A PLEA FOR FUNDS: USING *PADILLA*, *LAFLER*, AND *FRYE* TO INCREASE PUBLIC DEFENDER RESOURCES

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A desperate defendant facing a first-degree murder charge sends a letter to the judge in his case. It reads in part, "My lawyer turned down a plea to eight years without ever telling me about it."

The judge inquires about this allegation at the next hearing and finds out that there had in fact been a plea offer extended—it was an offer to plead guilty to armed manslaughter. The relevant sentencing guideline range would have called for a sentence of between seven and a half and fifteen years in prison. Records show that the attorney never visited the man in jail during the two weeks that the plea offer was on the table. The attorney does not claim to have discussed the plea offer with the client at any point until after it had expired.

The judge asks the prosecutor if the plea bargain can be re-extended. The prosecutor refuses, and instead extends a new plea offer to second-degree murder. The man now faces fourteen to twenty-eight years in prison, nearly double the time of the previous offer.[1]

I. Introduction

Fifty years ago in *Gideon v. Wainwright*,[2] the United States Supreme Court promised that criminal defense lawyers would protect poor people who were "haled into court" as criminal defendants with all of the power of the government brought down upon them.[3] "Governments, both state and federal," the Court noted, "quite properly spend vast sums of money to establish machinery to try defendants accused of crime."[4] Therefore, the Court concluded, lawyers to defend those accused by the government in criminal cases are "necessities, not luxuries," and that the "noble ideal" of "every defendant stand[ing] equal before the law . . .

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1. Although this hypothetical comes from a real case, some of the facts have been changed. Despite vigorous opposition by the government and months of litigation, the client was able to get his original plea offer back and was sentenced consistent with the original plea offer.

2. 372 U.S. 335 (1963).

3. *Id.* at 343–45.

4. *Id.* at 344.

cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."[5] The mere presence of a lawyer, of course, is virtually meaningless. Rather, following *Gideon*, the Court indicated that the Constitution requires the "effective assistance" of "reasonably competent" counsel.[6]

While some states and local jurisdictions had already created programs to provide criminal defense lawyers to indigent defendants—either public defender offices, "panels" of court-appointed lawyers,[7] or both—after *Gideon* there was a virtual explosion in the creation and funding of indigent defense programs throughout the country.[8] Unfortunately, despite the decades that have passed since the Court's promise in *Gideon*, poor criminal defendants continue to receive representation that falls short of putting them on equal footing with the prosecution machinery fueled by vast sums of government money. Some even argue that the level of representation on behalf of the poor has actually deteriorated over the years.[9] In many cases, this sub-standard representation is the result of indigent defense programs with too many cases and too few resources. Not coincidentally, more and more criminal cases resolve themselves by guilty plea rather than trial.[10] Indeed, the Court recently acknowledged that our "criminal justice [system] today

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5. *Id.*

6. Strickland v. Washington, 466 U.S. 668, 685–87 (1984).

7. This article frequently uses the term "public defender" broadly to describe both lawyers who work in public defender offices and defense attorneys who are appointed, and paid, by the courts to represent indigent defendants.

8. Although the first public defender office existed in this country as early as 1914, an explosion of public defender offices followed the Court's decision in *Gideon*. *See* NAT'L LEGAL AID & DEFENDER ASS'N, THE OTHER FACE OF JUSTICE 13 (1973) ("In 1961, two years prior to *Gideon*, defender systems existed in only 3% of the counties serving approximately a quarter of the country's population. Only 32 states compensated assigned counsel in non-capital cases and in 1182 counties indigent defendants were either unrepresented by counsel or were provided with lawyers who were obliged to serve without either fee or expense money. Today 650 defender systems provide indigent defense services in 883 (28%) counties throughout the United States. These defenders serve almost two-thirds of the nation's population.") (citations omitted); *see also* Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683, 688 (2010) ("[W]ithin days of the *Gideon* decision, Florida's then-governor Farris Bryant recommended to the state's legislature the creation of a public defender system in response to the opinion. Within two months, Florida's legislature passed a law creating a public defender office in every judicial circuit in Florida, parallel to the State's Attorneys' Offices."); Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2425–26 (1996) (discussing the growth in the number of public defender offices in the United States in the mid-1960s and early 1970s).

9. Opinions concerning the current state of indigent defense are primarily centered around a disparity in funding. *See generally* David A. Simon, Note, *Equal Before the Law: Toward a Restoration of* Gideon*'s Promise*, 43 HARV. C.R-C.L. L. REV. 581, 586 (2008) ("Of the more than $146.5 billion spent annually on criminal justice, over half is allocated to support the police officers and prosecutors who investigate and prosecute cases, while only about two to three percent goes towards indigent defense.").

10. In the 1970s, one in twelve cases went to trial; now it is fewer than one in forty. The decline is even more apparent in federal courts. *See* Richard A. Oppel, Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES (Sept. 25, 2011), http://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html (explaining that this decline is in part due to "underfinanced public defense lawyers who can try only a handful of their cases").

is for the most part a system of pleas, not a system of trials,"[11] and noted that well over ninety percent of convictions are by guilty plea in this country, in both the state and federal court.[12]

At the same time, in three recent opinions—*Padilla v. Kentucky*,[13] *Lafler v. Cooper*,[14] and *Missouri v. Frye*[15]—the Court concluded that the right to effective assistance of counsel applies to plea negotiations, clarified how defendants can obtain relief when their attorneys have failed them in the plea process, explained what relief is available, and expanded the requirements of effective lawyering at that crucial stage in the criminal process. These three cases together now set the standard for the most basic service that public defenders provide: advice regarding guilty pleas. By establishing in relatively concrete terms the constitutional "floor" for effective assistance of counsel during plea bargaining, and the possible relief for defendants when those standards are not met, the Court has provided indigent defendants and their lawyers with a significant stepping stone towards realizing the promise of *Gideon*: resources to adequately respond to the prosecution's awesome power.

Cases like the hypothetical one at the beginning of this Article are happening in courtrooms all over the country. Because defense lawyers are so busy, they often spend more time on cases they believe are destined for trial than on those that are likely to plead out. Attorneys sometimes fail to get plea offers to their indigent clients before they expire, and more frequently fail to provide their clients with the information necessary to make intelligent, informed decisions about whether to plead guilty or go to trial.

These failures have a powerfully detrimental impact on indigent criminal defendants and their loved ones. The innocent may plead guilty, and the guilty may end up suffering far greater consequences than they would have with more effective representation. For instance, after pleading guilty, indigent defendants often suffer such secondary consequences as deportation,[16] eviction,[17] and job

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11. Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012) (citing Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012)).

12. *Id.* ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").

13. 559 U.S. 356 (2010).

14. 132 S. Ct. 1376 (2012).

15. 132 S. Ct. 1399 (2012).

16. *Padilla*, 559 U.S. at 359. *See also* Gabriel J. Chin, *Making* Padilla *Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675, 689–90 (2011) (discussing the fact that deportation and other immigration consequences may occur as a result of a guilty plea).

17. A person convicted of a crime may be evicted from federal public housing. *See* 42 U.S.C. § 1437f(d)(1)(B)(iii) (2006) ("[A]ny criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises, or any drug-related criminal activity on or near such premises, engaged in by a tenant of any unit, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy . . . .").

loss.[18] Furthermore, the experience of being advised to take a plea undoubtedly leads indigent criminal defendants and their communities to distrust court-appointed attorneys and the criminal justice system as a whole. While simple fairness has not been enough to convince courts and indigent defense providers to ensure that defendants receive adequate advice regarding pleas, another incentive has emerged: the standards and relief established by *Padilla*, *Lafler*, and *Frye*. If lawyers for indigent defendants are not provided up-front with the resources necessary for effective plea-bargaining, subsequent litigation regarding inadequate plea advice costs both judges and lawyers even more valuable resources in the weeks, months, and years after convictions.[19]

In the same way that the Court revolutionized the criminal justice world with its ruling in *Gideon*,[20] these recent cases might also radically change the criminal justice landscape. This Article will attempt to answer the following question: if there is a solution for the ever-growing case load of the public defender and the crisis of indigent defense, can *Padilla*, *Lafler*, and *Frye* be a significant part of the solution?

This Article will proceed by examining whether these three opinions create a bar too high for most public defender offices to meet. It also seeks to suggest the kinds of changes needed for public defender offices to meet these basic requirements. To do so, I will begin in Part II by discussing guilty pleas in general. I will then describe the legal landscape prior to *Padilla*, *Lafler*, and *Frye* in Part III, and discuss the three cases themselves and their ramifications in Part IV. In Part V, I will then introduce the requirements for effective assistance of counsel, and describe the best practices for public defenders to use during plea bargaining. In Part VI, I will discuss the problem of the overburdened public defender office. Finally, in Part VII, I will conclude by addressing how overburdened public defender offices might employ these cases to help ease their case loads.

II. THE GUILTY PLEA

A. The Plea Bargaining Process

A plea bargain, generally negotiated by the prosecutor and the defense attorney, is the exchange of a criminal defendant's constitutional right to a trial[21] for some

18. Certain trades bar people with criminal convictions. *See* Chin, *supra* note 16, at 689 (discussing the fact that loss of a license, permit, or job may occur as a result of a guilty plea). Felons also may not be able to serve in the military. 10 U.S.C. § 504 (2012); *see also* 50 U.S.C. app. § 456(m) (2006) (conviction of a criminal offense for which the punishment imposed may be death or imprisonment for over one year may result in an individual being relieved from training and service).

19. *See infra* Section VI.

20. *See supra* text accompanying note 8.

21. U.S. CONST. amend. VI.

benefit from the government, typically a reduced sentence. While no defendant has the right to a plea deal,[22] prosecutors often offer plea bargains because their caseload is too burdensome to adequately prepare every case for trial.[23] Offering pleas to lesser crimes or to more lenient sentences ensures convictions for prosecutors and lightens their workloads.[24]

The plea bargaining process can be quite fluid. While some prosecutors' offices have guidelines prescribing certain pleas for specific charges, other offices give complete discretion to the particular government attorney handling the case. In addition, the terms of the agreement, the length of time for which an offer is left open, and many other details regarding the plea can vary significantly even within the same jurisdiction.[25] In most jurisdictions, judges have no involvement at all in the plea bargaining system.[26] The result is often a plea bargaining system where the government holds every card but one.

The decision to go to trial or to take a guilty plea belongs solely to the criminal defendant, and not his lawyer.[27] Of course, most criminal defendants rely heavily on their attorneys' advice when making this decision, in the same way that patients will rely on their doctors' advice about medical treatment. The defense attorney and her client together typically assess their chances at trial, the maximum and minimum sentences and any sentencing guideline ranges after a loss at trial against the plea offer, as well as the *likely* sentences after a trial loss against the plea offer. Sometimes the actual sentence is agreed upon by the parties and becomes a foregone conclusion if the plea offer is accepted. Often the defense attorney will provide specific advice about the offer, advising her client to accept the plea or not. The defendant then decides either to accept the plea offer or to go to trial, with the benefit of her lawyer's advice. While many details can be negotiated by the

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22. Missouri v. Frye, 132 S. Ct. 1399, 1406–07 (2012); *see also* Weatherford v. Bursey, 429 U.S. 545, 561 (1977) (stating that there is no constitutional right to plea bargain).

23. "The State to some degree encourages pleas of guilty at every important step in the criminal process." Brady v. United States, 397 U.S. 742, 750 (1970); *id.* at 752 ("For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof."); *see also* Santobello v. New York, 404 U.S. 257, 260 (1971) (mentioning the "enormous increase in the workload of the often understaffed prosecutor's offices").

24. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2471–72 (2004). Bibas also argues that as a group, prosecutors are ambitious and worry about their reputation as well. Guilty pleas ensure conviction without the possibility of a public loss at trial. Interestingly, he believes that prosecutors also push trials in strong cases where they are likely to win in order to build their reputations as skilled trial attorneys. *Id.* at 2471–73.

25. *See id.* at 2474–75.

26. *See id.* at 2535 n.316.

27. Jones v. Barnes, 463 U.S. 745, 753 n.6 (1983).

attorneys, the plea offer is not binding on the government until it is accepted in court on the record.[28]

B. The Centrality of Guilty Pleas to the Criminal Justice System and Criminal Defense Practice

There is little question that the guilty plea has become an "essential part" of our criminal justice system.[29] As the Supreme Court wrote in *Frye*, "[t]o 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."[30] While most criminal defense attorneys and prosecutors refer to and think of themselves as trial lawyers or litigators, the truth is that very few criminal cases are resolved at trial.[31] Despite the popular culture images of defense lawyer performances in front of juries, in reality, guilty pleas resolve the overwhelming majority of cases. Thus, a criminal defense attorney will call far more often on her skills at negotiating pleas than on her trial skills.

From a defense attorney's perspective, more time is required for a trial than a guilty plea. And while both trial and plea would ideally involve fact-investigation and legal research regarding the elements of the crime, sentencing guidelines, and maximum possible penalties, preparing for trial is much more time-consuming. To prepare for a trial, the defense attorney must develop a theory of the case, prepare an opening statement, prepare cross-examinations, prepare any potential defense witnesses, research and file motions regarding procedural and evidentiary issues, and prepare closing arguments. A plea generally consumes just a few minutes of in-court time while a trial can stretch on for days, weeks, or even months, even apart from the time required for pre-trial preparation.

Guilty pleas are, therefore, an effective and necessary way for criminal defense attorneys to manage their frequently heavy caseloads. While nobody graduates from law school with dreams of having the vast majority of their clients plead guilty, and most public defenders work hard, care about their clients, and have no desire to be "plea lawyers,"[32] the reality of high caseloads is that most cases must be resolved by guilty plea.

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28. Mabry v. Johnson, 467 U.S. 504, 507 (1984) ("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.").

29. *See, e.g.*, Santobello v. New York, 404 U.S. 257, 261 (1971) ("Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons.").

30. Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012).

31. *See id.*

32. *See generally* Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry Into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1093–94 (2004) (discussing public defender offices that are doing great work even under the strain of high caseloads).

While excessive caseloads are a significant part of the problem,[33] there are certainly other reasons for the increasingly high number of cases that result in guilty pleas. Frequently, bonds are set very high and many poor people sit in jail unable to post bail. In some jurisdictions, when a defendant is released pending trial on a misdemeanor charge, he is required to return to court repeatedly during the course of a year or more before a trial ever takes place. Plea offers with a sentence of "time served" or probation can therefore be very appealing to those defendants facing lengthy pre-trial detention or other hardships. Prosecutors also frequently over-charge defendants so that they can exert pressure on them to accept a plea deal.[34] Mandatory minimum sentences, even for non-violent drug offenses, are common. And the statutory maximum sentences for many offenses are very high in order to dissuade defendants from going to trial.[35] Defendants often plead guilty because of the potential of a very high sentence after losing at trial versus the potential of a lower sentence following an acceptance of the government's plea offer.

There is an added incentive to plead guilty in some jurisdictions, including the federal courts, where the sentencing guidelines allow for a downward departure for "acceptance of responsibility" that is only recognized if the defendant pleads guilty.[36] While judges are constitutionally precluded from penalizing criminal defendants for exercising their constitutional right to trial,[37] many prosecutors and defense attorneys are aware that some judges impose a "trial penalty."[38] In any event, defendants generally recognize that, in addition to any explicit benefit they can obtain from the plea offers, they will likely face a harsher punishment if they choose to go to trial rather than plead guilty.

With over two million people in prison,[39] the criminal justice system in the United States is a giant and would simply collapse without guilty pleas.[40] There are too many cases, the outcomes after trial are too draconian, and both defendants and the government have too few resources for many cases to resolve any other way.

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33. Not everyone sees the trading away of the constitutional right to trial as a problem. Even the Supreme Court stated that "[t]o note the prevalence of plea bargaining is not to criticize it." *Frye*, 132 S. Ct. at 1407.

34. Oppel, *supra* note 10 ("According to [one defendant's mother], Claudia Guthrie, the prosecutor told her son at a hearing . . . that if he did not plead guilty and take a five-year sentence, higher charges would be filed [and] . . . '[he was] going to get life.'").

35. *See Frye*, 132 S. Ct. at 1407 (acknowledging the reality that "longer sentences exist on the books largely for bargaining purposes") (citing Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN L. REV. 989, 1034 (2006)).

36. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2013), *available at* http://www.ussc.gov/Guidelines/2013_Guidelines/Manual_HTML/3e1_1.htm.

37. *See* North Carolina v. Pearce, 395 U.S. 711, 724 (1969), *overruled in part by* Alabama v. Smith, 490 U.S. 794 (1989).

38. Oppel, *supra* note 10.

39. *See* MICHELLE ALEXANDER, THE NEW JIM CROW 92–94 (2010) (elaborating on the phenomenon of mass incarceration).

40. *See* Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html.

Whatever the reasons, a staggering number of cases are now resolved by guilty plea. More than 90% of state criminal convictions and 97% of federal criminal convictions occur through guilty pleas,[41] and only about 5% of state and federal cases go to trial.[42] While our national psyche—and our popular culture—may envision a criminal justice system that revolves around trials, it is instead a system of guilty pleas.

III. THE LEGAL LANDSCAPE

In the case that established the standard for claims of ineffective assistance of counsel, *Strickland v. Washington*,[43] the Supreme Court held that a criminal defendant's Sixth Amendment rights are violated whenever his attorney's representation falls below "an objective standard of reasonableness," deprives him of a fair trial, and undermines confidence in the fairness of the outcome.[44] An understanding of *Strickland* and its progeny is necessary to the more recent Supreme Court cases surrounding ineffective assistance of counsel and guilty pleas.

The *Strickland* standard is very deferential to attorneys.[45] Under *Strickland*, to win an ineffective assistance of counsel claim, a defendant must prove both that the attorney's conduct was deficient, and that this deficient performance prejudiced him. To say that it has been, until recently, very difficult for criminal defendants to prove ineffective assistance of counsel would be an understatement. With respect to evaluating whether the attorney's conduct was sub-par, *Strickland* explicitly instructs trial courts to be highly deferential to an attorney's performance and to presume that counsel's conduct falls within the "wide range of professionally competent assistance."[46] Proving prejudice is even more difficult. The defendant must establish that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[47] Under this standard, lower courts—with the implicit stamp of approval provided by the Supreme Court's denial of certiorari—have rejected claims of ineffective assistance of counsel where defense attorneys were, at the time of trial, under the influence of drugs or alcohol or suffering from mental illness.[48] Indeed, some

41. Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012).

42. Padilla v. Kentucky, 559 U.S. 356, 372 n.13 (2010).

43. 466 U.S. 668 (1984).

44. *Id.* at 687–88.

45. The Court in *Strickland* wrote, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689.

46. *See id.* at 689–90, 693.

47. *Id*. at 694.

48. *See, e.g.*, McDougall v. Dixon, 921 F.2d 518, 535 (4th Cir. 1990), *cert. denied*, 501 U.S. 1223 (1991); Berry v. King, 765 F.2d 451, 454 (5th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986); Fowler v. Parratt, 682 F.2d 746, 750 (8th Cir. 1982).

defendants have even been executed as the result of trials during which their attorneys were under the influence of drugs and alcohol.[49]

Gideon, *Strickland*, and their progeny have nonetheless established the basic requirements for effective assistance of counsel at trial and other critical stages of criminal proceedings. The constitutional right to a lawyer has been expanded to juvenile delinquency cases,[50] misdemeanors,[51] in-person line-ups,[52] first appeals,[53] and cases involving suspended jail sentences.[54] These decisions have influenced, to some extent, the resources dedicated to public defender systems.[55] Because most criminal cases result in guilty pleas, however, and because the majority of Supreme Court opinions have focused on defense counsel's *trial* performance, those opinions have inadequately identified what the Sixth Amendment requires for *most* criminal defendants beyond a "warm body."[56]

Prior to *Padilla*, *Lafler*, and *Frye*, the Supreme Court dedicated little attention to the actual negotiation of pleas. Following *Gideon*, the Court held that a guilty plea entered without counsel and without a waiver of counsel is invalid.[57] The Court also concluded that a defendant's waiver of trial was invalid unless it was knowing and intelligent, requiring the defendant to have possessed an "understanding of the law in relation to the facts."[58] In *McMann v. Richardson*, a pre-*Strickland* case, the Court held that when a criminal defendant waives his right to trial "he assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts" and is bound by his guilty plea "unless he can allege and prove serious derelictions

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49. *See* Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 NEB. L. REV. 425, 426 (1996).

50. In re Gault, 387 U.S. 1, 41 (1967) (explaining that the Due Process Clause mandates that "the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent that child").

51. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial").

52. United States v. Wade, 388 U.S. 218, 236–37 (1967).

53. Douglas v. California, 372 U.S. 353, 357–58 (1963) (noting that the Fourteenth Amendment of the United States Constitution is violated "where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent . . . has only the right to a meaningless ritual").

54. Alabama v. Shelton, 535 U.S. 654, 674 (2002) (noting that a defendant was entitled to counsel on a case where he received a suspended sentence).

55. *See generally* Heidi Reamer Anderson, *Funding* Gideon*'s Promise by Viewing Excessive Caseloads As Unethical Conflicts of Interest*, 39 HASTINGS CONST. L.Q. 421, 435–42 (2012).

56. *See* United States ex. rel. Thomas v. O'Leary, 856 F.2d 1011, 1015 (7th Cir. 1988) ("The Sixth Amendment right to counsel, of course, guarantees more than just a warm body to stand next to the accused during critical stages of the proceedings; an accused is entitled to an attorney who plays a role necessary to ensure that the proceedings are fair.").

57. *See* White v. Maryland, 373 U.S. 59, 60 (1963); *see also* Arsenault v. Massachusetts, 393 U.S. 5, 6 (1968) (stating that the denial of the right to counsel at the trial on appeal and at the other "critical stages of the criminal proceedings" invariably denies a fair trial) (internal quotation marks omitted).

58. *See* McCarthy v. United States, 394 U.S. 459, 466 (1969); *cf.* Boykin v. Alabama, 395 U.S. 238, 242 (1969) (presuming waiver from a silent record is impermissible; several constitutional rights are involved in a waiver such as privilege against self-incrimination, right to trial by jury, and right of confrontation).

on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act."[59] Although the Court noted that a criminal defendant "cannot be left to the mercies of incompetent counsel," it concluded that these types of cases, "for the most part, should be left to the good sense and discretion of the trial courts."[60]

Three years later in *Tollett v. Henderson*,[61] the Court re-affirmed that "it is not sufficient for the criminal defendant seeking to set aside . . . a plea to show that his counsel in retrospect may not have correctly appraised the constitutional significance of certain historical facts," and added that "it is likewise not sufficient that he show that if counsel had pursued a certain factual inquiry such a pursuit would have uncovered a possible constitutional infirmity in the proceedings."[62] Indeed, the Court in *Tollett* frowned at the notion of fully investigating cases headed for guilty pleas:

> A prospect of plea bargaining, the expectation or hope of a lesser sentence, or the convincing nature of the evidence against the accused are considerations that might well suggest the advisability of a guilty plea *without elaborate consideration of whether pleas in abatement, such as unconstitutional grand jury selection procedures, might be factually supported*.[63]

Following *Strickland*, the Court in *Hill v. Lockhart*[64] held that *Strickland*'s two-prong test applies to convictions resulting from guilty pleas as well as trials.[65] In some respects, *Hill* laid the groundwork for the Court's decisions—more than two decades later—in *Padilla*, *Lafler*, and *Frye*. Before accepting a guilty plea to a murder charge, Mr. Hill alleged that his attorney advised him that he would be eligible for parole after serving just one third of his sentence.[66] However, after his guilty plea and sentencing, Hill learned that he would not be eligible for parole until serving one half of his thirty-five-year sentence.[67] Ultimately, the Court did not decide the issue of whether erroneous advice about parole eligibility would qualify as deficient performance under *Strickland*'s first prong. The Court avoided the issue, determining that Hill had failed to satisfy *Strickland*'s second prong because he made no claim that his decision to enter a guilty plea would have been different had he known the correct information regarding parole eligibility, thus failing to show a "reasonable probability" of a different outcome.[68]

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59. McMann v. Richardson, 397 U.S. 759, 774 (1970).
60. *Id.* at 771.
61. 411 U.S. 258 (1973).
62. *Id.* at 267 (citing *McMann*, 397 U.S. at 771).
63. *Id.* at 268 (emphasis added).
64. 474 U.S. 52 (1985).
65. *Id.* at 58.
66. *Id.* at 55.
67. *Id.*
68. *Id.* at 59–60.

In dicta, however, the Court offered some examples of how prejudice could be demonstrated:

> For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.[69]

While the Court took the important step of offering a few examples of how a defendant might show prejudice from ineffective advice regarding a plea, its opinion also appeared to discourage such claims: the Court not only rejected Hill's claim, but also noted that "'the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.'"[70] Indeed, a quarter of a century passed before the Supreme Court expressed any interest in setting aside a guilty plea based on erroneous legal advice.

IV. THE SUPREME COURT TURNS ITS FOCUS TO EFFECTIVE ASSISTANCE DURING THE PLEA BARGAINING PROCESS: *PADILLA*, *LAFLER* AND *FRYE*

In over-burdened, under-resourced indigent defense systems, providing even the constitutional minimum level of assistance for cases that go to trial has proved difficult, to say the least. For most public defenders, guilty pleas long ago became not just an escape valve to ease the pressure of high caseloads, but the primary manner of resolution, one which requires—or was believed to require—little time and effort on the part of lawyer. The constitutional minimum level of representation for guilty pleas was viewed by courts and practioners asparticularly low in part because the Supreme Court appeared to place little emphasis on that stage of the criminal process. That has changed in the last three years, however, as the Supreme Court has now focused on what constitutes effective assistance of counsel during the plea bargaining process.

In *Padilla*,[71] the first of the three cases, the Supreme Court made clear that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."[72] The Court also held

69. *Id.* at 59.
70. *Id*. at 58 (quoting United States v. Timmreck, 441 U.S. 780, 784 (1979)).
71. 559 U.S. 356 (2010).
72. *Id.* at 1486.

that the Sixth Amendment's guarantee of effective representation includes accurate legal advice about the immigration consequences of a guilty plea.[73] Padilla was a legal permanent resident of the United States for forty years, and a Vietnam veteran, who pled guilty to possessing a large amount of marijuana with intent to distribute.[74] Prior to his plea, his attorney incorrectly advised Padilla that a conviction would not result in his deportation because Padilla had legally resided in the United States for so many years.[75] However, after his conviction, Padilla did indeed face deportation from his home in the United States to a country where he had not lived for decades. The Court found the attorney's conduct to be deficient and remanded the case for a determination of prejudice.[76]

Padilla established a new standard for criminal defense lawyers: to adequately advise a defendant about a guilty plea, a criminal defense attorney must have knowledge, adequately perform legal research, and provide accurate advice regarding issues that stretch beyond criminal law and procedure. Although Padilla's case involved the dispensing of affirmatively erroneous advice on a fairly straightforward issue, immigration is infamously complex and unclear.[77] Indeed, the Court acknowledged that in many instances immigration consequences of criminal convictions are not always immediately clear and may require legal expertise outside the field of criminal law.[78] The Court plainly rejected the Solicitor General's argument that deficient performance could result only from incorrect advice, rather than the failure to inform a client about immigration consequences at all.[79] In rejecting that suggestion, the ruling requires criminal defense attorneys to research potential immigration consequences of a conviction and provide accurate advice, even though that topic lies outside the field of criminal law and procedure. The Court held that the severity of deportation "only underscores how critical it is for counsel to inform her non-citizen client that he faces a risk of deportation."[80]

While the *Padilla* Court explicitly stated that it was only addressing the collateral consequence of deportation in particular,[81] the Court also held that "the negotiation of a plea bargain is a critical phase of litigation" for ineffective

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73. *See id.* at 1484 (stating that the failure to provide client with available advice about an issue like deportation "clearly satisfies the first prong of the *Strickland* analysis").

74. *Id.* at 1477.

75. *Id.* at 1478.

76. *See id.* ("Whether he is entitled to relief depends on whether he has been prejudiced, a matter that we do not address.").

77. *Id*. at 1483 ("Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain.").

78. *Id.*

79. *Id.* at 1484.

80. *Id*. at 1486.

81. *Id.* at 1481.

assistance of counsel purposes,[82] and that "[w]e . . . have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance.'"[83] Thus, the Court's logic in *Padilla* could be seen as extending beyond the immigration context to virtually every collateral consequence of a criminal conviction, including eligibility for public housing, federal student loans, child custody, civil forfeiture, gun ownership, and sex offender registration.[84]

Some courts have already extended the holding of *Padilla* beyond immigration consequences. In *Bauder v. Department of Corrections*,[85] the Eleventh Circuit affirmed a lower court ruling extending *Padilla* to defense counsel's failure to warn a defendant of the possibility of civil commitment after pleading guilty.[86] An Alaska court also held that there was ineffective assistance of counsel when a defendant was improperly advised that his no contest plea could be used against him in civil court.[87] Additionally, in *Taylor v. State*,[88] the Georgia Court of Appeals found that in light of *Padilla*, "it is constitutionally deficient" for counsel not to advise her client about sex offender registration.[89]

Although these post-*Padilla* cases are significant, other courts have declined to extend the holding of *Padilla* beyond immigration consequences.[90] While the law regarding collateral consequences of conviction continues to develop, *Padilla* has already affected areas outside of immigration, and therefore will significantly impact indigent criminal defense lawyers and their clients.

In *Frye*,[91] decided in 2012, the Supreme Court held that failure to communicate a plea offer constituted ineffective assistance of counsel and, if prejudice is shown, the proper remedy is the re-extension of the original plea offer. In *Frye*, the defense attorney failed to communicate two plea offers to his client before they expired.[92] Because he missed the opportunity to plead to a lesser charge, the defendant consequently entered a guilty plea to a felony rather than a misdemeanor.[93] The Court rejected the state's argument that Frye was "not deprived of any legal benefit

82. *Id*. at 1486.
83. *Id.* at 1481.
84. *See, e.g.*, *infra* notes 122–30 and accompanying text.
85. 619 F.3d 1272 (11th Cir. 2010).
86. *Id.* at 1275.
87. Wilson v. State, 244 P.3d 535, 539–40 (Alaska Ct. App. 2010).
88. 698 S.E.2d 384 (Ga. Ct. App. 2010).
89. *Id.* at 385; *see also* In re C.P.H., 2010 WL 2926541, at *6 (N.J. Super. Ct. App. Div. 2010).
90. *See* United States v. Nicholson, 676 F.3d 376, 384–85 (4th Cir. 2012) (declining to extend *Padilla* to federal benefits); United States v. Reeves, 695 F.3d 637, 640–41 (7th Cir. 2012) (declining to find ineffective assistance of counsel where counsel failed to inform defendant of future sentencing enhancements based on instant conviction).
91. 132 S. Ct. 1399 (2012).
92. *Id.* at 1404.
93. *Id.*

to which he was entitled" because there is "no right to a plea offer."[94] Despite noting that the state's argument was not "without some persuasive force," the Court declared that the "simple reality" is that the plea bargaining process is almost always *the* most important part of a defense lawyer's job.[95] The Court strongly emphasized the centrality of plea bargaining:

> 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. Because ours "is for the most part a system of pleas, not a system of trials," it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. "To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system."[96]

In fact, the Court concluded that "[i]n today's criminal justice system . . . *the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant*."[97]

While *Frye* did not define all of the "dut[ies] and responsibilities of defense counsel in the plea bargain process," it held that "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."[98]

Citing *Padilla*, the Court rejected the argument that Frye's subsequent plea, though knowing and voluntary, superseded the previous errors of his defense counsel.[99] The Court held that a defendant who had missed an opportunity for a more beneficial plea offer due to ineffective assistance by counsel could demonstrate prejudice under *Strickland* by establishing reasonable probability that the defendant would have accepted the offer, that the prosecutor would not have withdrawn the offer, and that the trial court would have accepted the plea.[100] While the Court concluded that Frye had established deficient performance and a likelihood that he would have accepted the original plea offer, it remanded the case for the state court to consider whether the prosecutor would have canceled, or whether the trial court would have rejected, the original plea.[101]

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94. *Id*. at 1406.
95. *Id*. at 1407.
96. *Id*. (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992) (internal citation omitted)).
97. *Id.* (emphasis added).
98. *Id.* at 1408.
99. *Id.* at 1406.
100. *Id.* at 1410.
101. *Id.* at 1410–11.

On the same day as *Frye*, the Court decided *Lafler*.[102] *Lafler* involved a defendant's rejection of a plea offer and his subsequent conviction at trial based on faulty advice by his defense counsel regarding the plea offer and the sufficiency of the government's evidence. Specifically, in an assault with intent to murder case, the defense attorney suggested that his client reject a plea offer because the government would have had difficulty proving intent to murder where the gunshot wound was below the victim's waist.[103] On his counsel's advice, the defendant rejected the plea offer, went to trial, and was convicted on all counts.[104] Before the Supreme Court, the parties agreed that the attorney's advice had been deficient.[105] Just as in *Padilla* and *Frye* where the Court rejected the notion that a knowing and voluntary plea would supersede any previous errors by defense counsel, the Court rejected the State's argument that a trial—free from any error—superseded the lawyer's deficient advice regarding the plea offer.[106] The Court concluded that "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."[107] As in *Frye*, the Court made the point that plea bargaining is in most cases the most important duty of defense counsel: "the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences."[108]

In *Lafler*, the Court also considered the critical question of what remedies are available to the defendant who has rejected a plea offer because of deficient performance by his attorney, concluding that where the plea offer is to the same charge as the later conviction, the trial court "may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between."[109] Where the plea offer is to a lesser charge, or fewer charges, than the charge or charges for which the defendant was ultimately convicted, the remedy to the constitutional injury "may be *to require the prosecution to reoffer the plea proposal*."[110]

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102. 132 S. Ct.1376 (2012).
103. *Id.* at 1383.
104. *Id.*
105. *Id.* at 1384.
106. *See id.* at 1385–86 (discussing Sixth Amendment protections extending beyond the trial phase of a criminal proceeding).
107. *Id.* at 1388.
108. *Id.*
109. *Id.* at 1389.
110. *Id.* (emphasis added).

V. PLEA BARGAINING: REQUIREMENTS FOR EFFECTIVE ASSISTANCE OF COUNSEL AND BEST PRACTICES FOLLOWING *PADILLA*, *FRYE*, AND *LAFLER*

A. Effective Assistance of Counsel after Padilla*,* Frye*, and* Lafler

These cases have established three basic requirements for effective assistance of counsel in plea bargaining: 1) under *Frye*, the defense attorney must communicate all plea offers to her client before the offers expire; 2) under *Padilla*, the attorney must research and give thoughtful and accurate legal advice to her client about the collateral consequences of a criminal conviction; and 3) under *Lafler*, the defense attorney must give accurate guidance to her client about his decision to plead guilty or go to trial.[111]

Beyond these basic requirements, these three cases can have a much broader impact on a defense attorney's duties in the plea bargaining process. In addition to ensuring both that the attorney herself is informed when she advises about the plea, and that the client's decision about the plea is "as informed as possible," *Lafler*, *Frye*, and *Padilla* also obligate the defense attorney not just to pass the offer and relevant information along to the client, but to serve as an active participant in the *negotiation* of the plea when the client is interested in one. Indeed, the Court specifically noted in *Frye* that "horse trading" between prosecutors and defense attorneys is frequently the process that determines "who goes to jail and for how long."[112]

The import of *Padilla*, *Frye*, and *Lafler* is clear: effective representation in the plea bargaining process requires counsel to commit significant time and effort to ensure that the defendant is accurately and promptly informed of any plea offers, and that counsel herself is competently engaged in the bargaining process. The Court did not, however, set a comprehensive list of defense counsel's duties, nor is it likely to in any future case. In broad terms, defense counsel is required to ensure that her client is "as informed as possible" and to actively pursue the best possible deal for her client. In order to understand what effective assistance of counsel might look like, this section is an effort to describe what a defense attorney should do to "effectively"—in both the constitutional and the "real world" sense of the term—represent her client in the plea bargaining process.

B. Best Practices

The defense attorney must communicate with her client as early and as often as possible. Of course, since not all criminal defendants have the same goals,

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111. While not the holding of *Lafler*, the case was premised on the notion that the defense attorney owes his professional guidance regarding a guilty plea.

112. Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (internal quotations omitted).

communication between the lawyer and the client must be strong for the attorney to fully understand her client's interests. This is particularly necessary because many criminal defendants are young and undereducated, and therefore might not have the vocabulary or maturity to be able to express their long-term goals.[113] Similarly, other defendants are simply not aware of the various potential impacts of their criminal case, particularly the collateral consequences discussed in more detail below.

However, in an ideal world, the first communication between the defense attorney and her client will not involve discussion of a guilty plea. Many defendants, particularly those represented by public defenders or court-appointed lawyers, may not trust that their lawyers are interested in pursuing their interests. In these circumstances, beginning the relationship with the defendant by discussing a waiver of his rights may prove to be counter-productive, even if the advice is correct. Unfortunately, in some cases the attorney will not have this luxury. If an immediate plea offer with an early expiration is made, counsel is forced to discuss the plea options with the client right away.

In addition to learning the client's interests, the defense attorney must educate herself about the case, including reviewing any available discovery and conducting any necessary investigation. The defense attorney must also educate herself about the applicable law: the elements of the charged crimes; the sentencing range; any legal means for suppressing evidence; possible defenses to the charges; any other legal issues that might relate to the evidence, the charges, or the government's ability to proceed with the prosecution; and any potential collateral consequences that might apply. Finally, the defense attorney must understand her forum, including the general benefits for a guilty plea or negative ramifications for proceeding to trial, and the general likelihood of an acquittal in a criminal case.[114] This information is essential in order to evaluate any plea offer, provide advice about the plea offer, and understand whether better "bargains" exist or if case should be set for trial.

All of this information must be pursued as soon as possible after the defense attorney is appointed to the case. Frequently, when the prosecution makes its best

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113. *See, e.g.*, Kowalski v. Tesmer, 543 U.S. 125, 140–41 (2004) (Ginsberg, J., dissenting) (noting that a majority of defendants represented by appointed counsel "lack the most basic literacy skills," and thus "do[] not possess the skill necessary to pursue a competent *pro se* appeal"); Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. REV. 2103, 2167 (2003) ("The imbalance of power can be stark between criminal defense lawyers and criminal defendants, who are often young, poor, undereducated, isolated by being in police custody, non-English speakers, or members of some marginalized group.").

114. *See* NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION § 6.2(d) (1995) ("In conducting plea negotiations, counsel should attempt to become familiar with the practices and policies of the particular jurisdiction, judge and prosecuting authority which may affect the content and likely results of negotiated plea bargains.").

offer early on in the proceedings, a defense attorney without all available information cannot effectively advise her client or engage in bargaining with the prosecution.[115]

Once a plea offer has been extended, the defense attorney must provide her client with the following information: 1) the elements of the charged crimes and the facts that relate to the charged crimes;[116] 2) any available legal defenses to the charges;[117] 3) any legal means to exclude the government's evidence (e.g., suppression issues); 4) any legal challenges to the prosecution itself (e.g., jurisdictional claims or challenges to the indictment); 5) the client's trial rights (including cross-examination, compulsion of witnesses, silence, and trial by jury if available); 6) the potential consequences of accepting or rejecting the plea including the maximum and minimum periods of incarceration plus any potential enhancements;[118] 7) any applicable sentencing guidelines range; 8) any information regarding the potential for early release or parole, including the calculation of "good time" credits;[119] 9) any information regarding periods of supervision upon release (e.g. parole or probation) and the ramifications of such supervision;[120] 10) any possible fines; 11) any available mitigation, including diversion programs, drug court programs, and first time offender or youth offender sentencing options; 12) information particular to the forum (e.g. a judge's tendency to provide favorable sentences after guilty pleas or unfavorable sentences following conviction after trial); and 13) any potential collateral consequences.[121]

Some potential collateral consequences relate to: employment,[122] immigration

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115. The American Bar Association Standards call for defense attorneys to conduct "prompt" investigations of their cases. CRIMINAL JUSTICE STANDARDS COMM., AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-4.1(a) (3d ed. 1993).

116. Smith v. United States, 348 F.3d 545, 553 (6th Cir. 2003) ("A criminal defendant has a right to expect at least that his attorney will review the charges with him by explaining the elements necessary for the government to secure a conviction, discuss the evidence as it bears on those elements, and explain the sentencing exposure the defendant will face as a consequence of exercising each of the options available.").

117. *See* United States v. Taylor, 139 F.3d 924, 934 (D.C. Cir. 1998) (finding that allegations that counsel did not give advice regarding an available defense warranted an evidentiary hearing on ineffective assistance of counsel).

118. *See Smith*, 348 F.3d at 553.

119. NAT'L LEGAL AID & DEFENDER ASS'N, *supra* note 114, § 6.2 (offering advice on this issue).

120. Probation (or a suspended sentence, as it is sometime called) is an alternative to incarceration. Supervised release and parole are periods of supervision that follow a period of incarceration and can be very difficult. Drug testing, reporting requirements, and mental health treatment can be very onerous for some defendants. Failing to successfully complete probation, parole, or supervised release can result in additional jail time.

121. As defense counsel discovers new information through investigation and research, she should communicate that new information to the client as soon as possible.

122. Certain trades bar people with criminal convictions. *See* Chin, *supra* note 16, at 689. Felons also may not be able to serve in the military. 10 U.S.C. § 504 (2012); *see also* 50 app. U.S.C. 456(m) (2006).

status,[123] public housing,[124] food stamps,[125] children,[126] driver's licenses,[127] gun ownership,[128] student loans,[129] and several offender registration requirements (e.g. sex offender and gun offender registries).[130] The attorney therefore must know the various collateral consequences in addition to the law as it relates to those consequences. The attorney must also know her client well enough to be aware of which consequences might apply and how they relate to her client's interests, leading one commentator to note that "*Padilla* is first and foremost a mandate to get to know one's client."[131]

Effective advice regarding a plea extends beyond a simple recitation of the facts and the law, but also necessarily includes the attorney's subjective opinions about the case. The attorney must employ her experiential knowledge to advise the client about the chances of conviction, acquittal, mistrial, or a mixed verdict at trial, and the likely sentences—beyond guideline ranges and statutory minimums and

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123. *See generally* Padilla v. Kentucky, 559 U.S. 1473 (2010) (holding that failure to inform client of deportation consequences of plea agreement constituted claim for ineffective assistance of counsel).

124. A person convicted of virtually any crime may be evicted from federal public housing. *See* 42 U.S.C. § 1437f(d)(1)(B)(iii) (2006) ("[A]ny criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises, or any drug-related criminal activity on or near such premises, engaged in by a tenant of any unit, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy . . . .").

125. Some convictions will disqualify an individual from receiving food stamps. States may, however, elect not to impose such a disqualification or may limit the period of the disqualification. *See* 21 U.S.C. § 862a(a)–(d) (2012).

126. *See, e.g.*, S.C. CODE ANN. § 63-7-2350 (2010) (placing limits on a person's eligibility to be a foster parent following certain convictions).

127. Traffic convictions and simple possessory drug offenses can result in the suspension or revocation of the defendant's driver's license in many states. *See, e.g.*, GA. CODE ANN. § 40-5-75(a)(1)–(3) (2011); D.C. CODE § 50-1403.02 (2001). *See generally* Aaron J. Marcus, *Are The Roads a Safer Place Because Drug Offenders Aren't On Them?: An Analysis of Punishing Drug Offenders with License Suspensions*, 13 KAN. J. L. & PUB. POL'Y. 557 (2004).

128. If convicted in any court of a crime punishable by imprisonment for a term exceeding one year, a person may not ship or transport a firearm or ammunition in interstate or foreign commerce, possess a firearm or ammunition in or affecting commerce, or receive any firearm or ammunition that has been shipped or transported in interstate or foreign commerce. 18 U.S.C. § 922(f) (2012); *see also* Starrett v. State, 286 P.3d 1033, 1040 (Wyo. 2012) (reversing conviction where defendant was not advised that he would lose his right to carry a firearm as a result of his conviction).

129. A drug conviction, even as a juvenile, disqualifies a person from receiving federal student loans. *See generally* Donna Leinwand, *Drug Convictions Cost Students Their Financial Aid; Can Regain Eligibility if They Complete Rehab*, USA TODAY, Apr. 17, 2006, at A3 ("One in every 400 students applying for federal financial aid for college is rejected because of a drug conviction . . . .").

130. *E.g.*, Taylor v. State, 698 S.E.2d 384, 388 (Ga. Ct. App. 2010) (failure to warn a client of sex offender registration as a requirement of convictions violated the client's right to effective assistance of counsel).

131. Malia Brink, *A Gauntlet Thrown: The Transformative Potential of* Padilla v. Kentucky, 39 FORDHAM URB. L.J. 39, 51 (2011).

maximums—following a plea or conviction at trial.[132] Offering subjective advice about whether or not to accept a plea offer is a careful balancing act, however, and the attorney should be careful not to exert too much influence over her client's decision.[133] The attorney should ensure that the defendant understands that the decision is his alone, and that the attorney will zealously represent the defendant's interests regardless of his decision. Neither the attorney's high caseload nor personal considerations should factor into the attorney's advice regarding the plea offer.[134] Again, early action in communicating the offer and providing advice will benefit the client: he will have to time to consider his options and have his questions answered.

If the defendant has any interest at all in entering a guilty plea, successful representation during the plea bargaining phase also includes actual negotiation. If the defense attorney does not engage in negotiation, there is a significant likelihood that the defendant will suffer unnecessary negative consequences. Investigation and research are crucial for negotiation: the defense attorney can negotiate competently only if she is aware of the strengths and weaknesses of the prosecution's case. Knowing the client is also crucial: some aspect of the client's life may cause an empathetic prosecutor to make a better offer, and the defense attorney will also have a better understanding of what terms are likely to be acceptable to the client. The defense attorney must also be as aware as possible of the government's interests in arriving at a plea bargain, whether it is, for example, to conserve resources, or to avoid potential problems with the government's evidence at trial. Additionally, when defense counsel communicates a counter-offer to the prosecution, it is important for counsel to clearly indicate that the counter-offer does not constitute a rejection of the original offer, unless the defendant has already decided to reject the original offer.[135]

Finally, if both parties agree to the terms of a plea bargain, the defense attorney must endeavor to have the agreement entered in open court as soon as possible: until the plea is accepted on the record in open court it may be withdrawn by the government.[136]

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132. In *Boria v. Keane* the Second Circuit held that where the lawyer simply communicated the plea but did not advise the client whether or not the defendant should take the plea, "it would be impossible to imagine a clearer case of a lawyer depriving a client of constitutionally required advice." 99 F.3d 492, 497 (2d Cir. 1996).

133. NAT'L LEGAL AID & DEFENDER ASS'N, *supra* note 114, § 6.3(b) ("The decision to enter a plea of guilty rests solely with the client, and counsel should not attempt to unduly influence that decision.").

134. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2013) ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.").

135. Where a defendant is undecided, efforts to obtain additional time for the defendant to consider a plea offer are often advisable. This additional time can be used by the defense attorney for further investigation.

136. *See generally* Brady v. United State*s*, 397 U.S. 742, 748–51 (1970).

VI. THE CRISIS IN INDIGENT DEFENSE

Effective representation during the plea bargaining process requires a significant expenditure of time and resources by the defense attorney, generally including extensive discussions with the client, factual investigation, and legal research. While it may require fewer resources than a trial, effective plea bargaining is not a quick and easy way to dispose of a case. Unfortunately, given the budget limitations of many indigent defense systems throughout the country, providing effective representation during the plea bargaining process may be extremely challenging, if not impossible.

The crisis in indigent defense cannot be overstated. Most people who are accused of crimes are poor.[137] And, because they are poor, most of them rely on public defenders or court-appointed defense attorneys for their representation.[138] The United States prosecutes a staggering number of people every year. Public defender offices nationwide handle more than five million cases every year.[139]

In juggling scores—and in some cases even hundreds—of pre-trial cases at a time, public defenders in high-volume offices frequently spend most of each day in court. Most indigent defenders struggle to find time to investigate and conduct research, visit all clients in jail, advise each client promptly of plea offers, and bargain effectively.[140]

The American Council of Chief Defenders, a section of the National Legal Aid and Defender Association ("NLADA"), set guidelines that would prevent each public defender from handling over 150 non-capital felony cases per year or over 400 misdemeanor cases per year.[141] But even if these standards were followed, an attorney might struggle to effectively represent each individual client. Following the guidelines, a public defender handling felony cases who works fifty hours per week for fifty weeks per year[142] would have fewer than seventeen hours per year to spend on each felony case. This includes her time both inside the courtroom and out of court meeting with her client, investigating the case, assessing its strength, conducting legal research, and advising regarding all plea offers. A public defender

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137. More than 80% of prosecutions are of poor people. Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1034 (2006).

138. Jeffrey Rutherford, Comment, Dziubak v. Mott *and the Need to Better Balance the Interests of the Indigent Accused and Public Defenders*, 78 MINN. L. REV. 977, 979 (1994).

139. Press Release, Dep't of Justice, Public Defenders Offices Nationwide Received Nearly 5.6 Million Indigent Defense Cases in 2007 (Sept. 16, 2010), *available at* http://www.ojp.usdoj.gov/newsroom/pressreleases/2010/BJS10122.htm.

140. *See* Jonathan A. Rapping, *You Can't Build on Shaky Ground: Laying The Foundation For Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL'Y REV. 161, 163 (2009).

141. NAT'L LEGAL AID & DEFENDER ASS'N, AM. COUNCIL OF CHIEF DEFENDERS, STATEMENT ON CASELOADS AND WORKLOADS 1 (2007), *available at* http://www.nlada.org/DMS/Documents/1297703004.49/Caseloads%20Report%20Final.pdf.

142. This does not account for holidays. A lawyer who takes off any of the state and federal holidays or works less than 10 hours on each of those days will have even less time to work on her cases.

working the same number of hours per year on a misdemeanor case load would have just six hours for each misdemeanor case. Looking at it a different way, with 400 cases and 250 work days per year, the attorney must dispose of nearly two misdemeanor cases every single day either by pleading guilty, proceeding to trial, or obtaining a dismissal. It is troubling that in many public defender systems, the NLADA's standards are nothing more than lofty aspirations.

Indeed, almost every public defender office exceeds the NLADA standards.[143] Public defenders in Dakota County, Minnesota handle between 120 and 150 cases *at any given time*, not just over the course of a year.[144] Lawyers in Dallas handle at least *three times* more than what is recommended by the NLADA.[145] Attorneys for the poor in Leesburg, Virginia carried an average of 586 cases a year.[146] In 2008, Miami-Dade County public defenders were responsible for nearly 500 felony cases at a time.[147] One attorney there reported that he handled twenty-three guilty pleas in just one morning.[148] Legal Aid attorneys in New York City handle more than 700 cases a year.[149] Lawyers in Owensboro, Kentucky handle over 570 cases a year and those in Bowling Green, Kentucky handle close to 800 annually.[150] A young attorney in Georgia testified recently that she had 900 cases a year.[151] An attorney in New Orleans told a judge that he had just eleven *minutes* per client.[152] These numbers are absolutely astounding. And this is not just a dilemma confined to a handful of states. The Department of Justice has found that the majority of public defender offices exceed the maximum number of cases recommended under their guidelines.[153] The staggeringly high case loads of public defenders and court appointed attorneys, who represent the vast majority of criminal defendants in this country, lead to the staggeringly high rate of guilty pleas in criminal cases cited by the Supreme Court in *Lafler* and *Frye*: 97% of federal cases and 94% of state cases are resolved via guilty plea.[154]

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143. Peter A. Joy, *Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads*, 75 MO. L. REV. 771, 779 (2010).

144. Joy Powell, *Dakota County Public Defenders Buried in Cases*, MINN. STAR TRIB. (Apr. 1, 2009, 8:34 AM), http://www.startribune.com/local/south/42258087.html.

145. Jesse Hyde, *Broken Cogs: The Wheels of Justice in the Public Defender's Office Grind up a Few Lawyers,* DALLAS OBSERVER (Sept. 11, 2008), http://www.dallasobserver.com/2008-09-11/news/broken-cogs/.

146. Richard C. Goemann, Editorial, *Fixing a System that Denies Justice to the Poor*, WASH. POST, July 18, 2004, at B8.

147. Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, (Nov. 9, 2008), http://www.nytimes.com/2008/11/09/us/09defender.html.

148. *Id.*

149. William Glaberson, *Are Lawyers for the Poor Inadequate?,* N.Y. TIMES, Mar. 16, 2010, at A18.

150. Editorial, *Public Defenders Overwhelmed*, MCCLATCHY-TRIB. BUS. NEWS, Aug. 7, 2012.

151. *See* Jonathan A. Rapping, *National Crisis, National Neglect: Realizing Justice Through Transformative Change*, 13 U. PA J. L. & SOC. CHANGE 331, 332 (2010).

152. State v. Bell, 896 So. 2d 1236, 1240 (La. Ct. App. 2005).

153. Press Release, *supra* note 139.

154. *See supra* note 12.

As a practical matter, these caseloads mean that in some jurisdictions many defendants wait in jail for months before they meet their defense attorney.[155] And once the defendant finally meets his attorney, it becomes clear to him that this long-awaited professional counsel has done almost nothing to familiarize herself with the case or investigate the strength of the government's accusation. She may tell the defendant that she is not likely able to take his case to trial for months. Whether she acknowledges it or not, her caseload makes her more likely to recommend that the defendant pleads guilty rather than proceed to trial.[156] The defendant, having been held in custody so long, and having seen how ill-prepared his lawyer is to defend him at trial, can feel pressure to accept the plea offer immediately. This pressure is likely to be particularly powerful where the reduction in charges combined with the time the defendant has already spent in jail may mean his immediate release, whereas the only certain result in proceeding to trial is continued incarceration. Furthermore, most defendants have little faith in their court-appointed attorneys or public defenders, regardless of the circumstances.[157] Likely as a result of decades of over-burdened and under-funded public defender systems, public opinion about public defenders and other court-appointed attorneys is unfavorable. In a 2001 NLADA poll of 1500 adults in the United States, only 14% of those who responded believed that public defenders were "generally good" lawyers.[158] This broad perception undoubtedly leads to more guilty pleas by defendants who simply do not trust that their attorneys can capably represent them at trial, and who cannot afford to hire someone who they can trust.

The astounding number of guilty pleas has another negative effect for defendants represented by public defenders and court-appointed attorneys. Prosecutors usually reserve the best plea offers for defendants whose attorneys have reputations for taking cases to trial.[159] Because of the financial incentive to dedicate more hours to a client's criminal matter, and the interest in attracting new clients, retained attorneys are more likely to investigate facts, file motions, and take cases to trial.[160] As prosecutors offer pleas mainly to ensure convictions and save themselves the time and effort of trial, they offer more favorable guilty pleas to defense attorneys who typically try cases than those they offer to court-appointed attorneys who typically avoid trials.[161] This means that poor clients who cannot

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155. Defendants in Mississippi often wait a year to speak with a lawyer. *See* Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE, 427, 429 (2009).

156. Bibas, *supra* note 24, at 2479.

157. *See* BELDEN, RUSSONELLO & STWEART, DEVELOPING A NATIONAL MESSAGE FOR INDIGENT DEFENSE (2001), *available at* http://www.nlada.org/DMS/Documents/1211996548.53/Polling%20results%20report.pdf (listing complete survey results).

158. *Id.*

159. Bibas, *supra* note 24, at 2478.

160. *Id.* at 2479.

161. *See id*. at 2748.

afford to hire attorneys often receive the worst plea offers.[162]

The under-funding of indigent defender systems leads not only to high caseloads and worse plea offers, but inadequate attorney training as well. Attorneys who can barely tread water with their case loads are not spending the time learning about new and changing issues that are relevant to their practice, issues ranging from the Fourth Amendment to the confrontation clause to immigration law to forensic issues. If nothing else, what *Padilla*, *Frye*, and *Lafler* point to is a need for a more informed indigent defense bar. An inadequately trained attorney is unlikely to even be able to identify many legal issues, and therefore cannot effectively represent her client at any phase of litigation, including the plea bargaining phase.[163]

Some believe that decades of crushing case loads in some jurisdictions have led to a culture where defense attorneys no longer question the system and no longer push for more resources.[164] As institutional players who must interact with the same prosecutors and judges over and over again, some public defenders may be susceptible to making unethical deals that favor one client over another.[165] If public defender offices are so under-funded and overwhelmed that they cannot attract attorneys who care about their clients, or if the attorneys who do care ultimately "burn out," those defense attorneys are even less likely to spend the requisite amount of time preparing for and engaging in plea bargaining, advising their clients about plea offers, or preparing for trial.[166] Better funding that allows for lower case loads, therefore, may not only result in more attorney hours spent on each case, but also a higher quality of effort within those hours.

VII. HOW PUBLIC DEFENDERS MIGHT USE *PADILLA*, *FRYE*, AND *LAFLER*

Currently, most indigent defender systems are too underfunded to provide effective representation for plea bargaining purposes. For some, the first reaction to *Padilla*, *Lafler*, and *Frye* might be, "How do these cases change things?" After all, *Gideon* has been the law of the land for half a century.[167] But the landscape has changed; guilty pleas are no longer a black hole when it comes to the right to effective assistance of counsel. Until *Padilla*, the Supreme Court had expressed little interest in the plea bargaining phase.[168] The breadth of the entitlement to effective assistance at this stage and the remedies available to defendants who received defective attorney representation had been unclear. Supreme Court precedent regarding other critical stages was unhelpful to the vast majority of

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162. *Id.*

163. *See* Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 665 (1986).

164. *See generally* Rapping, *supra* note 151.

165. *Id.* at 165–67.

166. *See id.* at 183–84.

167. In 2013, *Gideon v. Wainright* celebrated its 50th anniversary.

168. *See supra* Part IV.

criminal defendants whose cases are disposed of by guilty plea. The Court has also made it abundantly apparent that lower courts must take claims of ineffective assistance of counsel seriously at the plea bargaining phase. The opinions do not, of course, wave a magic wand over cases headed for a guilty plea. They do, however, give public defenders and other advocates of poor people accused of crimes a weapon with which to fight for better funding and more time per case.

First, public defenders should ensure that *Padilla*, *Lafler*, and *Frye* do not go unnoticed by trial judges, prosecutors, and other defense attorneys. At a minimum, defense attorneys should be able to obtain more time to research, consider, and communicate plea offers. If a prosecutor balks at providing the time that the defense attorney needs, the defense attorney should be able to use *Frye* and *Lafler* to convince either the prosecutor or the trial judge that a viable ineffective assistance of counsel claim will be created unless more time is provided. If a large number of defense attorneys in a particular jurisdiction begin raising this issue, prosecutors and trial judges—and other defense attorneys—will understand that more time and attention is necessary to consider plea offers.

On a broader scale, public defenders and court-appointed attorneys can use *Padilla*, *Frye*, and *Lafler* to convince those in charge of the indigent defender system budget—generally legislators or judges—that more resources spent up front on more defense attorneys, investigators, other public defender support staff, and more training will ultimately save the jurisdiction money in the future.

Hearings on ineffective assistance of counsel claims regarding the plea bargaining phase, even if no relief is warranted, will consume considerable resources; and there is at least the potential that a large number of such claims will be made. Virtually every case involves a plea offer,[169] and while obtaining relief may be difficult, making at least a colorable claim of ineffective assistance is not a particularly high burden. Generally, there will be little or no disincentive to a defendant in making such a claim, except where a defendant successfully withdraws a guilty plea and risks a more severe sentence following conviction at trial.

To obtain relief from poor representation at the plea stage, a defendant, pro se or through an attorney, need only contact the court and claim that his attorney either failed to communicate a plea offer or provided incompetent advice, which led to a guilty plea or a rejection of a plea offer.[170] If that claim is colorable, the trial court must appoint a new attorney due to the conflict of interest between the client and former trial counsel.[171] Absent a concession by the parties that the claim can be

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169. Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012).

170. RANDY HERTZ & JAMES LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 12.3b (5th ed. 2005).

171. Whenever a client alleges that an attorney's conduct was deficient, there is an assumed conflict of interest because that attorney may want to defend herself against the accusation, and therefore a new attorney is appointed. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7, 1.16 (2013).

resolved on the documents alone, an evidentiary hearing must be held,[172] where it is likely that the original defense attorney and the defendant will both testify. At the hearing, the defendant must of course first show deficient performance by his attorney. To prove ineffective assistance of counsel, the new attorney for the defendant will offer evidence regarding the standards of professional conduct, either through expert testimony or affidavit regarding local bar association standards, such as criminal defense guidelines from the American Bar Association, NLADA, or the National Association of Criminal Defense Lawyers.[173] The defendant must also establish that but for the attorney's deficient representation, the outcome would have been different. For example, the defendant would have to show that were it not for deficient advice regarding the potential sentence, he would have accepted the plea offer and avoided the harsher punishment he received following conviction at trial. The litigation of such claims may also be complicated by issues regarding the limited waiver of attorney client privilege by the defendant.[174] Ultimately such claims, regardless of the final outcome, will likely require far more time and resources—not only from defense attorneys, but from prosecutors and judges—than would be required if the defendant was simply provided with effective representation in the first instance.

Where the defendant's claim prevails, the potential remedies can also be particularly costly. Where prejudicial ineffective assistance of counsel has caused a defendant to plead guilty, the defendant may be entitled to have the conviction vacated and proceed to trial.[175] That trial may then be complicated by the passage of time between the guilty plea and the resolution of the ineffectiveness claim.[176] This result impacts not just the parties, but witnesses and victims as well. Where the ineffectiveness resulted in the defendant missing the opportunity to avoid a greater sentence or a conviction on more serious charges, a new sentencing hearing may be necessary.[177] Although not a particularly costly remedy, allowing a defendant to plead guilty to an earlier plea offer after a trial highlights the waste stemming from ineffective assistance of counsel during plea bargaining: an entire trial would have been avoided had the defense attorney been able to competently advise her client.

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172. HERTZ & LIEBMAN, *supra* note 170, § 20.3e.

173. *See* Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012) ("Though the standard for counsel's performance is not determined solely by reference to codified standards of professional practice, these standards can be important guides.").

174. *See, e.g.*, Wharton v. Calderon, 127 F.3d 1201, 1205 (9th Cir. 1997); Tasby v. United States, 504 F.2d 332, 336 (8th Cir. 1974); Laughner v. United States, 373 F.2d 326, 327 (5th Cir. 1967).

175. *E.g.*, Helfant v. United States, No. 09-60838-CIV, 2009 WL 2258324, at *2 (S.D. Fla. July 29, 2009) ("[T]he only ground for vacating the conviction is that the plea was not both counseled and voluntary.") (citation omitted).

176. *Cf.* Johnson v. Uribe, 682 F.3d 1238 (9th Cir. 2012), *amended and superseded by* 700 F.3d 413 (9th Cir. 2012), *cert. denied*, No. 12-968, 2013 WL 449892 (U.S. Nov. 12, 2013) (withdrawing defendant's guilty plea six years after the plea was entered, leading to a new trial many years after the fact).

177. *See, e.g.*, Williams v. Taylor, 529 U.S. 362 (2000).

In one post-*Lafler* case, *Johnson v. Uribe*, the Ninth Circuit concluded that the remedy was to not only vacate the defendant's conviction following a guilty plea and allow him to proceed to trial, but also to "[permit him] to 'bargain' from the position he would have been in" were it not for his counsel's deficient conduct during plea bargaining.[178] The facts of *Johnson* are likely not uncommon in jurisdictions where public defenders are burdened with high caseloads. There, Johnson's public defender only met with Johnson on the few occasions when Johnson appeared in court, and then for only a few minutes at a time.[179] The public defender "did not interview Johnson about the events underlying the charges," ask Johnson for his version of events, or ask Johnson about his criminal history.[180] When the prosecution made an initial plea offer of five years, the public defender "only discussed this offer with Johnson for two or three minutes and did not advise him about whether he should accept or reject the offer."[181] The public defender also failed to realize—and thus failed to inform Johnson, the prosecutor, or the judge—that certain sentencing enhancement papers filed by the prosecution were invalid.[182] After failing to appear for a court hearing and having his release revoked, Johnson rejected the initial offer, but subsequently pleaded guilty on terms permitting, and resulting in, a more severe sentence.[183] Because the public defender failed to "perform an adequate investigation into the facts of [Johnson]'s case or the sentence enhancements" his performance was deficient "for the entire plea negotiation stage."[184] The court found prejudice because the erroneous sentencing enhancement calculation caused the "entire plea negotiation process" to be "weighted against Johnson."[185] In order to "'neutralize the taint' of [the] constitutional violation,"[186] the court concluded that Johnson was "entitled to be returned to [the] pre-plea stage and proceed under the correctly-calculated sentencing range," including electing to proceed to trial if Johnson so decided.[187]

As it may now be easier for defendants to raise ineffective assistance counsel claims after *Padilla*, concern remains whether the prevalence of such claims will increase, and therefore overburden dockets. In *Padilla*, the Solicitor General and the respondent raised concerns that entitling defendants to competent advice regarding the immigration consequences of a guilty plea would open the "floodgates" and result in a massive number of ineffectiveness claims.[188] The Court was

178. *Johnson*, 682 F.3d at 1246.
179. *Id.* at 1240.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 1243, 1245.
185. *Id.* at 1245.
186. *Id.* at 1244 (quoting Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012)).
187. *Id.* at 1245.
188. Padilla v. Kentucky, 559 U.S. 356, 371–72 (2010).

not persuaded by such concerns in part because a "flood did not follow" from the 1985 *Hill* decision in which the Court decided that *Strickland* applied to cases involving guilty pleas.[189] *Hill*, however, used fairly strong language discouraging such claims.[190] Neither the entitlement to effective representation during plea bargaining nor the potential remedies were clear until *Padilla*, *Lafler*, and *Frye*.[191] Also, prior to *Padilla*, it was unclear whether the Supreme Court had any real interest in ensuring effective representation at the plea bargaining phase of criminal proceedings.[192]

The *Padilla* Court also suggested that the "floodgates" would not open because defendants would have difficulty establishing a reasonable probability of prejudice stemming from the deficient performance of counsel during the plea bargaining phase.[193] This is unclear in the wake of *Lafler* and *Frye*. Virtually every case involves a plea offer and most are resolved by a guilty plea, and many public defenders and court-appointed attorneys simply do not have the time to represent their clients during plea-bargaining at the level conceived of by *Padilla*, *Frye*, and *Lafler*. Thus, instances of deficient conduct in the plea-bargaining phase are likely nearly as prevalent as guilty pleas themselves. And, even if the defendant cannot ultimately prove a reasonable probability of prejudice, in order to obtain a hearing—to which judges, prosecutors, and defense attorneys must apply resources—the defendant need only make a plausible claim that a different result would have been obtained if not for the attorney's deficient conduct.

Finally, the Court in *Padilla*—citing pre-*Padilla* statistics that guilty pleas account for "only approximately 30% of the habeas petitions filed"—noted that defendants who have pleaded guilty have a built-in disincentive to collaterally attack their guilty pleas: losing the benefit of the plea and proceeding to trial "may result in a *less favorable* outcome" if the defendant is convicted.[194] This built-in disincentive does not apply, however, in cases like *Frye*, where the defendant enters a subsequent and less favorable plea agreement,[195] or cases like *Lafler*, where the defendant is convicted at trial after rejecting a plea agreement.[196] In both instances, the defendant, if victorious, would receive the benefit of the more favorable plea agreement while risking essentially nothing.

Because plea offers and guilty pleas are so prevalent, only a relatively small portion of defendants would have to pursue ineffectiveness claims in order to

189. *Id.*

190. Hill v. Lockhart, 474 U.S. 52, 58 (1985) ("[T]he concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.") (internal quotation omitted); *see* discussion of *Hill supra* notes 64–70 and accompanying text.

191. *See* discussion *supra* Part IV.

192. *See* discussion *supra* Part IV.

193. *Padilla*, 559 U.S. at 371 n.12.

194. *Id.* at 372–73.

195. Missouri v. Frye, 132 S. Ct. 1399, 1410 (2012).

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

create "floodgates"-type pressure on legislatures and courts to provide more resources to public defenders and court-appointed attorneys.[197] Through an organized effort, public defenders and court-appointed attorneys could most effectively utilize *Padilla*, *Frye*, and *Lafler* to obtain more resources. Such an effort might be viewed as radical, particularly because the attorneys would have to document and acknowledge their own ineffectiveness. Radical measures by public defender offices to obtain more resources for their clients have, however, proved effective. Prior to the ruling in *Padilla*, the public defenders' office in Miami demanded lower caseloads by informing courts that the public defenders were no longer available for appointment.[198] The New York Times called the challenge, "the most open revolt by public defenders in memory."[199] The result was that the public defenders were not assigned new cases—those cases were assigned to court-appointed attorneys instead—until the public defenders' caseloads returned to a more manageable level.[200] Additionally, Missouri's public defenders were relieved of taking new cases by the state's Supreme Court.[201] And after a similar challenge in the state of Washington, the Washington Supreme Court set caseload caps at 150 felonies and 400 misdemeanors per year—the same as the guidelines set out by the NLADA.[202] Elsewhere, including Montana, Massachusetts, and Connecticut, class-action civil lawsuits on behalf of indigent defendants have been used as a means to obtain more funding and lower caseloads.[203]

Successfully using *Padilla*, *Frye*, and *Lafler* to obtain more resources will also depend on public defenders' and court-appointed attorneys' willingness to put their own egos aside and acknowledge that they are unable to provide effective representation. This should not be viewed as a comment on the individual lawyer's merits as an attorney, but simply as a product of the under-funded indigent defense system. Unless defense attorneys flag the issue of their own ineffectiveness for trial courts and concede, when facing ineffectiveness claims, that they simply do not have the time or resources to effectively engage in the plea bargaining process, then the defense attorneys themselves will be an obstacle to the realization of *Gideon*'s promise.

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197. A Westlaw search on December 25, 2013 found 1,203 cases citing to *Lafler* and 2,938 citing to *Padilla*. Of course, these numbers do not reflect cases pending for which there is as yet no published decision.

198. Brink, *supra* note 131, at 57–58.

199. Eckholm, *supra* note 147.

200. *See id.*

201. Virginia Young, *Defenders' Caseload Rules Are Rejected: Missouri Supreme Court Tells Legal System to Ensure That the Indigent Get Required Counsel*, ST. LOUIS POST-DISPATCH (Dec. 9, 2009 12:00 AM), http://www.stltoday.com/news/defenders-caseload-rules-are-rejected-missouri-supreme-court-tells-legal/article_dfdae84e-5c70-5e4a-9ce9-0255fb0f5058.html.

202. Thomas Clouse, *Court's Limit on Public Defender Work Likely to Force Changes*, SPOKANE SPOKESMAN-REV. (July 1, 2012), http://www.spokesman.com/stories/2012/jul/01/caseload-cap-looms/.

203. Drinan, *supra* note 155, at 444–45.