NOTE

REGULATING THE NEW GOLD STANDARD OF CRIMINAL JUSTICE: CONFRONTING THE LACK OF RECORD-KEEPING IN THE AMERICAN CRIMINAL JUSTICE SYSTEM

STEPHANIE STERN

Despite recent Supreme Court decisions acknowledging the constitutional importance of plea-bargaining to the criminal justice system, defendants' Sixth Amendment rights remain unprotected at the plea-bargaining stage due to the lack of record-keeping. This article illustrates the problems that stem from the lack of sufficient record-keeping during the plea bargaining stage and offers avenues for change. In particular, this article looks to the legislature to provide a solution in one of three ways: third-party reporting; mandatory reporting by defense counsel; or instituting a bench trial system in lieu of most plea bargains.

I. INTRODUCTION

In May of 2009, Angel Beauchamp was found guilty of robbery and unlawful imprisonment, and was sentenced to twenty years in prison.[1] Beauchamp later claimed that his attorney never conveyed to him the prosecutor's plea bargain of eight years in exchange for a guilty plea.[2] Beauchamp's defense attorney had a different version of the events. The defense attorney claimed that she presented the offer to Beauchamp several times, but he "consistently expressed throughout the course of [her] representation of him that he had no interest whatsoever in entering into a plea-bargain."[3] The court ultimately dismissed Beauchamp's version of the events because it was "contradicted by [defense counsel's] sworn affidavit," which the court found to be much more credible than Beauchamp's "self-serving and improbable" claims.[4] Without a record of the events that occurred behind closed doors, Beauchamp's potentially legitimate claims were stifled because he seemed less credible than his counsel.

Ninety-seven percent of federal convictions and ninety-four percent of state convictions result from plea-bargaining.[5] In recognition of how massively important plea-bargaining is to the American criminal justice process,

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[1] Beauchamp v. Perez, No. 13 Civ. 2452(AKH), 2014 WL 2767208, at *2 (S.D.N.Y. April 30, 2014).

[2] *Id.* at *5, *1.

[3] *Id.* at *1.

[4] *Id.* at *6–*7.

[5] Bill Mears, *Justices Say Defendants Who Get Bad Advice on Plea Bargains Deserve Relief*, CNN JUSTICE (Mar. 21, 2012, 1:18 PM), http://www.cnn.com/2012/03/21/justice/scotus-plea-bargains/, *archived at* http://perma.cc/Z8X5-3BUP.

the Supreme Court recently acknowledged plea-bargaining as a constitutionally protected area of the criminal process.[6] Still, the only Sixth Amendment protection the Court has afforded to defendants who plead guilty is the right to effective assistance of counsel.[7] Yet the Court's decision to extend constitutional protections to the plea-bargaining stage signals the potential for further change by a court system that, until recently, has been tied to the idea of the trial as the main means of vindicating defendants' rights.[8]

The Sixth Amendment protection afforded by the Court for pleading defendants does little to protect defendants like Beauchamp, however, due to one unfortunate aspect of plea-bargaining—the complete lack of record-keeping. Because plea-bargaining occurs almost exclusively behind closed doors, defendants have no record of events to aid them when they claim a violation of their constitutional right to effective assistance of counsel. Without a record to back up the asserted violations, defendants are unlikely to succeed on appeal, regardless of the veracity of their claims. As such, the limited constitutional protection recently afforded by the Supreme Court is left unfulfilled. A first step to enhancing effective assistance of counsel protections is instituting a record-keeping process. This paper will examine the various actors who might institute a record-keeping process and propose several statutory solutions to the problem, all with the goal of fulfilling the Court's promise of Sixth Amendment protections at the plea-bargaining stage. In particular, the most feasible solution for providing an accurate record of plea-bargaining events is the institution of third-party reporting.

II. Background: *Lafler* and *Frye*

After decades of viewing the trial as the main stage of criminal justice,[9] the Supreme Court finally acknowledged in 2012 "the reality that criminal justice today is for the most part a system of pleas, not a system of trials."[10] Foreshadowed by the Court's 2010 decision in *Padilla v. Kentucky*,[11] in which the majority found counsel constitutionally deficient for misinforming the defendant about the immigration consequences of his guilty plea,[12] the Court's official recognition of the plea-bargaining stage as a constitutionally

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[6] *See* Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012); Missouri v. Frye, 132 S. Ct. 1399, 1404 (2012).

[7] *See* Frye, 132 S. Ct. at 1405.

[8] *See* Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. Crim. L. & Criminology 1, 10 (2013) ("By 1925, almost 90% of criminal convictions were the result of guilty pleas . . . . Though plea-bargaining rates rose significantly in the early twentieth century, appellate courts were still reluctant to approve such deals when appealed.").

[9] *See* Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Calif. L. Rev. 1117, 1122–23 (2011).

[10] *Lafler*, 132 S. Ct. at 1381.

[11] 130 S. Ct. 1473 (2010).

[12] *Id.* at 1494.

protected area of the conviction process was nonetheless a watershed moment. This novel shift in precedent occurred in the Court's resolution of two cases regarding ineffective assistance of counsel at plea-bargaining: *Lafler v. Cooper* and *Missouri v. Frye*.

The respondent in *Lafler* was originally arrested for shooting a woman in the buttock, hip, and abdomen.[13] The respondent was charged with "assault with intent to murder, possession of a firearm by a felon, possession of a firearm in the commission of a felony, misdemeanor possession of marijuana, and for being a habitual offender."[14] The prosecution twice offered to dismiss two of the charges and recommend a lesser sentence of 51 to 85 months if the defendant pled guilty.[15] The defendant rejected all plea attempts, and was eventually convicted on all counts and received a mandatory minimum sentence of 185 to 360 months.[16] Afterward, the defendant filed a habeas petition claiming ineffective assistance of counsel due to the inaccurate legal information he was provided. The defendant's attorney incorrectly advised the defendant that intent to murder could not be established because the defendant had shot the woman below the waist.[17]

To prove ineffective assistance of counsel, a defendant generally must show that "counsel's performance was deficient" and "that the deficient performance prejudiced the defense."[18] All parties agreed that defense counsel's performance was ineffective,[19] and therefore the only contested issue was whether there was prejudice to a defendant who, after rejecting a guilty plea, received a full and fair trial.[20] The Solicitor General argued that there could be no prejudice to the defendant because a "fair trial wipes clean any deficient performance by defense counsel during plea-bargaining."[21] Prior Supreme Court jurisprudence aligned with the Solicitor General's view that the trial, not the plea bargain, is the "gold standard of American justice,"[22] and a fair trial is all that is required of the criminal justice system.[23] Despite the precedent supporting the Solicitor General's argument, the Court ultimately rejected the assertion that a fair trial can make up for a botched guilty plea.[24]

The Court's conclusion seemed to stem from a general disillusionment with the ideal of a trial by jury—with "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions . . . the result of guilty pleas"[25] the Court could no longer pretend that a sentence received

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[13] *Lafler*, 132 S. Ct. at 1383.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] Strickland v. Washington, 466 U.S. 668, 687 (1984).
[19] *Lafler*, 132 S. Ct. at 1384.
[20] *Id.* at 1385.
[21] *Id.* at 1388.
[22] *Id.* at 1398 (Scalia, J., dissenting).
[23] Bibas, *Regulating*, *supra* note 9, at 1122.
[24] *Lafler*, 132 S. Ct. at 1388.
[25] *Id.*

after trial was the fair sentence. The Court reasoned that when almost all criminal defendants get a lesser, plea-bargained sentence, that reduced sentence in effect becomes the standard price to pay for the crime committed—not merely a windfall to the defendant.[26] Thus, when the defendant in *Lafler* received a sentence three-and-a-half times the length of the plea bargain sentence offered by the prosecutor, the defendant did not receive a fair outcome simply because he got a trial—his ineffective counsel led to a sentence substantially greater than the norm.[27] That the defendant would have pled guilty but for counsel's inaccurate information and he would have received a significantly lesser sentence had he pled guilty were enough to prove prejudice—despite the full and fair trial the defendant received.

Decided the same day as *Lafler*, *Frye* involved a respondent who was originally arrested for driving with a revoked license.[28] The prosecutor offered two separate plea bargains to the respondent, including a proposal to recommend a 90-day sentence in exchange for a guilty plea. The defense counsel did not, however, inform Frye of these offers, and they expired. Less than a week before trial Frye was arrested once again for driving with a revoked license.[29] Frye eventually pled guilty with no underlying plea agreement and was given a three-year sentence.[30]

Afterwards, Frye brought an ineffective assistance of counsel claim. The State objected to the petition, arguing that since a defendant has no right to receive a plea offer in the first place, no objection could be made when defense counsel forgets to deliver the plea.[31] While the Court acknowledged that defendants do not have a right to receive a plea bargain, it nonetheless concluded 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."[32] The Court thereby indicated that defense counsel would be required to meet certain concrete standards at the plea-bargaining stage—including, at a bare minimum, actually delivering the plea offer.

Outside of requiring defense counsel to actually deliver a plea offer, however, the Court in *Frye* did not provide any further guidance as to what is required of attorneys at the plea-bargaining stage. Indeed, in addressing the deficient performance prong of the *Strickland* test, the Court acknowledged that determining ineffective assistance of counsel at the plea-bargaining stage was a difficult task since "[t]he art of negotiation is at least as nuanced as the art of trial advocacy."[33] Although the Court noted that codi-

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[26] *See* Bibas, *Regulating*, *supra* note 9, at 1138 ("The expected post-trial sentence is imposed in only a few percent of cases. It is like the sticker price for cars: only an ignorant, ill-advised consumer would view the full price as the norm and anything less as a bargain.").

[27] *Lafler*, 132 S. Ct. at 1386.

[28] Missouri v. Frye, 132 S. Ct. 1399, 1404 (2012).

[29] *Id.*

[30] *Id.*

[31] *Id.* at 1407.

[32] *Id.* at 1408.

[33] *Id.* (quoting Premo v. Moore, 131 S. Ct. 733, 741 (2011)).

fied standards of professional practice—such as American Bar Association recommendations—might be useful guides in assessing counsel's performance at the bargaining stage, the Justices emphasized that this "case presents neither the necessity nor the occasion to define the duties of defense counsel in those respects."[34] Since the Supreme Court declined to codify other defense counsel requirements, the only formal requirement set for defense counsel in *Frye* was the "duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."[35]

With regard to the prejudice prong of the test, the Court concluded that since Frye ultimately pled guilty to a more serious charge, he would have accepted the earlier, more favorable plea bargain.[36] Although it was clear to the Court that Frye would have accepted the first plea bargain, the Justices nevertheless remanded the case to the Court of Appeals to address another necessary aspect of the prejudice prong—whether there was a "reasonable probability that the prosecution would have adhered to the agreement and that it would have been accepted by the trial court."[37] The Supreme Court left unclear how exactly the defendant is supposed to prove this aspect of prejudice, and what the lower federal courts should take into consideration when making a decision regarding this rule.

Together, *Lafler* and *Frye* revolutionized the plea-bargaining process by imposing Sixth Amendment protection onto a process that had formerly been almost entirely unregulated. At a minimum, *Lafler* imposes on counsel a requirement to communicate formal plea offers to defendants, while *Frye* requires counsel not to provide false information that affects the defendant's decision regarding a guilty plea. The American Bar Association outlines additional standards that might be imposed on defense counsel at the plea-bargaining stage, including advising the defendant of "the maximum possible sentence on the charge,"[38] that a previous conviction subjects the defen-

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[34] *Id.*

[35] *Id.* Notably, however, divorce proceedings suggest that negotiations generally can be regulated effectively. Professor Mnookin and Professor Kornhauser argue that divorce negotiations occur in the shadow of the law, and this reliable set of legal rules allows couples to more or less predict the outcome of the case before they go to trial. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950, 968 (1979). Because the rules of divorce court are reliably and predictably applied, couples can more easily guess the outcome of their case given a set of facts. Consequently each side bargains to maximize their preferred outcome, rather than receiving the court-mandated outcome. *Id.* at 987. Thus, the shadow of the law determines the outcome of bargains because both parties are influenced by a reliable trial prediction. *Id.* at 968. In plea-bargaining, however, both structural and psychological pitfalls result in bargains that are made outside of the shadow of the trial. Therefore, while many bargains, such as divorce proceedings, are regulated by the shadow of the law, plea bargains cannot be based on the same model due to a variety of differences that skew the process. *See* Bibas, *Regulating*, *supra* note 9, at 1124.

[36] *Frye*, 132 S. Ct. at 1411.

[37] *Id.*

[38] ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY, Standard 14- 1.4(a)(ii) (1999).

dant to a "different or additional punishment,"[39] and "that by pleading guilty the defendant generally waives the right to appeal."[40] As of yet it is unclear whether courts will require greater and more exacting standards of counsel—thereby increasing oversight of a process formerly left in the shadows. Even before additional standards can be developed and imposed, however, there is one enormous hurdle preventing defendants from benefitting from the constitutionalization of plea-bargaining—the lack of any record of plea bargain discussions. Because plea bargains still largely occur behind closed doors and off the record, the ability of defendants to prove constitutionally deficient performance is almost impossible—especially given courts' historic deference to defense counsel conduct.[41]

III. The Lack of Record-Keeping During Plea-Bargaining: Why *Lafler* and *Frye's* Promises Remain Unfulfilled

Lack of oversight over defense counsel conduct during plea-bargaining, arguably the most important stage of the criminal justice process in the defendant's eyes, is a huge problem. Overburdened counsel may be tempted to cut corners at the plea-bargaining stage not only to lighten their workload, but also to maintain friendly relationships with judges and prosecutors by not pushing too hard in opposition to a plea deal.[42] *Lafler* and *Frye* attempted to provide a solution to this problem by setting standards that defense counsel must meet at plea-bargaining—thereby ensuring that at least some of the most basic aspects of effective plea-bargaining are met. Scrutinizing defense counsel at the plea-bargaining stage should, theoretically, raise the caliber of lawyering that occurs during the plea process—the only real legal representation most defendants will ever receive before being convicted.[43]

The goal of *Lafler* and *Frye* is, however, entirely frustrated by the fact that plea conferences are private affairs. As a result, unless counsel is willing to admit his serious failings as an attorney, the only evidence the defendant can generally bring forward in his ineffective assistance of counsel claim is his own testimony that the lawyer failed to communicate the plea offer, or misinformed the defendant about the law, or any number of other plea-bargaining failures that would only occur behind closed doors.[44] Consequently, a typical claim of ineffective assistance of counsel during plea-bargaining

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[39] *Id.* at Standard 14- 1.4(a)(iii).

[40] *Id.* at Standard 14- 1.4(a)(vi).

[41] Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 Harv. L. Rev. 150, 163 (2012).

[42] *See* Rishi Batra, Lafler *and* Frye*: A New Constitutional Standard for Negotiation*, 14 Cardozo J. Conflict Resol. 309, 318 (2013).

[43] *See id.* at 317.

[44] *See* Albert W. Alschuler, Lafler *and* Frye*: Two Small Band-Aids for a Festering Wound*, 51 Duq. L. Rev. 673, 683–84 (2013). Although the court might struggle to enforce an ineffective assistance of counsel claim, it still can enforce discovery requests, deadlines, and *Brady* obligations.

will result in a battle between the lawyer's version of events and the defendant's.[45] In this he-said, she-said debate, the judge is likely to find the lawyer's tale more persuasive and credible.[46]

Judge Willie Louis Sands of the Middle District of Georgia highlighted the unresolved questions that the lack of record leaves behind, noting that "[t]here will always be the question, sometimes legitimate, did the defendant really understand? Did he reject or accept the bargain knowingly and voluntarily? Was his rejection substantially affected by counsel's ineffective plea bargaining?"[47] Without a record, courts are generally going to believe the defense attorney's account—and as a consequence, defendants are rarely going to be able to prove ineffective assistance of counsel at the plea-bargaining stage. The lack of a record thereby stymies the watershed holdings of *Lafler* and *Frye*. Indeed, the ability to maintain a record of counsel's conduct was one of the reasons the Court preferred to standardize justice based on trials rather than plea bargains. A trial, unlike a plea bargain, "provides the full written record and factual background that serve to limit and clarify some of the choices counsel made."[48]

If the promise of Sixth Amendment protections at the plea-bargaining stage is ever to be realized, some kind of record of the events that occur during plea-bargaining is necessary. As outlined below, any one of the three branches of government could formulate and implement a record-keeping rule, and this rule could take any number of forms.

IV. Avenues for Implementing Record-Keeping Reform: The Executive, The Judiciary, or the Legislature

A. Judicial Reform

Arguably, the judiciary could intervene at the plea-bargaining stage to ensure that defendants' Sixth Amendment rights are vindicated. The state

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[45] *See, e.g.*, United States v. Stockton, Criminal No. MJG–99–0352, 2012 WL 2675240, at *8, *14 (D. Md. July 5, 2012) (crediting the defense attorney's version of events, despite finding that his "memory of details of this specific case was sketchy").

[46] *See, e.g.*, Miller v. Thaler, 714 F.3d 897, 899–903 (5th Cir. 2013) (*Strickland* appeal denied as the defense attorney's account was more credible than the defendant's; defense attorney stated that he "communicated to [the defendant] the final offer from the District Attorney's office"); Weston v. United States, Nos. 11 Civ. 2151(PKC), 04 Cr. 801(PKC), slip op. at 4–5 (S.D.N.Y. Sept. 2, 2014) (noting that although the defendant claimed that his attorney misled him, the defense counsel "stated that he timely informed [the defendant] of the plea offer before trial," and ultimately concluding that the defendant's version of events was "highly implausible"). Hardison v. United States, No. 3:07–CR–10–3–R, 2012 WL 6839716, at *13 (W.D. Ky. Oct. 26, 2012) (finding the defense attorney's "version of events to be the far more credible one under the circumstances that existed at the time").

[47] W. Louis Sands, *Plea Bargaining After* Frye *and* Lafler*, a Real Problem in Search of a Reasonable and Practical Solution (Meeting the Challenges of* Frye *and* Lafler*)*, 51 Duq. L. Rev. 537, 548 (2013).

[48] Premo v. Moore, 131 S. Ct. 733, 745 (2011).

and federal courts could, for example, determine and apply local standards that a competent attorney must meet to pass the *Strickland* test at the plea-bargaining stage.[49] Alternatively, the Supreme Court might eventually lay out additional standards for defense counsel conduct during the plea-bargaining stage. These novel standards would consist both of rules regarding a lawyer's substantive preparation for plea-bargaining and effectiveness during the negotiation process, as well as rules regulating what information a lawyer must provide to his or her client.

After setting up criteria lawyers must meet, judges could then question both the defense counsel and the defendant to determine whether they met these new standards—and if they found the plea bargain lacking, judges could nullify the plea bargain and proceed to trial, or send the lawyers back to further clarify the plea bargain to clients. This would not preserve the original record, but would provide testimony of what happened behind closed doors—testimony defendants could use on appeal.

Notably, judges do already question defendants about their knowledge of the plea-bargain—typically asking them if they understand the rights they are giving up and the power of the judge to override the deal.[50] This questioning has been roundly criticized for being a stale formality that does nothing to determine whether or not the defense attorney has actually conveyed to the defendant any relevant information regarding the plea bargain.[51] In order for an accurate and usable record to be created, judicial questioning would not only have to be more thorough, it would also have to be more tailored to the defendant's individual circumstances, including his crime, intelligence, and criminal history. Thus, each record would uniquely capture the circumstances of the defendant and thereby be more relevant than the current practice of engaging in standardized questioning during a public plea colloquy.

Relying on judicial intervention is, however, misguided for two main reasons: first, Rule 11 of the Federal Rules of Criminal Procedure ("FRCP") prohibits judicial intervention in plea-bargaining; and second, judicial intervention is a precarious, slow, and unsystematic mechanism for sweeping change.

Rule 11 of the FRCP prohibits judges from participating in plea bargain discussions.[52] This prohibition was included to ensure that a defendant never

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[49] *See* Batra, *supra* note 42, at 319 (arguing for judicial intervention in setting up standards for lawyers at the plea-bargaining stage).

[50] FED. R. CRIM. P. 11(b)(1) ("Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court.").

[51] Bibas, *Regulating*, *supra* note 9, at 1124 (Under Rule 11, "[t]he judge need mention only the rights being waived, the nature of the charges, the maximum and minimum penalties, and the vague existence of sentencing guidelines, and elicit a minimal factual basis for the plea. Judges need not opine on the likelihood of conviction, the probable sentence within the range, or the advisability of the bargain.").

[52] FED. R. CRIM. P. 11(c)(1).

felt induced to plead guilty rather than anger the judge who could later preside over his trial.[53] The prohibition also allays the concern that judicial involvement in a plea will inhibit the judge's objective assessments of the voluntariness of the defendant's guilty plea.[54] Rule 11 thereby attempts to address the risk that judicial participation in the plea negotiation will: (1) interfere with the judge's ability to objectively preside over the later trial or plea hearing, and (2) coerce defendants into pleading guilty.[55] The Federal Advisory Committee for this section of Rule 11 specifically noted the judge's "awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence."[56] Through Rule 11, the legislature has prohibited judges from participating in plea-bargaining in order to avoid the negative consequences of judicial intervention. Along with the legislature, the judicial branch also recognizes the danger that judicial intervention in plea-bargaining will "transform the court from an impartial arbiter to a participant in the plea negotiations."[57]

Due to the feared dangers of judicial intervention, the legislature's express instructions for judges not to participate in plea-bargaining, and judicial precedent, judges have strong incentives to employ a hands-off approach to plea-bargaining. Indeed, judges have repeatedly expressed a reluctance to get substantially involved in plea negotiations for fear of skewing the process.[58] As the judge in *United States v. Kyle*[59] noted, Rule 11 prevents judges from "shaping plea bargains or persuading the defendant to accept particular terms."[60] Judicial precedent demonstrates that judges do not want to substantially interject themselves into plea negotiations. However, in order to maintain a judicial record of the plea bargain, judges would necessarily have to

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[53] *See* United States v. Davila, 133 S. Ct. 2139, 2146 (2013).

[54] *Id.*

[55] *See* Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 203 (2006).

[56] FED. R. CRIM. P. 11 (1974 amendment) (quoting United States ex rel. Elksnis v. Gilligan, 256 F. Supp. 244, 254 (S.D.N.Y. 1966)).

[57] United States v. Kraus, 137 F.3d 447, 455 (7th Cir. 1998); *see also Davila*, 133 S. Ct. at 2146; *Gilligan*, 256 F. Supp. at 254.

[58] *See* United States v. Bradley, 455 F.3d 453, 460 (4th Cir. 2006) ("[P]rohibiting judicial participation in plea negotiations also 'preserve[s] the judge's impartiality' both during and after the plea negotiations. Without this prohibition there is 'a real danger that a judge's neutrality can be compromised.'") (quoting United States v. Bruce, 976 F.2d 552, 557 (9th Cir. 1992)) (internal citation omitted); United States v. Crowell, 60 F.3d 199, 203 (5th Cir. 1995) ("When a court goes beyond providing reasons for rejecting the agreement presented and comments on the hypothetical agreements it would or would not accept, it crosses over the line established by Rule 11 and becomes involved in negotiations."); Boyd v. United States, 703 A.2d 818, 821 (D.C. 1997) ("Judicial intervention is proscribed because a judge's participation in plea negotiations is 'inherently coercive.'") (quoting United States v. Barrett, 982 F.2d 193, 194 (6th Cir. 1992)).

[59] 734 F.3d 956 (9th Cir. 2013).

[60] *Id.* at 963 (quoting United States v. Frank, 36 F.3d 898, 902 (9th Cir. 1994)).

investigate what happens behind closed doors. Congress could potentially remedy this problem by either giving the judiciary a directive to question plea bargains more thoroughly or by amending Rule 11. Nonetheless, at present, due to Rule 11 and its reasoning, judges are reluctant to actively question a plea bargain in the manner required to preserve a record of the events that could be used on appeal.

Not only is the judiciary unlikely to participate in plea-bargaining to create a record of attorney conduct, it is also not the most effective branch to provide uniform and ordered change to the plea-bargaining process. If the lower courts implemented systems of intensive inquiry into plea bargains, inevitably a variety of different rules will be enforced depending on jurisdiction.[61] Some jurisdictions may forcefully inquire into backdoor plea-bargaining dealings, while others will simply take the word of the defense attorney at face value. Thus, even if some judges did intervene in plea-bargaining to create standards for defense attorneys, it would result in a disorderly and confusing system. Even in states where questioning of the defendant and the defense counsel about the plea bargain was thorough and based on the circumstances of each individual case, unless the judge asks the defense counsel to recount every step he took from the moment he received the case until he entered a guilty plea, it seems unlikely that an ex post facto judicial record will do much to provide defendants with a usable record of events for appeal.[62]

B. Executive Change

The Executive branch also has the power to set up and enforce standards for defense attorneys via its control over prosecutors. Prosecutors have an ethical duty to "seek justice, not merely to convict."[63] The Supreme Court has long held that a prosecutor's "interest . . . in a criminal prosecution

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[61] Notably, some state systems have diverged from the federal rule that judges may not interfere with plea negotiations. For example, the Florida Supreme Court held that a judge is allowed to "discuss potential sentences and comment on proposed plea agreements," but the court may not "initiate a plea dialogue." State v. Warner, 762 So.2d 507, 513–14 (Fla. 2000). Similarly, the Connecticut Supreme Court has recognized that "[i]t is a common practice in this state for the presiding criminal judge to conduct plea negotiations with the parties." State v. Revelo, 775 A.2d 260, 268 n.25 (Conn. 2001). If the judge does participate in plea negotiations and no agreement is reached, however, Connecticut precedent mandates that the judge "involved in the plea negotiations will play no role in the ensuing trial." *Id.* at 268. There have already been a variety of standards set up regarding how much a judge ought to participate in plea-bargaining. *See* Albert Alschuler, *The Trial Judge's Role in Plea Bargaining, Part 1*, 76 COLUM. L. REV. 1059, 1060–62 (1976) (reviewing the four different types of guilty-plea systems the author has encountered, each with different standards for judicial participation).

[62] Increased judicial questioning, if implemented, would result in rapid change. Further, questioning of the defendant and defense attorney directly following the plea would provide a fresher, more accurate version of the events than delving into the legitimacy of the plea deal during the appeals process.

[63] ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 3-1.2(c) (1993).

is not that [he] shall win the case, but that justice shall be done."[64] Thus, despite their role in investigating and presenting evidence against the defendant, prosecutors have a dual duty to arbitrate conduct and ensure that justice is served. As such, prosecutors could be relied upon to ensure that during plea negotiations, defense counsel meets certain standards of representation prior to filing a plea agreement. Logistically, such a set-up would have to involve a standard checklist that prosecutors must go through regarding the conduct of an attorney. The prosecutor might be required, for example, to ask the defense attorney whether he has informed the defendant of the potential sentence prior to presenting the plea bargain to the court. The prosecutor would also be required to preserve a record of the discussion and present it to the court for future use in ineffective assistance of counsel appeals.

It seems unlikely, at best, that prosecutor offices could be incentivized to set up and enforce recordkeeping requirements for prosecutors. First, the pressures and incentives that drive prosecutors will inherently push them against keeping an accurate record of the plea-bargaining process. Despite their duty to seek justice, prosecutors have an incentive to get convictions.[65] A good conviction record can further a prosecutor's career, as well as pad his or her ego and ensure praise by colleagues.[66] Maintaining a record for appeals enhances the likelihood that a conviction will be reversed. Not only would this reversal hurt a prosecutor's credentials, but it also would increase their already substantial workload.[67] Questioning the defense counsel thereby poses a conflict of interest to the prosecutor.

Even if prosecutors are mandated to create records, and they ignore the incentives to create poor transcripts of plea bargains, the prosecutors' position at plea-bargaining will inevitably result in a subpar record of the events. The prosecutor is not present during most discussions between defense counsel and the defendant. Therefore, the prosecutor will only obtain a record of what the defense attorney says occurred—a record of questionable accuracy and usefulness due both to the biases of the defense counsel in retelling the events and the time delay.

In addition to the personal incentives not to maintain a record system, prosecutors also have more objective criteria that would discourage them from maintaining accurate records of plea bargains. Namely, cognitive bias will lead a prosecutor to believe that any plea bargain they enter into is

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[64] Berger v. United States, 295 U.S. 78, 88 (1935).

[65] Tara J. Tobin, *Miscarriage of Justice During Closing Arguments by an Overzealous Prosecutor and a Timid Supreme Court in* State v. Smith, 45 S.D. L. Rev. 186, 189 (2000).

[66] *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2471 (2004) ("Favorable win-loss statistics boost prosecutors' egos, their esteem, their praise by colleagues, and their prospects for promotion and career advancement. Thus prosecutors may prefer the certainty of plea bargains.").

[67] *Id.*

constitutionally sound.[68] After conducting an investigation, determining guilt, and presenting the plea bargain to the defendant, a federal prosecutor is strongly biased to think the defendant is guilty and therefore is very unlikely to believe that anything but the most flagrantly abhorrent defense counsel conduct would prejudice the defendant. As such, prosecutor offices will generally find it unnecessary to keep an accurate record of plea bargains, since their offices are likely to believe that such records have no use—the defendant is guilty, and regardless of what else defense counsel may have done, the defendant would have taken the plea bargain. Given personal incentives and cognitive bias, prosecutors are not only unlikely to singularly institute a recordkeeping rule, but their skewed incentives also beg the question of the quality of the record they would maintain.[69]

C. Legislative Reform

Given the inherent problems with relying on either the judiciary or executive to institute record-keeping standards, it necessarily falls on the legislature to vindicate defendant rights. Arguably, the legislature, similar to prosecutors, is not normally incentivized to make defendant-favorable rules. Historically, politicians have repeatedly invoked and upheld a tough-on-crime mantra in efforts to appease voters.[70] Disillusionment with the criminal justice system has, however, lessened the political popularity of being "tough-on-crime."[71]

The general disillusionment with the criminal justice system would seem to indicate that it is the politically perfect time for the legislature to pass a bill instituting record-keeping standards. Nonetheless, Congress remains a difficult institution to rely upon for change due to the extreme ideological polarization of the current legislature, which makes it hard for any bill to pass[72]—let alone a bill that would restructure the criminal justice sys-

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[68] *See* Alafair Burke, Commentary, Brady*'s Brainteaser: The Accidental Prosecutor and Cognitive Bias*, 57 Case W. Res. L. Rev. 575, 580 (2007) (discussing cognitive bias in relation to *Brady* disclosures).

[69] Further, due to the fragmentation between state and federal prosecutors, each jurisdiction would have to impose its own set of prosecutorial standards. Thus, similar to judicial change, prosecutorial change would likely result in a discordant system with a variety of different rules and standards depending on whether one is in state or federal court.

[70] Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 Law & Soc. Inquiry 1111, 1111–12 (2000) ("The centrality of crime to electoral politics and the formal actions of state and federal politicians has long since become conventional wisdom.").

[71] Charlie Savage and Erica Goode, *Two Powerful Signals of a Major Shift on Crime*, N.Y. Times (Aug. 12, 2013), *available at* http://www.nytimes.com/2013/08/13/us/two-powerful-signals-of-a-major-shift-on-crime.html?pagewanted=all&_r=0, *archived at* http://perma.cc/NJ4R-MSYP ("Two decisions . . . were powerful signals that the pendulum has swung away from the tough-on-crime policies of a generation ago.").

[72] *See* Norm Ornstein, *Why Can't Congress Even Pass an Infrastructure Bill?*, Atlantic (May 7, 2014, 11:17 AM), http://www.theatlantic.com/politics/archive/2014/05/why-cant-congress-even-pass-an-infrastructure-bill/361906/, *archived at* http://perma.cc/44DK-6CP2.

tem in a manner that benefits defendants. Indeed, between 1973 and 2013, the number of laws enacted by each Congress has steadily declined from 772 enacted laws to just 184.[73] Although altering standards through a direct legislative enactment does not seem like a feasible option, a congressional response to plea bargain record-keeping is necessary to resolve the record-keeping issue and protect defendant's rights.

To prevent any potential political backlash, stalling, or the production of standards that inhibit the goal of defendant protection, Congress should give the power to promulgate plea-bargaining standards to an independent body. This Plea-Bargaining Commission would be similar to the United States Sentencing Commission, which is an independent agency created by Congress in the Sentencing Reform Act and responsible for articulating sentencing guidelines for the federal judiciary.[74] The President, after consulting with "judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process," appoints the members of the Sentencing Commission by and with the advice and consent of the Senate.[75] Three of the appointed members must be judges, and no more than four of the members of the Commission can be of the same political party.[76] The United States Attorney General, or the Attorney General's designee, sits as a nonvoting member of the Commission.[77] The set-up of the Commission ensures that its members are experts and experienced in the field of sentencing, and also that they represent a variety of political viewpoints. A Plea-Bargaining Commission might consist of judges as well—but could also feature negotiation experts in addition to former prosecutors and defense attorneys. Similar to the Sentencing Commission, the Plea-Bargaining Commission would be responsible for promulgating rules and standards for plea-bargaining, as well as policy statements regarding the proper application of its doctrine.[78] Like the Sentencing Commission Guidelines', any Guidelines set up by the Plea-Bargaining Commission would only apply to the federal courts. Nonetheless, the Plea-Bargaining Commission might serve as a model that states could replicate. Just as many states have Sentencing Commissions,[79] states might also develop their own Plea-Bargaining Commissions.

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[73] *Statistics and Historical Comparison: Bills by Final Status*, GovTrack, https://www.govtrack.us/congress/bills/statistics (last visited Oct. 9, 2014), *archived at* http://perma.cc/FXS2-79DG.

[74] 28 U.S.C. § 991 (2012).

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *See* 28 U.S.C. § 994 (2012) (The Commission "shall promulgate and distribute to all courts of the United States" guidelines as well as "general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation".).

[79] *See* Michael Tonry, *The Success of Judge Frankel's Sentencing Commission*, 64 U. Colo. L. Rev. 713, 718 (1993) (commenting on the Sentencing Commission Guidelines in Minnesota, Pennsylvania, Washington, and Oregon).

Mandatory regulations by the Plea-Bargaining Commission could potentially pose separation of powers issues—plea-bargaining is typically an executive decision, and the legislature's divestment of power to an independent agency could be seen as encroachment into the executive's jurisdiction.[80] To help avoid this potential constitutional problem, the Commission's promulgations should not be made mandatory—just like the Sentencing Commission's Guidelines, the Plea-Bargaining Commission's promulgations would be made advisory. In this scenario, whether or not to heed the advisement of the Commission would be left to the discretion of prosecutors and defense attorneys, and the ultimate review of the judge.

Although a discretionary system leaves the actual enforcement of new rules and standards to actors outside of the legislature—actors who, as explained above, have little incentive to alter plea-bargaining rules—it nonetheless has the potential to garner expansive change. First, among prosecutors and defense attorneys, a discretionary system will subconsciously lead attorneys to inculcate the new standards imposed by the legislature. An example of such an indoctrination of the rules by attorneys is evidenced in the implementation of the *Batson v. Kentucky*[81] rule, which forbids a prosecutor from using peremptory challenges to strike jurors on the basis of race.[82] In responding to *Batson* challenges, however, a prosecutor can assert any non-racial, neutral reason for striking the juror.[83] In assessing the prosecutor's response against a defendant's allegation of racial discrimination, judges generally accept almost any explanation that a prosecutor provides to explain his or her behavior.[84] As a result, many critics feel *Batson* fails to keep prosecutors from using peremptory challenges to strike based on race since they can come up with almost any alternative explanation for their behavior and the court will accept it at face value.[85] Viewed through the lens of legal ethics, however, *Batson* results in a positive outcome regardless

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[80] Despite the importance of plea bargains to almost all defendants, prosecutors—who are agents of the executive branch—have absolute discretion over whether or not to offer a plea agreement. Indeed, in responding to a defendant's argument to the contrary, the Third Circuit stated that "the prosecutor was not required to entertain a plea to lessor charges" and therefore was free to pursue a trial if he or she wished. United States v. Yahsi, 549 Fed. App'x 83, 85 (3rd Cir. 2013).

[81] 476 U.S. 79 (1986).

[82] *Id.* at 89 ("[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race.").

[83] *Id.* at 94 (holding that a decision by the prosecution to exclude black members of the jury is permissible if the prosecution can demonstrate that its actions were based on "permissible racially neutral selection criteria.") (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972).

[84] *See* Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 Cornell L. Rev. 1075, 1092 (2011) (finding that "prosecutors regularly respond to a defendant's prima facie case of racially motivated jury selection with tepid, almost laughable 'race-neutral' reasons," and "that courts accept those reasons as sufficient.").

[85] *See* Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. Crim. L. & Criminology 1, 26 (2014).

of the critics' statements because it influences prosecutorial behavior through its message.[86] Simply by imposing a code of conduct on attorneys, *Batson* influences social norms and thereby changes behavior.[87] Arguably, the knowledge that their jury selection may be challenged for a *Batson* violation alters prosecutors' behavior and makes them more cautious in their actions.[88] The public nature of the attack combined with the stigma associated with being called out for prejudicial practices can serve to alter prosecutors' behavior by making them more thoughtful of their choices during the jury selection process.[89]

As applied in the plea-bargaining context, discretionary rules promulgated by a Plea-Bargaining Commission have the potential to alter prosecutorial, defense, and judicial actions with relation to plea-bargaining—and thus enhance the overall standards at the plea-bargaining stage. Although there is not as much stigma associated with a *Strickland* challenge as there is with a *Batson* challenge, attorneys will still be incentivized to follow the discretionary rules in order to avoid reputational harm. Additionally, failure to follow the discretionary rules might be used on appeal to attack the behavior of the attorney—thereby providing counsel with another incentive for following the Plea-Bargaining Commission's standards. Therefore, even if the rules are discretionary, they will still have the power to alter behavior and thereby enhance protections for defendants.

Another hurdle that could stymie the successful implementation of a Plea-Bargaining Commission is the potential for congressional over-involvement. Indeed legislative interference with the United States Sentencing Commission serves as a cautionary tale. Although the Sentencing Commission has the exclusive power to promulgate sentencing guidelines, Congress has repeatedly interfered with the implementation of a uniform standard of sentencing through this expert body by promulgating mandatory minimum sentences for certain crimes.[90] These legislatively imposed mandatory minimums result in much higher sentences than the Guidelines would otherwise impose.[91] As a result, the purpose of the Commission—to have experts promulgate uniform and reasoned sentences—is greatly inhibited. In order to prevent such an outcome from occurring with regards to plea-bargaining standards, the statute that creates the Plea-Bargaining Commission ought to

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[86] *See* Laura I. Appleman, *Reports of* Batson*'s Death Have Been Greatly Exaggerated: How the* Batson *Doctrine Enforces a Normative Framework of Legal Ethics*, 78 TEMP. L. REV. 607, 619 (2005).

[87] *Id.*

[88] *Id.* at 624.

[89] *Id.*

[90] *See* Philip Oliss, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1878 (1995) ("In the late 1980s, as the Sentencing Commission was implementing the guidelines and Congress was passing more mandatory minimum statutes, concerns about the wisdom of mandatory penalties and their compatibility with the mission of the Sentencing Commission began to arise in Congress.").

[91] *See generally* U.S. SENTENCING COMM'N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 85–103 (2011).

make it prohibitively difficult for Congress to interfere with plea-bargaining standards.[92] Perhaps, for example, the legislation could require a 3/4 majority of both houses before a bill modifying plea-bargaining standards could be passed. Alternatively, the legislation might only allow congressional intervention under extreme circumstances—such as in times of extreme national crisis or substantial change in national priorities.[93]

Once Congress has instituted a Plea-Bargaining Commission with the power to promulgate discretionary rules and standards, and with a substantial amount of independence from Congress, one of the first things the Commission will have to address is the inability of the Sixth Amendment to fully protect defendants due to the lack of record-keeping at the plea-bargaining stage. The Commission might begin by considering three particular solutions: mandatory inclusion of a third-party reporter in all plea negotiations, mandatory reporting by defense attorneys, or the institution of a bench trial in lieu of most plea bargains.

1. Third-Party Reporter

A simple and clear-cut solution to the lack of record-keeping at plea-bargaining is the mandatory inclusion of a third party reporter in all plea discussions. Similar to a court reporter, the third party would be included in all discussions between the defendant and the defense attorney. In order to avoid any conflicts of interest, the third-party reporter would be an independent agent of the judicial branch. Ideally, the fact that the position is created by a legislative agency but exists within the judiciary would decrease the influence any one branch might exert over the new position. The legislation creating this position would also require the defense attorney to include the third-party reporter in every conversation he or she has with the defendant. This would eliminate the he-said-she-said problems of *Strickland* appeals because there would be a clear record of exactly what the defense attorney told the defendant, or did not tell the defendant, about the plea bargain.

A defense attorney could, potentially, circumvent the system by discussing plea bargain matters alone with his client, and refusing to call a reporter to attend as well. In many *Strickland* plea-bargaining appeals, the lawyer will claim he or she advised the client of the plea bargain, while the

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[92] One way the legislature might interfere with the Plea-Bargaining Commission, for example, is by making it difficult for defendants to appeal a decision due to lack of record-keeping or inadequate record-keeping. Similar to appeal difficulties created by the Antiterrorism and Effective Death Penalty Act, Congress could create a statute that requires a defendant to prove prejudice in order for him or her to challenge a plea bargain based on lack of record-keeping. This is just one of many ways Congress might stymie attempts by the Commission to protect defendants.

[93] It might, however, prove easy for a politician to manipulate the system. Even if a high bar for legislative change is set, most skilled legislators would be able to frame their proposal for intervention as stemming from an extreme national crisis or a substantial change in national priorities. Further defining these terms would somewhat help remedy the problem, but would not totally resolve it.

defendant will claim either that the lawyer never told him about the plea bargain or inadequately advised him of the benefits or negatives of the plea bargain.[94] Under the proposed legislation, if the attorney claims he told his client about a plea bargain and adequately advised him, there should be a record of the events. In instances where the defense failed to include the third-party reporter in his discussions, the judge would automatically credit the testimony of the defendant—thereby incentivizing defense attorneys to ensure the reporters are with them at every discussion. The judge could further remedy the situation for the individual defendant who does not have a record by mandating the prosecution reoffer the plea deal, and replacing existing counsel with a new defense attorney who would start-over the plea-bargaining process with the defendant. Judges would also retain the power to sanction defense counsel who they find repeatedly violate the recordkeeping rule.

It would seem, however, that in certain situations the judge would have no way of knowing whether an actual violation of the court-reporter rule occurred—it would simply be the defendant's word against the defense counsel of whether they meet privately. Further, the time spent finding and coordinating schedules with a third-party reporter could cause plea-bargaining to take substantially longer—costing the criminal justice system extra money in the process. Although a reporter would certainly enhance the recordkeeping from its current nonexistent status, the rule may prove only marginally successful in stopping he-said, she-said contests and would likely prove massively expensive.[95]

2. Mandatory Reporting by Defense Counsel

An alternative means of ensuring a record at the plea-bargaining stage is for the legislature to require the defense to capture its key discussions with the defendant regarding a plea bargain. The rule would require a record of defense counsel advice that defendants rely on most in making a plea-bargaining decision, and are consequently the issues defendants are most likely

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[94] *See* discussion *supra*, pg. 5–6.

[95] In assessing the costs of third-party reporters, it is useful to look at the costs associated with a similar job—court reporting. In 2012, the median pay for court reporters was $48,160 per year. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *Court Reporters*, *in* OCCUPATIONAL OUTLOOK HANDBOOK (2014), *available at* http://www.bls.gov/ooh/legal/court-reporters.htm, *archived at* http://perma.cc/JT7S-RCU4. Presumably, third-party reporters would yield a similar income. Further, with ninety-seven percent of federal cases and ninety-four percent of state cases concluding in a plea bargain, third-party reporters would be required to get involved in almost every case. *See* Erica Goode, *Stronger Hand for Judges in the 'Bazaar' of Plea Deals*, N.Y. TIMES (Mar. 22, 2012), *available at* http://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html, *archived at* http://perma.cc/8SE3-CZNR. Given the number of cases ending in plea bargains, there would need to be a substantial number of third-party reporters—an increase in manpower that would, undoubtedly, prove costly.

to challenge in an ineffective assistance of counsel claim.[96] The legislature, via the Plea-Bargaining Commission, would have the power to determine exactly what essential elements of plea-bargaining defense counsel must preserve for the record. The essential elements would probably include advice regarding the anticipated outcome of a trial, the terms of the plea bargain, and an evaluation of every other legal option available to the defendant.[97] Because the record might contain confidential attorney-client communications, it would remain closed unless the client pursues an ineffective assistance of counsel claim, at which point the judge would be free to review the record to determine if counsel's plea-bargaining was defective.[98]

The defense counsel method is cost-effective and easy to implement since defense counsel is already present during all discussions with the client, but it also exacerbates tensions that are inherent in *Strickland* plea-bargaining claims. Normally when a defendant claims a *Strickland* violation at the plea-bargaining stage, the lack of record results in a battle of the tales—defense counsel recounts one version of the events, the client presents another. The judge then becomes the final arbiter of whose version represents what really happened behind closed doors.[99] A similar impediment for petitioners is likely to arise when an ineffective assistance of counsel claim is determined based on a record kept by the defense counsel. In particular, three specific aspects of plea-bargaining make defendants unlikely to prevail on *Strickland* claims that rely on defense counsel recordkeeping. First, even if the judge concludes that the defense counsel acted outside of the range of reasonable attorney conduct during plea-bargaining, they will likely attribute that conduct to strategy. Indeed, the Court in *Missouri v. Frye* acknowledged that "[b]argaining is, by its nature, defined to a substantial degree by personal style."[100] Given that plea-bargaining is so driven by personal antics, judges are more likely to attribute an erratic decision to a particular attorney's style and strategy than to substandard counseling.

Second, defense counsel are incentivized to keep a biased or vague record in order to minimize its usefulness on appeal and thereby decrease the

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[96] *See* Joel Mallord, *Putting Plea Bargaining on the Record*, 162 U. PA. L. REV. 683, 716 (2014) ("[T]he record should consist of at least three primary sections: expected trial outcome, terms of the plea bargain deal, and an evaluation of options. These are the inputs into the defendant's decision to accept or reject a plea bargain deal—and those most needed to review a lawyer's advice after the fact.").

[97] *Id.*

[98] *Id.*

[99] *See* Gerard E. Lynch, Frye *and* Lafler*: No Big Deal*, 122 YALE L.J. ONLINE 39, 42 (2012), http://www.yalelawjournal.org/pdf/1097_2s91y2uf.pdf ("Like plea bargaining, much of the work essential to trial success takes place outside the courtroom, off the record . . . . Courts routinely adjudicate these claims, and whatever can be said about such cases, they certainly have not led to widespread defendant victories."), *archived at* http://perma.cc/9Y4N-6HMK.

[100] 132 S. Ct. at 1408.

likelihood that they will be involved in a lengthy, expensive court battle.[101] A detailed and accurate record will give a defendant more to work with on an ineffective assistance of counsel appeal. Thus, defense counsel will be incentivized to keep their records as general and nondescript as possible—thereby giving the judge little to work with and decreasing the likelihood that they will be found deficient.[102]

Finally, this record-keeping process would place substantial strain on an already overburdened defense counsel system. Indigent defense counsel are not only some of the least compensated attorneys, but they are also forced to deal with enormous caseloads.[103] Given the tremendous strain already placed attorneys who represent indigent defendants, defense offices are likely to respond to an added requirement of record-keeping at plea-bargaining by instituting the most efficient, least onerous method of record-keeping possible. Such a system would likely involve a checklist of items to discuss with defendants prior to entering into a plea bargain. While this would undoubtedly raise the bar for defense counsel conduct during plea-bargaining by ensuring that certain issues are discussed, the record it produces is essentially useless since every record will look exactly the same—a standard form with check marks to indicate that the topic was discussed with the client. Thus, while this system might ensure that the defense counsel at least discuss certain issues with defendants, it is not helpful in preserving a useful record for appeal. Overall, due to the conflict in interest issues, the ability to claim strategic decision-making post-hoc, and the strain on defense counsel resources, using defense offices as a means of maintaining a record is unlikely to substantially benefit defendants claiming ineffective assistance of counsel.

3. Institution of a Bench Trial System in Lieu of Most Plea Deals

As mentioned previously, Rule 11 of the Federal Rules of Criminal Procedure prevents the judge from inserting him or herself into the plea-bargaining process.[104] Thus, in order for the judge to preserve a record of the proceedings, an alternative to the traditional plea-bargaining mode would need to be instituted. In Philadelphia, judges arbitrate over modified plea-bargaining cases via bench trials. Under the Philadelphia system, defendants

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[101] *See* Andrew Hessick III & Reshma Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 210 (2002) (commenting that while private defense counsel are influenced by monetary incentives, public defense counsel are influenced by their enormous workload).

[102] Arguably, a judge might look through the record and ensure its thoroughness before accepting a plea bargain. Given judges' historical unwillingness to get involved in plea-bargaining, it seems unlikely that the judiciary would serve as a reliable fact checker. *See supra* pg. 8–9.

[103] Note, Gideon's *Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2064 (2000).

[104] *See* FED. R. CRIM. P. 11(c)(1).

are given three options: they can plead guilty, go to trial, or receive a bench trial.[105] If a defendant chooses to pursue a bench trial, they waive their right to a jury—a concession that guarantees a more lenient sentence than a jury trial if they are ultimately found guilty.[106] While defendants waive the right to a trial by jury, they maintain the other essential aspects of the adversarial process—presentation of witnesses, cross-examinations, and presentation of other relevant evidence.[107] The time consumed by these trials is generally very short—with most completed in less than two hours.[108] Further, if the prosecutor prefers a jury trial, for whatever reason, their consent is still required in order for a bench trial to occur.[109]

Although Philadelphia has substantially fewer plea-bargained convictions than other jurisdictions, plea bargaining is not completely abolished.[110] The lack of plea-bargains is in part due to the fact that prosecutorial concessions are much more limited than typical plea-bargaining cases in other states. Indeed, significant concessions, such as dropping more serious charges or recommending a very low sentence are only used in extreme circumstances.[111] Due to the lack of concessions by the prosecutor, defense counsel generally only recommend a plea bargain in situations where there is no possible defense or during one of the rare circumstances where the prosecutor offers significant concessions.[112] As such, only the most clear-cut cases, the cases easiest to decide on appeal even without a record of what happened behind closed doors, are plea-bargained out. The rest are decided via the bench trial process.

Bench trials combine the time-saving and lenient sentencing benefits of plea bargains with the ability to preserve a complete and accurate record of events. Notably, instituting a majority bench trial system would undoubtedly increase costs. Bench trials would take much more courtroom time than guilty pleas. Given that the vast majority of guilty verdicts are the result of pleas, even a small increase in time would prove costly and potentially result in delays in the system.[113]

Arguably, however, while the bench trial requires more resources than a regular guilty plea, it may not require much more. Most guilty plea cases

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[105] Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1063 (1984).

[106] *Id.* at 1064.

[107] *Id.* at 1065.

[108] *Id.* at 1066.

[109] FED. R. CRIM. P. 23.

[110] Schulhofer, *supra* note 105, at 1083.

[111] *Id.* at 1058.

[112] *Id.* at 1061.

[113] Professor Schulhofer estimated that, at least in Philadelphia, the total courtroom time consumed by the typical guilty plea was fifty-five minutes. Meanwhile, the total courtroom time required to complete a bench trial was approximately one hour and twenty minutes. *Id.* at 1066. Schulhofer's research, though valuable, was completed 30 years ago. Research into the current court time plea bargains consume would be useful given the importance of plea-bargaining to the criminal justice process.

entail a preliminary investigation, a formal preliminary hearing, a presentence report, continuances, a wavier colloquy, and a sentencing hearing.[114] Given the substantial time devoted to plea bargains, changing the system to a bench trial process may not actually increase court time and costs too substantially. Even if these bench trials are not as adversarial as a regular trial, they succeed in preserving almost all events on the record before the judge—the only contested issue that occurs behind closed doors is the lawyer's discussion with the client about whether to plead, forfeit a jury trial, or proceed to trial.

Despite the increase in court costs, a majority bench trial system could also save money and time on appeals by substantially streamlining the system. Defendants who plead guilty outright will be quickly disposed with since their cases will be the ones with the most evidence of guilt—and they thereby will be unable to prove prejudice. Defendants who proceed to a bench trial, meanwhile, will have an intact record of almost every action their lawyer made that led to a conviction—the only aspect that can be unclear is the adequacy of the attorney's counseling regarding whether or not to take the bench trial. Although this gray area remains, and could lead to further he-said-she-said accounts of events, the far more limited attorney-client activity that occurs behind closed doors will make it much easier to decide most *Strickland* appeals. Using a bench trial will thereby make it easier for defendants to prove deficient conduct since they will be able to point to specific points on the record where defense counsel did not perform as a reasonable attorney.

V. Conclusion

While any solution to the lack of record-keeping during plea-bargaining will come with inherent flaws, this does not mean the problem should be ignored. Although the Supreme Court has technically provided for effective assistance of counsel at the plea-bargaining stage, Beauchamp's story demonstrates the limits of those protections. Ultimately, like Beauchamp, defendants will find that despite the Court's novel holdings in *Lafler* and *Frye*, their rights remain unprotected during the plea-bargaining process. Providing for effective assistance of counsel at the plea-bargaining stage was a monumental and crucial first step by the Supreme Court—but it cannot be the final solution. Instead, a form of record-keeping must be instituted. In particular, third-party reporting appears to be the best solution for two main reasons. First, there already exists an infrastructure for finding and training court reporters—an infrastructure that could easily be expanded to include third-party plea-bargaining reporters as well. Second, third-party reporting—unlike reporting by the judge, defense attorney, or prosecutor—will provide an unbiased, accurate, and thorough record of the events, which is exactly

[114] *Id.* at 1084.

the type of record a defendant needs in order to appeal. Despite the monetary and efficiency costs associated with third-party reporting, at the moment it is the most realistic and useful solution available. Ultimately, however, regardless of what form the record-keeping comes in, one thing is certain—this change, from whatever source and in whatever form, needs to happen now.