remorse.¹⁷⁵

As for Cooper's case, the Sixth Circuit could not determine for AEDPA purposes whether the Michigan appellate court had reached the ineffective assistance of counsel claim or what rule of law had been applied, correctly or not.¹⁷⁶ Still, this was no impediment to review, since the state appeals court did take notice of the claim albeit without applying *Strickland*.¹⁷⁷ Instead, the Michigan court held that defendant's decision was "knowing and voluntary," which was the wrong standard.¹⁷⁸ By overlooking *Strickland* in its assessment of the ineffectiveness of counsel claim, the state court opened the door to federal habeas review.¹⁷⁹ And, as mentioned earlier, the first *Strickland* prong, deficient performance, had been conceded by all parties.¹⁸⁰

As for the prejudice prong, it was apparent that but for his attorney's advice, Cooper and the trial judge would have accepted the plea offer.¹⁸¹ Due to the imposition of a sentence after trial that was three times higher than the sentence recommendation tied to the plea bargain, prejudice under *Strickland* was established.¹⁸² The Supreme Court did not endorse the district court judge's specific performance remedy but instead indicated that the proper

¹⁷⁴ *Id.* Justice Kennedy again indicated that the Court would not demand that trial judges had to ignore post-plea offer information. The purpose of this factor was for the court to be mindful of the cost and difficulty of retrying the case. "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 that does not require the prosecution to incur the expense of conducting a new trial." *Id.*

¹⁷⁵ *Id.* at 1389–90. The third criterion was intended to address the floodgates argument, which the majority did not believe to be a real problem. Due to the Justices' confidence in the system, there was no fear that convictions would be overturned en masse, even though most of them were the results of pleas.

¹⁷⁶ *Id.* at 1390.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* ("After stating the incorrect standard, moreover, the state court then made an irrelevant observation about counsel's performance at trial and mischaracterized respondent's claim as a complaint that his attorney did not obtain a more favorable plea bargain.")

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 1390–91.

¹⁸¹ *Id.* at 1391.

¹⁸² *Id.*

remedy was to order the prosecution to reoffer the plea bargain.¹⁸³ If Cooper were to accept the plea, then the state trial judge would have the discretion to vacate the trial conviction and resentence based on the prosecution's original recommendation, or to vacate the judgment for some of the counts and resentence accordingly, or to let the trial conviction and sentence stand.¹⁸⁴ Thus, the respondent would gain a chance at receiving a plea that sets aside a trial, but which still would have many variables and unknowns as to the outcome.¹⁸⁵

The risks and benefits of resentencing have already been touched on by the Supreme Court in *Frye*, and to some degree in *Cooper*. But there will be problems that will inevitably come to light, and frankly too many to list. For instance, there might be new aggravating factors that surfaced post-plea offer as well as new rehabilitation evidence, credit for time served under a vacated sentence, parole proceedings and early or supervised release that might be nullified, and changes in sentencing laws, policies and restrictions. Also, the prosecution might raise appeals over their discretion in setting plea terms on remand, rather than being locked into a plea offer that they can no longer endorse or which would be unsupportable under current law. Finally, there might be new issues to further complicate the matter, such as whether a resentence should run concurrent or consecutive to new or pending charges, pendency of postconviction motions on substantive issues, updating records such as criminal histories or offender registries, and other collateral consequences.¹⁸⁶

Again, Justice Scalia decried the majority's minting a "new field of constitutionalized criminal procedure: plea-bargaining law."¹⁸⁷ And he pointed to the cloud descending on the practice of justice that would obscure and impede the administration of plea bargaining, in addition to the unaddressed issues mentioned above.¹⁸⁸ Moreover, assuming that Cooper had a right beyond

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ See Ken Strutin, *Big Data, Little Privacy: Tracking the Usual Suspects*, LLRX (Jul. 21, 2013), <http://www.llrx.com/features/dataprivacy.htm>.

¹⁸⁷ *Lafleur*, 132 S. Ct. at 1391 (Scalia, J., dissenting). Justice Scalia also lamented on the increased complexity and difficulty of trying criminal cases due to the pursuit of "perfect justice." "The ordinary criminal process has become too long, too expensive, and unpredictable, in no small part as a consequence of an intricate federal Code of Criminal Procedure imposed on the States by this Court in pursuit of perfect justice." *Id.* (citations omitted).

¹⁸⁸ *Id.* at 1392 ("Is it constitutional, for example, for the prosecution to withdraw a plea

receiving a fair trial, the plea bargain standard set by the majority was a “new rule” unanticipated by the Michigan court and therefore unreviewable.¹⁸⁹ And the remedy of nearly unfettered discretion for the trial judge seemed too formless for a constitutional harm.¹⁹⁰

The dissenters in *Cooper* believed that the right to effective assistance of counsel was intended to protect the trial and those phases of the case that impacted on litigation.¹⁹¹ Specifically, Justice Scalia derided the invention of a right to effective plea bargaining, which included counseling before rejecting a plea offer, because it went beyond the areas of plea negotiation recognized in *Padilla v. Kentucky*, *Iowa v. Tovar*,¹⁹² and *Hill v. Lockhart*.¹⁹³ For the dissenters, the trial is the thing. Indeed, a fair trial ended all inquiry over a lost plea offer. Thus, plea bargaining was only a spoke on a wheel anchored by due process. If it did not lead away from the reliability of the trial outcome, it had no constitutional significance.¹⁹⁴ Fairness under *Strickland* applied solely to the trustworthiness of the trial process resulting in conviction, sentence, or appeal.

Indeed, according to Justice Scalia, the majority confused the origins of the right to effective assistance of counsel with the right to a fair trial.¹⁹⁵ For the dissent, the real question was “whether a

offer that has already been accepted? Or to withdraw an offer before the defense has had adequate time to consider and accept it? Or to make no plea offer at all, even though its case is weak—thereby excluding the defendant from ‘the criminal justice system?’”).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* Notably, Justice Scalia pointed out that the right to competent counsel really stemmed from due process and the promise of a fair trial, which was then moved into the Sixth Amendment right to counsel by *Strickland*. Compare *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006) (finding the origin of the right to effective assistance of counsel in the Due Process Clause), with *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (finding the right to effective assistance of counsel in the Sixth Amendment).

¹⁹² *Iowa v. Tovar*, 541 U.S. 77 (2004).

¹⁹³ *Lafler*, 132 S. Ct. at 1393 (Scalia, J., dissenting); see also *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (“[The Court has] long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.”); *Tovar*, 541 U.S. at 80–81 (“The Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process.”); *Hill v. Lockhart*, 474 U.S. 52, 57 (1985) (finding that the two-part standard set forth in *Strickland*, protecting a convicted defendant’s right to effective assistance of counsel in capital sentencing proceedings, extended to guilty pleas).

¹⁹⁴ *Lafler*, 132 S. Ct. at 1393 (Scalia, J., dissenting) (“Because the right to effective assistance has as its purpose the assurance of a fair trial, the right is not infringed unless counsel’s mistakes call into question the basic justice of a defendant’s conviction or sentence.”).

¹⁹⁵ *Id.* at 1393 n.1, 1395. Justice Scalia asserted that the majority had miscited cases concerning procedural integrity errors to show that a fair trial did not resolve all ills. *Id.* at 1393 n.1; see generally *Vasquez v. Hillery*, 474 U.S. 254, 264 (1986) (showing a violation of

defendant can establish *prejudice* under *Strickland v. Washington* . . . while conceding the fairness of his conviction, sentence, and appeal.”¹⁹⁶ The unwavering focus of the *Strickland* test was “fundamental fairness of the proceeding.”¹⁹⁷ The plea bargain was a closed circuit unconnected to the result of a trial. And ineffective assistance of counsel in this circumstance did not “deprive the defendant of any substantive or procedural right” to which he was entitled, since there was no right to a plea bargain, and the plea bargain determination would not affect the outcome of a trial—an option that would still be available in the alternative to a plea.¹⁹⁸ The *Strickland* prejudice test should not have depended solely or even primarily on outcome, which diverted the analysis from fundamental fairness according to Justice Scalia.¹⁹⁹ In other words, a fair trial did not offend justice as compared with an unfair plea negotiation.

The dissent also pointed to a procedural bar. The Michigan appeals court had decided the issue on the merits, which should have precluded review under AEDPA.²⁰⁰ While their statement of the prejudice standard might have been unartful, it did not undermine the *Strickland* analysis.²⁰¹ The vagueness of the state’s opinion had been resolved, e.g., no finding of prejudice or no record of counsel’s deficient performance. Thus, the majority could not find both to be an unreasonable interpretation of federal law under AEDPA.²⁰² The Sixth Circuit erred by accepting the case for review.

Justice Scalia focused attention on the unprecedented nature of

equal protection in grand jury selection); *Stirone v. United States*, 361 U.S. 212, 219 (1960) (showing a violation of Fifth Amendment right to indictment by grand jury); *Ballard v. United States*, 329 U.S. 187, 193 (1946) (showing a violation of statutory scheme providing that women serve on juries). However, no showing of prejudice had been required in those cases.

¹⁹⁶ *Lafler*, 132 S. Ct. at 1393 (Scalia, J., dissenting) (citation omitted).

¹⁹⁷ *Id.* at 1394 (quoting *Strickland v. Washington*, 466 U.S. 668, 696 (1984)).

¹⁹⁸ *Lafler*, 132 S. Ct. at 1394 (Scalia, J., dissenting) (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)).

¹⁹⁹ *Lafler*, 132 S. Ct. at 1395 (Scalia, J., dissenting).

²⁰⁰ *Id.*

²⁰¹ *Id.* at 1395–96. Referring to the Michigan Court of Appeals’ opinion apropos prejudice, “defendant knowingly and intelligently rejected two plea offers and chose to go to trial.” The dissenters believed that it indicated either there was no fundamental unfairness in the conviction and sentence or the ineffectiveness of counsel claim had no foundations in the record. *Id.* at 1396. Although ambiguous, the dissent did not exalt technique over substance: “The state court’s analysis was admittedly not a model of clarity, but federal habeas corpus is a ‘guard against extreme malfunctions in the state criminal justice systems,’ not a license to penalize a state court for its opinion-writing technique.” *Id.*

²⁰² *Id.*

the remedy—ordering the prosecution to reoffer the plea.²⁰³ The dissent was puzzled by the need for the State to make the offer again and require the defendant to show that he would have accepted it when the court still had ultimate discretion to vacate the trial verdict or not, as well as adjust the sentence range.²⁰⁴ Since, in their view, the choices in a plea bargain had no constitutional standing, the remedy was totally “discretionary” for an unconstitutional conviction.²⁰⁵ Thus, the formlessness of the remedy bespoke the lack of real constitutional error in the first place. The result was to undo a fair trial based on a fault with an unconnected plea process.²⁰⁶

Notably, Justice Scalia offered a sobering addendum to Justice Kennedy’s picture of the reality in today’s criminal justice system.²⁰⁷ Plea bargaining was undeniably prevalent but a necessary evil begrudgingly accepted. And as such, this practice had many faults:

It presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense; and for guilty defendants it often—perhaps usually—results in a sentence well below what the law prescribes for the actual crime. But even so, we accept plea bargaining because many believe that without it our long and expensive process of criminal trial could not sustain the burden imposed on it, and our system of criminal justice would grind to a halt.²⁰⁸

And the dissent took the majority to task for raising plea bargaining’s importance to a “constitutional entitlement” and the essence of criminal justice.²⁰⁹ This new mindset led to the absurd result of overturning the “gold standard” of a fair trial on account of the infringement of the new plea bargain “entitlement.”²¹⁰ The dissenters also added that it would introduce more gamesmanship into criminal justice, i.e., a “sporting chance theory of criminal law,” which focused on the odds of getting the best deal rather than the

²⁰³ *Id.*

²⁰⁴ *Id.* at 1396–97.

²⁰⁵ *Id.* at 1397. The dissenters were concerned that this remedy had no boundaries except for the judge’s discretion or the state rules for accepting or rejecting plea bargains. Indeed, the choice of doing nothing was particularly disturbing as a remedy.

²⁰⁶ *Id.* (“The defendant has been fairly tried, lawfully convicted, and properly sentenced, and *any* ‘remedy’ provided for this will do nothing but undo the just results of a fair adversarial process.”).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 1398.

most just result.²¹¹

In a separate dissent, Justice Alito added his criticism of the inevitable conflicts created by a remedy for a right undeserving of constitutional recognition.²¹² Cooper had received a fair trial without constitutional error, so there was no basis for habeas relief.²¹³ Still, even assuming for the sake of argument that there was a cognizable harm, the remedy prescribed by the majority revealed the flaws in its reasoning. Justice Alito noted two scenarios that made a totally discretionary remedy problematic: (1) post-plea offer revelation of new aggravating information; and (2) the considerable amount of judicial and prosecutorial resources that would have to be expended when the reoffer is rejected.²¹⁴

On remand from the Sixth Circuit, the federal district court vacated its earlier decision ordering specific performance and instead required the prosecutor to reoffer the plea agreement.²¹⁵

Overall, the *Lafler* decision reflected the Supreme Court's conflicting views of the role of plea bargaining versus trial and its place in the constitutional landscape. On the one hand, it exists at the core of the new reality where pleas have assumed the end of trials. On the other hand, there was great apprehension about the abuse of process that might occur from elevating its importance, and the deep-seated fear that the defendant might have his cake and eat it too. In any case, the remedy is not without peril.

For the defendant, there might be no offer, or one that is less favorable than before; emergence of new aggravating factors might increase the sentence recommendation; and changes in the public policy landscape might toughen both the prosecution and judicial approach to crime enforcement. And, of course, there is the judge's mindfulness of post-plea information, e.g., updated presentence report, new aggravating or mitigating facts from a plea allocution or trial testimony.²¹⁶ And then there is the bird in the hand

²¹¹ *Id.*

²¹² *Id.* (Alito, J., dissenting).

²¹³ *Id.*

²¹⁴ *Id.* at 1398–99.

²¹⁵ *Cooper v. Lafler*, 2:06-CV-11068, 2012 U.S. Dist. LEXIS 104162, at *4 (E.D. Mich. Jul. 26, 2012). It appears that Cooper has since been released on parole. See Correy Stephenson, *Public Defenders Prevail in Right to Counsel Cases*, LAW. WKLY. USA, Dec. 20, 2012 (“[Michigan Appellate Defender Valerie R.] Newman’s client has already been paroled.”).

²¹⁶ The Supreme Court has recognized the relevance of postconviction rehabilitation as an important factor in resentencing. See *Pepper v. United States*, 131 S. Ct. 1229, 1241–43 (2011). On the other hand, even a prosecutor’s recommendation of leniency might fall on deaf ears. See, e.g., Michael Wilson, *Judge Gives Fortuneteller in Manhattan 5 to 15 Years*, N.Y. TIMES, Nov. 15, 2013, at A27 (reporting a case in which the defendant rejected a plea bargain

conundrum. Before seeking to vacate a plea or trial verdict, the defendant ought to be counseled about the worst-case scenarios that might result from success on appeal.²¹⁷ Peeling apart a bargain, for instance, can reopen the case without any benefits, exposing the defendant to top count charges and a higher sentencing bracket.²¹⁸ Inevitably, new facts or intervening events will influence the composition of a new plea bargain and sentence.

IV. PROOF AND TRUTH: *BURT V. TITLOW*

In the 2013 term, the Supreme Court decided *Burt v. Titlow*, in which pretrial investigation, a withdrawn plea, a full trial, and postconviction review provided a rollercoaster perspective on the role of accuracy and finality in the justice system.²¹⁹ Like *Lafler*, this case also arose in Michigan, and a plea offer was rejected in favor of a trial.²²⁰

Vonlee Nicole Titlow, along with her Aunt Billie Rogers, had been arrested for first-degree murder for the death of her Uncle Donald Rogers; it was alleged that they had poured vodka into his mouth and placed a pillow over his face to asphyxiate him.²²¹ The attorney who initially represented Titlow and negotiated a deal that required

which included no jail time, only to receive a sentence of five to fifteen years—despite the prosecution’s request for three to nine).

²¹⁷ Another important fact is that the defendant will have served significant time in prison awaiting an appeal or the outcome of a federal habeas decision. Time served or release on parole might be affected and at least should be factored into the analysis of the remedy, its merits, and its risks. See 2 A. VINCENT BUZARD & THOMAS R. NEWMAN, N.Y. APPELLATE PRACTICE § 13.03 (2013).

²¹⁸ *Id.* § 13.09(d).

²¹⁹ See *Burt v. Titlow*, 134 S. Ct. 10, 13–15 (2013).

²²⁰ *Id.* The implicit question in both cases was the extent to which a trial proceeding can inform the review of a pretrial determination, such as the efficacy of a plea bargain or even a suppression ruling. See, e.g., *In re L.J.*, 79 A.3d 1073, 1076 (Pa. 2013) (holding that it was improper for the Superior Court to rely on trial testimony to validate a pretrial suppression hearing decision). The Supreme Court in *Lafler* and *Titlow* sub silentio contended with the influence of a trial verdict on a plea bargain, despite the information divide that must always exist between them. Indeed, the general prohibition against using a plea allocution against a defendant at trial in the same case bespeaks the tension between waiving rights at one proceeding and fairly asserting them in another. See *Simmons v. United States*, 390 U.S. 377, 394 (1968) (“[I]n this case [the petitioner] was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.”).

²²¹ *Titlow*, 134 S. Ct. at 13.

Titlow to testify against her Aunt Billie in a separate trial.²²² In exchange, the prosecution promised to reduce the charge to manslaughter and recommend seven to fifteen years in prison.²²³ The record at the sentencing hearing showed that Titlow's attorney had reviewed the case evidence with her and that she was aware that there was sufficient evidence to support the murder charge.²²⁴ The court approved the plea.²²⁵

Just three days before Aunt Billie's trial started, Titlow changed counsel.²²⁶ This second lawyer wanted to renegotiate the sentence recommendation and asked for a three year minimum.²²⁷ The prosecution would not reopen the agreement to lower the prison term.²²⁸ In court, Titlow's plea and cooperation were withdrawn with full knowledge that the original murder charge would be restored.²²⁹ Without Titlow's key testimony, Aunt Billie was acquitted.²³⁰

At Titlow's trial, her defense was lack of intent to harm her uncle. She had denied any knowledge of the acts that lead to the victim's death.²³¹ Moreover, Titlow claimed that she had tried to prevent Aunt Billie from hurting her husband.²³² Nonetheless, the jury convicted Titlow of second-degree murder, choosing to give credence to her previous out-of-court statements acknowledging participation in the act rather than her courtroom disavowals.²³³ The judge sentenced Titlow to a term of twenty to forty years in prison.²³⁴

Before turning to the appellate issues of effective assistance of counsel apropos the plea, it is worth considering the tension created by this scenario between accuracy and resolution, truth and compromise. Procedural channels tend to shape and circumscribe the core evidence in a case (i.e., the defendant's confession). Vonlee Titlow had to choose among her roles accorded by the system: the

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.* Aunt Billie died some time afterwards. Thus, a key ingredient of the plea bargain, Titlow's testimony for the prosecution, was "doubly" eliminated. The foundations of the plea bargain had changed and it would thus affect any potential remedy, since the original condition could no longer be fulfilled.

²³¹ *Id.* at 13–14.

²³² *Id.* at 14.

²³³ *Id.*

²³⁴ *Id.*

accused who made out-of-court statements (potentially suppressible); the witness for the prosecution willing to testify against her co-defendant; the pleader who allocuted in exchange for a bargain; and finally, the litigant who testified in her own defense at trial. Thus, Titlow was the nexus of key evidence in a case that heavily relied on her statements. And depending on the stage of the prosecution and the purpose of the proceeding, the ratio of revealed truth (at trial) to constructed truth (at plea) would be evaluated differently. Legal truth is truly in the eye of the beholder, for instance, the prosecution might have been unsatisfied with her proffered testimony at Aunt Billie's trial, or Titlow could have recanted or modified her statements. Indeed, the fact that someone pleaded guilty is not always dispositive of true guilt. Indeed, innocence can be resurrected on appeal or at parole with difficulty and problematic results.²³⁵

In her state appeal, Titlow maintained that her second lawyer's advice, which led to the plea withdrawal, was ill-considered based on his inadequate investigation of the facts and evaluation of the strength of the prosecution's case.²³⁶ The Michigan Court of Appeals rejected this argument, finding that the second lawyer's strategic choices had been reasonable under *Strickland*, since his client had claimed that she was innocent.²³⁷ In other words, counsel's decision to withdraw the plea due to an assertion of innocence was not unreasonable, despite the advantages of the plea bargain. Failing to find a state court remedy, Titlow turned to federal habeas corpus where she confronted "doubly deferential" review under the AEDPA.²³⁸ The district court denied relief, finding the Michigan Court of Appeals' decision reasonable on both "the law and the facts."²³⁹ The second lawyer's choice to seek a better sentencing bargain was not ineffective since Aunt Billie's trial was in a matter of days and his client denied any involvement in the act.²⁴⁰ The Sixth Circuit disagreed, finding that the state court's

²³⁵ See, e.g., Robles, *supra* note 73; Frances Robles & N.R. Kleinfeld, *Review of 50 Brooklyn Murder Cases Ordered*, N.Y. TIMES, May 12, 2013, at A1 (discussing the unpredictability of confessions and witness testimony).

²³⁶ *Titlow*, 134 S. Ct. at 14.

²³⁷ *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). While incarcerated, Titlow had told a sheriff's deputy she was innocent, which precipitated the hiring of Toca [the second lawyer] and the withdrawal of her guilty plea. *Titlow*, 134 S. Ct. at 16.

²³⁸ *Titlow*, 134 S. Ct. at 13 (quoting *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011)); see also *Titlow*, 134 S. Ct. at 14 (noting the AEDPA's requirement to accord deference to the state court's decision as well as defense counsel's judgment).

²³⁹ *Titlow*, 134 S. Ct. at 14.

²⁴⁰ *Id.*

decision premised the plea withdrawal on Titlow's claim of innocence, while the record showed that the real reason was to gain a better and more reasonable sentencing recommendation.²⁴¹ And the record did not reveal that the second lawyer had fully informed Titlow about the consequences of taking back her guilty plea.²⁴² Citing *Lafler*, the Sixth Circuit found ineffectiveness of counsel and remanded the case for the prosecution to reoffer the plea bargain and for the trial judge to "fashion" an appropriate remedy guided by the original offer.²⁴³

Back in the state trial court, the prosecution adhered to the circuit court's order and reoffered the plea bargain, notwithstanding that a crucial element of the bargain had been abated by Aunt Billie's acquittal and death.²⁴⁴ However, Titlow could not allocute as required. She conceded pouring alcohol into the victim's throat, but refused to admit participation in the actual killing or knowledge that her actions contributed to Rogers' death.²⁴⁵ Still, upon consultation with her new counsel, Titlow confessed to putting her uncle in danger by administering alcohol down his throat knowing that it might cause death.²⁴⁶ The state court judge took the plea under advisement, and later the Supreme Court accepted the case for review.²⁴⁷

Justice Alito, writing for the majority, concentrated on the key to federal review under the AEDPA: "State courts are adequate forums for the vindication of federal rights."²⁴⁸ Thus, the first prong of the "doubly deferential" standard had to be assessed: competency of the state court's fact-finding and application of Supreme Court precedent.²⁴⁹ In the Court's view, a federal habeas judge did not possess any kind of special wisdom that should trump his or her state court counterpart without clear and convincing evidence of unreasonableness in decision making.²⁵⁰ Under this standard, the

²⁴¹ *Id.* The second lawyer argued in court that the sentencing range for the manslaughter plea was "substantially higher" than the state guidelines for a second-degree murder conviction. *Id.* (quoting *Titlow v. Burt*, 680 F.3d 577, 589 (6th Cir. 2012), *rev'd* 134 S. Ct. 10 (2013)).

²⁴² *Titlow*, 134 S. Ct. at 14.

²⁴³ *Id.* (quoting *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012)).

²⁴⁴ *Titlow*, 134 S. Ct. at 14–15.

²⁴⁵ *Id.* at 15. Indeed, all the parties to this proceeding were constrained by Titlow's trial testimony asserting that she had tried to stop Aunt Billie from harming her uncle.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *See id.* at 13.

²⁵⁰ *Id.* at 15 ("AEDPA instructs that, when a federal habeas petitioner challenges the factual basis for a prior state-court decision rejecting a claim, the federal court may overturn

majority found the Michigan Court of Appeals' decision completely reasonable.²⁵¹

The record supported the state appeals court's finding that the second lawyer's advice to withdraw the plea was made only after Titlow's innocence claim.²⁵² Indeed, she had passed a polygraph test disavowing any plan to murder her uncle or being present when it happened.²⁵³ And while she was in jail, it was a deputy sheriff who admonished her against pleading guilty if she were actually innocent, which led to the employment of her second counsel.²⁵⁴ Thus, these facts combined with the change of counsel immediately before Aunt Billie's trial, at which Titlow would have had to incriminate herself, and her exculpatory statements at her own trial, supported the idea that respondent regretted her original plea. Since the record showed that innocence and not sentencing was Titlow's chief concern, the Sixth Circuit improperly substituted its judgment for the reasonable conclusions of the state appeals court.²⁵⁵ In point of fact, it was not inconsistent for a criminal defendant invested in her interpretation of the evidence to seek some advantage in plea bargaining by virtue of her risk analysis. Justice Alito observed: "Indeed, a defendant convinced of his or her own innocence may have a particularly optimistic view of the likelihood of acquittal, and therefore be more likely to drive a hard bargain with the prosecution before pleading guilty."²⁵⁶

Since the Michigan Court of Appeals' finding of facts was reasonable and entitled to deference, the Sixth Circuit erred in

the state court's decision only if it was 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' The prisoner bears the burden of rebutting the state court's factual findings 'by clear and convincing evidence.' We have not defined the precise relationship between § 2254(d)(2) and § 2254(e)(1), and we need not do so here. For present purposes, it is enough to reiterate 'that a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.'" (citations omitted) (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)).

²⁵¹ *Titlow*, 134 S. Ct. at 17.

²⁵² *Id.* at 16.

²⁵³ *Id.*

²⁵⁴ *Id.* This information was derived from an affidavit submitted by Titlow to the state court in support of an evidentiary hearing. *Id.* at 16 n.1. There was some contention about the use of this document by the Michigan appeals court. Notwithstanding the question of whether the state court acted properly in relying on the affidavit, its misuse would not have justified federal habeas relief according to the Supreme Court. *Id.*

²⁵⁵ *Id.* at 16–17. The Circuit Court over-relied on the second lawyer's in-court statements that focused solely on the sentencing range to contradict the findings of the state court. *Id.* However, the Michigan Court of Appeals was aware of this fact. *Id.* at 17.

²⁵⁶ *Id.*

finding a *Strickland* violation.²⁵⁷ The sticking point was respondent's claim of innocence. According to Justice Alito, the type of advice counsel might render must be filtered through a client's assertion of innocence.²⁵⁸ And her second attorney's advice to withdraw the guilty plea was presumed correct in the absence of proof to the contrary.²⁵⁹ Moreover, the decision to accept or reject a plea bargain was exclusively the defendant's. Hence, Titlow's change of heart about going forward with an arrangement that involved accepting an above-guideline sentence for manslaughter only days before she was to inculcate herself under oath at Aunt Billie's trial was an informed choice.²⁶⁰ And for this reason, the second lawyer's performance was not ineffective under *Strickland*.²⁶¹

The Sixth Circuit's rejection of the state court analysis was also based on the second attorney's failure to acquire the client's file before his first court appearance.²⁶² Justice Alito again emphasized the importance of the "presumption of effectiveness;" in this case based, curiously, on undocumented information: "The record does not reveal how much Toca [the second lawyer] was able to glean about respondent's case from other sources; he may well have obtained copies of the critical materials from prosecutors or the court."²⁶³ But the Supreme Court did not hang its hat on this assumption about what information the second attorney might have possessed. Instead, it relied on the earlier court proceeding where Titlow admitted guilt and affirmed that her first attorney informed her of the evidence against her and that it was sufficient to prove first-degree murder.²⁶⁴ Thus, her second lawyer could impute to Titlow knowledge of the advice and evidence from this first proceeding and rightly conclude that his client's decision to withdraw her plea was informed by it. For purposes of evaluating

²⁵⁷ *Id.*

²⁵⁸ *Id.* ("Although a defendant's proclamation of innocence does not relieve counsel of his normal responsibilities under *Strickland*, it may affect the advice counsel gives.")

²⁵⁹ *Id.* The only evidence in the record that the second lawyer advised withdrawal, as opposed to merely coordinating it, came from Titlow's own testimony. *Id.* at 17 n.2.

²⁶⁰ *See id.* at 18 (stating that the record indicated that "Toca [the second lawyer] was justified" in concluding that Titlow "understood the strength of the prosecution's case and nevertheless wished to withdraw the plea").

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* The second lawyer did make the court aware that more time was required to prepare for trial due to the large amount of material involved. *Id.* From this the court concluded that the new counsel must have had knowledge about materials beyond the first lawyer's file. *Id.*

²⁶⁴ *Id.*

Titlow's understanding of the consequences of her choices, the guilty plea and withdrawal proceedings were treated as one.²⁶⁵ In effect, the second lawyer's performance borrowed or leaned on the first lawyer's, and thus the Court believed that they were justified in viewing them collectively.²⁶⁶ Any failings or "[t]roubling" choices by her second counsel were not found to be relevant to the *Strickland* inquiry.²⁶⁷ The state court had reasonably found that Titlow had been sufficiently informed of her rights and the evidence against her by "counsel" before deciding to take back her guilty plea.²⁶⁸ Therefore, the Sixth Circuit's decision was reversed and the other questions on appeal left unanswered.²⁶⁹

While endorsing the majority's viewpoint on the insufficiency of respondent's evidence,²⁷⁰ Justice Sotomayor expressed concerns about the second attorney's conduct of the defense.²⁷¹ First, a proclamation of innocence or guilt does not weaken a defense attorney's duties under *Strickland*.²⁷² It was still incumbent on Titlow's counsel to properly and independently review the evidence and case file before offering an informed opinion on whether to plead guilty or not.²⁷³ Although the decision belonged solely to the

²⁶⁵ *See id.* at 18.

²⁶⁶ *See id.* Defendant's knowledge (self-analysis) and her attorney's advice were separate and distinct information events that should not have been conflated.

²⁶⁷ *Id.* ("[W]e recognize that Toca's [the second lawyer] conduct in this litigation was far from exemplary. He may well have violated the rules of professional conduct by accepting respondent's publication rights as partial payment for his services, and he waited weeks before consulting respondent's first lawyer about the case."). Despite this, the Court adhered to the established principle that the Sixth Amendment entitled an accused to effective assistance, not "perfect counsel." *Id.* Such effective assistance of counsel is necessary in order for counsel to fulfill the role of protecting the presumption of innocence described in *Gideon v. Wainwright*. *See Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963). For a discussion of the counsel offered to indigent defendants, see Andrew Ramonas, *Kagan, Holder Address the Five Decades Since Historic Gideon Decision*, BLOG OF LEGAL TIMES (Mar. 18, 2013), <http://legaltimes.typepad.com/blt/2013/03/kagan-holder-address-the-five-decades-since-historic-gideon-decision.html>. On the anniversary of the Supreme Court's decision in *Gideon*, Justice Kagan remarked in sum at a Department of Justice event: "[T]he provision of a 'Cadillac' lawyer isn't a right for poor defendants. But they should at least have a 'Ford Taurus' defense, complete with a lawyer who has the skills, resources and competence necessary to thoroughly advise a client." *Id.* Still, the "Cadillac" lawyer ideal should not be abandoned. The system's failure to reach the highest standards of representation does not mean that we should enshrine mediocrity or dubious morality.

²⁶⁸ *Titlow*, 134 S. Ct. at 18.

²⁶⁹ *Id.* at 18 n.3. The other questions included issues involving the *Strickland* prejudice prong and the appropriateness of the remedy requiring the prosecution to reoffer the plea and for the state court to fashion an appropriate remedy. *Id.*

²⁷⁰ *Id.* at 18 (Sotomayor, J., concurring).

²⁷¹ *Id.*

²⁷² *Id.* at 19 (citations omitted).

²⁷³ *See id.*

defendant and bound the attorney, it had to be based on counsel's advice and risk analysis.²⁷⁴ Thus, a declaration of innocence is only a goal of a particular case, which like an embracement of guilt, must be founded on informed decision making.

In addition, while it was reasonable for the state court to find that Titlow did not meet her burden to establish the second attorney's ineffectiveness, it was not an endorsement of her lawyer's performance. Justice Sotomayor clarified this point:

[O]ur statement about the facts of this case does not imply that an attorney performs effectively in advising his client to withdraw from a plea whenever the client asserts her innocence and has only a few days to make the decision. Had respondent made a better factual record—had she actually shown, for example, that Toca [the second lawyer] failed to educate himself about the case before recommending that she withdraw her plea—then she could well have prevailed.²⁷⁵

And Justice Ginsburg, in a separate opinion joining in the judgment only, harbored doubts about the state court's conclusion that the second attorney's actions were reasonable in light of his client's assertion of innocence.²⁷⁶ Immediately upon being hired, the second lawyer advised Titlow that he would be able to try and win the case without having reviewed the file or consulting with the first lawyer.²⁷⁷ At the sentencing withdrawal, even the prosecutor had to concede that Titlow had been the "victim of some bad advice."²⁷⁸ Nonetheless, when Titlow refused to testify at Aunt Billie's trial, the plea bargain fell apart.²⁷⁹ Ergo, had this case been resolved by the Supreme Court in Titlow's favor, the Court would have been hard put to confirm a remedy for a plea bargain that could no longer be carried out. In other words, once the key condition of the guilty plea ceased to exist, Titlow's refusal to testify along with Aunt Billie's acquittal and death rendered the original agreement legally and factually incapable of being performed.²⁸⁰

The Supreme Court's decision in *Burt v. Titlow* advanced the doctrine of AEDPA deference more than the constitutionality of plea

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* (Ginsburg, J., concurring).

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 20.

bargaining.²⁸¹ Unfortunately, the Court was more concerned about defendant's ability to prove ineffectiveness than the actual performance of her counsel.²⁸² So it is that proof of process trumped proof of guilt. Assertions of innocence, a polygraph test, prosecution evidence of guilt, and legal truth were subordinated to the low threshold of plea negotiation standards. The Justices concentrated on the burden of proof needed to challenge the effectiveness of counsel and preparation at the plea stage, i.e., metadata about the negotiation process.²⁸³ By virtue of this analysis, they relied on an in-depth examination of direct evidence of guilt, the measure of the prosecution's case, which was an important factor in assessing the merits of the plea bargain or the wisdom of withdrawing from it. This decision highlighted the distinction between process and proof. Vonlee Titlow as the accused was an information source and potentially a witness for the prosecution. At trial, she became a defendant in an adversarial process, illustrating the key difference between a pleader and a testificant.

Having abandoned the agreed upon pleading facts, the competing theories of the prosecution and the defense were presented to a jury.²⁸⁴ In court, Titlow testified about her mitigating and partially exculpatory defense.²⁸⁵ This is a good example of how a person's interpretation of innocence cannot be assumed to be monolithic. It is a term of legal art that to a lay person can mean total

²⁸¹ See Rory Little, *Opinion Analysis: Court Says More About Federal Habeas Review Than Ineffective Assistance in Plea Bargaining*, SCOTUS BLOG (Nov. 6, 2013, 3:42 PM), <http://www.scotusblog.com/2013/11/opinion-analysis-court-says-more-about-federal-habeas-review-than-ineffective-assistance-in-plea-bargaining/> (“[T]he Court may well still be looking for vehicles to advance the law down the new road that *Lafler*, *Frye*, and 2010’s *Padilla* decision opened. But *Titlow* suggests that they will be looking for direct review cases from the state and federal courts to clarify the law in this area, rather than through the foggy filter that federal habeas doctrine imposes.”).

²⁸² Ironically, and unjustly, most defendants at the late stage of postconviction litigation will be counsel-less. See Post-Conviction Justice in the Information Age, *supra* note 7, at 1.

²⁸³ *Titlow*, 134 S. Ct. at 15.

²⁸⁴ *Titlow v. Burt*, 680 F.3d 577, 584 (6th Cir. 2012), *rev’d*, 134 S. Ct. 10 (2013) (“The State’s theory of the case was that Titlow helped Billie kill Donald in order to obtain money for a sex-change operation, since Titlow, although born a man, had been living as a woman for many years. Titlow offered several theories in her defense: that she was merely present and did not participate in the murder; that she had abandoned any intent to aid in the murder and was guilty of a lesser crime only; and that Donald died from acute, self-induced intoxication rather than anything that she had done.”).

²⁸⁵ *Id.* (“Titlow took the stand in her own defense. She admitted to putting her hand over Donald’s mouth after Billie poured vodka down his throat. Titlow further confirmed that she poured some vodka as well, but in a much smaller quantity. She also testified that she ultimately stopped Billie from giving Donald more alcohol and then left the room. When she returned, she saw Billie holding a pillow over Donald’s face. Titlow conceded that she accepted Billie’s money as a bribe to keep silent.”).

exoneration, partial culpability, or ignorance of what acts might have been illegal. It is not a matter of objective metaphysical truth. For plea purposes, it was a manslaughter case, at trial the prosecution proved murder. The question of what innocence meant to the defendant was very different from the intrinsic legal merit of the case to a lawyer. The accused used non-legal standards to interpret innocence versus guilt, while prosecutors and defense attorneys were bound up with what was provable. There were contingencies for both that could have altered the outcome, because the process was adversarial, competitive, and unscientific. Thus, the defendant's subjective beliefs about the risks were as important and informative as the attorney's estimates of provability in so far as postverdict evaluation of the right to counsel was concerned. Ultimately, the fact-finding succumbed to the policies of dispute resolution and truth surrendered to finality.

So a pretrial manslaughter plea was converted into a trial conviction for second-degree murder, an aider and abettor became the principal. And a sentence offer of seven to fifteen years now became twenty to forty years of incarceration.²⁸⁶ At the sentencing hearing for the trial conviction, Titlow revealed the machinations behind her decision to forgo the original plea arrangement.²⁸⁷ She stated that she

would have testified against Billie during her trial, had I [Titlow] not been persuaded to withdraw my plea agreement and the chance to testify, because an attorney promised me he would represent me. . . . I don't know a lot about the law, because I've never been in serious trouble before. So I trusted what he was saying.²⁸⁸

Without an evidentiary hearing, the truth about the truth had to be inferred from the record as constructed by the appeals courts. Even so, at such a proceeding or habeas review, Vonlee Titlow's statements would have been perceived as subjective and self-serving, necessitating corroboration by objective evidence. Indeed, in the process of upholding the defense attorney's performance and justifying the plea offer, the prosecution would have been compelled to draw upon trial evidence of guilt. So the efficacy of the plea would have been bolstered by proof from the trial, which in this instance occurred but in the majority of cases would only have been

²⁸⁶ *Id.* at 583–84.

²⁸⁷ *Id.* at 584.

²⁸⁸ *Id.* (internal quotation marks omitted).

speculative.

All three Supreme Court opinions, *Lafler*, *Frye* and *Titlow*, demonstrated that the truth of a plea is not the truth of a trial. The advantages, gamesmanship, and leverage that account for a plea bargain override an honest and fair assessment of legal truth. The prosecutor's charging decision, the grand jury's indictment, the legislature's sentencing guidelines, judicial discretion, and the defense counsel's investigation set the perimeters of legal truth at the pleading and pretrial stages. Indeed, the entire spectrum of a case from beginning to end is an information assembly line of uneven virtues: plea bargains, pretrial suppression motions and hearings, trial testimony and evidence, and postconviction hearings that include newly discovered evidence and non-record exchanges of information.²⁸⁹ However, the AEDPA has forced content to be divorced from context on a larger scale than ever before.²⁹⁰ The consuming arguments about the effectiveness of counsel, the fairness of the plea process, and the appropriateness of the remedy land far afield from an objective assessment of the guilt or innocence of the person at the center of the storm. Still, increased attention to information gathering and analysis at the pre-plea stage would improve the odds that an accused would receive a fair offer and outcome. It might even more closely approximate the legal truth of a trial, while not offending the fundamentals of due process and due punishment.

V. ACCURACY OR CERTAINTY

From the inception of the Sixth Amendment, the right to trial has been at the heart of the battle to protect the presumption of innocence and the validity of convictions.²⁹¹ Now the majority of the Supreme Court has changed the narrative to focus on due punishment rather than due process. The legitimacy of the plea, and hence the sentence, has become paramount. But there is more.

The true nature of justice is found between the antipodes of

²⁸⁹ This scenario must also take into account the limitations of privileged, ex parte, or confidential information exchanges.

²⁹⁰ All of the information or proof is ultimately screened through the filters of the rules of evidence at trial and the deference, presumptions, and inferences that dominate the postconviction process.

²⁹¹ See Molly Armour, *Dazed and Confused: The Need For a Legislative Solution to the Constitutional Problem of Juror Incomprehension*, 17 TEMP. POL. & CIV. RTS. L. REV. 641, 643-44 (2008) (stating that a jury trial is fundamental to fairness in the American justice system and is in place to protect the rights of the accused).

Lafler's and *Frye's* majority and dissenting opinions. Hoary notions of a perfect system of trial justice have been expressly dispelled. And the right to counsel, with its *Strickland* accents, might bring to light more due process claims and open a window on fundamental fairness. In essence, *Lafler* and *Frye* evinced a remote acquaintanceship with the daily workings of criminal courts, albeit expressed as raw percentages of pleas dominating trials. Now, all process from inception to verdict registers on the Supreme Court's constitutional radar. In practical terms, it was an evolution in the Court's thinking more than a change in the reality of criminal practice. Thus, a majority of the Justices transitioned from being strictly concerned with pleas as a mechanism to waive the trial right to viewing them as constitutionally independent events. The biggest question left open was the "art of the deal," making this one of the last frontiers of criminal justice in need of regulation.

For the defendant, a perilous choice is whether to go forward with this claim or to abandon it. Deconstructing a plea or a trial might open up the possibility of more serious and unforeseeable consequences, for example, heavier sentences, collateral consequences, convictions on other counts, and so on. Without a right to postconviction representation, habeas petitioners remain adrift without counsel to consult on this important decision.²⁹²

And there will be other issues stemming from the nature of the advice given in which the credibility of the defendant's postconviction testimony will play a key role.²⁹³ Moreover, the courts will have to decide the proper division of labor in decision making between defendant and defense counsel, the limits of friendly persuasion, and the accused's competency to make choices.²⁹⁴ Finally, there is basic preparedness. The amount of

²⁹² See *Post-Conviction Representation*, *supra* note 7; Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. J. CONST. L. 1219, 1223 (2012); Sarah L. Thomas, *A Legislative Challenge: A Proposed Model Statute to Provide for the Appointment of Counsel in State Habeas Corpus Proceedings for Indigent Petitioners*, 54 EMORY L.J. 1139, 1140 (2005).

²⁹³ See, e.g., *Carrion v. Smith*, 365 Fed. App'x 278, 280–81 (2d Cir. 2010) (at a federal habeas corpus evidentiary hearing, petitioner's specific testimony as opposed to defense counsel's "general practice" statements established a claim that his attorney had failed to advise him of the sentencing exposure at trial); *Purdy v. United States*, 208 F.3d 41, 48 (2d Cir. 2000) ("[Defense counsel] acted reasonably when he informed Purdy fully of the strength of the government's case against him, together with the nature of the government's plea offer, without specifically advising Purdy to take the plea.").

²⁹⁴ See *Jones v. Barnes*, 463 U.S. 745, 749, 751 (1983) (stating that it is an attorney's professional duty to choose which issues to argue in court; however, the accused has the ultimate authority to make certain fundamental decisions concerning the case); *People v.*

information collected in connection with a trial is radically different from the paucity of facts and investigation that precedes a plea. The law on defense counsel's duty to investigate facts related to the charge or mitigating factors will have to be accounted and enforced.²⁹⁵ Then there is the need to formalize and audit the prosecutor's obligation to provide full *Brady* discovery.²⁹⁶ Thus, while defense lawyers will not have to resort to decision trees and game theory to raise the level of their negotiation skills, their activities will serve as a barometer for the entire process.

For the Supreme Court, plea bargaining had been an outlier, a necessary evil that drew focus away from the cardinal virtue of trial as the guarantor of the presumption of innocence. And if trials operate to preserve the presumption of innocence, what do guilty pleas protect? In *Gideon v. Wainwright*, the right to counsel was intended to protect the presumption of innocence;²⁹⁷ in *Douglas v. California*,²⁹⁸ the accuracy of the verdict;²⁹⁹ and in *Frye and Lafler*, due punishment,³⁰⁰ i.e., the bargained for plea and sentence. Indeed, *Frye* and *Lafler* were less about the merits of the plea than about the merits of the process.

Some of the most fundamental rules of criminal procedure rely on the safeguards of trial to protect the innocent. For instance, an accused cannot be convicted solely on her own testimony, i.e., the

White, 539 N.E.2d 577, 583 (N.Y. 1989) (stating that in the best interest of the client, competent appellate practice may require an attorney to take a different approach than what is urged by the client).

²⁹⁵ See, e.g., *People v. Oliveras*, 21 N.Y.3d 339, 348 (2013) ("It simply cannot be said that a total failure to investigate the facts of a case, or review pertinent records, constitutes a trial strategy resulting in meaningful representation."). See generally Gregory G. Sarno, Annotation, *Adequacy of Defense Counsel's Representation of Criminal Client Regarding Guilty Pleas*, 10 A.L.R.4th 8 (1981) (includes cases discussing counsel's failure to investigate at the pleading stage).

²⁹⁶ In the 2013 term, the Supreme Court denied certiorari in *California v. Gutierrez*, 134 S. Ct. 684 (2013), and thus rejected an opportunity to confront the constitutionality of pretrial *Brady* obligations. See *California v. Gutierrez*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/california-v-gutierrez/> (last visited Aug. 16, 2014). The issue in this case was "[w]hether under *United States v. Ruiz* and *Brady v. Maryland* prosecutors must provide exculpatory evidence to a criminal defendant before a preliminary hearing at which a magistrate determines whether sufficient cause exists to require the defendant to stand trial." *Id.*; see generally Lissa Griffin, *Pretrial Procedures for Innocent People: Reforming Brady*, 56 N.Y.L. SCH. L. REV. 969, 1001 (2012) (discussing the need to design and enforce a clear and effective disclosure regime).

²⁹⁷ *Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1963).

²⁹⁸ *Douglas v. California*, 372 U.S. 353 (1963).

²⁹⁹ *Id.* at 357–58.

³⁰⁰ *Lafler v. Cooper*, 132 S. Ct. 1376, 1382–83 (2012); *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012).

confession-corroboration rule.³⁰¹ On the other hand, a plea allocution, in essence a confession, is all that is required for the acceptance of guilt by the court. And yet, the false confession, the bane of wrongful convictions after trial, can wend their way into plea allocutions.³⁰² So what drives the innocent or the guilty to plead rather than face a jury?

First, there are many shades of gray between innocence and guilt. Regardless of the myriad individual reasons and pressures that might induce anyone, again innocent or guilty, to plead, the most salient systemic reason is fear of wrongful conviction and harsh punishment. In the Supreme Court's newly envisioned system of bargain justice, the plea has become the trial, and the fear of trial is the catalyst that moves the plea. The trepidation behind going to trial inheres in its uncertainty. And this risk is magnified due to the danger of wrongful conviction and excessive sentences.³⁰³

There is too much documentation to deny the perils of criminal prosecutions that can lead to wrongful incarceration, such as: (1) official misconduct, (2) false confessions, (3) misidentification, (4) bad forensics, (5) witness perjury, (6) ineffective defense counsel, (7) under-resourced defense counsel, (8) CSI effect, and (9) racial profiling.³⁰⁴ And the scope of prosecutorial discretion in its charging decision or the judge's prerogative in sentencing can be contentious and their roles sometimes unclear.³⁰⁵ Still, the prosecution and the

³⁰¹ See Corey J. Ayling, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 WIS. L. REV. 1121, 1125–30 (explaining that the rule's origin and acceptance in American jurisdictions was founded on the need for reliability and improvement in the accuracy of criminal prosecutions); Julian S. Millstein, *Confession Corroboration in New York: A Replacement for the Corpus Delicti Rule*, 46 FORDHAM L. REV. 1205, 1207–11 (1978) (describing the origin and policy justifications for a rule to inhibit wrongful convictions and false confessions); see generally E. H. Schopler, *Corroboration of Extrajudicial Confession or Admission*, 45 A.L.R.2D 1316 (1956) (discussing the current confession-corroboration rule in each jurisdiction).

³⁰² See Saul M. Kassin et al., *Confessions That Corrupt: Evidence From the DNA Exoneration Case Files*, 23 PSYCHOL. SCI. 41, 41 (2012).

³⁰³ See Ken Strutin, *Mass Incarceration and the Next Generation*, N.Y.L.J., Oct. 19, 2012, at 4, 8; see generally Ken Strutin, *Mass Incarceration and the "Degree of Civilization,"* LLRX (Sept. 4, 2012), <http://www.llrx.com/features/massincarceration.htm> (discussing and reviewing studies on the causes of mass incarceration and growing inmate populations in the United States) [hereinafter *Mass Incarceration and the "Degree of Civilization"*].

³⁰⁴ See generally JON B. GOULD ET AL., *supra* note 28, at 7 (identifying the factors that most commonly led to wrongful conviction based on the results of a case study of wrongful convictions); see also *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/> (last visited August 16, 2014) (listing the seven most common causes leading to wrongful convictions).

³⁰⁵ See, e.g., Marlene Kennedy, *Don't Tell Me Who to Prosecute, DA Tells Judge*, COURTHOUSE NEWS SERVICE (June 6, 2013), <http://www.courthousenews.com/2013/06/06/58275.htm>; *Judge in Iowa Acts as 'Prosecutor-in-*

defense attorney have interests in common as trading partners in the justice system. Some of those interests, as pointed out by Professor Bibas in his research, include: avoiding unnecessary trials, for the prosecutor to protect the conviction, for both sides to stem the tide of backlogs, and for the defense attorney to forestall claims of malpractice and ineffectiveness of counsel.³⁰⁶

The defendant's interests in fairness and the community's interests in truth are best served by a complete record. The written offer in *Frye* was an example of essential documentation.³⁰⁷ Pleas, convictions, and trials are information events. The more details shared, the better informed the decision makers will be. Open discovery, frank discussion about strength of evidence and trial risk, and sentencing recommendations through an information exchange between prosecutors and defense can facilitate process while fairly educating the defendant about the plea option.³⁰⁸ Thus, merit-based plea bargaining would not have to rely on the happenstance of

Chief, Defense Lawyer Claims, DES MOINES REG., June 5, 2013, available at 2013 WLNR 13791928. Lately, there have been criticisms about federal prosecutorial plea bargaining policies in narcotics cases that have resulted in internal reform and judicial acknowledgement of the problem. See, e.g., *United States v. Kupa*, 976 F. Supp. 2d 417, 417–18 (2013) (“Attorney General Eric H. Holder, Jr. recently announced a new ‘Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases’ (the ‘2013 Holder Policy’). The new policy limits the circumstances in which United States Attorneys can properly invoke these harsh mandatory sentences. It has the potential to reduce significantly both the unfairness and the unnecessary expense caused by our current federal sentencing regime for drug offenses.” (footnote omitted)). This also raises concerns over bans on plea bargaining or blanket sentencing policies. See Roland Acevedo, Note, *Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 FORDHAM L. REV. 987, 1003–05 (1995) (describing the adverse effects of the plea bargain ban in the Bronx); see also *United States v. C.R.*, 972 F. Supp. 2d 457, 462 (2013) (“Needlessly destructive sentencing should not be countenanced in a sound system of law. Statutes should not embrace such punishments even if the Constitution does not prohibit them.”); *People v. Glendenning*, 487 N.Y.S.2d 952, 953 (N.Y. Sup. Ct. 1985) (“There can be no question that a court can reject a plea to a lesser count but such rejection should be supported by the facts and by the law. A blanket policy as enunciated by the lower court Judge in this case draws into question the propriety of a court’s categorical rejection of proffered pleas which both the prosecutor and the defendant are willing to enter, a fortiori, when the prosecutor offers the reduced plea in the first instance.”).

³⁰⁶ See Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 164–67 (2012) (discussing some of the incentives behind plea negotiations).

³⁰⁷ *Id.* at 167 (suggesting that the interests of justice would be served if plea offers were written in plain English and carbon copied to the defendant).

³⁰⁸ See *id.* at 167–68. Professor Bibas outlined reforms for each institution involved in the plea process. *Id.* For instance, adequately funding public defense resources would expand and enhance pretrial investigation and case preparation; prosecutors could improve the quality and fairness of plea bargaining by painting a fair portrait of their case at trial and the consequences of sentencing; and the courts could play a role in seeing that plea offer terms are made part of the record and develop better information about sentencing options, which would reduce uncertainty in making sentencing promises. *Id.*

defense attorney skills or availability of investigators or experts, but on the proper role of prosecutors, courts, and the entire justice system.³⁰⁹ A detailed plea offer and court record can aid in holding defense counsel, prosecutors, and courts accountable for their decision making.³¹⁰ Otherwise, the process will continue to result in (1) an innocent pleading guilty, or (2) the guilty pleading to more serious offenses than can be proved or forgoing viable defenses, and (3) the improper leveraging of a guilty plea due to fear of compounding pending charges, violating parole or probation, as well as pressures from poverty such as high bail and pretrial incarceration, loss of benefits, housing and employment.³¹¹ Since plea bargaining is responsible for the majority of justice produced in this country, it ought to be held to the highest due process standards. As Professor Bibas has noted: “[I]n a sense, the entire criminal justice system bears the obligation of ensuring fair, accurate convictions.”³¹²

In a system where the plea is the trial, the accused deserves independent competent advice and access to legal, factual, and expert information. And in an adversarial system, the roles of prosecutor, judge, and defense counsel are collectively in the business of information gathering and evaluation as well as the administration of law based on that process. Thus, the closer that plea bargaining comes to a truth-finding proceeding, similar to the discovery and fact-finding of the pretrial track, the closer it comes to justice.³¹³

³⁰⁹ *Id.* at 169 (“The Sixth Amendment presupposes a vigorous, effective adversarial system to test not only defendants’ factual guilt but also their culpability and the sentences they deserve. . . . Other actors, including judges and prosecutors, can help defense lawyers to do their jobs well, backstopping them where they fall short.”).

³¹⁰ *Id.* at 169–70. Indeed, the Supreme Court’s focus on defense attorney competence might be a catalyst to systemic reforms in plea bargaining and adjudication. *Id.* (“*Lafler* and *Frye* are far from panaceas for sloth, ineptitude, and overwork, but they do provide a remedy for some of the worst incompetence, and they prod other actors to pursue further reforms. The result should be sentences that are tied more to the strength of the evidence and the severity of the crime and criminal record than to irrelevant tactical failures.”).

³¹¹ *Id.*

³¹² *Id.* at 170.

³¹³ This is particularly important as parallel concerns continue to be raised, such as mass incarceration. See Ken Strutin, *The Realignment of Incarcerative Punishment: Sentencing Reform and the Conditions of Confinement*, 38 WM. MITCHELL L. REV. 1313, 1314 (2012). In fact, the chief outcome of plea bargaining, the incarcerative sentence, is mirrored in the high populations of America’s prisons. And successful challenges to their deleterious conditions due to overcrowding are slow to be remedied. See *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011) (“Overcrowding [in California state prisons] has overtaken the limited resources of prison staff; imposed demands well beyond the capacity of medical and mental health facilities; and created unsanitary and unsafe conditions that make progress in the provision

The upshot of *Lafler* and *Frye* is that plea bargaining has come to be as vital as trial advocacy. Indeed, the impetus of these decisions might lead to reforms that address systemic problems with plea-based justice,³¹⁴ and a closer approximation between the truth-finding ratios of pleas and trials. For the present, these two decisions have created a right to effective assistance of counsel gateway to due process, i.e., fundamental fairness and non-trial claims.³¹⁵ How far that gateway will open depends on the extent of the canon of constitutional interpretation that prefers decisions to be based on right to counsel rather than due process and the further restriction of procedural default.

From an information perspective, pleas are fact-confirmatory (or fact-molding), while trials are fact-finding (fact-contesting). The plea is a settlement that relies on the confession model, where the accused is the chief exponent of the facts based on agreement by the lawyers and oversight from the court. Thus, while the trial is revelatory, the plea is manufactured to statutory specifications. Still, the imbalance of resources that undercuts accuracy in the trial track also impacts the foreshortened process of pleading guilty. Many of the reforms of plea bargaining seek to improve pretrial investigation and exchange of information, thus promoting fairness and to some degree accuracy. Again, the more closely the plea resembles the trial, the more accurate and fair the outcome.

of care difficult or impossible to achieve.”); Paige St. John & Chris Megerian, *Brown Given Time on Prisons*, L.A. TIMES, Oct. 22, 2013, at 3, available at 2013 WLNR 26478766 (“Federal judges on Monday gave Gov. Jerry Brown an additional 28 days to meet their order to reduce prison crowding. Brown, whose administration has been in court-ordered talks with inmates’ lawyers in search of a long-term solution to overcrowding, now has until Feb. 24 to remove about 9,600 prisoners from state lockups.”); see also *Mass Incarceration and the “Degree of Civilization”* *supra* note 303, at 4.

³¹⁴ As the principal means for adjudicating cases, guilty plea convictions also reveal unaddressed systemic problems, notwithstanding the effective assistance of counsel issues, which includes among others: (1) coercion or duress; (2) defendant competency and capacity; (3) mistake of fact, misunderstanding, or confusion; (4) lack of level playing field between prosecution and defense; (5) pressures on defense counsel; and (6) pressures on prosecution. See Rishi Batra, *Lafler and Frye: A New Constitutional Standard for Negotiation*, 14 CARDOZO J. CONFLICT RESOL. 309, 317–19 (2013) (“Scholars have long criticized plea-bargaining, arguing that the system under which they are conducted is inherently unfair to defendants, given the power differential between prosecutors and defendants, as well as the coercive nature of the process. Others have focused on the pressures and incentives that defense attorneys face which can prejudice their clients.” (footnotes omitted)). Other factors are prosecutorial vindictiveness, judicial sentencing abuse, conditions of confinement that inherently compel pleas pretrial, and the threat of lengthy harsh sentences.

³¹⁵ See generally Justin F. Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, 14 U. PA. J. CONST. L. 1161, 1164, 1193–1216 (2012) (exploring the effects of *Lafler* and *Frye* on common issues of criminal practice, including pretrial detention, speedy trial, and double jeopardy).

Indeed, due process and due punishment ought to be rebalanced to accommodate the goals of accuracy and dispute resolution.³¹⁶

CONCLUSION

The lock on the prison door is the willingness of society to accept equivocal judgments of guilt and innocence. The reason behind the ambiguity of legal truth is the means by which it is arrived at. Scientific inquiry is likely the most honest examination of facts, and from there it is a rapid decline into trials and at last to pleas. Law more than any other discipline is governed by history, convention, and culture. Trials did not institutionalize truth-finding, they institutionalized combat.³¹⁷ Indeed, the underlying purpose of

³¹⁶ See Brown, *supra* note 8, at 1587–92 (discussing the ramifications of an adversarial system of justice with insufficiently balanced resource allocation between the prosecution and the defense, and the virtues of judicial oversight and regulation to enhance the accuracy of adjudications). In particular, the author focused on the hazards of adversarial justice and the compromises of plea bargaining. *Id.* at 1604 (“Strickland represents the Court’s acquiescence to a widespread legislative judgment against the institutionalization of zealous defense counsel, a choice that undermines adversarial process as the dominant guarantor of accurate fact-finding. When bargaining substitutes for trial, defendants and their counsel replace the jury in the structural role of checking the executive’s factual accounts of crimes. Weak defense facilitates case resolution; underfunded defenders prefer quick pleas. But this arrangement aggravates current problems with fact-finding. Yet in part because defense counsel sometimes hinder accuracy as well as help it, a feasible solution will have to be—and is beginning to be—something other than reversing that political judgment and more fully funding defense counsel.” (footnotes omitted)).

³¹⁷ Trials are cultural filters that satisfy society’s need for vindication and punishment. They emerged from a medieval system of resolution in which proof was judgment and truth defined by the values of those times. Hence the battle between opponents or proxies (trial by combat) and between the accused and herself (trial by ordeal) once adjudicated by divine or naturally inspired laws sprang from the same soil that gave rise to modern day rationalism and the cultural imperatives of punishment, certainty, and finality. See Edward L. Rubin, *Trial by Battle. Trial by Argument.*, 56 ARK. L. REV. 261, 261–77 (2003) (tracing the history of medieval “trial by combat” alongside the contemporary system of “trial by argument”). The author showed that the historical goals and outcomes were better understood and aligned with their times rather than an objective truth-seeking function. *Id.* at 280 (“In fact, a comparison reveals that trial by combat and trial by battle suffer from similar defects as a means of determining the truth: the inherent inaccuracy of the adversary method, the reliance on professional representatives, and conscious antiquarianism.”). From fields of honor to courts of law, the past has left its mark on the progress of criminal justice in the form of trial by character. See *id.* at 274–75. While the physical battles and ordeals of the old justice system left no precedent, its rejection compelled the evolution of a new means for resolving disputes and maintaining the peace. See *id.* at 268–69. At the same time, its adversarial imprint became a watermark. The procedures have changed, and in many regards improved, but truth continues to be viewed as the product (or byproduct) of “conflict.” See *id.* at 277. Ultimately, the war of words (logomachy) as a means of fact-finding has proven ancillary and atavistic. See *id.* at 280–81. Indeed, society’s motivation to improve or change the administration of justice remains stymied until the present mode of trial by argument is exhausted and truth-seeking and fairness in result become the paramount goals. See generally Susan A. Bandes, *Protecting the Innocent as the Primary Value of the Criminal*

government has been to quell “civil” war—the war of “each against all.”³¹⁸ Thus, there has been an historical misapprehension of the trial process as truth centered, when it had more in common with the resolution and settlement now consigned to plea bargaining. The chief difference between the two is in the amount and quality of information developed before the judgment is reached and the options for decision makers afterwards. Outcome risk factors might decide in favor of the plea track versus the trial, but the core of each proceeding is to achieve the end of accusation, closure of investigation, certainty in result, and finality of conviction.³¹⁹ It is the integrity of that process that the Supreme Court has been debating.

Indeed, *Lafler* and *Frye* are about shifting legal realities. For a

Justice System, 7 OHIO ST. J. CRIM. L. 413, 435 (2009) (discussing the contrasting goals of protecting innocence, privacy, fairness, and autonomy in the criminal justice system). As one scholar observed, this is especially salient in the realm of plea negotiations. See Rubin, *supra*, at 291–92 (“Given that plea bargaining is the dominant method of resolving criminal cases in this undramatic, administrative, mass society, we betray our genuine values if we fail to ensure its fairness because we regard trial by argument as the only proper way to resolve a criminal case.”). It boils down to our judgment about making judgments, matching goals (truth) and procedures (accuracy) to the aspirations of justice and not the shadows of the Dark Ages. See *id.* at 293–94.

³¹⁸ See THOMAS HOBBS, *LEVIATHAN* 96–98 (Oxford Univ. Press 1929) (1651) (“Hereby it is manifest, that during the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man. . . . To this warre of every man against every man, this also is consequent; that nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power, there is no Law: where no Law, no Injustice.”).

³¹⁹ The finality doctrine is in essence a trial-centered philosophy that puts a seal on certainty in favor of saving the costs and time devoted to re-litigating cases without limit. The result is to protect the verdict at the expense of truth. The epicenter of justice continues to be resolution, not truth-seeking or accuracy; and finality serves to punish the convicted and their counsel for the unrealized values of cost-savings and improvements in trial performance. See generally Kim, *supra* note 15, at 579 (describing the pillars underlying the policies of finality: (1) conservation of judicial, prosecutorial, and defense resources; (2) requiring heightened attention to error or efficiency at the trial stage by defense attorneys; and (3) promoting deterrence by assuring that sentences will be served and will be beyond review at a certain point). Then Professor Kim showed how the current approach resulted in inefficient use of resources, wrongful incarceration, and ineffective deterrence. *Id.* at 579–81. Professor Kim used the term “wrongful incarceration” as an overarching concept to capture wrongful conviction (innocence), unfair trial, and excessive punishment. *Id.* at 581. Indeed, the error rate of incarceration continues to be treated as less important than public satisfaction with the overall result. Nonetheless, wrongful conviction continues to make the criminal process seem irrational and punishment random at times. See MYLES FREDERICK MCLELLAN, *THE REAL NUMBER OF WRONGFUL CONVICTIONS AND PRESUMPTIVE INNOCENCE* 4 (Canadian Criminal Justice Association, 34th Canadian Congress on Criminal Justice, SSRN Oct. 8, 2013), <http://www.cjja-acjp.ca/cong2013/presentations/14.pdf> (arguing that wrongful conviction numbers should extend beyond the exonerated to those found not guilty, which should be equivalent to “innocence” as a product of the undisturbed presumption of innocence).

long time, trial-centered justice was the reality. The presumption of innocence, preventing wrongful convictions, and assuring the accuracy and reliability of verdicts to sustain finality were the bread and butter of Sixth Amendment litigation. But the exclusive emphasis on the trial was misplaced in a system that seldom tried cases. If criminal courts in this country tried every case on their dockets and plea reductions were eliminated then a new picture would emerge. Only meritorious cases would end up on the trial calendar. Weak cases would have to be dismissed, since no middle ground would be available. But there are not enough judges, prosecutors, defense attorneys, or courtrooms to run an exclusively trial-based system of justice. Thus, plea bargains emerged as a logical and fiscally sound compromise. And this compromise props up mediocre cases, leverages defendants into surrendering their rights, and until recently operated on the pale of constitutional jurisprudence.³²⁰

Prison populations are being reduced because it has become too costly to lock up everyone at the current rate. And now it has become too expensive to leave the infirmities of plea bargaining unnoticed. The Court's new philosophy is that protecting the sanctity of trials alone is not adequate in a system driven by pleas. The guilty plea is the grist of justice and *Lafler* and *Frye* are proposals to law makers and judges that they have a duty to see that they are processed constitutionally. Due to the canon of constraint, these decisions were based on the right to counsel, a trial right, not due process, a systemic right. The move from outcome (verdict) to process (plea negotiation) was significant. But the due process track has not been exhausted.

Ineffective assistance of counsel was only one integer in this equation. The prosecutor's duty to seek justice, disclose evidence, and fair dealing are other factors. The judges also had to exercise

³²⁰ There are numerous observations and suggestions for responding to over-criminalization and prosecutorial abuse. See Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102, 107 (2013) ("The 'nuclear option' of prosecutorial accountability would involve banning plea bargains. An understanding that every criminal charge filed would have to be either backed up in open court or ignominiously dropped would significantly reduce the incentive to overcharge. It would also drastically reduce the number of criminal convictions achieved by our justice system. But given that America is a world leader in incarceration, it is fair to suggest that this might be not a bug, but a feature. Our criminal justice system, as presently practiced, is basically a plea bargain system with actual trials of guilt or innocence a bit of showy froth floating on top." (footnotes omitted)). In addition, the plea offer and sentence recommendation might be presented to the decision maker after conviction at trial and before sentencing to provide a barometric reading of the case's worth. *Id.*

their discretion in setting bail, overseeing the fairness of pretrial discovery, and superintending resource allocation and plea negotiations, all of which are independent of and in addition to the role of competent defense counsel. Deficient representation deprived the accused of a choice between plea or trial by corrupting the bargain option. Thus, the defendant surrendered the presumption of innocence without a trial, which was meant to be protected by the right to counsel. Even a fair trial later could not restore or validate the loss of the right to choose.

The Supreme Court has transformed the *Strickland* doctrine into plea bargain insurance; but deficient performance is not enough. There is a high premium for this insurance, and it will not be easy to sustain a claim of prejudice after the fact. The trial is not the nucleus of criminal justice, but the nuclear option. Its integrity will continue to exert unseen pressures on the plea negotiation process. And to the weighty factors of pretrial detention, prosecutorial and judicial discretion, and limited funds and access to resources for the defense can be added the real and pervasive reality of wrongful conviction.

Moreover, the deficits of trial are magnified in the microcosm of plea negotiations. Settlements of charges and waiver of rights occur without full discovery, litigation of suppression issues, complete investigations, or other indicia of a level playing field. Early entry of counsel, reasonable and flexible bail terms, open file discovery, and fully funded defense resources are only a start.

Truth has a hard time finding a place in a system that can indict a ham sandwich.³²¹ And the definition of wrongful incarcerations continues to extend into the surreal in which people are condemned for non-events or guilt by association.³²² In terms of information

³²¹ See Maurice Carroll, *Wachtler Urges Legislators to Approve Court Changes*, N.Y. TIMES, Apr. 23, 1985, at B2 (“Judge Wachtler has a reputation as a colorful speaker. He caused a stir soon after his appointment to head the state courts by telling reporters that the grand-jury system of bringing criminal indictments was so controlled by prosecutors that most grand juries, if asked to, would ‘indict a ham sandwich.’ Today, he made the same point, but less vividly. ‘Is it any wonder,’ he asked, ‘that nearly everybody experienced with the criminal law readily concedes that the grand jury almost invariably does what the prosecutor wants? Is it really necessary to expend the time and energy to assemble 23 jurors, court officers, police, witnesses and prosecutors merely to have them confirm—as they almost invariably do—a conclusion already reached by the only legal adviser they will hear?’ It would be better, he said, to let a judge order a case to trial.”); see also Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2335–37 (2008) (discussing the current low repute of the grand jury as embodied in clichés and the need to revitalize its role in speaking for the community and legitimating the criminal justice system).

³²² See Nat’l Registry of Exonerations, *One Out of Five Known Exonerations Is for a Crime That Never Happened*, VERTICAL RESPONSE,

analysis, defendants are not black boxes, and unlike scientific inquiry, the truth of human affairs is often hard to pin down. Legislating certainty is not the answer. For in the last analysis, pleas and trials are meant to preserve the peace, not the truth. In order to enthrone accuracy, measures for improving pretrial representation, investigation, disclosure and discovery, and postconviction relief need to be fully constitutionalized.

<http://hosted.verticalresponse.com/1438491/60b961faeb/546806695/58c46ec68e/> (last updated Nov. 13, 2013) (“No-Crime cases now account for 22% of known exonerations. The largest numbers occur among child sex abuse cases (109), followed by homicides (39), adult sexual assaults (34) and drug cases (28).”). Further, the number of this type of non-event prosecution has been increasing. *Id.* (“In a 2005 Report on 340 exonerations in the United States—the most complete compilation at the time—fewer than 4% were cases where no crime had occurred. The first National Registry Report included 873 exonerations, from 1989 through February 2012. Of these, 15% were No-Crime cases. As of today, 22% of the 1,242 exonerations in the Registry are No-Crime cases, including 38% of the cases added since March 2012.”).