

Systemic Barriers to Effective Assistance of Counsel in Plea Bargaining

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INTRODUCTION

In a trio of recent cases, *Padilla v. Kentucky*,¹ *Missouri v. Frye*,² and *Lafler v. Cooper*,³ the U.S. Supreme Court focused its attention on defense counsel's pivotal role during the plea bargaining process. The Court recognized long ago that a criminal defendant was entitled to effective assistance of counsel at the plea stage.⁴ Prior to *Cooper*, however, the Court had not found that defense counsel's advice to turn down a plea bargain could constitute ineffective assistance.⁵ Likewise, prior to *Padilla*, the Court had not overturned a guilty plea because defense counsel failed to alert a defendant to a significant consequence—deportation—that followed from that plea.⁶ Before *Frye*, it had never declared that “defense counsel did not render the effective assistance the Constitution requires” because defense counsel had neglected to communicate an earlier favorable plea offer.⁷

To Justice Scalia, the decision in *Cooper* “elevates plea bargaining from a necessary evil to a constitutional entitlement,” “upends decades of our cases,” “and opens a whole new boutique of constitutional jurisprudence.”⁸ *Cooper*, *Frye*, and *Padilla*, however, do not portend major changes in the nation's criminal justice systems. Rather, these cases largely represent a rejection of Scalia's unduly narrow view of defense counsel's role and his belief that a voluntary guilty plea or a decision to reject a plea offer should be immune from an ineffective assistance claim, even when the defendant's decision was based on counsel's professionally deficient advice. Given that “the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant,”⁹ the Court's willingness under certain circumstances to find that a defense counsel's professionally unsound plea bargaining performance constitutes ineffective assistance of counsel is hardly remarkable.

Indeed, few commentators see these decisions as signaling a major shift in the Court's general reluctance to find that a criminal defense lawyer's representation was both professionally unreasonable and prejudicial.¹⁰ This

1. *Padilla v. Kentucky*, 559 U.S. 356 (2010).

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

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

4. *McMann v. Richardson*, 397 U.S. 759, 772 (1970) (holding that a guilty plea is not “subject to collateral attack . . . unless the defendant was incompetently advised by his attorney”); *see also* *Hill v. Lockhart*, 474 U.S. 52, 57 (1985) (holding that the same test for determining ineffective assistance of counsel at trial “seems to us applicable to ineffective-assistance claims arising out of the plea process”).

5. *Cooper*, 132 S. Ct. at 1384–91.

6. *Padilla*, 559 U.S. at 365–66.

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

8. *Cooper*, 132 S. Ct. at 1397–98 (Scalia, J., dissenting).

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

10. *See, e.g.*, Bruce A. Green, *The Right to Plea Bargain with Competent Counsel After Cooper and Frye: Is the Supreme Court Making the Ordinary Criminal Process “Too Long, Too Expensive, and*

is largely because of the deferential nature of the ineffective assistance of counsel test set forth in *Strickland v. Washington*.¹¹ As Justice Stevens noted in *Padilla*, “[s]urmounting *Strickland*’s high bar is never an easy task.”¹² Unquestionably, when judging the performance of defense counsel in negotiating a plea, the Court will apply a strong presumption that counsel’s performance was reasonable, give substantial deference to counsel’s judgment, and avoid second guessing counsel’s nuanced strategic calls.¹³ As Justice Stevens confidently proclaimed in *Padilla*, “[w]e should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty.”¹⁴

Given the woefully inadequate advice provided to many defendants by indigent defenders who lack the time or resources to adequately investigate, analyze, or prepare the defendant’s case, such a sweeping presumption is unwarranted.¹⁵ If the Court truly intends the right to effective counsel at the plea bargaining stage to be meaningful, it cannot continue to ignore the systemic features that render this right largely meaningless for many defendants. It must be willing to provide relief to those defendants who suffer prejudice because of counsel’s deficient plea bargaining performance.

As the Court reiterated in *Padilla*, criminal defendants ought not be “left to the ‘mercies of incompetent counsel.’”¹⁶ The troubling practice of some prosecutors who demand that defendants waive ineffective assistance of counsel claims as a condition of a negotiated plea, however, does just that. In essence, such a practice nullifies the right to effective assistance of counsel at the plea stage by leaving the accused represented by incompetent counsel without any recourse once the defendant enters a plea.¹⁷

Unpredictable . . . in Pursuit of Perfect Justice?, 51 DUQ. L. REV. 735, 766 (2013) (“*Cooper and Frye* did little more than preserve and reinforce the status quo.”).

11. *Strickland v. Washington*, 466 U.S. 668, 687–89 (1984).

12. *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010) (referring to the two-part ineffective assistance of counsel standard set forth in *Strickland*, 466 U.S. at 689). That bar is especially difficult to overcome given the “doubly deferential” standard of review of ineffective assistance of counsel claims to be afforded state court decisions by federal judges. *Burt v. Titlow*, 134 S. Ct. 10, 13 (2013).

13. See *Premo v. Moore*, 131 S. Ct. 733, 739–42 (2011).

14. *Padilla*, 559 U.S. at 372.

15. For two of a host of articles decrying the extent to which *Strickland*’s ineffective assistance of counsel standard operates to deny many indigent defendants the competent representation promised by *Gideon*, see Erwin Chemerinsky, *Lessons from Gideon*, 122 YALE L.J. 2676 (2013) and David Cole, *Gideon v. Wainwright and Strickland v. Washington: Broken Promises*, in CRIMINAL PROCEDURE STORIES 101 (Carol S. Steiker ed., 2006). For an extended look at the well-documented deficient representation that many indigent defendants and the working poor receive, and the pressure that inadequate lawyering brings to bear on clients, especially the innocent, considering a plea, see Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 748–64, 779–82, 796–802.

16. *Padilla*, 559 U.S. at 374 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

17. In this Essay we primarily focus on express waivers of ineffective assistance of counsel claims. Some prosecutors require broadly worded waivers that purport to waive any and all

By its very nature, a plea of guilty involves the defendant waiving certain constitutional rights such as the right to a trial before a judge or jury, to confront and cross-examine witnesses, to call witnesses to testify on one's behalf, to remain silent or to testify, and to require the government to prove guilt beyond a reasonable doubt. In addition to waiving these trial rights, prosecutors have long required additional waiver of the right to file a direct appeal of the conviction and sentence. As long as waivers of these important rights are voluntary, knowing and intelligent, courts have consistently upheld such waivers,¹⁸ because the waiver of trial and appeal rights promotes finality and conserves prosecutorial and judicial resources.

Increasingly, though, prosecutors have enlarged the scope of such waivers to include waiving all constitutional and procedural errors, even unknown ineffective assistance of counsel claims such as those that proved successful in *Padilla* and *Frye*. Had Jose Padilla and Galin Frye been forced to sign a waiver of any ineffective assistance of counsel claim as a condition of entering their pleas, and if the Supreme Court approved of such waivers, then neither Padilla nor Frye would have secured the relief the Court held that they deserved.

Waivers of ineffective assistance of counsel claims pose both legal and ethical issues. Legally, the waivers serve to undermine a defendant's due process rights—recognized by the *Gideon*¹⁹ Court—by requiring the defendant not only to waive what is unknown to them at the time of waiver, but to do so even when based upon bad advice of ineffective counsel. For example, Jose Padilla did not know that by entering his plea he would be deported because his lawyer never alerted him to that critical consequence.²⁰ Similarly, Galin Frye entered a plea without the opportunity to take a more favorable plea bargain because his lawyer never informed

rights of appeal or collaterally attack a conviction and sentence, and some courts have upheld these general waivers. *See, e.g.*, *United States v. Jackson*, Nos. 08-20150-02-CM, 11-2562-CM, 2012 WL 5869822, at *1 (D. Kan. Nov. 19, 2012) (enforcing a general waiver that stated “any right to appeal or collaterally attack any matter in connection with this prosecution, the defendant’s conviction, or the components of the sentence to be imposed”). We focus on express waivers of ineffective assistance of counsel claims for two reasons. First, if courts refuse to enforce specific waivers of ineffective assistance of counsel claims, then courts are unlikely to enforce such waivers as part of broad provisions purporting to waive all appeals and collateral relief. Second, specific waivers of ineffective assistance of counsel claims bring into sharp focus troubling ethical issues for both defense lawyers and prosecutors in light of the Court’s recent decisions about the right to counsel at the plea stage.

18. *See, e.g.*, *Peretz v. United States*, 501 U.S. 923, 936 (1991) (“The most basic rights of criminal defendants are . . . subject to waiver.”); *Whitmore v. Arkansas*, 495 U.S. 149, 165–66 (1990) (permitting capital defendant to waive post-conviction review entirely); *Boykin v. Alabama*, 395 U.S. 238, 243–44 (1969) (requiring the trial judge to find affirmatively on the record that the guilty plea and waiver of rights were knowing and voluntary); *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) (holding that the right to counsel may be waived).

19. *See generally Gideon v. Wainwright*, 372 U.S. 335 (1963).

20. Indeed, Padilla’s lawyer falsely assured him he had nothing to worry about given his long stay in the country. *Padilla*, 559 U.S. at 359–60.

him that a plea bargain had been offered and had lapsed.²¹ In both instances, defense counsel had been ineffective, thereby falling far short of what the *Gideon* decision promised.

Ethically, a defense lawyer counseling a defendant to waive ineffective assistance of counsel claims has a personal conflict of interest with the client, because the lawyer has reputational and other interests in not having the lawyer's representation of the client determined to be ineffective.²² Whether the Supreme Court would approve a waiver of an ineffective assistance claim that would negate the due process right to effective assistance of counsel is not yet resolved. Such a decision, however, would immunize much incompetent lawyering from any judicial scrutiny altogether.

Part I explores the challenges competent, conscientious defense counsel faces to provide meaningful advice to criminal defendants contemplating a guilty plea. Part II describes the limited assistance of counsel that too many defendants receive. It concludes that the underfunding of defense services in many jurisdictions, together with the coerciveness of the plea bargaining process, already comprise constitutionally inadequate representation during plea bargaining for too many defendants. The prosecutorial practice of demanding a waiver of ineffective assistance of counsel only exacerbates the existing situation. Part III analyzes the law and ethics of waivers of ineffective assistance of counsel claims and whether such waivers should be permissible.

We contend that such waivers should not be enforceable for both legal and ethical reasons. Permitting waivers of ineffective assistance of counsel claims not only constitutes judicial acceptance of a prosecutorial veto of the Court's recent decisions regarding plea bargaining, but also ensures that more defendants never receive the effective assistance of counsel during plea bargaining.

I. COMPETENT REPRESENTATION DURING PLEA BARGAINING

Frye, *Padilla*, and *Cooper* recognize that defense counsel must provide effective assistance of counsel during the plea-bargaining process. At a minimum, defense counsel must communicate all plea offers,²³ must alert clients to possible deportation should they enter a guilty plea,²⁴ and must

21. *Missouri v. Frye*, 132 S. Ct. 1399, 1404–05 (2012).

22. “[A] lawyer shall not represent a client if . . . (2) there is a significant risk that the representation . . . will be materially limited by . . . a personal interest of the lawyer.” MODEL RULES OF PROF'L CONDUCT R. 1.7 (2013). See *infra* notes 109–12 and accompanying text for a discussion of the defense lawyer's conflict of interest in advising a defendant to waive ineffective assistance of counsel claims.

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

24. *Padilla*, 559 U.S. at 373–74.

not provide clearly erroneous advice about the risk of a conviction at trial.²⁵ Effective representation during the negotiation stage also requires defense “counsel to advise ‘the client of the advantages and disadvantages of a plea agreement.’”²⁶

Although this sounds relatively straightforward, the task of properly advising a client whether to accept or reject a plea offer is anything but easy. A defense lawyer should not urge a client to enter into any plea deal—or turn one down—until counsel has done an appropriate investigation, “including an analysis of controlling law and the evidence likely to be introduced at trial.”²⁷ Indeed, the American Bar Association (“ABA”) Criminal Justice Standards insist that counsel’s duty to investigate exists even in the face of a client’s admission of guilt or stated desire to plead guilty.²⁸ It is only after an adequate investigation of the facts and a proper analysis of the law as it relates to the charges against the defendant that counsel can properly advise the defendant if the prosecution will be able to prove guilt beyond a reasonable doubt.

Undoubtedly, before defense counsel can have a meaningful discussion about the advantages and disadvantages of a plea agreement, counsel must do a considerable amount of work.²⁹ Counsel certainly needs to do a thorough client interview to learn as much as possible about the client’s knowledge of the facts surrounding the charges the client faces. During that interview, counsel must begin gathering information about the client’s background and personal circumstances.³⁰ Absent a good client interview,

25. In *Cooper*, the parties all agreed that counsel’s performance was deficient because “he advised respondent to reject the plea offer on the grounds he could not be convicted at trial.” *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012). The Court noted, however, that “an erroneous strategic prediction about the outcome of a trial is not necessarily deficient performance.” *Id.* at 1391. Although the Court did not address the issue because of the prosecution’s concession, it is clear that not all mistaken advice will be both professionally deficient and prejudicial. *See Hill v. Lockhart*, 474 U.S. 52, 160 (1985); *Premo v. Moore*, 131 S. Ct. 733, 741 (2011).

26. *See Padilla*, 559 U.S. at 370 (quoting *Libretti v. United States*, 516 U.S. 29, 50–51 (1995)).

27. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEF. FUNCTION § 4-6.1(b) (3d ed. 1993) [hereinafter ABA STANDARDS]; *see also Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) (finding that “counsel [must] make an independent examination of facts, circumstances, pleadings and law” before offering client an opinion regarding the plea to be entered).

28. ABA STANDARDS, *supra* note 27, at § 4-4.1(a); *see also Rompilla v. Beard*, 545 U.S. 374, 377 (2005) (stating a “lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will rely on as evidence of aggravation at the sentencing phase of [a] trial” even if the defendant and his family say no mitigating evidence is available).

29. For an extensive discussion of the role of defense counsel in plea bargaining, *see Rodney J. Uphoff, The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73 (1995).

30. *Wiggins v. Smith*, 539 U.S. 510, 522 (2003) (noting that the Court in *Williams* held that counsel failed to “fulfill[] their obligation to conduct a thorough investigation of the defendant’s background” thereby “fail[ing] to uncover and present voluminous mitigating

counsel may be oblivious to the client's immigration status and unprepared to alert the client to the collateral consequences of a plea. Moreover, such an interview often is critical if counsel is to identify potential witnesses, possible defenses, and areas of investigation.

To be effective, defense counsel must do far more than just conduct a good client interview. If counsel is to assess meaningfully the prosecution's case as well as evaluate the strengths and weaknesses of potential defenses, then counsel must undertake an adequate investigation.³¹ This requires that counsel obtain and review discovery material, attempt to interview key prosecution witnesses, and talk to prospective defense witnesses. It also means trying to ascertain whether the prosecution has witnesses that actually will show up at trial and whether the totality of the evidence presented will be enough to convict.

Jurisdictions vary markedly in how much discovery must be provided to the defense and the timing of the disclosure of witnesses and their statements.³² Delayed access to the prosecution's case makes it extremely difficult for defense counsel to make accurate judgments about the state's case.³³ That problem is exacerbated because of the failure of some prosecutors to turn over *Brady* material either at all or in a timely manner.³⁴

In addition, many jurisdictions process felony cases very quickly, setting status conferences shortly after arraignment. In these jurisdictions, a majority of felony cases are resolved at the status conferences, when the defense may have nothing more than a police report, the prosecution has not had time to comply with *Brady*, and the defense has not investigated the case.³⁵ "Misdemeanor cases also are routinely disposed of at the [initial] court appearance."³⁶

evidence" (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)) (internal quotation marks omitted for first quotation).

31. *Rompilla*, 545 U.S. at 383–86 (reasoning that while reasonably diligent counsel is not required to waste time where there is good reason to believe that further investigation is futile, the failure to examine a "readily available file" of prior conviction compromised the defense's ability to respond to the prosecution).

32. See, e.g., Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 573–81 (describing state variations in discovery).

33. Many commentators have described the difficult task defense counsel faces in assessing the prosecution's case given the time constraints, a limited ability to conduct discovery, and the practice of some prosecutors to offer plea bargains with short deadlines. See, e.g., Jane Campbell Moriarty & Marisa Main, "Waiving" Goodbye to Rights: Plea Bargaining and the Defense Dilemma of Competent Representation, 38 HASTINGS CONST. L.Q. 1029, 1040–47 (2011).

34. In *Brady v. Maryland*, the Court recognized a defendant's due process right to exculpatory evidence and required the prosecutor to provide the defense with any favorable evidence that is material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The prosecutor must also disclose materials that could impeach a witness's credibility. *Giglio v. United States*, 405 U.S. 150, 154–55 (1972).

35. Laurence A. Benner, *Expanding the Right to Effective Counsel at Plea Bargaining: Opening Pandora's Box?*, CRIM. JUST., Fall 2012, at 4, 9.

36. *Id.*

In the end, even if defense counsel does conduct a thorough investigation, counsel's evaluation process will necessarily be fraught with considerable uncertainty. As the Court observed in *McMann*, "the decision to plead guilty before the evidence is in frequently involves the making of difficult judgments."³⁷ In only a handful of states does defense counsel have the ability to do a discovery deposition before trial,³⁸ so generally counsel has only a limited view of the witnesses' testimony or how they will actually perform on the witness stand. The problem is compounded because many witnesses decline to be interviewed by defense counsel or defense investigators. In addition, counsel seldom knows much about the witnesses' availability for trial. Finally, even if a case appears strong on paper, witnesses do not always perform as expected when they actually testify at trial.

Counsel's evaluation of a defendant's chances of winning at trial must take into consideration the likely testimony of state and defense witnesses, the likelihood that the jury will actually hear the evidence, and the likely impact of all of the evidence on the fact finder. Defense counsel necessarily must factor into his or her overall assessment of the case a prediction of how the judge will rule on a host of known evidentiary issues—and on other potential evidentiary issues—as well as how the judge or jurors are likely to react to the overall evidentiary presentation. Counsel's assessment also must encompass the defendant's testimony, should the defendant decide to testify at the trial, compared with the likely effect should the defendant not testify.

Once defense counsel has completed the investigation and carefully evaluated the case, counsel should "advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome."³⁹ Advice about all aspects of the case demands not only counsel's estimate regarding the client's chance of winning at trial but also the likely sentence to be imposed if the defendant is convicted at trial. For a client with potential immigration issues, defense counsel must inform the client of a serious consequence, such as the risk of deportation, which might follow from a loss at trial compared with the advantage of a plea that might avoid such consequences.⁴⁰ With respect to a guilty plea, the client should be told not only of the advantages of a particular plea bargain—reduction in the change or dismissal of the other charges, for example—but also the

37. *McMann v. Richardson*, 397 U.S. 759, 769 (1970).

38. See Prosser, *supra* note 32, at 606–13 (describing procedures in eight states allowing defense discovery depositions of prosecution witnesses and arguing for increased discovery including depositions to ensure reliable results).

39. ABA STANDARDS, *supra* note 27, at § 4-5.1.

40. *Padilla v. Kentucky*, 559 U.S. 356, 373–74 (2010).

likely consequences of the sentence to be imposed as part of the plea agreement.⁴¹

Certainly, counsel striving to provide effective representation during plea bargaining will advise a client in a manner that enables the client to understand his or her options fully.⁴² The more successful counsel has been in establishing a relationship of trust with the client, the more likely counsel's advice will be heeded. On the other hand, to the extent that the client perceives that counsel is attempting to force that client to accept a plea, the client is unlikely to be receptive to counsel's presentation of options. Counsel's goal should be to help the client make the best choice between trial and a plea agreement. Sometimes this involves a hard choice between two bad alternatives, made even harder because the client is often being influenced by family, friends, or fellow inmates. The ABA Standards warn that "counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea."⁴³ Conscientious defense lawyers strive to present their clients advice and recommendations so that clients understand both their options and the ramifications of whatever choices they make.

If defense counsel has done a thorough investigation, properly evaluated the options, presented sound advice to a client, and the client decides to plead guilty, then—assuming the prosecutor has not withheld material exculpatory evidence—the client will not be able to successfully challenge the plea by later claiming that counsel's assistance was ineffective.⁴⁴ In fact, even if the plea was induced by defense counsel's dubious predictions about the outcome of a trial, or the likely sentence after trial, that may not suffice to support an ineffective assistance of counsel

41. The client should be advised about the length of his sentence, parole eligibility, and all serious collateral consequences. The client should also be told that the right to appeal after a plea is virtually nonexistent.

42. Nonetheless, a client who fails to grasp or appreciate all of the information provided by counsel is highly unlikely to prevail on an ineffective assistance of counsel claim, when, in fact, counsel provided accurate advice. See *United States v. Ruiz*, 536 U.S. 622, 630 (2002) (noting that the Constitution does not require that a defendant have complete knowledge, but permits waiver of rights and recognizes the voluntariness of a guilty plea "despite various forms of misapprehension under which a defendant might labor").

43. ABA STANDARDS, *supra* note 27, at § 4-5.1 (b).

44. See *Premo v. Moore*, 131 S. Ct. 733, 739-43 (2011) (detailing the substantial burden a defendant who pleads guilty must carry to show ineffective assistance and thereby undo a guilty plea). If the exculpatory material was significant enough that it was likely to have affected the lawyer's recommendation and the defendant's decision to plead guilty rather than go to trial, then the defendant may be able to show the requisite prejudice that would warrant setting aside a guilty plea. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). For a look at the varied approaches courts take on the question of whether a defendant can challenge a guilty plea based on a prosecutor's failure to disclose exculpatory evidence, see Michael Nasser Petegorsky, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 *FORDHAM L. REV.* 3599 (2013).

claim.⁴⁵ As the Court observed in *McMann*, “[w]aiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court’s judgment might be on given facts.”⁴⁶ Unquestionably, defendants who did, in fact, receive competent advice following an adequate investigation will be bound by their plea decisions.⁴⁷

II. THE LIMITED ASSISTANCE OF COUNSEL

Not all defendants receive competent advice, however. The Court’s presumption that criminal defense lawyers generally provide competent advice to their clients about plea bargains⁴⁸ flies in the face of a host of studies showing that many defendants in underfunded jurisdictions across the United States receive woeful representation.⁴⁹ Surely the “meet ‘em and plead ‘em” attitude that marks the plea bargaining efforts of too many indigent defenders cannot be seriously described as effective.⁵⁰ Admittedly, those defendants fortunate enough to be charged in a jurisdiction with adequate resources so that they are represented by well-trained defense lawyers with the time to properly prepare and with access to investigative and expert services are likely to receive competent advice.⁵¹ Similarly, defendants who can afford to retain defense lawyers with the time, resources, and expertise to provide them competent advice about a prospective plea bargain may be presumed to receive effective assistance of counsel at the plea stage.

For indigent defendants in an underfunded jurisdiction, however, too many are represented by an inexperienced or overwhelmed lawyer with a crushing caseload that prevents counsel from doing anything more on a case other than a cursory interview and the presentation of the prosecutor’s plea

45. *Lafler v. Cooper*, 132 S. Ct. 1376, 1391 (2012). For an excellent look at the difficulty of proving that a defendant’s guilty plea was based on erroneous advice, see Bruce A. Green, *Judicial Rationalizations for Rationing Justice: How Sixth Amendment Doctrine Undermines Reform*, 70 *FORDHAM L. REV.* 1729 (2002).

46. *McMann v. Richardson*, 397 U.S. 759, 770 (1970).

47. *Id.*

48. *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010).

49. For a summary of the “national reports, individual state studies, and articles” lamenting the inadequate representation provided many indigent defendants in underfunded jurisdictions across this country, see Rodney Uphoff, *Forward to Symposium: Broke and Broken: Can We Fix Our State Indigent Defense System?*, 75 *MO. L. REV.* 667, 667–68 (2010) (footnotes omitted).

50. See Stephen B. Bright, *The Right to Counsel in Death Penalty and Other Criminal Cases: Neglect of the Most Fundamental Right and What We Should Do About It*, 11 *J.L. SOC’Y* 1, 17 (2010).

51. See, e.g., Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 *HARV. L. REV.* 1239, 1263–66 (1993) (describing the high quality representation provided by the Washington, D.C. Public Defender Service).

offer.⁵² Galin Frye's lawyer did not make a strategic choice to decline to relay the prosecutor's offer because he thought it was unreasonable or that Frye had a case worth taking to trial. Rather, he was struggling with a crushing caseload that so preoccupied him that he did not even find the time to communicate a favorable plea offer to Frye.⁵³

For those defendants who earn minimum wage and do not qualify for an indigent defender, the prospects for competent advice are equally bleak.⁵⁴ They, too, do not receive the benefit of a thorough investigation, careful analysis of the evidence against them, nor any candid explanation of the advantages and disadvantages of taking the prosecution's plea offer. Rarely do their lawyers have time to conduct legal research, file motions, locate witnesses, or investigate possible defenses. Realistically, like the indigent defendant represented by the overburdened contract lawyer or public defender, these defendants receive only limited advice and often do not have any meaningful option but to plead guilty.⁵⁵

Although the Court has made it clear that a defendant is not entitled to a skilled negotiator who performs consistent with best practices,⁵⁶ it has long proclaimed that a defendant should not be left to the mercy of an incompetent lawyer.⁵⁷ If the Court is serious that defendants are, in fact, entitled to effective assistance of counsel during plea bargaining, then the Court should not presume that any defense lawyer can proffer constitutionally competent advice without having done an adequate investigation of the facts and law involved in a defendant's case.⁵⁸ Absent an

52. In a workload study of the Missouri State Public Defender ("MSPD") system, MSPD lawyers reported that in 20 to 40% of cases resulting in guilty pleas, the defender did not have complete discovery or failed to review discovery with the client before advising the client to accept the plea offer. Missouri State Public Defender Workload Survey 2006 (on file with authors). In 60 to 80% of cases resulting in a guilty plea, the defender never contacted or interviewed the State's endorsed witnesses before advising the client to accept the plea offer. *Id.* In over 80% of cases resulting in a guilty plea, the defender never reviewed the physical evidence or did not visit the crime scene before advising the client to accept the plea. *Id.* Finally, in over 80% of the cases resulting in a guilty plea, the defender never obtained, received or investigated the client's medical or mental health records for use in mitigating before sentencing. *Id.*

53. In Missouri, where a public defender represented Galin Frye, a caseload study in 2010 demonstrated that the State of Missouri Public Defender system was short 125 lawyers according to national guidelines. See Peter A. Joy, *Rationing Justice by Rationing Lawyers*, 37 WASH. U. J. L. & POL'Y 205, 209 (2011). Such understaffing leads to unreasonable caseloads that public defenders are "drowning in cases." *Id.*

54. See Uphoff, *supra* note 15, at 748-54.

55. See, e.g., Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1181-1206 (1975) (detailing the practices of privately retained lawyers who pressure their clients into guilty pleas).

56. *Premo v. Moore*, 131 S. Ct. 733, 740 (2011).

57. See *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

58. In legal malpractice cases, courts routinely find that counsel's advice regarding a proposed settlement in a civil case may be negligent if it was not based on a diligent

adequate investigation and proper preparation, defense counsel cannot possibly give a professionally competent estimate of the defendant's chances of success at trial. Absent proper preparation, defense counsel has little ability to negotiate effectively; rather, the defendant only receives a one-sided description of the merits of the plea offer with an unsupported prediction that a trial is hopeless. Contrary to the Court's assurance in *Premo v. Moore* that "[m]any defendants reasonably enter plea agreements even though there is a significant probability—much more than a reasonable doubt—that they would be acquitted if they proceeded to trial,"⁵⁹ our experience and the literature teach us that very few defendants are ever told by competent counsel that there is a "significant" probability of acquittal.⁶⁰ Most defendants plead guilty because their counsel tells them that they have little to no chance to win at trial, and that if they lose at trial, their sentence will be much worse.⁶¹

Of course, even an adequate investigation does not necessarily ensure that a defendant has received the effective assistance of counsel prior to entering a plea. Even if a defense lawyer conducts a competent investigation, it does not mean that an inexperienced or poor lawyer will properly analyze the law or evaluate the strengths and weaknesses of a client's case. The lawyer in *Cooper* may have adequately investigated the case, yet he gave his client ill-founded advice which caused the client to believe that the prosecution would be unable to convict him at trial.⁶²

Undoubtedly, there are inexperienced or incompetent defense lawyers who will make the effort to investigate, but who will then offer their clients an overly pessimistic evaluation of the risk of going to trial. Absent an instance as in *Cooper* where the defendant can convincingly demonstrate that counsel's advice was clearly unsound, however, it will be exceedingly difficult for a client to prevail on an ineffective assistance of counsel claim following a client's decision to plead guilty rather than risk trial. The Court's long-standing application of the *Strickland* standard for ineffective assistance of counsel⁶³ from *McMann* to *Premo* shows that the Court is unwilling to engage

investigation and adequate preparation. See, e.g., *Grayson v. Wofsey*, 646 A.2d 195, 199–200 (Conn. 1994).

59. *Premo*, 131 S. Ct. at 744.

60. To the contrary, numerous commentators have described the manner in which defense lawyers often oversell the virtue of pleading guilty in part by claiming that the odds for success at trial are slim to none. See, e.g., Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205, 209.

61. See, e.g., Green, *supra* note 10, at 737–41.

62. *Lafler v. Cooper*, 132 S. Ct. 1376, 1383 (2012). For a recent case that highlights the difficulty a client faces in proving that counsel's advice to turn down a plea offer and go to trial constituted ineffective assistance, see *Burt v. Titlow*, 134 S. Ct. 10 (2013).

63. In *Strickland v. Washington*, the Court held that to prove an ineffective assistance of counsel claim under the Sixth Amendment, the defendant must prove both objectively unreasonable performance by the lawyer and prejudice—a reasonable probability that the

in an intrusive post-trial inquiry and second-guess reasonably competent advice that induces a defendant to plead guilty.⁶⁴ Although the Court may be willing to find that questionable advice based on a failure to investigate constitutes ineffective representation,⁶⁵ it is unlikely that the Court will second-guess the risk assessment of a lawyer recommending against trial if that assessment, albeit questionable, was grounded on an adequate investigation.⁶⁶

Accordingly, *Cooper*, *Frye*, and *Padilla* do nothing to address the features of our plea-bargain-driven criminal justice system that too often compromise a defendant's right to the effective assistance of counsel. First, as has already been noted, too many criminal defendants in underfunded jurisdictions have an indigent defender who is not ready, able, or willing to go to trial. Similarly, a sizeable number of defendants who do not qualify as indigent lack sufficient funds to retain a private lawyer willing and able to devote adequate time to investigate and to prepare for trial. For these defendants, the promise of effective assistance at the plea bargaining stage is virtually meaningless. These defendants realistically do not have the option of turning down the prosecutor's plea offer and going to trial because few defendants are willing to risk going to trial with an unprepared, seemingly disinterested lawyer.

Second, even for defendants fortunate enough to be represented by a competent, zealous lawyer, the "give and take" of the plea bargaining process can be so coercive that even innocent defendants ultimately forego the trial option and plead guilty.⁶⁷ The incredible leverage that the prosecutor wields—the threat of a much harsher sentence if convicted at trial, of additional charges, of the use of sentencing enhancers, or of the death penalty—tends to raise the potential penalty of going to trial to the point where few are willing to run the risk.⁶⁸ *Frye*, *Cooper*, and *Padilla* offer no comfort to the defendant who relies on the recommendation of a reasonably

lawyer's inadequate performance adversely affected the outcome of the case. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984).

64. *Premo*, 131 S. Ct. at 740; *McMann v. Richardson*, 397 U.S. 759, 770–71 (1970); see also *supra* notes 10–15 and accompanying text.

65. See *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (noting counsel's strategic decision to limit their investigation of the client's background was based on "inattention" and not on reasoned strategic judgment).

66. See *Green*, *supra* note 10, at 748–57.

67. *Uphoff*, *supra* note 15, at 796–802. Although the DNA exonerations show that innocent defendants plead guilty, most commentators believe that the number of innocent defendants pleading guilty is even higher than reflected in those exonerations. See, e.g., Samuel R. Gross & Michael Shaffer, *Exonerations in the United States, 1989–2012* 61 (Univ. of Mich. Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 277, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2092195.

68. See Jonathan A. Rapping, *Who's Guarding the Henhouse? How the American Prosecutor Came to Devour Those He is Sworn to Protect*, 51 WASHBURN L.J. 513, 542–52 (2012) (describing the pressure and tactics prosecutors can bring to bear to induce guilty pleas).

competent lawyer and pleads guilty to avoid what the client perceives will be an even worse outcome after a trial.

The plight of Christopher Ochoa, a young man arrested in Texas for rape and murder, vividly illustrates the coerciveness of the plea bargaining system.⁶⁹ Ochoa was not in any way involved in the crime. Nonetheless, after a lengthy interrogation, Ochoa, who had no prior record or experience with the police, confessed to being involved in the crime while claiming his friend Richard Danziger actually committed the murder. Threatened with the death penalty, Ochoa later agreed, upon the advice of counsel, to plead guilty in return for a life sentence. He also agreed to testify against Danziger. At trial, however, Ochoa testified he, not Danziger, was the shooter and Danziger was convicted of rape but not murder. Both received life sentences.

After serving over eleven years, DNA evidence ultimately exonerated both men and they were released from prison. For some, it is incomprehensible that an innocent person like Ochoa would confess to a crime he did not commit, implicate his innocent friend, and then plead guilty rather than go to trial. Ochoa's behavior might be viewed as especially astounding in that Ochoa had not been beaten by the police. Ochoa also was not mentally ill, but a bright young man with the intellect that enabled him later to graduate from law school.⁷⁰

Nevertheless, false confessions and guilty pleas by the innocent are unfortunate features of our criminal justice system, and studies show that between six and eight percent of defendants who have been officially exonerated pleaded guilty despite their innocence.⁷¹ Christopher Ochoa has talked about the incredible pressure he was under to give the police a story and his willingness to say what the police wanted to hear to end the interrogation. He naïvely thought it would all get straightened out later when he got a lawyer. Trying to unravel the damage caused by a false confession is not easy, as Ochoa was to discover. Rather than risk a death-penalty conviction should the jury not believe him at trial, Ochoa, acting upon the advice of his lawyer, decided not to go to trial.

Fortunately, Ochoa was able to find justice. Nonetheless, there is another feature of our plea bargaining system that threatens to prevent a person like Christopher Ochoa—or for that matter Jose Padilla or Galin Frye—from ever achieving justice. Some prosecutors insist on conditioning

69. *Know the Cases: Christopher Ochoa*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Christopher_Ochoa.php (last visited May 20, 2014).

70. *Person of the Week: Chris Ochoa*, ABC NEWS (May 12, 2006), <http://abcnews.go.com/WNT/PersonOfWeek/story?id=1955889&page=1>.

71. See, e.g., BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 150 (2011) (finding 19 of 250 DNA exonerees pled guilty to crimes they did not commit); Gross & Shaffer, *supra* note 67 (finding that eight percent of defendants officially exonerated pled guilty despite their innocence).

plea bargains upon the defendant signing various waivers, including waivers of ineffective assistance of counsel claims. Such a practice may well have prevented these defendants, and many others in the future, from securing DNA testing and ultimately proving their innocence, or from successfully challenging the unconstitutionality of some aspect of their plea.⁷²

III. WAIVERS OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

As described above, prosecutors are increasingly requiring defendants to waive all potential ineffective assistance of counsel claims as part of their plea agreements. This Part examines the existing case law pertaining to waivers of ineffective assistance of counsel claims. The Part concludes by analyzing the ethical implications of such waivers.

A. CASE LAW ON WAIVERS OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

The Supreme Court has not considered whether the Constitution prohibits the waiver of the right to assert an ineffective assistance of counsel claim, and there is a split of authority on the issue in lower courts. Most of the cases addressing waiver of ineffective assistance of counsel claims do so in the context of a general waiver of the right to collaterally attack the conviction and sentence that the government required as part of a negotiated plea. When there is such a general waiver and the defendant later attempts to assert an ineffective assistance of counsel claim, the government argues that the waiver to collaterally attack the conviction and sentence precludes asserting an ineffective assistance of counsel claim. The majority view is that as long as the waiver is knowing and voluntary, the defendant is barred from bringing a claim of ineffective assistance of counsel.⁷³ The only exception to enforcing the waiver against a defendant recognized by some courts is an allegation that the waiver itself was involuntary or unknowing.⁷⁴

The courts that have upheld waivers of ineffective assistance of counsel claims have found that such waivers encompass all aspects of pre- and post-plea representation, including erroneous advice that lead to the plea, incorrect advice about sentencing consequences, failing to investigate or

72. A discussion of the constitutionality, ethics, and policy implications of requiring defendants to waive the right to seek future DNA testing is beyond the scope of this paper. For a thoughtful discussion of the problems with such waivers, see Samuel R. Wiseman, *Waiving Innocence*, 96 MINN. L. REV. 952 (2012).

73. See *United States v. Lemaster*, 403 F.3d 216, 220 (4th Cir. 2005); *Williams v. United States*, 396 F.3d 1340, 1342 (11th Cir. 2005); *Garcia-Santos v. United States*, 273 F.3d 506, 509 (2d Cir. 2001); *United States v. Cockerham*, 237 F.3d 1179, 1183 (10th Cir. 2001); *DeRoo v. United States*, 223 F.3d 919, 923 (8th Cir. 2000); *Jones v. United States*, 167 F.3d 1142, 1145 (7th Cir. 1999); *Watson v. United States*, 165 F.3d 486, 489 (6th Cir. 1999); *United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994); *United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir. 1993).

74. See, e.g., *Washington v. Lampert*, 422 F.3d 864, 871 (9th Cir. 2005).

assert defenses, and ineffective assistance of counsel at sentencing.⁷⁵ The waiver of ineffective assistance of counsel claims has even been upheld when the defendant alleged that defense counsel's erroneous advice induced the defendant to plead guilty and sign the waiver.⁷⁶ Those courts that uphold the validity of such waivers do so because they reason that defendants who make an intelligent and knowing choice to plead guilty should be able to give up their right to challenge the effectiveness of counsel in exchange for the concessions they receive as a part of their plea bargain.⁷⁷

In *Watson v. United States*, for example, the Eighth Circuit quoted approvingly from an earlier Eighth Circuit case to the effect that it would be unfair to a criminal defendant to deny him the ability to negotiate substantial concessions in exchange for a waiver of a future ineffective assistance of counsel claim.⁷⁸ The defendant might not be able to secure a more favorable plea bargain if the government were precluded from enforcing such waivers.⁷⁹ The *Watson* court, like other courts upholding the waiver of ineffective assistance of counsel claims, did not sufficiently appreciate, however, the coerciveness of the plea bargain process and significantly underestimated the full extent of the government's plea bargaining leverage over most defendants. When a defendant is represented by an overburdened or underpaid defense counsel without the time to investigate or prepare adequately, such defense counsel is in no position to extract plea bargaining concessions. Often, the prosecutor makes a "take it or leave it" offer, and defense counsel convinces the defendant to accept the offer and plead guilty by pointing out that the offer is better than the highest possible sentence should the defendant be found guilty at trial. The defendant, however, receives no extra concession or benefit for agreeing to a waiver of ineffective assistance of counsel. Rather, it is merely an add-on that the defendant is compelled to accept if the defendant wants a plea bargain at all.

75. See Nancy J. King, *Plea Bargains that Waive Claims of Ineffective Assistance—Waiving Padilla and Frye*, 51 DUQ. L. REV. 647, 654–55 & nn.20–26 (2013) (citing several federal and state cases upholding waivers of ineffective assistance of counsel claims alleging both pre- and post-plea errors by counsel). King maintains that the law favors enforcement of waivers of ineffective assistance of counsel claims, though she argues that for policy reasons they should not be enforced. See generally *id.* We agree with King that the policy reasons favor non-enforcement of the waivers, but we also contend that there are sound legal reasons to reject the waivers when the plea and waiver are the result of ineffective assistance of counsel.

76. *United States v. Montemayor*, No. CR C-10-1178, 2012 WL 6681906, at *4 (S.D. Tex. Dec. 20, 2012) (upholding waiver after finding that the record demonstrated that defendant's guilty plea was voluntary and he acknowledged the rights he was waiving and the maximum sentence he faced).

77. See, e.g., King, *supra* note 75, at 652 n.19 (describing the courts' reasoning in upholding the validity of ineffective assistance waivers).

78. *Watson v. United States*, 682 F.3d 740, 743 (8th Cir. 2012) (citing *DeRoo*, 223 F.3d at 919).

79. *Id.*

At the time such a guilty plea is entered, the plea will appear to the court to be knowing and voluntary. That is because most plea colloquies require the defendant to state that he or she is satisfied with defense counsel and understands the effect of the guilty plea and the rights that are being waived.⁸⁰ But when the plea itself is premised on ineffective assistance of counsel in preparing the case and negotiating the plea, the plea is anything but knowing or voluntary.⁸¹

Heath v. State illustrates how ineffective assistance of counsel at the plea stage can render the plea unknowing and involuntary.⁸² Richard Heath faced “fifteen counts of [causing] serious injury by [a] vehicle” in connection with a motor vehicle accident, and, due to his injuries, had no memory of the accident.⁸³ He told his lawyer that a co-worker, who was at the scene, may have been driving and gave defense counsel the name of the co-worker and where he believed the witness could be found.⁸⁴ Heath’s contract counsel failed to investigate who was driving the company truck at the time of the accident and instead negotiated a plea to three counts with a maximum sentence of thirty years, with Heath to serve between four and fifteen years.⁸⁵ Heath’s counsel told him he had no option but to plead guilty,⁸⁶ but that he could expect to be sentenced “at the lower end of the range.”⁸⁷ In fact, Heath received a fifteen-year sentence.⁸⁸ At the sentencing hearing defense counsel argued that Heath had been the driver, that he had been drinking, that he should not have been driving, and said, “There’s nothing I can say to excuse what Mr. Heath has done.”⁸⁹

Heath filed a motion to withdraw his plea asserting that it was not voluntary and intelligently entered due to defense counsel’s ineffective assistance.⁹⁰ Ultimately, the Georgia Court of Appeals found that defense counsel’s performance “was tantamount to no representation at all.”⁹¹ The

80. The defendant represented by a lawyer who has done nothing other than pressure the defendant into a guilty plea faces a Hobson’s choice during the plea colloquy when asked if he or she is satisfied with counsel’s representation. If the defendant answers no, then the court is likely not to accept the plea, thereby scrapping the deal. If, however, counsel has not done any factual investigation and is not ready for trial, then defendant cannot afford to risk going to trial with an unprepared lawyer and a likely conviction with a far harsher sentence. So the defendant will answer that he or she is satisfied with counsel regardless of how little counsel has done. A full exploration of the defendant’s dilemma, however, is beyond the scope of this essay.

81. See, e.g., *DeRoo*, 223 F.3d at 919.

82. *Heath v. State*, 574 S.E.2d 852 (Ga. Ct. App. 2002), *rev’d*, 588 S.E.2d 738 (Ga. 2003).

83. *Id.* at 853–54.

84. *Id.* at 854.

85. *Id.* at 853–54.

86. See *id.* at 854.

87. *Id.* at 853 (internal quotation marks omitted).

88. *Id.* at 853.

89. *Id.* at 854.

90. *Id.* at 853.

91. *Heath v. State*, 601 S.E.2d 758, 759 (Ga. Ct. App. 2004).

court found that but for counsel's woefully inadequate performance, Heath would not have pled guilty but would have gone to trial. His guilty plea, therefore, was vacated.⁹²

Undoubtedly, Richard Heath would have readily agreed to a waiver of all ineffective assistance of counsel claims as a condition of his plea bargain had the prosecutor included one in the plea package. Given his lawyer's lack of effort and the threat of a much harsher sentence if he were to go to trial, Heath really had no choice but to accept whatever the prosecutor demanded.

Heath's case highlights why the waiver of ineffective assistance claims as a condition of a negotiated plea is so troubling. Such waivers serve to negate the Sixth Amendment right to effective assistance of counsel by insulating counsel's incompetent representation during the plea bargaining stage from any judicial review. It is the equivalent of the prosecutor requiring a defendant to waive the right to counsel as a condition of a negotiated plea—there is little difference between having an ineffective lawyer and no lawyer. As the Seventh Circuit stated in *Jones v. United States*:

Justice dictates that a claim of ineffective assistance of counsel in connection with the negotiation of a cooperation agreement cannot be barred by the agreement itself—the very product of the alleged ineffectiveness. To hold otherwise would deprive a defendant of an opportunity to assert his Sixth Amendment right to counsel where he had accepted the waiver in reliance on delinquent representation.⁹³

The same rationale holds true with any negotiated plea—to bar a defendant from asserting a Sixth Amendment right to effective assistance of counsel based on a waiver that was part of a negotiated plea in which counsel was ineffective is simply unjust.

In *Hurlow v. United States*, the Seventh Circuit also refused to enforce a waiver of direct and collateral review of his plea and sentencing when the defendant “allege[d] that he entered the plea agreement based on advice of counsel that fell below constitutional standards.”⁹⁴ Hurlow claimed that his trial counsel was ineffective in failing to recognize that evidence was seized in violation of the defendant's Fourth Amendment rights.⁹⁵ Hurlow told his counsel of the facts that would have established the violation but his counsel refused to investigate the claim.⁹⁶ Hurlow also alleged that his decision to plead guilty was based on counsel's ineffectiveness because “counsel failed to

92. *Id.* at 763.

93. *Jones v. United States*, 167 F.3d 1142, 1145 (7th Cir. 1999).

94. *Harlow v. United States*, 726 F.3d 958, 966–67 (7th Cir. 2013).

95. *Id.* at 961.

96. *Id.*

inform him that a challenge to the search was possible, and instead ‘persuaded’ and ‘cajoled’ him into pleading guilty by telling him ‘that if [he] did not plead guilty, that [he] would [receive] 30 years to life imprisonment.’”⁹⁷

The Seventh Circuit’s analysis in *Hurlow* is important because it explicitly states that a defendant is not limited to asserting an ineffective assistance of counsel claim solely with regard to ineffective representation in negotiating the waiver, but that the defendant may assert ineffective representation leading to the plea itself.⁹⁸ The Seventh Circuit reasoned that this was consistent with Supreme Court authority that despite an unconditional guilty plea, a defendant may still attack the voluntary and intelligent nature of the plea if the defendant can demonstrate that the defendant “plead[ed] guilty on the advice of counsel that was not within the range of competence demanded of attorneys in criminal cases.”⁹⁹ As the Supreme Court has stated, “[T]he voluntariness of the plea *depends* on whether counsel’s advice ‘was within the range of competence demanded of attorneys in criminal cases.’”¹⁰⁰ In other words, the plea itself and the waiver are not knowing and intelligent if counsel’s ineffectiveness led to the guilty plea and waiver. Some state court decisions also reject waivers of ineffective assistance of counsel claims on these same grounds.¹⁰¹

In his concurring opinion in *Padilla*, Justice Alito acknowledged that “incompetent advice distorts the defendant’s decision making process and seems to call the fairness and integrity of the criminal proceeding itself into question.”¹⁰² In such instances, “it seems hard to say that the plea was entered with the advice of constitutionally competent counsel—or that it embodies a voluntary and intelligent decision to forsake constitutional rights.”¹⁰³ Alito’s reasoning is consistent with the view of the Seventh Circuit and other courts that when ineffective assistance of counsel leads to a guilty plea including a waiver of ineffective assistance of counsel claims, the plea

97. *Id.* at 967 (alteration in original).

98. *Id.* at 967–68.

99. *Id.* at 966 (quoting *Tollet v. Henderson*, 411 U.S. 258, 266 (1973)) (alteration in original) (internal quotation marks omitted).

100. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (emphasis added) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

101. *See, e.g., Yarbrough v. State*, 841 So. 2d 306, 308 (Ala. Crim. App. 2002) (“[B]ecause ineffective assistance of counsel may, in some circumstances, render a guilty plea involuntary . . . we believe that claims of ineffective assistance of trial counsel may also be raised . . . despite a waiver of collateral review.”); *Castro v. State*, 795 N.W.2d 789 (Iowa 2011) (explaining that the difference between an ineffective assistance of counsel claim that survives a waiver and one that does not is whether the defendant alleges that counsel’s ineffectiveness led to the defendant to enter the guilty plea with the waiver).

102. *Padilla v. Kentucky*, 559 U.S. 356, 385 (2010) (Alito, J., concurring).

103. *Id.* at 385–86.

and waiver are not knowing and intelligent and should not be enforced.¹⁰⁴ This is also consistent with Supreme Court authority that the waiver of any constitutional right must be knowing and intelligent.¹⁰⁵

Courts that have considered whether counsel has a personal conflict of interest in advising a client to waive ineffective assistance of counsel claims also have disapproved of such waivers.¹⁰⁶ For example, in *Watson v. United States*, the Eighth Circuit considered an explicit waiver of ineffective assistance of counsel in a negotiated plea agreement.¹⁰⁷ The *Watson* court declined to approve of the explicit waiver of ineffective assistance of counsel noting, “[e]thics opinions from various states have addressed whether a defendant’s attorney labors under a conflict of interest when advising a client to waive an ineffective assistance of counsel claim, with conflicting results.”¹⁰⁸ Instead of approving the waiver, the Eighth Circuit decided the ineffective assistance claim on the merits notwithstanding authority in the circuit suggesting that an explicit waiver of ineffective assistance of counsel claims should be upheld.¹⁰⁹ Similarly, a district court in the Third Circuit recently decided a claim of ineffective assistance of counsel on the merits rather than approving the waiver, observing that cases upholding such waivers “do not take into account the state bar ethics opinions to the contrary, many of which were decided only in the past two years.”¹¹⁰

In considering concurrent conflicts of interest that may be present when the same defense lawyer represents two or more co-defendants, the U.S. Supreme Court has acknowledged that trial courts

must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.¹¹¹

The premise of this cautious approach to concurrent conflicts of interest is that courts “have an independent duty to ensure that criminal defendants receive a trial that is fair and does not contravene the Sixth

104. See *supra* notes 90–93 and accompanying text.

105. See, e.g., King, *supra* note 75, at 656 n.29 (citing several U.S. Supreme Court cases that have approved defendants waiving a number of constitutional rights provided the waivers were knowing and intelligent).

106. See *infra* notes 107–10 and accompanying text (analyzing defense counsel’s personal conflict of interest in advising a client to waive ineffective assistance of counsel claims).

107. *Watson v. United States*, 682 F.3d 740 (8th Cir. 2012).

108. *Id.* at 744.

109. *Id.* at 743–45.

110. *United States v. Deluca*, Nos. 08-108, 10-3576, 2012 WL 5902555, at *10 (E.D. Pa. Nov. 26, 2012).

111. *Wheat v. United States*, 486 U.S. 153, 163 (1988).

Amendment.”¹¹² Courts have a similar duty to ensure that criminal defendants receive fair representation at the plea stage, and courts should not sanction waivers of ineffective assistance of counsel claims due to the personal conflict of interest of defense counsel in facilitating a client’s consent to such waiver.

In the end, the right to effective assistance of counsel under the Sixth Amendment serves two main purposes. First, it protects the accused by providing counsel to advise the defendant of his or her rights and ensures both in the context of a negotiated plea or trial that the defendant has an advocate in our adversary system of justice. Indeed, the right to effective assistance of counsel is critical to defendants’ ability to meaningfully exercise all their rights.¹¹³ Thus, underlying *Gideon* as well as *Padilla*, *Frye*, and *Cooper* is the fundamental premise that defense counsel will provide the defendant with competent advice and effective representation to enable the defendant to make a knowing and intelligent decision whether to accept a plea offer or go to trial.

Second, effective assistance of counsel also protects the integrity of the criminal justice system. As the Court pointed out in *Frye*, plea bargaining is “central to the administration of the criminal justice system” but if the benefits of such a system are to be “realized,” then “criminal defendants require effective counsel during plea negotiations.”¹¹⁴ The Sixth Amendment protections exist, therefore, not just to ensure “the fairness or reliability of [a] 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.”¹¹⁵

If counsel’s performance in representing the defendant at the plea stage falls below an objective standard of reasonableness, the defendant should be entitled to relief if the defendant is able to demonstrate a reasonable probability that the lawyer’s inadequate performance adversely affected his or her decision to enter the plea.¹¹⁶ The defendant should not be denied relief simply because the defendant’s plea agreement included a waiver of the right to complain about counsel’s ineffectiveness, especially when the very decision to enter into the plea agreement is based upon inaccurate advice by ill-prepared defense counsel who pressures the defendant into pleading guilty. To uphold a waiver of ineffective assistance of counsel claims that was a condition of a negotiated plea is fundamentally unfair because many defendants represented by incompetent counsel have

112. *Id.* at 161.

113. As Justice Stewart observed, “In an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel.” *Lakeside v. Oregon*, 435 U.S. 333, 341 (1978).

114. *Missouri v. Frye*, 132 S. Ct. 1399, 1407–08 (2012).

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

116. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

no viable choice other than to accept a plea offer even though it includes a waiver of the very right meant to protect all other rights—the right to effective assistance of counsel. Equally important, the widespread use of such waivers undermines the integrity of the system by leaving many defendants unprotected from the incompetent representation provided by an underfunded indigent defense system.

B. THE ETHICS OF WAIVERS OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Although courts are divided on the constitutionality of waivers of ineffective assistance of counsel claims, the overwhelming majority of state ethics authorities that have addressed this issue have found that such waivers are not ethical. Bar authorities in twelve states have addressed the ethics of defense counsel and prosecutors entering into plea agreements in which the defendant waives the right to pursue a claim of ineffective assistance of counsel, and ten of these opinions have found that the waivers pose serious ethical issues for defense counsel and, in some of the opinions, for prosecutors as well.¹¹⁷ Only two ethics committees have opined that such waivers do not violate their states' ethical rules.¹¹⁸

Ethics authorities in eight states (Alabama, Florida, Kentucky, Missouri, Nevada, North Carolina, Vermont, and Virginia) contend that defense counsel has an unwaivable personal conflict of interest, under the states' equivalent of Model Rule 1.7(a)(2),¹¹⁹ when advising a client about accepting a plea offer conditioned upon expressly waiving ineffective assistance of counsel. Model Rule 1.7(a) states that "a lawyer shall not represent a client if . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."¹²⁰ Personal interests under the ethics rule encompass financial, reputational, and other personal interests. A defense lawyer has a personal reputational interest in not having a court find that counsel's representation was ineffective. A finding of ineffective assistance of counsel also could lead to a malpractice suit or discipline by bar

117. In addition to the state bar advisory ethics opinion, the National Association of Criminal Defense Lawyers ("NACDL") issued a formal ethics opinion that "the rules of professional ethics prohibit a criminal defense lawyer from signing a plea agreement limiting the client's ability to claim ineffective assistance of counsel" due to a conflict of interest between the lawyer and client and because such a waiver could operate to limit liability to the client. NACDL Ethics Advisory Comm., Formal Op. 12-02 (2012).

118. See *infra* notes 126–29 and accompanying text.

119. Ky. Bar Ass'n, Advisory Ethics Op. KBAE-435 (2012); Prof'l Ethics of the Fla. Bar, Op. 12-1 (2012); Ala. State Bar, Formal Op. 2011-02 (2011); State Bar of Nev. Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 48 (2011); Va. State Bar, Legal Ethics Op. 1857 (2011); Advisory Comm. of the Supreme Court of Mo., Formal Op. 126 (2009); Vt. Bar Ass'n, Advisory Ethics Op. 95-04 (1995); N.C. State Bar, Ethics Op. RPC 129 (1993).

120. MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2011).

authorities.¹²¹ Thus, in counseling a client about waiving ineffective assistance of counsel claims, “it may be difficult or impossible for the lawyer to give a client detached advice” when there is such a personal conflict of interest.¹²² Many of these same jurisdictions also opine that a prosecutor who requires such waivers as a condition of a plea agreement violates the states’ equivalent of Model Rule 8.4(a), which prohibits a lawyer from inducing another to violate the ethics rules.¹²³

Ohio, Tennessee, and Vermont also find such waivers unethical on the ground that the waivers violate the rule against a lawyer limiting malpractice liability to a client, under the state equivalent of Model Rule 1.8(h).¹²⁴ In addition, North Carolina and Kentucky assert that a prosecutor violates the special responsibilities set forth in the state versions of Model Rule 3.8, Comment [1] to be a minister of justice imposed upon prosecutors by insisting on such waivers.¹²⁵

In contrast, ethics authorities in Arizona and Texas have decided that the ethics rules do not bar waivers of ineffective assistance of counsel claims. The Arizona committee limited its consideration to whether a waiver of claims of ineffective assistance of counsel was the equivalent of or raised the same concerns as an agreement between a lawyer and client in which the lawyer seeks to limit malpractice liability to the client. The ethics committee concluded that Arizona’s version of Model Rule 1.8(h) was “specific and unambiguous” and did not prohibit waivers of ineffective assistance of counsel claims.¹²⁶ The Arizona committee, however, did not address the underlying conflict of interest in counseling the client that other bar authorities found objectionable.

121. Most jurisdictions require that a defendant “seeking damages for malpractice causing a conviction must have had that conviction set aside.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 cmt. d (2000). If defense counsel recommends that the defendant waive the right to assert ineffective assistance of counsel claims, and if that waiver is upheld, then in most jurisdictions the defense lawyer is likely insulated from possible malpractice claims. In addition, a finding of ineffective assistance of counsel may be used by bar authorities as a predicate for imposing professional discipline. *See, e.g.*, Fla. Bar v. Sandstrom, 609 So. 2d 583, 584 n.1 (Fla. 1992) (finding that defendant’s murder conviction vacated due to ineffective assistance of counsel involved “flagrant lack of preparation and such deficient performance” to warrant defense counsel’s suspension); Attorney Grievance Comm’n of Md. v. Middleton, 756 A.2d 565 (Md. 2000) (finding that lawyer’s failure to move to suppress evidence, present favorable evidence, or prepare cross-examination of prosecution witnesses should result in discipline of defense attorney after defendant received post-conviction relief for ineffective assistance of counsel).

122. MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 10.

123. *Id.* R. 8.4(a).

124. Ohio Bd. of Comm’rs on Grievances & Discipline, Advisory Op. 2001-6 (2001); Bd. of Prof’l Responsibility of Supreme Court of Tenn., Advisory Ethics Op. 1994-A-549 (1994); Vermont Bar Ass’n, Advisory Ethics Op. 95-04.

125. *See* Kentucky Bar Ass’n Advisory Ethics Op. KBA E-435 (2012); North Carolina State Bar, Ethics Op. RPC 129 (1993).

126. State Bar of Arizona, Ethics Op. 95-08 (1995).

The Texas ethics committee considered the defense attorney conflict of interest issue under the Texas conflict of interest rule, which differs from Model Rule 1.7(a)(2) in that it identifies a personal conflict of interest as one that “reasonably appears to be or become adversely limited . . . by the lawyer’s or law firm’s own interests.”¹²⁷ The ethics committee concluded that defense counsel would have to determine on a case-by-case basis whether there was a conflict of interest and, in cases in which the lawyer concluded there was, “the defendant must be advised by separate counsel concerning the proposed waiver of post-conviction appeals based on claims of ineffective assistance of counsel.”¹²⁸ The Texas opinion also concluded that the Texas version of Model Rule 1.8(g) did not apply to a defense lawyer advising a client to waive claims of ineffective assistance of counsel.¹²⁹

Virtually all of these ethics opinions make clear that courts should be reluctant to recognize waivers of ineffective assistance of counsel claims that have the practical effect of insulating defense counsel from any potential liability or responsibility for breaching their duty of care for clients.¹³⁰ No professional should be permitted to require clients to give up their right to competent professional assistance in order to obtain that assistance. Rather, public policy demands that an injured client not be barred from seeking relief from harm caused by a professional’s negligence simply because the client was required to sign a waiver as a condition of receiving professional assistance. In the medical profession, a doctor is not permitted to insist that before treating a patient the patient must sign a waiver of the right to recover damages for medical malpractice. Any such agreement would be unenforceable on public policy grounds.¹³¹ If courts view the waiver of such rights by patients as unenforceable, they should also refuse to enforce waivers of ineffective assistance of counsel claims.

Recently, the ABA addressed the issue of waivers of ineffective assistance of counsel claims. In August 2013, the ABA House of Delegates adopted Resolution 113E, sponsored by the Criminal Justice Section, in which the ABA opposed plea agreements that require a defendant to waive post-conviction claims of ineffective assistance of counsel “unless based upon past

127. Supreme Court of Tex. Prof’l Ethics Comm., Op. 571 (2006) (quoting TEX. DISCIPLINARY RULES OF PROF’L CONDUCT 1.06(b)(2) (2005)).

128. *Id.*

129. *See id.*

130. *See supra* note 121 (explaining that a waiver of ineffective assistance of counsel claims has the practical effect of both barring a legal malpractice claim against defense counsel and insulating defense counsel from professional discipline for failing to provide competent representation).

131. *See, e.g.,* *Kozan v. Comstock*, 270 F.2d 839, 845 (5th Cir. 1959) (“Certainly, a physician could not avoid liability for negligent conduct by having contracted not to be liable for negligence. The duty is owed in all cases, and a breach of this duty constitutes a tort.”); *Meiman v. Rehab. Ctr., Inc.*, 444 S.W.2d 78, 80 (Ky. 1969) (voiding a patient contract not to sue medical facility as invalid and against public policy).

instances of such conduct that are specifically identified in the plea or sentencing agreement or transcript of the proceedings.”¹³² The resolution also requires that a defendant be provided with independent counsel before being permitted to waive ineffective assistance of counsel claims and urges judges to reject pleas that contained waivers addressing ineffective assistance of counsel claims unless based upon past conduct specifically identified in the plea agreement or transcript of the proceedings.¹³³

By limiting the waivers to past conduct identified in the plea agreement or on the record, the resolution seeks to prohibit both waivers of past ineffective assistance of counsel claims not disclosed to the defendant and the court as well as prospective waivers of claims relating to ineffectiveness of defense counsel that may occur after the plea, such as during sentencing or failing to challenge a breach of the plea agreement by the prosecutor. The provision that the defendant have independent counsel to advise the defendant concerning the plea waiver is a measure to avoid the personal conflict of interest a defense lawyer may have in counseling a client to waive claims of ineffective assistance of counsel.

An ABA resolution reflects a policy position by the ABA, and what effect it may have on this issue and debate is unknown. Yet, the ABA position embraces the type of public policy that courts should adopt. Waivers of ineffective assistance of counsel claims should only be permitted if there truly are adequate safeguards in place to ensure that the defendant has received effective assistance of counsel at the plea stage.

The ABA position requires independent advice of counsel before a waiver of ineffective assistance of counsel claims is accepted. As a practical matter, though, this position is likely workable only in rare cases. First, indigent defense services are woefully underfunded and the cost of requiring a second lawyer every time there is a waiver of ineffective assistance of counsel claims would likely be too costly to implement. Second, to counsel a client effectively on whether to enter into the plea agreement with such a waiver, independent counsel would have to review the client’s file including all of the work of the defense counsel, independently review discovery, discuss possible defenses with the client, and, in many instances, conduct his or her own investigation into facts and law. In other words, to advise a client competently and effectively would require independent counsel to duplicate much of the work of primary counsel and, in some instances, to do even more.

132. ABA Res. 113E (2013), available at <http://www.americanbar.org/content/dam/aba/images/news/PDF/113E.pdf>; see also ABA, REPORT ON THE ABA ANNUAL MEETING (2013), available at www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2013_hod_annual_meeting_select_committee_report.docx.

133. ABA Res. 113E, *supra* note 132.

Given the split of authority on this issue in the federal circuits and increasing attention to this issue,¹³⁴ the Supreme Court will likely consider whether a waiver of ineffective assistance of counsel claims should be enforced. Ultimately, the Court should not enforce waivers of ineffective assistance of counsel claims for several important reasons. The criminal justice system needs to have a relief valve for those defendants prejudiced by the unreasonable performance of defense counsel. The high bar *Strickland* sets will continue to block most claims because of the difficulty that most defendants will have to demonstrate the reasonable probability that their counsel's ineffective representation adversely affected the outcome in the case. Nonetheless, defendants like Jose Padilla, Galin Frye, and Richard Heath should not be precluded from obtaining relief merely because they were compelled to agree to a waiver of ineffective assistance of counsel claims as a condition of their plea agreements.

CONCLUSION

Bad lawyering for criminal defendants with little or no money is endemic in our criminal justice system. Funding for indigent defense is insufficient, often resulting in unrealistic caseloads. Quite often, defense counsel does not adequately investigate or prepare cases. It is extremely hard to detect and remedy bad lawyering, especially at the guilty plea stage, because often there is little record of what defense counsel has or has not done. Allowing prosecutors to require waivers of ineffective assistance claims in the context of guilty pleas simply exacerbates this situation.

Although some hope that *Padilla*, *Frye*, and *Cooper* signal a willingness on the part of the Court to breathe new life into *Gideon*, we believe that hope is misplaced. The Court has long operated on the misguided view that in the give-and-take of the negotiation process, the prosecution and the defense “arguably possess relatively equal bargaining power.”¹³⁵ It follows, therefore, that the Court incorrectly assumes plea bargaining provides a “mutuality of advantage” to defendants and prosecutors both with different reasons for wanting to avoid trial.¹³⁶ Unfortunately, the Court's willingness to accept the legitimacy of plea bargaining is not only based on this flawed assumption about relatively equal bargaining power, but also on the belief that “[d]efendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in

134. See, e.g., Editorial, *Trial Judge to Appeals Court: Review Me*, N.Y. TIMES (July 16, 2012), <http://www.nytimes.com/2012/07/17/opinion/trial-judge-to-appeals-court-review-me.html> (calling waivers of ineffective assistance of counsel “outrageous” and noting that without appellate review the system of pleas “looks more like a system of railroading”).

135. *Bordenkircher v. Hayes*, 434 U.S. 357, 362–63 (1971) (quoting *Parker v. North Carolina*, 397 U.S. 790, 809 (Brennan, J., concurring in part and dissenting in part)).

136. See *id.* at 363 (citing *Brady v. United States*, 397 U.S. 742, 752 (1970)).

response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation.”¹³⁷

For too many defendants, however, the protection of procedural safeguards is meaningless if counsel is not ready, willing, and properly prepared to go to trial. These defendants do not receive the nuanced advocacy based on strategic calculations described by the *Premo* court. Instead, too many are forced to accept the plea deal offered along with whatever conditions the prosecutor mandates.¹³⁸ For defendants like Christopher Ochoa, what the Court characterizes as “persuasion” is pressure so powerful that it induces even the innocent to falsely condemn themselves and plead guilty.

Admittedly, the current system does work to the benefit of many criminal defendants who receive a discounted sentence as a result of a plea bargain. Even though many of these defendants receive only the limited assistance of counsel at the plea stage, they will be reluctant to seek to overturn their plea bargain for fear of receiving a less beneficial plea bargain offer or higher sentence if their plea is vacated and remanded for trial. Yet there are a significant number of other defendants, especially the innocent, who do not receive any “mutuality of advantage” by a system that largely robs them of any ability to go to trial. For these defendants, the right to effective assistance of counsel during plea bargaining is unlikely to ever benefit them.

Plea bargaining is the lifeblood of a criminal justice system that is seriously underfunded in many jurisdictions. Given the Court’s commitment to stability and the certainty of the plea process,¹³⁹ the Court is highly unlikely to disrupt that system by overturning a significant number of guilty pleas even though defense counsel did little to nothing before recommending the client accept the plea offer. Perhaps the Court might be more receptive to ineffective assistance claims if the justices believed that our current system, in fact, was pressuring a significant number of innocent persons to plead guilty or producing a disturbing number of wrongful convictions. Apparently, however, the Court views the conviction of the innocent as a rarity,¹⁴⁰ even though exonerations prove that the innocent

137. *Id.*

138. See Green, *supra* note 10, at 741–46.

139. *Premo v. Moore*, 131 S. Ct. 733, 745 (2011).

140. For example, during one oral argument Justice Scalia expressed this point of view by stating:

I—I don’t think our system ever encourages or, indeed, even permits an innocent person to plead guilty. Our rules require the judge to—to interrogate the person pleading guilty to make sure that, indeed, the person is guilty. There is nothing in our system that encourages or even allows an innocent person to—to plead guilty. And I would be horrified if—if there was something like that.

are not only convicted at trial, but that some, like Christopher Ochoa, plead guilty.¹⁴¹

Compounding these systemic barriers to effective assistance of counsel at the plea stage is the increased use of waivers of ineffective assistance of counsel claims. Prosecutors, the courts, and the public have a right to the certainty and finality of pleas, but there needs to be some check on substandard lawyering that objectively prejudices a defendant. Recognizing the legitimacy of a waiver that prevents defendants from gaining relief—when they were denied the representation that *Gideon* promised them in the first place—would eliminate the Court’s ability to take the kind of corrective actions that it did in *Padilla* and *Frye*. Legitimizing such waivers not only would run directly contrary to the Court’s perceived need for some regulation of the plea bargaining process, but it also would virtually immunize bad lawyering during the plea process from any judicial review. Thus, if such waivers are deemed to be constitutionally acceptable, the Court will have failed to uphold its constitutional responsibility to ensure that no criminal defendant is left to the “mercies of incompetent counsel,”¹⁴² and the promise of effective assistance at counsel at the plea bargaining stage will be more elusive for even more criminal defendants.

Transcript of Oral Argument at 26, *United States v. Ruiz*, 536 U.S. 622 (2002) (No. 01-595) (responding to counsel’s argument that plea bargaining provides incentives for innocent defendants to plead guilty).

141. *Supra* notes 60–71 and accompanying text.

142. *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).