Touro Law Review

Volume 29
Number 4 *Annual New York State Constitutional Issue*

Article 23

March 2014

An Effective but Unreported Application of Lafler & Frye

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Cover Page Footnote
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AN EFFECTIVE BUT UNREPORTED APPLICATION OF *LAFLER* & *FRYE*

SUPREME COURT OF NEW YORK QUEENS COUNTY

People v. Verni[1]
(decided March 29, 2012)

I. INTRODUCTION

On November 22, 2009 Michael Verni was found wounded inside of his automobile with a firearm between his legs.[2] He later admitted that he owned the firearm and had shot himself, which culminated in his conviction of criminal possession of a weapon in the second degree.[3] Prior to sentencing, Verni motioned the court to set aside the verdict under New York Criminal Procedure Law Section 330.30.[4] First, he alleged that his right to effective assistance of counsel was violated when his attorney failed to convey a plea offer to him.[5] Second, he alleged that his right to an impartial jury was violated because a sworn juror failed to disclose that she was a former neighbor of defendant's and held a bias against him.[6] Ultimately, the court held Verni's claim of ineffective assistance of counsel was "unsupported in fact or law" and there was no basis for his claim of juror bias.[7]

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[1] No. 2014/10, 2012 WL 1059382 (N.Y. Sup. Ct. Mar. 29, 2012).

[2] *Id.* at *1.

[3] *Id.*

[4] *Id.* New York Criminal Procedure Law Section 330.30 governs when a verdict of guilty may be set aside. Under subsection one a guilty verdict may be set aside if "[a]ny ground appearing in the record which, if raised upon an appeal . . . would require reversal or modification of the judgment as a matter of law by an appellate court." N.Y. CRIM. PROC. LAW § 330.30(1) (McKinney 2013).

[5] *Verni*, 2012 WL 1059382, at *1.

[6] *Id.* While the court addressed the claims of juror bias, it will not be discussed in detail in this Note.

[7] *Id.* at *6-*7.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

An analysis of the right to the effective assistance of counsel first begins with the right to counsel itself. The right to counsel is guaranteed by both the Federal and New York State Constitutions.[8] Additionally, in *Strickland v. Washington*[9] the Supreme Court stated "that the right to counsel [includes] the right to [receive] the effective assistance of counsel."[10] In *Strickland*, the Supreme Court outlined a two-pronged test in order to determine whether a defendant received the effective assistance of counsel.[11] The *Strickland* test requires that a defendant show a) his "counsel's representation fell below an objective standard of reasonableness," and b) the deficient conduct caused him prejudice.[12]

Under New York law, the current test as to whether a defendant received the effective assistance of counsel was adopted by the New York Court of Appeals in *People v. Baldi*.[13] In *Baldi*, which was decided prior to *Strickland*, the court held that the question of whether a defendant received the effective assistance of counsel is based on whether he received meaningful representation based on the totality of circumstances.[14] The New York Court of Appeals has also declined to adopt the *Strickland* test on state constitutional grounds.[15]

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[8] U.S. CONST. amend. VI. (stating in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."); N.Y. CONST art. I, § 6 (stating in pertinent part that "[i]n any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel . . . .").

[9] 466 U.S. 668 (1984).

[10] *Strickland*, 466 U.S. at 686 (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (internal quotation marks omitted).

[11] *Id.*

[12] *Id.* at 687-88.

[13] 429 N.E.2d 400 (N.Y. 1981).

[14] *Id.* at 405.

[15] People v. Benevento, 697 N.E.2d 584, 588-89 (N.Y. 1998) (discussing that prejudice is viewed generally in its overall determination of whether defendant received meaningful representation). The court further stated:

> While the inquiry focuses on the quality of the representation provided to the accused, the claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case. In that regard, we have refused to apply the harmless error doctrine in cases involving substantiated claims of ineffective assistance. Thus, whether defendant would have been acquitted of the charges but for counsel's errors is relevant, but not dispositive

While the right to effective assistance is guaranteed by both Federal and New York Constitutions, it is not clear whether the *Baldi* test provides for greater protections than *Strickland*. The result of this uncertainty is made clear by the court in *Verni* as it analyzed the representation received by defendant under both *Strickland* and *Baldi*.[16] While the Court of Appeals' refusal to adopt *Strickland* raises a question as to whether *Baldi* provides defendants with greater protection,[17] another question remains: What differences, if any, exist in between the New York and Federal approach to claims of ineffective assistance during guilty pleas?

III. THE FEDERAL APPROACH TO CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA BARGAINING

In *Strickland*, David Leroy Washington faced the death penalty after perpetrating a string of heinous crimes including "three brutal stabbing murders, torture, kidnapping, severe assaults . . . attempted extortion, and theft."[18] Faced with the death penalty, Washington was appointed an experienced defense attorney who began his work with vigor.[19] However, against his counsel's advice, defendant confessed to two of the murders, "waived his right to a jury trial . . . and pleaded guilty to all charges, including three capital murder charges."[20] Defendant's actions caused counsel to feel hopeless about his client's case.[21] During the plea colloquy, defendant stated to the judge that he was under "extreme stress" at the time he perpetrated the crimes because he was unable to provide for his family.[22] Defendant also stated that "he had no significant prior criminal record"

> under the State constitutional guarantee of effective assistance of counsel. The safeguards provided under the Constitution must be applied in all cases to be effective and, for that reason, our legal system is concerned as much with the integrity of the judicial process as with the issue of guilt or innocence.

Id. at 588 (citations omitted) (internal quotation marks omitted).

16 *See generally Verni*, 2012 WL 1059382.

17 This issue is beyond the scope of this Note.

18 *Strickland*, 466 U.S. at 671-72.

19 *Id.* at 672.

20 *Id.*

21 *Id.*

22 *Id.*

and that "he accepted responsibility for the crimes."[23] During the colloquy the judge stated to Washington that "he had 'a great deal of respect for people who are willing to step forward and admit their responsibility.' "[24] However, the statements made by Washington about his criminal history were not true.[25] Again against counsel's advice, Washington waived his right to an advisory jury at his sentencing hearing, preferring to be sentenced solely by the judge.[26] As his strategy to have his client's life spared, defense counsel relied on the rapport, which developed during the plea colloquy, and that "[Washington's] remorse and acceptance of responsibility justified sparing him from the death penalty."[27] Counsel worked within this strategy, having defendant's "rap sheet" suppressed, and deliberately presented no evidence regarding his client's emotional state in order to prevent opening the door to the prosecution.[28] However, counsel's strategy proved to be unsuccessful and the judge, having found "numerous aggravating circumstances" and no mitigating factors, sentenced Washington to death.[29]

The Supreme Court granted certiorari in order to determine what standards to apply to claims of actual ineffectiveness.[30] Of great importance to the Court was the fact "that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial."[31] The Court also noted that while a sentencing hearing occurs after a trial, it "is sufficiently like a trial in its adversarial format and in the existence of standards for decision, that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial testing process works to pro-

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[23] *Strickland*, 466 U.S. at 672.

[24] *Id.*

[25] *Id.* at 673.

[26] *Id.* at 672.

[27] *Id.* at 672-74. However, counsel failed to pursue interviews with defendant's family. *Strickland*, 466 U.S. at 672-73.

[28] *Id.* at 673.

[29] *Id.* at 674-75.

[30] *Id.* at 684.

[31] *Id.* at 684. The Court stated that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

duce a just result . . . ."[32] Before fashioning its two-part test,[33] the Court explained that the right to counsel is not satisfied by the accused having a lawyer at the table next to him.[34] Rather, the Sixth Amendment "envisions" counsel who plays the role of adversary in order to ensure that the system "produce just results."[35] The first prong, deficient conduct, requires that a "defendant . . . show that counsel's representation fell below an objective standard of reasonableness."[36] Notably, the Court conceded that it indirectly recognized this standard in a prior case, *McMann v. Richardson*,[37] where the Court held that a guilty plea is involuntary if it is based on the ineffective assistance of counsel.[38] Next, the Court reasoned that the question of whether the claimed error was unreasonable is to be judged on a case-by-case basis.[39] All efforts to remove the effects of hindsight must be taken including viewing the conduct of counsel, their perspective of counsel at the time of the claimed error, and affording counsel a "strong presumption" of reasonableness.[40] In order to illustrate the first prong of the test, the Court listed several basic duties that counsel owes a defendant: "[A] duty of loyalty, a duty to avoid conflicts of interest,"[41] a "duty to advocate defendant's cause . . . to consult with defendant on important decisions[,] . . . to keep defendant informed of important developments in the course of the prosecution,"[42] and "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process."[43] In addition to demonstrating deficient conduct, the second prong of the test requires a defendant to demonstrate prejudice.[44] In requiring prejudice, the Court reasoned that "[a]n error by counsel, even if pro-

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[32] *Id.* at 686-87 (citations omitted).

[33] *Id.* at 687.

[34] *Id.* at 685.

[35] *Id.* "[T]he right to counsel is the right to the effective assistance of counsel." *Strickland*, 466 U.S at 686 (quoting *McMann*, 397 U.S. at 771 n.14).

[36] *Strickland*, 466 U.S. at 687-88.

[37] 397 U.S. 759 (1970).

[38] *Id.* at 770-71.

[39] *Strickland*, 466 U.S. at 689.

[40] *Id.*

[41] *Id.* at 688 (citing Cuyler v. Sullivan, 446 U.S. 335, 346 (1980)).

[42] *Id.* at 688.

[43] *Id.* (citing Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).

[44] *Strickland*, 466 U.S. at 691.

fessionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."[45] In order to demonstrate prejudice, a defendant must prove "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[46] The Court further stated that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome."[47] Finally, the Court in fashioning its two-part test, did not overrule *McMann* and the question of whether *Strickland* applies to claims of ineffective assistance arising before trial was left unresolved.[48]

The question of whether *Strickland* applied to plea bargaining was resolved in *Hill v. Lockhart*,[49] where the Supreme Court applied the *Strickland* test to a guilty plea.[50] In *Hill*, at issue was a guilty plea made by defendant, William Lloyd Hill, where he pled guilty to theft and first-degree murder in exchange for concurrent sentences of ten and thirty-five years respectively.[51] Two years later, defendant filed a habeas corpus petition which asked the court to vacate his plea.[52] Defendant argued his decision was involuntary because he was induced to plead guilty based on his counsel's erroneous advice that he would become eligible for parole after serving one-third of his sentence.[53] However, because of a prior felony conviction, defendant was eligible for parole after serving one-half of his sentence.[54]

The Court began its discussion by reiterating the requirements for a valid plea, or that "the plea represent[] a voluntary and intelligent choice among the alternative courses of action open to the defendant."[55] However, the Court refused to analyze whether counsel's performance was objectively reasonable because defendant failed to

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[45] *Id.* (citing United States v. Morrison, 449 U.S. 361, 364-65 (1981)). Note that this also serves to demonstrate the Court's concern for the integrity of the judicial system.

[46] *Id.* at 694.

[47] *Id.*

[48] *Id.* at 689.

[49] 474 U.S. 52 (1985).

[50] *Id.* at 58.

[51] *Id.* at 54.

[52] *Id.* at 54-55.

[53] *Id.*

[54] *Hill*, 474 U.S. at 55.

[55] *Id.* at 56 (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)).

establish that he was prejudiced by pleading guilty.[56] In order to satisfy the prejudice requirement, a "defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[57] However, because "[Hill] did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial," the Court found no error in the district court's dismissal of defendant's petition without a hearing.[58] With the understanding that the right to the effective assistance of counsel applies to the plea bargaining phase, the next question is: How far does it extend?

The Supreme Court partially answered this question in *Padilla v. Kentucky*.[59] In *Padilla* the Court held counsel's conduct was deficient when he failed to advise his client that by accepting a plea he would be subject to deportation.[60] In *Padilla*, defendant, Jose Padilla, a veteran of the Vietnam War, citizen of Honduras, and resident of the United States for over forty years, was charged with transporting marijuana in his tractor-trailer.[61] Padilla pled guilty to the charge in reliance on counsel's advice that he need not worry about deportation because of his extensive tenure in the United States.[62] However, unbeknownst to counsel, and discoverable with only minor legal research, "virtually every drug offense except for only the most insignificant marijuana offense[], is a deportable offense . . . ."[63]

After pleading guilty, defendant raised a claim of ineffective assistance, asserting that but for his counsel's erroneous advice he would not have pled guilty and "would have insisted on going to trial."[64] In analyzing defendant's claim of ineffective assistance, the Court first determined that while deportation "is not, in a strict sense, a criminal sanction," it is still "intimately related to the criminal process" and falls within the "ambit of the Sixth Amendment right to

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[56] *Id.* at 60.
[57] *Id.* at 59.
[58] *Id.* at 60.
[59] 130 S. Ct. 1473 (2010).
[60] *Id.* at 1483.
[61] *Id.* at 1477.
[62] *Id.* at 1478.
[63] *Id.* at 1477 n.1.
[64] *Padilla*, 130 S. Ct. at 1478.

counsel."[65] Next, the Court recognized its long history in using the "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . . ."[66] The Court then acknowledged that the prevailing norm of the criminal Bar requires counsel to advise their client of a risk of deportation.[67] Because counsel could have easily determined that by pleading guilty defendant would be subject to mandatory deportation, his advice provided false assurance that defendant would not be deported and was deficient.[68] The Court then remanded the case back to state court in order to determine whether defendant was prejudiced by his plea.[69] *Padilla* confirmed that ineffective assistance of counsel applies when the deficient conduct results in the plea being accepted.[70] Having established that the effective assistance of counsel is not merely a trial right, but applies to advice which results in a defendant pleading guilty, does it also apply when counsel's deficient conduct results in a plea that is not accepted, and a defendant is convicted after an otherwise fair trial?

The Supreme Court answered the above question in the affirmative on March 21, 2012, in two companion cases, *Lafler v. Cooper*[71] and *Missouri v. Frye*.[72] These cases dealt with the issue of when "inadequate assistance of counsel caused nonacceptance of a plea offer and further proceedings led to a less favorable outcome."[73]

In *Lafler*, defendant was charged with "assault with intent to murder, possession of a firearm by a felon, [and] possession of a firearm in the commission of a felony."[74] In speaking with the lower court, defendant admitted guilt and "expressed a willingness" to

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[65] *Id.* at 1481-82.

[66] *Id.* at 1482.

[67] *Id.*

[68] *Id.* at 1483.

[69] *Padilla*, 130 S. Ct. at 1483-84. Additionally, the Court, at the request of the Solicitor General, refused to limit ineffective assistance claims during plea bargaining to only "affirmative misadvice" on grounds it would lead to "absurd results." *See id.* at 1184 (stating that limiting claims to affirmative misadvice would encourage counsel to give no advice even when the answer is clear).

[70] *Id.* at 1486.

[71] 132 S. Ct. 1376 (2012).

[72] 132 S. Ct. 1399 (2012).

[73] *Lafler*, 132. S. Ct. at 1382-83.

[74] *Id.* at 1383.

plead to one count of the indictment in exchange for a recommended sentence of fifty-one to eighty-five months.[75] However, defendant twice rejected the offer on the erroneous advice from his counsel that the prosecutor could not establish the requisite intent "because [the victim] had been shot below the waist."[76] However, at trial, defendant was convicted on all counts and sentenced to a minimum of 185 to 360 months.[77]

In *Frye*, defendant was charged with driving with a revoked license, a crime he had been previously convicted of on three prior occasions.[78] The prosecutor offered a choice of two bargains: in exchange for a felony plea the prosecution would recommend ten days in jail, or in exchange for a misdemeanor plea the prosecution would recommend a sentence of ninety days in jail.[79] However, counsel failed to advise defendant of either offer and both lapsed.[80] Shortly before his preliminary hearing, defendant was again arrested for driving with a revoked license and as a result, openly pled to the charges and received a sentence of three years.[81]

While the Court in *Lafler* and *Frye* recognized that there is no right to a plea bargain,[82] it recognized that the nature of the modern criminal justice system is one of pleas, not trials.[83] Therefore, for upwards of ninety-four percent of defendants,[84] the effective assistance of counsel consists almost entirely of securing a favorable plea.[85] The Court rejected the argument that "an otherwise fair" trial cures any defect in counsel's representation in securing a plea bargain.[86] It stated that the Sixth Amendment right to effective assistance of counsel guarantees the legitimacy of the adversarial process

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[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Frye*, 132 S. Ct. at 1404.
[79] *Id.*
[80] *Id.*
[81] *Id.* at 1404-05.
[82] *Id.* at 1406 (citing Weatherford v. Bursey, 429 U.S. 545, 561 (1977)); *see also Lafler*, 132 S. Ct. at 1387.
[83] *Lafler*, 132 S. Ct. at 1388.
[84] *Frye*, 132 S. Ct. at 1407.
[85] *Id.*
[86] *Lafler*, 132 S. Ct. at 1386.

as a whole, not simply a fair trial.[87] In applying *Strickland* to rejected pleas, the Court held that the standard is whether there is a "reasonable probability the plea offer would have been presented to the court, . . . that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed."[88]

In sum, under the federal approach the backbone of the right to the effective assistance of counsel is the legitimacy of the adversarial process as a whole.[89] However, the two-prong test of *Strickland*, which requires deficient conduct and prejudice, was limited to the right to a fair trial.[90] However, in *Hill*, the Court expanded *Strickland* to include erroneous pre-trial advice which results in a guilty plea.[91] Under *Padilla*, the Court again widened the scope of *Strickland* to include incorrect deportation advice when it is relied upon in entering a guilty plea.[92] Finally, in *Lafler*, the Court again widened the scope of ineffective assistance to include deficient conduct which causes the "nonacceptance" of a plea which is followed by "an otherwise fair trial."[93]

IV. THE NEW YORK APPROACH TO THE INEFFECTIVE ASSISTANCE OF COUNSEL

As discussion of the federal approach begins with *Strickland*, discussion of the New York approach begins with *People v. Baldi*.[94] In *Baldi*, defendant, Joseph Baldi, was convicted of murder in the se-

[87] *Id.* at 1387-88. The Court noted that *Strickland* concerned itself with the fairness of a trial, but here the fairness concern involves the process which precedes the trial. *Id.* at 1388.

[88] *Id.* at 1385.

[89] *See id.* at 1388 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." (quoting *Strickland*, 466 U.S. at 686)).

[90] *Strickland*, 466 U.S. at 687.

[91] *Hill*, 474 U.S. at 58-59.

[92] *Padilla*, 130 S. Ct. at 1483. The Court also refused to limit ineffective assistance claims to only "affirmative misadvice" by counsel. *Id.* at 1484.

[93] *Lafler*, 132 S. Ct. at 1385.

[94] 429 N.E.2d 400 (N.Y. 1981).

cond degree.[95] At issue was counsel's "innovative" tactics where he testified as to his client's mental state and disclosed that defendant confessed in a "trance-like state."[96]

On appeal, defendant raised the issue that counsel did not pursue the defense of factual innocence; however, the court did not find this fact constituted ineffective assistance.[97] In fashioning its test as to whether a defendant received the effective assistance of counsel, the court evaluated whether the defendant received meaningful assistance determined by a totality of circumstances.[98] The court found that the tactics used by counsel, while uncommon, were not entirely unheard of in New York.[99] The court emphasized that "[h]indsight should not escalate what may have been a few tactical errors into ineffective assistance of counsel."[100] Finding that counsel put all of his years of experience to work for defendant in his representation, the court held that defendant received effective assistance based on the totality of circumstances.[101]

In *People v. Benevento*,[102] the New York Court of Appeals declined to adopt the *Strickland* test on state constitutional grounds.[103] Notable in *Benevento* is the great length the court went into explaining that meaningful representation is concerned first with whether a defendant received a fair trial.[104] However, the court rationalized that the Constitution of New York is "concerned as much with the integrity of the judicial process as with the issue of guilt or innocence" and defended its refusal to enforce the harmless error rule when a claim of ineffective assistance has been substantiated.[105] While *Benevento* elaborated on why New York has adhered to *Baldi*, the question still remains on how the *Baldi* test applies to plea bar-

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[95] *Baldi*, 429 N.E.2d at 404.

[96] *Id.* at 402-04.

[97] *Id.* at 405-07.

[98] *Id.* at 405.

[99] *Id.* at 407 (citing People v. Wood, 187 N.E.2d 116 (N.Y. 1962); People v. Garrow, 379 N.Y.S.2d 185 (App. Div. 3d Dep't 1976)).

[100] *Baldi*, 429 N.E.2d at 407.

[101] *Id.* at 408.

[102] *Benevento*, 697 N.E.2d 584.

[103] *Id.* at 589.

[104] *Id.* at 588.

[105] *Id.* (quoting People v. Donovan, 193 N.E.2d 628, 631 (N.Y. 1963)).

gains.

A leading case in New York regarding the application of effective assistance to plea bargains is *People v. Fernandez*.[106] In this memorandum opinion, the Court of Appeals adopted the Appellate Division, Third Department's holding in *People v. Rogers*[107] that the "defendant had the burden to demonstrate 'that a plea offer was made, that defense counsel failed to inform him of that offer, and that he would have been willing to accept the offer.' "[108]

New York, like the federal courts, also gives deference to counsel's actions.[109] Additionally, the Court of Appeals has refused to implement the *Strickland* prejudice requirement, preferring to have the requirement of prejudice be but one factor in a court's overall determination of whether defendant received meaningful representation.[110] Finally, the Court of Appeals in applying the amorphous *Baldi* test to plea bargains, adopted a formulaic approach. A defendant must prove an offer was made, counsel failed to convey the offer, and the defendant would have accepted its terms.[111]

V. RECONCILING THE FEDERAL & NEW YORK APPROACHES TO CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA BARGAINING

While the Federal and New York approaches to claims of ineffective assistance of counsel differ, they are both motivated by the same underlying purpose: to ensure the legitimacy of the judicial system.[112] The Supreme Court stated in *Strickland* that in order to satis-

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[106] 836 N.E.2d 1144 (N.Y. 2005) (per curiam).

[107] 780 N.Y.S.2d 393 (App. Div. 3d Dep't 2004).

[108] *Fernandez*, 836 N.E.2d at 1144 (quoting *Rogers*, 780 N.Y.S.2d at 396).

[109] *Baldi*, 429 N.E.2d at 407 ("Hindsight should not escalate what may have been a few tactical errors into ineffective assistance of counsel"); People v. Satterfield, 488 N.E.2d 834, 836-37 (N.Y. 1985) ("It is not for this court to second-guess whether a course chosen by defendant's counsel was the best trial strategy, or even a good one, so long as defendant was afforded meaningful representation."); *see also Strickland*, 466 U.S. at 689.

[110] *Benevento*, 697 N.E.2d at 588.

[111] *Fernandez*, 836 N.E.2d at 1144.

[112] *See Lafler*, 132 S. Ct. at 1388 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." (quoting *Strickland*, 466 U.S. at 686)); *Benevento*, 697 N.E.2d at 588.

fy the requirements of the Sixth Amendment, the defendant must be afforded counsel who plays the role of the adversary envisioned by the Sixth Amendment.[113] This requirement is predicated by the fact that our legal system is adversarial, and adversarial testing ensures confidence in the outcome of any proceeding.[114] In addition to the deficient conduct requirement, *Strickland* requires an additional showing of prejudice, or that but for the conduct of counsel, defendant would have received a more favorable outcome.[115] However, the New York Court of Appeals has forgone this requirement and instead prefers that prejudice be only a factor in the determination of whether a defendant has been afforded meaningful representation.[116]

While the Federal and New York approaches differ in regards to claims of ineffective assistance, both approaches as applied to plea bargains are quite similar.[117] Under the federal approach, the Supreme Court stated in *Lafler* that "a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court, . . . that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed."[118] Within these requirements the two-part test of *Strickland* can be discerned. The first requirement of *Strickland* is contained in the requirement that there be a reasonable probability the offer would be presented to and accepted by the court.[119] The second requirement of *Strickland*, or the prejudice requirement, is embodied in the requirement that a defendant receive a sentence that is harsher than the offered plea.[120] However, this requirement is unnecessary. The fundamental nature of plea bargaining entails that the offer be more favorable than the consequences of being convicted after a trial, and

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[113] *Strickland*, 466 U.S. at 688.
[114] *Id.*
[115] *Id.* at 687.
[116] *Benevento*, 697 N.E.2d at 588.
[117] *Compare Lafler*, 132 S. Ct. at 1385 (federal approach), *with Fernandez*, 836 N.E.2d at 1144 (New York approach).
[118] *Lafler*, 132 S. Ct. at 1385.
[119] *Id.*
[120] *Id.*

thus the requirement of prejudice appears illusory.[121] This is because in instances where a defendant is convicted after a fair trial, a claim of ineffective assistance would not be raised if he or she received a more favorable sentence than the offered plea.[122]

Under the New York approach to plea bargains, a defendant must prove there was an offer, counsel failed to convey the offer, and he or she would have accepted its terms.[123] This formulaic approach is similar to its federal counterpart. While not an express requirement of prejudice, the requirement that a defendant show he or she would have accepted the offer appears to serve the same purpose as its federal counterpart, to demonstrate that the defendant was prejudiced by the verdict.[124] Finally, while the New York approach lacks the additional distinction present in the federal approach, that the court accepts the plea, this may simply reflect the fact that judges in the federal system are not bound by the terms of a plea bargain.[125]

VI. EFFECTIVELY APPLYING THE STANDARDS

The court in *Verni* addressed the differences between Federal and New York law effectively. The *Verni* court first addressed the two competing standards by briefly citing the applicable law.[126] Next, the court analyzed defendant's claim of ineffective assistance under New York law and found that defendant did not allege he would have accepted the offer (or any offer), a "condition precedent to [] relief."[127] The court also found that there was an "insufficient basis" to find that a firm offer was made.[128] The court noted that while there was discussion of a plea containing a mental health component, it was merely to gauge whether defendant was receptive to

[121] *Contra id* (describing that "the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed").

[122] It is also likely to be frivolous. In order to demonstrate that a defendant would have accepted the terms of plea it would appear that self-serving testimony is required. Therefore, it also appears to be an illusory requirement.

[123] *Fernandez*, 836 N.E.2d at 1144.

[124] *Id.* at 1144.

[125] *Frye*, 132 S. Ct. at 1410 (citing Santobello v. New York, 404 U.S. 257, 262 (1971)).

[126] *Verni*, 2012 WL 1059382, at *2-*3.

[127] *Id.* at *4.

[128] *Id.* at *5.

such an offer, and absent was any discussion of the ultimate sentence defendant would plead to.[129] The court found that because there was "no meeting of the minds," the discussions did not constitute a cognizable offer, and thus there could be no failure to convey.[130] Having established a sufficient basis to make its determination under New York law, the court then discussed the applicable federal law.[131]

The court first cited *Strickland* and then discussed the recent decisions of *Lafler* and *Frye*.[132] After summarily noting the applicable federal law, the court then applied the law to the case at hand and found that the defendant failed to establish that he would have accepted the offer, the court would have accepted the offer, and he would have received a lesser sentence.[133] The court then held that defendant's claim of ineffective assistance was "unsupported in fact or law."[134]

VII. CONCLUSION

The approaches taken by the New York and federal courts arise from the same fundamental concern, the legitimacy our judicial system.[135] In *Frye*, the Supreme Court recognized that our modern system of criminal justice entails that for most defendants the effective assistance of counsel is comprised of securing a favorable plea.[136] While claims of ineffective assistance provide counsel's actions at trial with a strong presumption of reasonableness,[137] it is logical because of the crucial role and respect that our system provides for a jury's verdict. However, in the context of plea bargains, errors by counsel are potentially magnified, because a judge who oversees the process has only limited information, and there is no jury of defendant's peers to serve as a final safeguard to the defendant's rights.

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[129] *Id.*

[130] *Id.* at *5.

[131] *Verni*, 2012 WL 1059382, at *5.

[132] *Id.* at *5-*6.

[133] *Id.* at *5-*7.

[134] *Id.* at *6.

[135] *See Lafler*, 132 S. Ct. at 1388; *Benevento*, 697 N.E.2d 588-89.

[136] *Frye*, 132 S. Ct. at 1407.

[137] *Strickland*, 466 U.S. at 689; People v. Meyers, 632 N.Y.S.2d 461 (App. Div. 2d Dep't. 1995).

Therefore, in a plea bargain setting, confidence in the outcome is far distinguishable than after a trial. Since our judicial system is one of pleas not trials,[138] is it not more important?

When applying both the Federal and New York tests for ineffective assistance of counsel, as applied to plea bargaining, it may belabor the facts to analyze both, but because each approach is formulaic, the necessity of including each element cannot be stressed enough. In *Hill*, the Supreme Court dismissed defendant's claim for failure to state that he suffered prejudice, a requirement that had yet to be enumerated as *Strickland* had not yet been applied to plea bargains,[139] and prejudice was not required under *McMann*.[140] The same holds true under *Verni* as that court stated defendant's claim for failure to state that he would have accepted the terms of the plea was "a condition precedent to [] relief."[141] As stated earlier, both the Federal and New York approaches require a defendant demonstrate that he suffered prejudice. However, while the requirement of prejudice is relevant to claims of ineffective assistance arising from a counsel's error at trial, it appears illusory when applied to plea bargains because the very nature of plea bargaining has ensured that a defendant has suffered prejudice. While it was admirable and pragmatic for the Supreme Court to recognize that the criminal justice system is a "system of pleas, not a system of trials," it did not delve far enough into the nature of plea bargaining itself.[142] By perpetuating the requirement of prejudice for plea bargains, the Supreme Court allows the opportunity for claims of ineffective assistance to be dismissed not on merit, but mere technicality, and thus has undermined the primary purpose of the Sixth Amendment right to the effective assistance of counsel: confidence in our judicial system.

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[138] *Lafler*, 132 S. Ct. at 1388.

[139] *Hill*, 474 U.S. at 60.

[140] *McMann*, 397 U.S. at 770.

[141] *Verni*, 2012 WL 1059382, at *4.

[142] *Lafler*, 132 S. Ct. at 1388.

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