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Proving Prejudice, Post-Padilla

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Proving Prejudice, Post-*Padilla*

JENNY ROBERTS*

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INTRODUCTION

In its 2010 decision in *Padilla v. Kentucky*, the United States Supreme Court recognized that the critical role defense counsel plays in counseling clients about the consequences of a criminal conviction falls under a defendant’s Sixth Amendment right to the effective assistance of counsel.¹ In holding that defense counsel has an affirmative obligation to warn clients about mandatory deportation consequences of a criminal conviction, the Supreme Court paved the way for significant change in the constitutionally-regulated aspects of the relationship between a criminal defendant and his lawyer.² In an era that has seen an explosion in “collateral” consequences of criminal convictions, the decision recognized a defendant’s right to accurate information about at least one of these harsh consequences—deportation—prior to deciding whether to plead guilty or go to trial.³

Though monumental for ineffective-assistance jurisprudence, the *Padilla* decision may not help Mr. Padilla. He still faces deportation after living legally in the United States for forty years, serving in the military in Vietnam, working here, marrying a citizen, and raising citizen children, all born in California.⁴ He has already served his prison

1. See *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

2. *Id.* at 1478.

3. See JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 9 (2003) (noting difficulties that former prisoners face with employment, parental and voting rights, and access to public assistance and housing). There is no single definition of a “collateral consequence.” See *Padilla*, 130 S. Ct. at 1481 n.8. The most common explanation, however, is that a collateral consequence has no “definite, immediate and largely automatic effect on the range of the defendant’s punishment.” *Cuthrell v. Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973).

4. See *Padilla*, 130 S. Ct. at 1477; see also Brief for Petitioner at *52, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651); Reply Brief for Petitioner at *29, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651) (“*Padilla*, a lawful permanent resident for nearly [forty] years with an American family”); E-mail from Timothy Arnold, Dir., Post-Trial Div., Dep’t of Pub. Advocacy, to Jenny Roberts, Assoc. Professor of Law, Washington Coll. of Law (Mar. 29, 2011,

sentence. Moreover, unless he can prove that his lawyer's failure to warn him about deportation prejudiced him, he will get no relief from his conviction and pending deportation.⁵

Defendants who claim ineffective assistance of counsel must demonstrate two things: attorney error that rose to a level of unreasonable behavior and prejudice flowing from that error.⁶ In *Padilla*, the Supreme Court found that defense counsel's failure to correctly warn Mr. Padilla, prior to his guilty plea, about deportation consequences that were so "succinct, clear, and explicit" under immigration law was attorney error under prong one.⁷ The courts below, however, had not ruled on the prejudice prong and consequently the Supreme Court remanded for that inquiry.⁸

There has been much commentary on the first prong of the ineffective-assistance test, cataloguing and critiquing both the courts' general approach to such determinations and the application of the test to specific cases.⁹ While there has also been commentary on the prejudice prong,¹⁰ the issue has not been fully re-examined in light of the *Padilla* decision.¹¹ In addition, the Supreme Court granted certio-

5:54 P.M.) (on file with author) [hereinafter E-mail from Arnold]. Since arriving in this country as a teenager, Mr. Padilla has spent approximately two weeks in Honduras, where he still holds citizenship. This was during the 1990s, to visit a sick relative on her deathbed. His only other trip out of the country was to do military service in Vietnam. E-mail from Arnold, *supra*.

5. After the Supreme Court remanded Mr. Padilla's case for a prejudice determination, the Hardin County Circuit Court denied Mr. Padilla's motion for relief. See Telephone Conversation with Rebecca Reynolds, County Clerk, Hardin County Circuit Court (Mar. 25, 2011) (notes on file with author). Mr. Padilla filed an appeal from that decision on 3/23/11. See *Padilla v. Kentucky* Case Information for Case No. 2011-CA-000553, KYCOURTS.NET, http://apps.kycourts.net/coa_public/CaseInfo.aspx?Case=2011CA000553 (last visited Mar. 29, 2011).

6. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *infra* notes 22–26 and accompanying text (discussing the ineffective-assistance test).

7. See *Padilla*, 130 S. Ct. at 1490.

8. *Id.* at 1483-84 ("Whether Padilla is entitled to relief on his claim will depend on whether he can satisfy *Strickland*'s second prong, prejudice, a matter we leave to the Kentucky courts to consider in the first instance.").

9. See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); Robert R. Rigg, *The T-Rex Without Teeth: Evolving Strickland v. Washington and the Test for Ineffective Assistance of Counsel*, 35 PEPP. L. REV. 77 (2007); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323 (1993).

10. See, e.g., Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. REV. 1069 (2009) (evaluating the attorney error and prejudice prongs in the context of non-capital sentencing); Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425 (1996) (arguing that the prejudice requirement should not apply in cases where counsel was asleep or otherwise mentally impaired).

11. For a discussion of potential issues the courts will face in the wake of *Padilla*, including a brief discussion of the prejudice prong for failure-to-warn cases, see Gary Proctor & Nancy J.

rari to hear two cases in the 2011-2012 term that squarely raise prejudice issues, *Lafler v. Cooper* and *Missouri v. Frye*.¹²

Most courts undertake a prejudice inquiry that requires a defendant to demonstrate that, but for the attorney error, there is a reasonable probability he would have gotten a result *at trial* that is better than what he received with the attorney error.¹³ This Article refers to this as the “trial-outcome” prejudice approach. Courts have adopted such an approach based on a narrow reading of the Supreme Court’s ineffectiveness jurisprudence, in particular *Strickland v. Washington* and *Hill v. Lockhart*.¹⁴ When the underlying conviction is based on a guilty plea, a trial-outcome approach is problematic on at least two fronts. First, it assumes that rejection of a guilty plea has only one outcome—trial. Second, in a criminal justice system in which well over ninety percent of convictions are the result of guilty pleas,¹⁵ prejudice inquiries do not fit neatly into such a trial-outcome analysis. This is particularly true of failure-to-warn claims.

These problems are illustrated in a case like *Padilla*, where the ineffectiveness is that defense counsel either misadvised or failed to warn her client about a severe “collateral” consequence of a guilty plea.¹⁶ Collateral consequences do not, by their very definition, factor in any way into the guilt/innocence phase of a trial. The fact finder will not hear about deportation, eviction, or loss of voting rights, which do not relate to any element of the offense and make it neither more or less likely that a defendant will prevail at trial. Thus, even if defense counsel knew (and counseled her client) about the conse-

King, *Post Padilla: Padilla’s Puzzles for Review in State and Federal Courts*, 23 FED. SENT’G REP. 239 (2011).

12. See generally *Cooper v. Lafler*, 376 F. App’x 563 (6th Cir. 2010) (holding that petitioner was prejudiced by his defense counsel’s advice, based on counsel’s misunderstanding of the relevant Michigan criminal law statute, to reject a plea bargain), *cert. granted*, 131 S. Ct. 856 (2011) (No. 10-209); *Frye v. Missouri*, 311 S.W.3d 350 (Mo. Ct. App. 2010) (holding that defendant was prejudiced because counsel failed to inform his client of an offer from the state), *cert. granted*, 131 S. Ct. 856 (2011) (No. 10-444); see also *infra* text accompanying notes 101–15 (discussing the *Cooper* and *Frye* cases).

13. See *infra* Part I.A (discussing prevailing trial-outcome paradigm in prejudice inquiries).

14. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (“In other words, in order to satisfy the ‘prejudice’ requirement, the 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.”); *Strickland v. Washington*, 466 U.S. 668, 695 (1984) (“When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.”).

15. See *infra* note 142.

16. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1484 (2010) (recognizing the dangers of differentiating between affirmative misadvice and lack of advice about collateral consequences, and thus treating them the same in imposing an affirmative duty to advise).

quence, this would not lead to a decision to go to trial based on a better chance of winning.

This information, however, may well factor into defense counsel's negotiation or sentencing advocacy. In other words, the defendant might get a different or better plea bargain if his attorney and the prosecution factor an automatic, harsh consequence like deportation into the bargaining equation.¹⁷ Indeed, the bargained-for sentence might actually be longer in exchange for a charge bargain that allows the defendant to avoid imposition of the collateral consequence. The prosecution or judge might also consider a severe collateral consequence in arriving at the appropriate sentence for the conviction. Finally, if these options are not available, a defendant will have to make a decision about whether to plead guilty and face the collateral consequence or go to trial in the hopes of an acquittal or a conviction on a lesser charge. Most defendants, even some innocent ones, are convicted after pleading guilty.¹⁸ However, disclosure about a severe collateral consequence can radically alter a defendant's risk analysis, and might lead some defendants to take a risk at trial where acquittal or conviction on a lesser charge is the only way to potentially avoid that consequence.

Thus far, prejudice prong analyses have largely failed to account for this broader picture that recognizes the realities of a non-trial based criminal justice system. *Padilla* says little about prejudice, which is not surprising given its decision to remand for a lower court ruling on that aspect of Mr. Padilla's ineffective-assistance claim. However, Justice Stevens' opinion offers an opening into a broader analysis, noting how "to obtain relief on this type of claim, a petitioner must convince the court that *a decision to reject the plea bargain would*

17. Indeed, the *Padilla* Court urged the parties to use information about collateral consequences in negotiations. *Padilla*, 130 S. Ct. at 1486; see also *infra* text accompanying notes 121–22 (discussing this aspect of *Padilla*); Robert M.A. Johnson, *Message from the President: Collateral Consequences*, 35 PROSECUTOR 5 (May-June 2001) (former prosecutor advocating use of information about collateral consequences in disposition of criminal cases).

18. See DOJ, BUREAU OF JUSTICE STATISTICS, STATE COURT PROCESSING STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/ascii/fdluc06.txt> (“[G]uilty pleas accounted for 95 percent of convictions of the estimated 32,876 convictions obtained within 1 year of arrest.”); see also INNOCENCE PROJECT, 250 EXONERATED, TOO MANY WRONGFULLY CONVICTED 32-33 (2010), available at http://www.innocenceproject.org/docs/InnocenceProject_250.pdf (noting that 27% [of the 250 individuals thus far exonerated by DNA] were convicted based at least in part on false convictions, admissions, or guilty pleas.); Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2004-2005).

have been rational under the circumstances.”¹⁹ This Article follows up on that opening and calls for a broader approach to the prejudice analysis in a world largely without trials. It proposes a prejudice prong analysis that acknowledges the context and complexity of plea bargaining, sentencing advocacy, and decision-making in a criminal justice system replete with severe “collateral” consequences.

Under such an approach, courts would ask whether it is reasonably probable that a rational person in Mr. Padilla’s position would have rejected the plea had he known that mandatory deportation would follow. In deciding this, courts must ask whether, if the defendant had not taken the plea, it is reasonably probable that there would have been a different outcome. This can come in the traditional *Strickland* form of a likely successful trial outcome, but can also come in three other forms. First, counsel might re-negotiate, leading to a likely second plea structured to avoid imposition of the consequence (even if it means a higher penal sentence). Second, counsel might secure a sentence that is significantly discounted to account for the harshness of the collateral consequence. Third, a defendant might make a different risk calculation in deciding whether to plead guilty or go to trial. In short, trial-outcome is only one part of a more nuanced and realistic approach.

Defendants facing misdemeanor or low-level felony charges whose defense counsel failed to warn them about a severe collateral consequence comprise the group that will most benefit from application of a broader prejudice analysis. There are two reasons for this. First, the possibilities for re-negotiation, resulting in a disposition that avoids the collateral consequence, are most promising for these defendants. Second, it is this group of defendants who—if re-negotiation fails—are more likely to face the risk of trial in light of a certain, severe collateral consequence as compared to a potential, relatively small sentence of incarceration.²⁰

19. *Padilla*, 130 S. Ct. at 1485 (emphasis added).

20. See *infra* notes 149–50 and accompanying text; see also *infra* text accompanying notes 191–198. Unfortunately, it is defendants facing misdemeanor charges who are most likely to receive ineffective assistance of counsel, because underfunded and overloaded defenders and defender offices often devote fewer resources and less attention to lower-level cases. See Jenny Roberts, *Why Misdemeanors Matter*, 45 U.C. DAVIS L. REV. (forthcoming 2011) (on file with author) (noting need for definition of effective assistance of misdemeanor counsel in professional standards, ethical rules, and Sixth Amendment jurisprudence). Still, there is great potential for creative negotiation and avoidance of unintended collateral consequences with low-level charges, and some defenders certainly offer high-quality representation that looks beyond the narrow confines of the criminal charge. See, e.g., THE BRONX DEFENDERS, THE CENTER FOR

Part I of this Article briefly sets out the framework of ineffective-assistance-of-counsel claims, including the particular holding of *Padilla*, with a focus on the prejudice prong. This Article's proposed prejudice standard is set forth in Part II. Part III points out and responds to potential critiques of this more inclusive prejudice approach.

I. THE PREJUDICE PRONG TEST FOR INEFFECTIVE-ASSISTANCE CLAIMS

This Part examines the development of the prejudice inquiry of ineffective-assistance claims in the guilty plea context. It first explores the predominant trial-outcome analysis for the prejudice prong, driven by the lower courts' focus on particular language in *Strickland* and *Hill*. After a closer reading of *Strickland* and *Hill*, this Part then considers the support in *Padilla* for a prejudice approach that captures the need to broaden the prejudice lens and consider different outcomes outside of the trial setting in a context-specific inquiry.

A. The "Trial-Outcome" Prejudice Inquiry: A Narrow Reading of *Strickland* and *Hill*

It is long established that the Sixth Amendment right to counsel means the right to the effective assistance of counsel.²¹ Courts analyzing ineffective-assistance claims use what one court recently described as the "well-worn, two-prong standard established in *Strickland v. Washington*,"²² requiring a defendant making such a claim to show: (1) attorney error; and (2) prejudice flowing from that error.²³ The

HOLISTIC DEFENSE, THE 2011 HOLISTIC DEFENSE FOR PUBLIC DEFENDER OFFICES, TECHNICAL ASSISTANCE PROJECT 2-4 (2011), available at <http://www.bronxdefenders.org/sites/default/files/2011%20Technical%20Assistance%20RFP.pdf> (explaining the Bronx Defenders' theory of holistic representation); *Holistic Representation*, KNOX COUNTY PUB. DEFENDERS COMMUNITY L. OFF., <http://www.pdknox.org/writeup/80> (last visited Mar. 31, 2011) (explaining the Knox County Public Defenders' holistic representation model).

21. See *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

22. *Seaton v. United States*, Nos. C-08-0105 MHP, CR-02-00044 MHP, 2010 WL 1957398, at *2 (N.D. Cal. May 14, 2010) (rejecting all of Seaton's ineffective-assistance claims for failure to demonstrate prejudice).

23. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In its 2000 decision in *Williams v. Taylor*, the Court clarified that the two-prong *Strickland* test "provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims." *Williams v. Taylor*, 529 U.S. 362, 391 (2000). "The Virginia Supreme Court erred in holding that our decision in *Lockhart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838, 122 L.Ed.2d 180 (1993), modified or in some way supplanted the rule set down in *Strickland*." *Id.* *Williams* clarified that the Court's earlier decision in *Lockhart* dealt with the rare situation where the "likelihood of a different outcome attributable to an incorrect interpretation of the law should be regarded as a potential 'windfall' to the

Supreme Court has held the two-part *Strickland* test applicable to guilty pleas.²⁴

Under the first prong of this test, a defendant has to overcome a strong presumption of competence to show that his lawyer fell below prevailing professional norms in an unreasonable manner.²⁵ Under the second prong, *Strickland* requires a defendant to demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”²⁶

Many courts have interpreted this “different outcome” inquiry to mean a different trial outcome—namely, acquittal, or conviction on a lesser charge. Sometimes, courts interpret “different outcome” to include the likelihood of a lower sentence *after* a trial.²⁷ Most courts thus require a defendant to demonstrate that he would not have pled guilty, but rather would have chosen trial and would have either won that trial or received a lower sentence after trial than he received after pleading guilty. This ignores the fact that initial rejection of a guilty

defendant rather than the legitimate ‘prejudice’ contemplated by our opinion in *Strickland*.” *Williams*, 529 U.S. at 392; *see also* *United States v. Glover*, 531 U.S. 198, 203 (2001) (“[O]ur holding in *Lockhart* does not supplant the *Strickland* analysis.”). The other “outlier” prejudice situation is that of presumed prejudice, applied in a narrow class of cases that deal with structural rather than individual attorney errors. *See Williams*, 529 U.S. at 391; *see also* *United States v. Cronin*, 466 U.S. 648, 659 (1984) (presuming prejudice where defense counsel “entirely fails to subject the prosecution’s case to meaningful adversarial testing”). Failure-to-warn cases are not “windfall” cases, and it is clear from *Padilla* that the Court regards them as the type of case that fits within *Strickland*’s two-prong structure. *Padilla*, 130 S. Ct. at 1482 (“*Strickland* applies to *Padilla*’s case.”).

24. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (“We hold, therefore, that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.”).

25. *Strickland*, 466 U.S. at 688-91.

Judicial scrutiny of counsel’s performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Id. at 689.

26. *Id.* at 694. In settling on a “reasonable probability” standard, *Strickland* found that requiring a mere showing that counsel’s “errors had some conceivable effect on the outcome of the proceeding,” would provide “no workable principle.” *Id.* at 693-94. The Court then noted how “[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” *Id.* at 694. *Strickland*’s “reasonable probability” language thus requires demonstrating something more than “some conceivable effect” yet less than a “more likely than not” effect on outcome. *See id.* at 693.

27. This is particularly so in capital cases, where—as *Strickland* noted—the capital sentencing hearing is like a trial. *Id.* at 686-87.

plea does not always lead to trial, but instead might lead to re-negotiation in order to avoid imposition of a collateral consequence, or to the other different outcomes described in the Introduction.

A recent Rhode Island state court decision illustrates how the trial-outcome focused approach fails to account for the complexity and nuance of plea bargaining. Fernelys Brea was charged with one count of felony possession of stolen property.²⁸ He pled guilty in exchange for a five-year suspended sentence and five years of probation.²⁹ Although the court and defense counsel warned Brea that his conviction might have adverse immigration consequences, he was not told that the five-year suspended sentence made him automatically deportable, whereas a sentence of less than one year (even if not suspended) would not have led to this drastic consequence.³⁰ Despite recognizing that this informational failure met the first prong of ineffective assistance given the recent decision in *Padilla*, the court found a lack of prejudice by using a trial-outcome analysis and completely ignoring a record replete with re-negotiation possibilities.³¹ Indeed, the court “accepted Brea’s testimony that had he known of the INA’s deportation requirements he would have pled guilty to incarceration and to a non-deportable sentence of less than one year imprisonment—assuming the State had been inclined to offer this to him.”³² Such an outcome hardly seems unlikely, since it would allow the government to achieve conviction on the top count and actual incarceration, rather than a suspended sentence. It also would have allowed the judge to offer such a sentence without prosecutorial consent since Brea was pleading guilty to the charges. Ignoring the reasonable probability of a re-negotiated outcome, the court set out the relevant framework as follows:

Brea was required to prove that there was a reasonable probability he would have rejected the plea offer and would have insisted on going to trial. Brea also was required to prove there was a reasonable probability the criminal proceedings against him would have finally resulted in a different outcome, more specifically either in an

28. *Brea v. State*, P.M. 2010-4426, 2010 R.I. Super. LEXIS 176, at *1 (Sup. Ct. R.I. Dec. 3, 2010).

29. *Id.*

30. *Id.* at *2 (noting how Brea had been in the United States since childhood, and had “personal and familial connections to the United States”).

31. *Id.* at *4-12.

32. *Id.* at *8 (internal citation omitted).

acquittal or a conviction coupled with a non-deportable sentence of less than one year.³³

In other words, Brea was not allowed to show prejudice by showing that it was probable his attorney could have achieved a non-deportable sentence through negotiation or sentencing advocacy. Instead, he was forced to show that he could have achieved this same result through a trial.³⁴

The origins of the myopic trial-outcome prejudice approach lie in *Strickland*. In particular, there is one section of the decision's prejudice analysis that explains how "[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt."³⁵ However, looking at this passage in isolation ignores its context, as well as other parts of *Strickland*, which explain prejudice more generally. The entire paragraph reads:

The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.³⁶

Strickland involved a capital sentencing proceeding, and the Court noted earlier how such proceedings are "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."³⁷ Thus, the only "governing legal standard" *Strickland* considered was that of a conviction after trial, as compared to a death sentence after a capital sentencing proceeding. This leaves room for recognition that the "governing legal standard" would be different if the context was something other than a trial or trial-like proceeding. In fact, *Strickland's* later announcement about the "appropriate test

33. *Id.* at *6 (internal citation omitted).

34. *Id.*

35. *Strickland v. Washington*, 466 U.S. 668, 695 (1984).

36. *Id.*

37. *Id.* at 686-87 (internal citations omitted).

for prejudice” is that “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”³⁸ This is broader than a narrow trial-outcome inquiry.

Just a year after *Strickland*, the Court applied its two-part test to ineffective-assistance-of-counsel claims following guilty pleas.³⁹ In *Hill v. Lockhart*, the Court first noted that attorney error under prong one was essentially the same inquiry in reviewing a guilty plea as it was in reviewing a trial or sentencing phase error.⁴⁰ At the beginning of the Court’s prejudice discussion, there appears to be some recognition that a trial-outcome approach would not be a good fit for review of guilty pleas. Thus, the Court stated that the prejudice prong should “focus[] on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process.”⁴¹ This implies that going to trial is not the only possible outcome of a rejected plea. However, *Hill* went on to hold that “to satisfy the ‘prejudice’ requirement, the 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.”⁴² The decision thus veered back to a trial-outcome focus, noting that “[i]n many guilty plea cases, the ‘prejudice’ inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial.”⁴³

Further, in describing in *Hill* how a plea-outcome inquiry will often look a lot like a trial-outcome inquiry, Justice Rehnquist offered three examples of alleged pre-plea attorney error: failure to investigate; failure to discover potentially exculpatory evidence; and failure to advise the defendant of a potential affirmative defense.⁴⁴ In all of these examples, *Hill* noted, the likelihood that a defendant would

38. *Id.* at 694.

39. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

40. *Id.* at 57.

41. *Id.* at 59 (emphasis added). The Court noted that, among other reasons, “requiring a showing of ‘prejudice’ from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel will serve the fundamental interest in the finality of guilty pleas.” *Id.* at 58.

42. *Id.* at 59.

43. *Id.*; see also Emily Rubin, *Ineffective Assistance of Counsel and Guilty Pleas: Towards a Paradigm of Informed Consent*, 80 VA. L. REV. 1699, 1704-05 (1994) (noting how *Hill*’s prejudice-inquiry language results in “a de facto requirement that a defendant prove an adverse effect on the outcome of a hypothetical trial in order to make out a successful claim for ineffective assistance”).

44. See *Lockhart*, 474 U.S. at 59.

have decided to go to trial rather than plead guilty in the absence of the error turns on whether the case without the error offered a likelihood of success at trial.⁴⁵ Thus, “where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the ‘prejudice’ inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.”⁴⁶

In short, *Hill* initially articulated a broad prejudice inquiry that asked whether, given competent representation, the outcome of the plea process would have been different. This inquiry appeared to recognize that factors other than the chances of winning a trial figure into a defendant’s decision-making process, and that a different outcome might mean a “better” plea bargain or sentence, and not simply a trial. However, instead of grappling with the ways that lower courts might apply such an inquiry, *Hill* provided examples that effectively adopted a trial-outcome focused prejudice test. In other words, *Hill* asked whether the defendant would have won the trial—either the one that he had, in review of a post-trial conviction, or the one that he never had, in review of a conviction by guilty plea.

Many lower state and federal courts rely on *Hill*’s trial-outcome language in taking a similar approach in failure-to-warn cases.⁴⁷ One recent federal district court case illustrates the problems with a trial-outcome prejudice inquiry. Dapo Emmanuel Adeyeye sought to withdraw his guilty plea based on the fact that his lawyer failed to warn him about the automatic deportation consequences of his conviction.⁴⁸ Addressing the prejudice prong of his claim, the court found:

[T]his alleged omission did not prejudice the defendant because Adeyeye has not demonstrated (*nor could he*) that the knowledge of this deportation possibility had any effect on his guilt or innocence. Therefore, there is no reason for this court to believe that if Adeyeye had known about the possibility of deportation, the out-

45. *Id.* (stating how the prejudice assessment in a failure-to-investigate claim “will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial”).

46. *Id.*

47. See, e.g., *People v. Cristache*, 907 N.Y.S.2d 833, 841 (N.Y. Crim. Ct. 2010) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)); *Rampal v. State*, No. 2008-1394, 2010 WL 1836782 (Sup. Ct. R.I. Apr. 30, 2010) (quoting *Hill*, 474 U.S. at 59).

48. *Adeyeye v. United States*, No. 00 CR 233, 2009 WL 3229585, at *1 (N.D. Ill. Oct. 1, 2009). The court’s holding on the first prong, namely that failure-to-warn about deportation did not violate prong one of *Strickland*, is clearly contrary to the result in *Padilla*. *Id.* at *5-*6.

come would have been different. Accordingly, even if [defense counsel] did, in fact, fail to inform Adeyeye about the possibility of deportation (an allegation directly contradicted by the evidence in the record), we find that this does not rise to level of ineffective assistance of counsel⁴⁹

By noting “nor could he,” the *Adeyeye* court explicitly found that a defendant alleging ineffective assistance for the failure to warn about deportation will *never* be able to succeed on the claim.⁵⁰ This would put such claims in a category separate from other ineffective-assistance claims, such as failure to investigate or failure to file a suppression motion, where the defendant might be able to show a different trial outcome “but for” the attorney error.⁵¹ It would put them in a category where demonstrating prejudice is impossible. Surely, that cannot be what the *Padilla* Court intended when it granted certiorari and then ruled that such failures-to-warn violated the first prong of the ineffective-assistance test.

While the *Adeyeye* decision pre-dates *Padilla* and takes a rather drastic approach, a number of lower court decisions after *Padilla* impose a similar trial-outcome focused method on defendants who pled guilty.⁵² In a less extreme example, a federal district court cited *Hill’s*

49. *Id.* at *6 (emphasis added).

50. *Id.*

51. That is not to say that such failures should only be examined under a trial-outcome lens. A well-developed case for suppression, or a thorough investigation that reveals weaknesses in the government’s case, for example, often lead to a better plea offer from the prosecution.

52. *See, e.g.,* United States v. Hough, No. 2:02-cr-00649-WJM-1, 2010 WL 5250996, at *4-*5 (D.N.J. Dec. 17, 2010) (finding—in case involving counsel’s failure to warn about deportation—that defendant did not show prejudice because the evidence against him was strong, making it unlikely that he would have succeeded at trial); *People v. Nunez*, No. 6786/94, 2010 WL 2326584, at *5-*6 (N.Y. Sup. Ct. May 21, 2010) (noting that “defendant’s affidavit is bereft of any averment that he, too, would have insisted on going to trial had plea counsel properly advised him” about deportation, and that he failed to show prejudice because the evidence against him was overwhelming and he had not provided any plausible trial defenses).

In the months since the March 2010 decision in *Padilla*, there have been more than two hundred published lower state and federal court decisions that cite the case. *See, e.g.,* United States v. Gutierrez Martinez, Crim. No. 07-91(5), ADM/FLN, Civ. No. 10-2553 ADM, 2010 WL 5266490 (D. Minn. 2010) (discussing a number of aspects of *Padilla*); *Cristache*, 907 N.Y.S.2d at 847-51, slip op. at 13-17 (same). A number of these decisions undertake some type of prejudice analysis, some in dicta and others as part of the ultimate holding. *See* *Brown v. United States*, No. 10 Civ. 3012, 2010 WL 5313546, at *6 (E.D.N.Y. 2010) (finding no prejudice when the defendant knew prior to entering the guilty plea that he would likely be deported); *State v. Barrios*, 2010 WL 5071177, at *4 (N.J. Super. Ct. App. Div. 2010) (asserting in dicta that prejudice could not be met under the facts). An analysis of these cases reveals five basic categories that capture, broadly, the types of prejudice analyses these courts are conducting: (1) No Harm, No Foul; (2) Cure; (3) Evidentiary Threshold; (4) Trial Outcome; and (5) Sentencing and Negotiation Advocacy. There is arguably a sixth, “other,” category, with some unique (and some outlier) analyses. In “No Harm, No Foul” cases, courts have found that the defendant failed to demonstrate prejudice because the consequence he sought to avoid would have happened even without the

language on how a defendant must establish “a reasonable probability that, but for counsel’s unreasonable advice, the defendant would not have pleaded guilty and would have gone to trial.”⁵³ The court noted how, “[i]n any event, Ramiro makes no showing of prejudice. Ramiro only asserts that he would have gone to trial, but he offers no evidence that the result at trial would have been better than the result he obtained through his guilty plea.”⁵⁴ The court mentioned another case in which the defendant showed a likelihood of a different outcome based on the fact that he might have gotten “a downward departure in sentencing, renegotiated his plea agreement, or pled guilty to a lesser charge.”⁵⁵ Yet the court did not allow such alternative options in Ramiro’s case, and instead focused on Ramiro’s failure to show a better result flowing from a trial.⁵⁶

What these cases all ignore is that *Hill*, in fact, left room for a prejudice inquiry that goes beyond the narrow question of likely trial

first prong, attorney error. See *infra* note 179 and accompanying text (discussing Gutierrez Martinez, 2010 WL 5266490, at *4 (D. Minn. Dec. 17, 2010), and other examples). The “Cure” group of cases finds lack of prejudice where the defendant did not feel the effect of his attorney’s incompetence because some other actor “fixed” the problem. See, e.g., *United States v. Bhindar*, No. 07 Cr 711-04(LAP), 2010 WL 2633858, at *5 (S.D.N.Y. June 30, 2010) (rejecting defendant’s claim that defense counsel misinformed him of the immigration consequences of his guilty plea where the court had colloquy about immigration with defendant during his plea allocution). *Bhindar* and other “cure” cases ignore the clear differences between warnings in a written agreement, or even on the record by the court, and a counseling conversation with one’s own lawyer about deportation. The importance of this difference is underscored by the *Padilla* decision, which explicitly grounded the right to information about immigration consequences in the Sixth Amendment right to counsel, and not in the Due Process Clause rights that relate more generally to guilty pleas and the colloquy with the trial court. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010). However, the Supreme Court in dicta has suggested an analogous “cure” for potential ineffective assistance in the area of defense counsel’s duty to inform her client about his appeal rights. See *Roe v. Flores-Ortega*, 528 U.S. 470, 479-80 (2000) (“[F]or example, suppose a sentencing court’s instructions to a defendant about his appeal rights in a particular case are so clear and informative as to substitute for counsel’s duty to consult.”).

In the third category, courts have held that the defendant failed to meet the evidentiary threshold necessary to get an evidentiary hearing. *Hill* was such a case, as the Supreme Court upheld the trial court’s denial of Hill’s claim without any hearing. See *Hill v. Lockhart*, 474 U.S. 52, 60 (1985) (“Petitioner 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.”); see also *United States v. McDougal*, Nos. 1:10cv24-HSO, 1:08cr91-HSO-RHW-5, 2010 WL 4615425, at *3-*4 (S.D. Miss. Nov. 4, 2010) (finding no need for an evidentiary hearing where the habeas petition contained only a “conclusory statement that [Petitioner] would have gone to trial if advised of the possible inclusion of the cocaine in calculating the guidelines range”). The fourth and fifth categories, “Trial-Outcome” and “Sentencing and Negotiation Advocacy,” respectively, are fully explored in this Article.

53. *United States v. Ramiro*, Crim. No. 08-00294 SOM-2, Civ. No. 09-00559 SOM/KSC, 2009 WL 5103312, at *5 (D. Haw. Dec. 23, 2009).

54. *Id.*

55. *Id.*

56. *Id.* (“Ramiro, by contrast, shows no likelihood that going to trial would have resulted in a favorable outcome.”).

outcome. The Court stated that “[i]n many guilty plea cases, the ‘prejudice’ inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial.”⁵⁷ This clearly indicates that there are *some* guilty plea cases where the prejudice inquiry will differ. The trial-outcome based examples that *Hill* offered, described above, come after this statement and illustrate the Court’s suggested approach for “many” guilty plea cases. *Padilla*, and failure-to-warn cases generally, do not fall into the “many such cases” category, as the next section explores.

B. *Padilla*’s Broader Prejudice Paradigm

Padilla makes clear that the prejudice inquiry should be whether a rational person would have rejected a particular plea, not whether a hypothetical trial outcome would have led to a better result than the plea. Despite decisions to the contrary, *Strickland* and *Hill* both note that the prejudice inquiry is informed by context. The evaluation of prejudice in the context of pre-plea negotiations necessitates a realistic evaluation of the impact of severe collateral consequences on rational decision-makers, the opportunities for creative plea bargaining, and the willingness to risk increased incarceration to avoid certain severe collateral consequences. This section briefly explains the *Padilla* decision as necessary background for understanding the few but important words that the Court devotes to the prejudice prong. It also considers a significant move in *Padilla*—considering the prejudice prong *after* the first prong’s attorney error analysis. Finally, it turns to the broader prejudice prong language in *Padilla*.

1. The *Padilla* Decision’s Focus on Deportation and the Duty to Warn

Padilla’s central holding related to the attorney error prong of ineffective assistance: where the deportation consequences of a criminal conviction are “succinct, clear and explicit,” defense counsel has a Sixth Amendment obligation to correctly inform his client of this consequence.⁵⁸ Justice Stevens labored in the majority opinion to distin-

57. *Hill*, 474 U.S. at 59 (emphasis added).

58. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010) (“In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequences for *Padilla*’s conviction.”). In dicta, the decision also stated that where deportation is “unclear or uncertain,” counsel has a “more limited” duty to simply “advise a noncitizen client

guish deportation from the many other potential collateral consequences of so many criminal convictions.⁵⁹ However, the reality is that even *Padilla*'s narrowly-crafted test will eventually draw other non-deportation consequences into the ambit of the Sixth Amendment duty to counsel. Indeed, it has already done so in the lower courts, which have cited *Padilla* as they considered consequences ranging from sex offender registration to pension forfeiture.⁶⁰

The most obvious candidate for extension of *Padilla*'s "succinct, clear, and explicit" test for determining if a defendant has a Sixth Amendment right to information about a collateral consequence is Sex Offender Registration and Notification Act ("SORNA") consequences. Both state and federal SORNAs typically consist of a list of criminal convictions that qualify an individual for registration and sometimes notification, so they could not be clearer.⁶¹ These laws are explicit in that they require registration or, alternatively, criminal lia-

that pending criminal charges *may* carry a risk of adverse immigration consequences." *Id.* at 1478 (emphasis added).

59. *Id.* at 1480.

[C]hanges to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

Id. The Court's language casts a shadow over the previously bright line the Court has attempted to draw between criminal and immigration law. *See, e.g.,* *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (explaining that immigration issues are "purely civil action[s]" because instead of seeking to punish the defendant, these proceedings aim to determine whether the defendant may remain in this country). Scholars have begun to comment on the significance of *Padilla* for immigration law. *See, e.g.,* Peter L. Markowitz, *Deportation is Different* 47 (Benjamin N. Cardozo School of Law, Working Paper No. 308, 2010), available at <http://ssrn.com/abstract=1666788>.

60. *See, e.g.,* *Taylor v. State*, 304 Ga. App. 878, 884 (Ga. Ct. App. 2010) (failure to inform client of sex offender registration is deficient performance, although Defendant did not show prejudice); *Commonwealth v. Abraham*, 996 A.2d 1090, 1094-95 (Pa. Super. 2010), *granted in part*, 9 A.3d 1133 (Pa. 2010) ("Because of the automatic nature of forfeiture, the punitive nature of the consequence, and the fact that only criminal behavior triggers forfeiture, the application of [the Pennsylvania Pension Forfeiture Act] is, like deportation, intimately connected to the criminal process. Therefore, counsel was obliged to warn his client of the loss of pension as a consequence to pleading guilty."). For a number of courts that have declined to extend *Padilla* to non-deportation consequences, see generally *United States v. Bakilana*, No. 1:10-cr-00093 (LMB), 2010 WL 4007608 (E.D. Va. Oct. 12, 2010) (potential liability in civil suit); *Maxwell v. Larkins*, No. 4:08 CV 1896 DDN, 2010 WL 2680333 (E.D. Mo. July 1, 2010) (sex offender registration); *Brown v. Goodwin*, Civ. No. 09-211 (RMB), 2010 WL 1930574 (D.N.J. May 11, 2010) (involuntary commitment); *Blair v. State*, No. W2010-00627-CCA-R3-PC, 2010 WL 4812768 (Tenn. Crim. App. Nov. 18, 2010) (loss of employment).

61. *See, e.g.,* N.Y. CORRECT. LAW § 168-a (McKinney 2010) (naming convictions for sexual misconduct, rape in the first degree, sex trafficking, sexual abuse in the first degree, and other crimes in statutory list that leads to mandatory sex offender registration).

bility for failure to register.⁶² Finally, one could surely call them succinct because they consist of a list of qualifying crimes.

These issues left open after *Padilla* are critical as they flow from what is already—even with *Padilla*'s narrow focus on deportation—a monumental shift in the role of the defense lawyer in counseling a client about the advantages and disadvantages of any guilty plea or trial. *Padilla* is simply the beginning of what is sure to be a robust jurisprudence of ineffective assistance of counsel based on the failure to warn about severe collateral consequences. This body of law, as it percolates in the lower federal and state courts (and perhaps eventually back up to the Supreme Court), will serve to define the constitutional boundaries of defense counsel's role in such warnings, and thus will deter behavior that falls outside of these boundaries.⁶³ Indeed, the spate of trainings and practice manuals in the wake of *Padilla* evidence the influence that a Supreme Court decision can have on attorney behavior.⁶⁴ Future developments will also define a person's right to know about consequences that may often overshadow the criminal sentence and thus factor into the plea/trial decision-making process.

2. Ordering the Two Prongs: The Importance of Considering Prejudice Second

There is a serious potential obstacle to the development of what is surely much-needed guidance to criminal justice system actors on the parameters of *Padilla*.⁶⁵ It takes two prongs to make a successful

62. See, e.g., *Id.* § 168-t (criminalizing failure to register as a sex offender).

63. Such deterrence is largely informal, as criminal defense lawyers rarely face any type of disciplinary action when a former client claims ineffective assistance. See Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 43; see also Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 1 (2007) (noting that state disciplinary agencies formally sanction only about 5600 lawyers per year, despite receiving more than 125,000 lawyer discipline complaints per year).

64. See *infra* note 71 (citing to these trainings and manuals). A similar thing happened after the Court's decision in *Wiggins v. Smith*, 539 U.S. 510, 538 (2003), holding that defense counsel has a Sixth Amendment duty to investigate mitigation evidence in a capital case. See, e.g., *National Capital Mitigation Seminar to be Held in New Orleans April 15-17, 2004*, THE DEFENDER NEVER RESTS (FED. PUBL. DEFENDER'S OFF. FOR THE E. DISTRICT OF LA.) 2 (2004), available at www.federaldefender.net/Documents/newsletters/nltr-Jan04.pdf (listing training "prompted by *Wiggins v. Smith*"); *Death Penalty and Capital Habeas Corpus Training Programs For Defense Counsel and Mitigation Specialists: Eighth National Seminar on the Development and Integration of Mitigation Evidence*, CAP. DEF. NETWORK, http://www.capdefnet.org/hat/contents/shared_files/upcoming_seminars/upcoming.htm (last updated Mar. 08, 2011) ("This seminar has been held annually since the Supreme Court decision in *Wiggins v. Smith*.").

65. Judges and prosecutors, as well as defense counsel, have an interest in assuring that defendants receive effective assistance of counsel.

ineffective-assistance claim, and there will be a well-developed precedential body of law about failures-to-warn only if at least some defendants manage to get past the high hurdle of the prejudice prong. In other words, if courts analyzing ineffective-assistance claims turn first to prejudice, many of those courts will never reach the attorney competence prong. Alternatively, they may note attorney error in dicta, only to emphasize the effective immunity of such error by finding failure to prove prejudice, thereby sending a troubling message to defense counsel and others about the need to warn about collateral consequences—you must warn, but nothing is likely to happen if you do not.

The prejudice prong serves several judicially-articulated policy purposes, including the protection of defense counsel’s strategic decision-making without fear of over-regulation.⁶⁶ There is also the perceived and exaggerated necessity to protect against a flood of conviction reversals—in short, finality concerns.⁶⁷ Although the attorney performance prong—with its strongly-worded and strictly-applied presumption of competence—is certainly not a low hurdle, it has proven even harder for defendants to demonstrate prejudice.⁶⁸

The prejudice prong is particularly significant because *Strickland* encouraged lower courts to analyze ineffective-assistance claims to first determine prejudice, or lack thereof, and to evaluate any attorney error only after the defendant has met that burden.

The object of an ineffectiveness claim is not to grade counsel’s performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims [do] not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.⁶⁹

The Court took its own advice in *Hill*, finding “it unnecessary to determine” the claim of first prong attorney error “because in the pre-

66. *Strickland v. Washington*, 466 U.S. 668, 697 (1984) (“Courts should strive to ensure that ineffectiveness claims [do] not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.”).

67. See *infra* Part III.B.1 (discussing and debunking exaggerated floodgates concerns).

68. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485 n.12 (2010) (“[I]t is often quite difficult for petitioners who have acknowledged their guilt to satisfy *Strickland*’s prejudice prong.”). For notorious examples of egregious attorney error (such as a drunk or sleeping defense counsel) with no finding of prejudice and thus no remedy, see Kirchmeier, *supra* note 10, at 455-63.

69. *Strickland*, 466 U.S. at 697.

sent case we conclude that petitioner's allegations are insufficient to satisfy the . . . requirement of 'prejudice.'⁷⁰

One drawback to a prejudice-first approach is that attorney performance is shaped in part by the backdrop of ineffective-assistance jurisprudence.⁷¹ The high prejudice hurdle, particularly when analyzed first, sends a message to the defense bar that even egregious behavior is unlikely to lead to a finding that the attorney was constitutionally "ineffective."⁷² In addition, if courts never get to the attorney error analysis, then constitutional norms of unacceptable attorney practice will not develop. A full exploration of the potential problems with a prejudice-first approach is beyond the scope of this Article.⁷³ This brief discussion is intended to highlight the importance of getting prejudice analyses right, particularly if courts undertake this inquiry first and thus make it a gateway to any attorney competence analysis.

Perhaps anticipating the need to further develop attorney competence norms in future failure-to-warn cases, *Padilla* reversed course and put prejudice last: "Under *Strickland*, we first determine whether counsel's representation fell below an objective standard of reasonableness. Then we ask whether there is a reasonable probability that,

70. *Hill v. Lockhart*, 474 U.S. 52, 60 (1985); see also Martin C. Calhoun, Comment, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 416 n.21 (1988) (finding that 291 of 702 ineffective assistance of counsel claims between 1984 and 1988 were adversely decided solely on lack of prejudice grounds).

71. For some of the many local and national trainings in the wake of *Padilla*, see *The Fifth National Training on the Immigration Consequences of Criminal Convictions*, DEFENDING IMMIGRANTS PARTNERSHIP, <http://defendingimmigrants.org> (last visited Mar. 12, 2011); *Upcoming Trainings: The Impact of Padilla v. Kentucky*, PAIR PROJECT, <http://www.pairproject.org/trainings.php> (last visited Mar. 12, 2011). For practice advisories on the same, see generally IMMIGRANT DEF. PROJECT, A DEFENDING IMMIGRANTS PARTNERSHIP PRACTICE ADVISORY: DUTY OF CRIMINAL DEFENSE COUNSEL REPRESENTING AN IMMIGRANT DEFENDANT AFTER *PADILLA V. KENTUCKY* (2010), available at http://www.immigrantdefenseproject.org/docs/2010/10-Padilla_Practice_Advisory.pdf; DAN KESSELBRENNER, NAT'L IMMIGRATION PROJECT, A DEFENDING IMMIGRANTS PARTNERSHIP PRACTICE ADVISORY: RETROACTIVE APPLICABILITY OF *PADILLA V. KENTUCKY* (2010); WASH. DEFENDER ASSOCIATION'S IMMIGRATION PROJECT, HOW TO ADVISE NONCITIZEN DEFENDANTS: WHAT IS "CLEAR AND UNCLEAR" AFTER *PADILLA V. KENTUCKY* (2010).

72. A similar critique has been aimed at the high "materiality" hurdle in *Brady* claims, where the message to prosecutors is that most violations (of the *Brady* right to exculpatory evidence) will not result in reversal of convictions. See, e.g., Alafair Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 488-98 (2009) (arguing that materiality hurdle leads to under-disclosure and prosecutorial cognitive bias).

73. For such an exploration in a closely-related area, see Stephen I. Vladeck, *AEDPA, Saucier, and the Stronger Case for Rights-First Constitutional Adjudication*, 32 SEATTLE U. L. REV. 595 (2009) (urging post-conviction courts to evaluate whether a defendant has sufficiently alleged violation of a right before examining the procedural bar of whether the state court's decision was contrary to, or an unreasonable application of, clearly established federal law).

but for counsel's unprofessional errors, the result of the proceeding would have been different."⁷⁴ While this contradicts *Strickland's* advice to lower courts to analyze prejudice first, it remains to be seen what the lower courts do with this contradiction. At least some courts have continued to address prejudice first,⁷⁵ which demonstrates the importance of moving from a narrow, trial-outcome inquiry to a broader, more realistic prejudice analysis.

In failure-to-warn cases like *Padilla*, there is particular difficulty in demonstrating prejudice under the prevailing trial-outcome analysis, which is not well-suited to such cases. This is not to simply say that defendants will have a hard time demonstrating prejudice under the current test—that is already the case in all types of ineffective-assistance claims,⁷⁶ and purposely so.⁷⁷ Rather, failure-to-warn claims raise unique issues that the current approach does not account for, with its singular focus on a different trial (or sometimes sentence) outcome, “but for” the alleged incompetent lawyering.

3. *Padilla* on Prejudice

After agreeing with Mr. Padilla that his lawyer had a Sixth Amendment duty to advise him that his guilty plea made him eligible for automatic deportation, the Court noted: “Whether he is entitled to relief depends on whether he has been prejudiced, a matter that we do not address.”⁷⁸ Except that the Court did address the matter, and did so in a significant way. It did not discuss the merits of any potential

74. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010) (internal citations and quotations omitted).

75. See, e.g., *Hutchings v. United States*, 618 F.3d 693, 699 n.3 (7th Cir. 2010) (“The *Padilla* decision has no bearing on our decision in this case because we need not decide whether [defense counsel’s] performance was deficient to reach our conclusion that Hutchings was not prejudiced and therefore not entitled to habeas relief.”); *United States v. Gutierrez Martinez*, Crim. No. 07-91(5) ADM/FLN, Civ. No. 10-2553 ADM, 2010 WL 5266490, at *3-*4 (D. Minn. Dec. 17, 2010) (quoting *Strickland's* prejudice-first language in noting how a “finding that the defendant failed to satisfy the second prong is dispositive”).

76. See *Kirchmeier*, *supra* note 10, at 455-56 (describing cases dismissing defendant’s claim of ineffective assistance of counsel for failure to prove prejudice, even though counsel’s performance was impaired by drugs or alcohol).

77. See *infra* Part III.B.1 (discussing finality concerns in criminal cases).

78. *Padilla*, 130 S. Ct. at 1478; see also *id.* at 1483-84 (“Whether Padilla is entitled to relief on his claim will depend on whether he can satisfy *Strickland's* second prong, prejudice, a matter we leave to the Kentucky courts to consider in the first instance.”); *id.* at 1487 (“Whether Padilla is entitled to relief will depend on whether he can demonstrate prejudice as a result thereof, a question we do not reach because it was not passed on below.”).

prejudice, but the decision spoke to the way in which courts should approach the prejudice determination in a case like Mr. Padilla's.⁷⁹

Padilla actually moved away from *Strickland's* and *Hill's* trial-outcome-based prejudice language. Instead, it noted that "to obtain relief on this type of claim [of failure to warn about deportation], a petitioner must convince the court that *a decision to reject the plea bargain would have been rational under the circumstances.*"⁸⁰ In making this statement, the *Padilla* Court cited neither *Strickland* nor *Hill*. Indeed, neither of these decisions used the word "rational" to describe decision-making, nor did they directly discuss the reasonableness or rationality of the decision-making process as the underpinning of a prejudice inquiry. While a "rational under the circumstances" standard does not exclude considerations of trial outcome, it is much broader and allows for consideration of a different type of risk analysis by a defendant. It also allows for recognition of the fact that a rejected plea does not always mean a trial, but rather might lead to a different plea offer or a different sentence. This section will examine *Padilla's* prejudice statements in more detail.

Padilla made its first reference to prejudice when it set forth the general two-prong test for ineffective-assistance claims, quoting *Strickland* for how the prejudice inquiry asks "whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"⁸¹ More significantly, the *Padilla* Court returned to prejudice later in the decision. Considering, and ultimately rejecting, the finality and floodgates concerns that various parties and *amici* in *Padilla* raised about a rule requiring counsel to offer clients pre-plea warnings about any type of "collateral" consequence, the Court observed "that it is often quite difficult for petitioners who have acknowledged their guilt (i.e. have pled guilty) to satisfy *Strickland's* prejudice prong."⁸² Continuing to reassure that *Strickland's* high two-prong bar protects against the opening of any floodgates, the Court then set out the "rational under the circumstances" test.⁸³ In this discussion, *Padilla* did not mention *Strickland* or *Hill*.

79. See *id.* at 1483-84.

80. *Id.* at 1485 (emphasis added).

81. *Id.* at 1482 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

82. *Id.* at 1485 n.12.

83. *Id.* at 1485.

Instead, *Padilla* cited two parts of its 2000 decision in *Roe v. Flores-Ortega*, which examined “the proper framework for evaluating an ineffective assistance of counsel claim, based on counsel’s failure to file a notice of appeal without respondent’s consent.”⁸⁴ In one of these parts, *Flores-Ortega* found that there is such a duty “when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.”⁸⁵ The decision explained how courts undertaking such an inquiry must “consider[] all relevant factors in a given case.”⁸⁶ While this first part of *Flores-Ortega* related to the attorney competence prong of the ineffectiveness test, *Padilla* also cited to another part of *Flores-Ortega* that squarely addressed prejudice.

In this part of the decision, the *Flores-Ortega* Court stated a clear prejudice test that would simply “require the defendant to demonstrate that, but for counsel’s deficient conduct, he would have appealed.”⁸⁷ The Court explained that it would be “unfair” to require a “defendant to demonstrate that his hypothetical appeal might have had merit” in order to show prejudice.⁸⁸

The *Padilla* Court never explicitly linked its “rational under the circumstances” language to the prejudice prong. However, a close reading of *Padilla* and the *Flores-Ortega* pages to which it cited make clear that this language offers guidance to lower courts determining the proper prejudice analysis for failure-to-warn cases.⁸⁹ Indeed, *Flores-Ortega* compared the claim of defense counsel’s failure to consult with a client about an appeal to a claim of counsel’s deficient advice about the consequences of entering a guilty plea.⁹⁰ The proper analysis does not require a defendant to show that he would have won the appeal he never had the chance to file. Instead, the Court “h[e]ld that

84. *Roe v. Flores-Ortega*, 528 U.S. 470, 473 (2000); see also *id.* at 477 (articulating “[t]he question presented in this case” as: “Is counsel deficient for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other?”).

85. *Id.* at 480.

86. *Id.*

87. *Id.* at 486.

88. *Id.*

89. See, e.g., *People v. Henlin*, 911 N.Y.S.2d 695, No. 1981-09 (N.Y. Crim. Ct. 2010) (remanding for an evidentiary hearing to determine whether, had the defendant known about the “mandatory deportation consequences which automatically attached to his plea, . . . such knowledge would have led to his rejection of the plea offer and such rejection would have been rational”).

90. *Flores-Ortega*, 528 U.S. at 485 (discussing *Hill v. Lockhart*, 474 U.S. 52 (1985)).

when counsel's constitutionally deficient performance *deprives a defendant of an appeal that he otherwise would have taken,*" the defendant wins his claim of ineffective assistance and can file his appeal.⁹¹

The Supreme Court's most recent pronouncement in the area of plea bargaining and ineffective assistance of counsel could be seen as a cautious step back from *Padilla's* potentially far-reaching impact. In *Premo v. Moore*, the Court rejected Moore's claim that counsel's advice that he plead guilty, without first seeking suppression of Moore's confession, was ineffective assistance.⁹² Justice Kennedy's majority opinion is full of strong language about the particular need for "strict adherence" to *Strickland's* highly deferential standard of review for ineffective-assistance claims involving the plea bargain stage.⁹³

However, the Court's prejudice analysis is largely driven by the particular facts of the case, which underscore the weak nature of Moore's claim of prejudice. Although Moore's attorney advised him to enter a plea before filing a motion to suppress his confession to the police, Moore made similar confessions to his brother and his accomplice's girlfriend, both close in time to the murder with which he was charged.⁹⁴ Moore also clearly received real benefit from his bargain. He was charged with attacking a man, throwing him into a car trunk, driving to the countryside, and shooting him in the temple, killing him.⁹⁵ Moore faced potential aggravated murder charges, with a potential sentence of death or life without parole, and he accepted a bargain early in the case under which he pled no contest to felony murder in exchange for a sentence of three hundred months, the statutory minimum.⁹⁶

Premo's conclusion is also driven by the procedural posture of the case. It came to the Supreme Court on review of a grant of federal habeas corpus relief from a state conviction. Under the restrictive federal habeas statute, such relief lies only if the state court's decision denying relief "involves 'an unreasonable application' of

91. *Id.* at 484 (emphasis added).

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

93. *Id.* at 741 (noting the potential for eroding principles of acceptance of responsibility and acknowledgment of guilt "if a guilty plea is too easily set aside based on facts and circumstances not apparent to a competent attorney when actions and advice leading to the plea took place").

94. *Id.*

95. *Id.* at 738.

96. *Id.* A "no contest" plea has the same force and effect as a guilty plea for the purposes of having a conviction and serving a sentence. The only difference is that such a plea allows the defendant to neither admit nor deny the charges. See *North Carolina v. Alford*, 400 U.S. 25, 36 n.8 (1970).

‘clearly established Federal law, as determined by the Supreme Court.’ ”⁹⁷ This stringent standard of review, combined with *Strickland*’s mandate to defer to defense counsel’s strategic decision-making, effectively results in double deference.⁹⁸

Much of the Court’s analysis focused on the timing of the plea, and noted how early pleas—while they “might come before the prosecution finds its case is getting weaker”—can also come before “the case grows stronger and prosecutors find stiffened resolve.”⁹⁹ The Court thus recognized that individuals facing criminal charges take the risks and rewards of pleading guilty into account when making that critical decision, and emphasized the importance of the decision-making process. In this light, the Court noted:

Many defendants reasonably enter plea agreements even though there is a significant probability—much more than a reasonable doubt—that they would be acquitted if they proceeded to trial. Thus, the question in the present case is not whether Moore was sure beyond a reasonable doubt that he would still be convicted if the extra confession were suppressed. It is whether Moore established the reasonable probability that he would not have entered his plea but for his counsel’s deficiency.¹⁰⁰

Just as someone might rationally forgo a significant likelihood of acquittal and enter a plea, so might someone rationally take a chance at trial despite a significant likelihood of conviction, where the alternative is a guilty plea followed by a certain, severe collateral consequence.

In the 2011-2012 Term, the Supreme Court will hear two ineffective-assistance-of-counsel cases, both of which raise prejudice issues. In *Cooper v. Lafler*, the Sixth Circuit found that Anthony Cooper’s attorney provided deficient performance when he advised Cooper to reject a plea bargain.¹⁰¹ Defense counsel told Cooper that he could not be convicted of assault with intent to murder because the bullets

97. *Id.* at 737.

98. *Id.* at 740.

99. *Id.* at 741.

100. *Id.* On the issue of prejudice, *Premo* did revert back to *Hill*’s language that Moore had to demonstrate how, “but for” counsel’s errors, “he would not have pleaded guilty and would have insisted on going to trial.” *Id.* at 743 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)); see also *id.* at 745 (quoting same *Hill* language); *id.* at 746 (Ginsburg, J., concurring) (same).

101. *Cooper v. Lafler*, 376 F. App’x 563 (6th Cir. 2010) (affirming district court’s grant of habeas relief “[b]ecause we agree that state courts’ decision rejecting petitioner’s argument was an unreasonable application of *Strickland v. Washington*”), cert. granted, 131 S. Ct. 856, (2011) (No. 10-209).

that hit the victim entered her body below the waist and thus the state could not prove intent.¹⁰² As the Sixth Circuit succinctly noted about this novel defense theory, “[c]ounsel was wrong.”¹⁰³ The court also found that, since Cooper turned down an offer with a fifty-one to eighty-five month minimum sentence and was sentenced to 185 to 360 months after trial, he demonstrated prejudice.¹⁰⁴ Noting “the importance of counsel during plea negotiations” and how negotiations are a “critical stage” of a criminal case where there is clearly a right to counsel,¹⁰⁵ the court rejected the state’s argument that the Sixth Amendment protects only the right to trial, and that an individual who declines a plea and later has a fair trial thus can never show prejudice.¹⁰⁶ Finally, the court stated that “[t]o say that there is no prejudice because the petitioner ultimately received a fair trial is to understate the value of plea bargaining—not just to the state, but also to defendants.”¹⁰⁷

The Court will also review the Missouri Court of Appeals decision in *Missouri v. Frye*.¹⁰⁸ After the state charged Galin Frye with the felony of driving with a revoked license, it sent his attorney a written plea offer: Frye could plead guilty to the felony and do ten days of “shock” incarceration, or he could serve ninety days if he pled guilty to a misdemeanor.¹⁰⁹ Frye’s attorney never told his client about this offer, and Frye later entered an “open” guilty plea to the top felony count; the court sentenced him to three years.¹¹⁰ The Missouri court made short work of its deficient performance analysis, since it could “conceive of no reasonable trial strategy that would justify trial counsel’s failure to communicate the Offer to Frye.”¹¹¹

The Missouri court’s prejudice prong analysis in *Frye* is significant for its sound rejection of the state’s argument—and the lower court’s conclusion—“that because Frye did not contend that ‘but for’ trial counsel’s failure he would have insisted on going to trial, Frye

102. *Id.* at 566.

103. *Id.* at 570.

104. *Id.* at 566-67, 571.

105. *Id.* at 572.

106. *Id.*

107. *Id.* at 573.

108. *Frye v. Missouri*, 311 S.W.3d 350 (Mo. Ct. App. 2010), *cert. granted*, 131 S. Ct. 856 (2011) (No. 10-444).

109. *Id.* at 351-52.

110. *Id.* at 352-53.

111. *Id.* at 354.

cannot establish prejudice as a matter of law.”¹¹² As this Article argues, the court found that

[r]eliance on *Hill*’s “template” that a defendant must contend that “but for” counsel’s ineffective assistance the defendant would have insisted on going to trial as determinative of whether a defendant can establish prejudice completely ignores *Strickland*’s looser emphasis on whether a defendant can establish “an adverse effect on the defense.”¹¹³

The court noted how, while a defendant can and often will demonstrate prejudice by showing that he would have gone to trial, *Strickland*’s call for a context-specific prejudice analysis means that there are other ways to show that “the result of the proceeding would have been different.”¹¹⁴ In situations like *Frye*’s, where “insisting on going to trial cannot possibly remediate ineffective assistance that has affected the outcome of the proceeding,” courts must recognize that a different outcome can include a better plea offer.¹¹⁵

The Missouri court’s analysis shows an understanding of the realities of the criminal justice system, where plea bargaining and counseling about plea offers, not trials, are where counsel and clients largely interact. It remains to be seen if the Supreme Court will also recognize these realities when it reviews the two cases next term. The Court has long kept the vanishing trial at the center of its criminal procedure jurisprudence, even while acknowledging the fact that guilty pleas dominate the landscape.¹¹⁶ However, *Padilla* was a firm step away from the trial-as-touchstone,¹¹⁷ and towards recognition of

112. *Id.* at 357.

113. *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 693 (1984)).

114. *Id.*

115. *Id.* at 358. Both *Cooper* and *Frye* raise a significant issue about remedies for ineffective assistance of counsel. When the Court granted certiorari in each case, it directed the parties to brief an additional question: “What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convinced [sic] and sentenced pursuant to constitutionally adequate procedures?” Petition Granting Certiorari, *Lafler v. Cooper*, 131 S. Ct. 856 (No. 10-209) (Mem.) (2011); Petition Granting Certiorari, *Frye v. Missouri*, 131 S. Ct. 856 (No. 10-144) (Mem.) (2011) (same). Particularly in *Frye*, where counsel completely failed to communicate an offer and *Frye* served extra years in jail as a result, the remedy issue is both complex and troubling.

116. See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Regulation*, 99 CAL. L. REV. (forthcoming 2011) (manuscript at 5), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1694111 (“Even as the Court noted and blessed the prevalence of pleas, its frame of reference remained the self-contained criminal jury trial, uncluttered by sentencing or civil considerations.”).

117. *Id.* (manuscript at 1) (noting how in *Padilla*, the “Court began to move beyond its fixation upon the handful of cases that go to jury trials” and “began in earnest to regulate plea bargains”).

the fact that negotiation and client counseling are largely where the impact of the assistance of counsel—be it effective or ineffective—is felt. This Article views the *Padilla* language as an invitation to move away from the poor fit of the trial-outcome approach that many courts employ in what has been a circumscribed view of the realities of effective counseling about guilty pleas. Instead, *Padilla* opened a window into the broader type of analysis that this Article encourages, one that also serves the important purpose of avoiding a major problem of a restrictive prejudice approach, namely stunted development of constitutional duty-to-warn norms.

If on remand the Kentucky courts in *Padilla* apply this same type of prejudice analysis, Mr. Padilla would have to show that, had he known about the automatic deportation that would flow from his guilty plea, it would have been rational for him to reject that plea. That is very different—and a much more expansive inquiry—than showing that he would have chosen trial over the plea because he had a reasonable likelihood of winning that trial or expected a better sentence after a trial. Instead, Mr. Padilla could show *either* that he wanted a trial because of a reasonable likelihood of winning it *or* that he wanted to reject that particular plea because it would lead to automatic deportation. This latter method of proving prejudice could be based on Mr. Padilla's hopes of negotiating another offer to avoid the consequence, if possible. It could also be based on his desire to take his chances at trial, however slim the likelihood of acquittal, so long as that was a rational choice, because it was the only route to avoiding deportation.

II. PROVING PREJUDICE, POST-PADILLA: ACCOUNTING FOR RISK AVERSION, AND THE USE OF COLLATERAL CONSEQUENCES IN NEGOTIATION AND SENTENCING ADVOCACY

When defense counsel fails to warn about a severe collateral consequence of a guilty plea, the case falls under *Padilla*'s recognition that not all prejudice inquiries fit neatly into a trial-outcome analysis. The primary reason for this is that collateral consequences¹¹⁸ do not

118. Most courts and commentators use the term "collateral consequences" to describe non-penal consequences that flow from a criminal conviction. See *supra* note 3 (explaining the predominant definition of "collateral consequence"). This is not to suggest that "collateral" is an apt term to describe the effect of consequences that can severely overshadow any criminal penalty, but it is certainly the most widely-used term. See McGregor Smyth, *Holistic Is Not a Bad*

factor into the guilt/innocence phase of a trial in any way. The fact-finder will not hear about deportation, eviction, or loss of voting rights. Thus, if defense counsel had information about the consequence and shared it with her client, this would not lead to a decision to go to trial based on a better chance of winning that trial. However, such information may well, and often should, factor into defense counsel's negotiation or sentencing advocacy, so that the defendant might get a different or better plea bargain or sentence when the collateral consequence enters the picture.¹¹⁹ In addition, this information will always factor in some way into a defendant's decision whether to plead guilty.¹²⁰

There are thus two main flaws in the trial-outcome oriented approach to prejudice. First is the failure to consider the negotiation and sentencing advocacy context for ineffective-assistance claims based on a failure to warn the defendant about a serious collateral consequence. Second is the failure to realistically assess the way a "rational" person might make decisions when faced not only with the prospect of the criminal case, but also with the imposition of a severe consequence like deportation, sex offender registration, loss of public housing, or custody of a child. Part II addresses these two issues, both central to any consideration of how defendants alleging that they were provided ineffective assistance of counsel prior to entering a guilty plea might actually suffer prejudice. Part II then explores the facts in *Padilla* under both prejudice paradigms to illustrate the failure of the trial-outcome model and the need for an analysis that reflects the impact of the failure to warn about severe collateral consequences.

A. Negotiation and Sentencing Advocacy as Leading to a Reasonably Probable Different Outcome

In *Padilla*, Justice Stevens noted that the Court has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."¹²¹ In one of the more practically-grounded portions of the decision, *Padilla* noted:

Word: *A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 479-80 (2005) (explaining why the term "invisible" is more appropriate).

119. See *infra* note 122 and accompanying text (quoting *Padilla* on how all parties should take collateral consequences into account during plea negotiations).

120. See *infra* Part II.B.

121. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

[I]nformed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.¹²²

This passage is important because it recognizes the reality of the discussions that should precede any guilty plea involving a serious collateral consequence. Unfortunately, there is currently a disconnect, at least in many trial-outcome prejudice inquiries, between the context of the case and the court's inquiry. If a defendant goes to trial and his attorney commits some sort of trial error, it makes sense during the prejudice analysis to ask whether it is reasonably likely that the trial would have come out differently but for that error. If a defendant pleads guilty, however, there is no longer a trial backdrop as context. Instead, the backdrop is the more nuanced setting of plea bargaining with a prosecutor and perhaps also sentencing advocacy before a judge. In short, trials are different from plea negotiations and sentencing advocacy, and ineffective-assistance jurisprudence should reflect those differences.

There is a glimmer of recognition of these contextual differences in the *Strickland* decision, where the Court noted how “[t]he governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel’s errors.”¹²³ *Strickland* mentioned this by pointing out the difference between challenges to effective assistance in relation to a conviction and challenges in relation to a death sentence.¹²⁴ In the Court’s view, when there is a conviction, “the question is whether there is a reasonable probability that,

122. *Id.*

123. *Strickland v. Washington*, 466 U.S. 668, 695 (1984) (emphasis added).

124. *Id.* at 686-87.

absent the errors, the factfinder would have had a reasonable doubt respecting guilt.”¹²⁵ For death sentence challenges, however, “the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.”¹²⁶ The *Strickland* Court correctly distinguished factual contexts here, and noted how the prejudice inquiry must be appropriately tailored to the particular context.¹²⁷

However, *Strickland* and *Hill* failed to recognize that not all *convictions* preceded by some type of ineffective assistance are the same. Some convictions come after a defendant chooses a trial, and after attorney error at that trial. The vast majority of convictions come after the defendant pleads guilty, often after plea negotiations over the terms of that plea. In these instances, the attorney error was not at the trial, but instead took place at some point leading up to the guilty plea. This can include factual or legal investigation errors, negotiation errors, and counseling errors when sharing information with a client. It is critical to integrate into the prejudice inquiry these realities of plea bargaining, which include negotiating over both charges and sentence, and the effect of these negotiations on a defendant’s decision-making process. In short, it is not simply a matter of the strength of the government’s case, although that plays a role in the analysis, but is also about what the plea or sentence decision-makers would have likely done with full information.

The right to effective assistance includes the right to attorney-client counseling about the decision to plead guilty or go to trial.¹²⁸ If there was any question about this before, the link between client counseling and the Sixth Amendment became clear when the Court decided *Padilla*.¹²⁹ A major purpose of attorney-client counseling is to provide information so that the defendant can make a voluntary, informed choice among the available options. If full information

125. *Id.* at 695.

126. *Id.*

127. *See id.*

128. *See Padilla v. Kentucky*, 130 S. Ct. 1473, 1478 (2010).

129. *Id.* (“We agree with *Padilla* that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation.”); *see also id.* at 1486 (“[W]e have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.”).

about required matters—which now includes automatic deportation and such “direct” consequences as the maximum sentence—would lead a defendant to reject the plea, three things could follow: (1) he could go to trial; (2) his attorney could attempt to re-negotiate the plea for one that either avoided imposition of the consequence or lowered the charge and/or sentence in recognition of the fact that deportation, or some other harsh consequence, would follow the conviction; or (3) assuming the plea did not include a sentence bargain, his attorney could use the additional consequence in post-plea sentencing advocacy before the judge.¹³⁰ While a factual inquiry is of course required to determine whether any of those different outcomes are reasonably probable, it is certainly possible for any of these three post-plea rejection scenarios to lead to an outcome that is “better” than the rejected outcome. Trial-outcome focused inquiries fail to recognize these other possibilities.

Some courts have undertaken appropriately context-specific prejudice analyses that appear to appreciate the realities behind the plea decision-making process, as well as what follows in the wake of a plea rejection. For example, a 2005 Ninth Circuit decision focused squarely on a defendant’s claim that, had he known about the automatic deportation consequence of his guilty plea, he would not have accepted the same plea deal. Instead, he would have either asked for a sentence from the judge that would have kept the conviction from qualifying as a deportable offense or attempted to re-negotiate the plea to avoid that qualification.¹³¹ The court found that “[h]ad counsel and the court been aware that a nominally shorter sentence would enable [the defendant] to avoid deportation, there is a reasonable probability that the court would have imposed a sentence of less than one year.”¹³² The court also credited the potential for renegotiation or, if that failed, the defendant’s ability to choose a trial: “Kwan could have gone to trial or renegotiated his plea agreement to avoid deportation; he could have pled guilty to a lesser charge, or the parties could

130. See Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 32 n.10, 82 (2002) (“In a charge bargain, the prosecutor agrees to dismiss some charges in return for a plea of guilty to the remaining charges,” whereas sentence bargains entail a “conversation [that] relates directly to the sentence rather than to the crime of conviction.”).

131. *United States v. Kwan*, 407 F.3d 1005, 1017 (9th Cir. 2005). Kwan’s case was before the Ninth Circuit on a petition for a writ of *coram nobis*, and the court conducted a two-prong ineffective-assistance-of-counsel inquiry under one of the writ’s four requirements—“fundamental error.” *Id.* at 1014 (“Kwan may satisfy the fundamental error requirement by establishing that he received ineffective assistance of counsel.”).

132. *Id.* at 1017.

have stipulated that Kwan would be sentenced to less than one year in prison.”¹³³ In crediting the defendant’s claim of prejudice, the court noted that Kwan asked counsel about immigration consequences before pleading, thus placing “particular emphasis” on this aspect of his decision-making process.¹³⁴ The court also noted that he went “to great lengths to avoid deportation and separation from his wife and children, who are all United States citizens.”¹³⁵

The Ninth Circuit was certainly correct about the possibility of sentencing advocacy in order to avoid deportation. In an Arlington County, Virginia case, the trial judge revisited a sentence that he had imposed some five years earlier, noting that “[i]f this Court had been made aware of the fact that [the defendant’s] single criminal conviction could result in deportation without the possibility of discretionary relief, an alternative sentence may have been reached.”¹³⁶ In another Virginia county, the judge granted a *coram nobis* motion seeking re-sentencing to avoid deportation.¹³⁷ After that resentencing, the pending deportation proceedings were dismissed.¹³⁸

The Ninth Circuit was also correct to focus on the *objective* likelihood of a different sentence, or a re-negotiation of the plea deal. *Strickland* cautioned that an evaluation of the likelihood that the result would have been different but for counsel’s ineffectiveness should be made objectively, without regard for the “idiosyncrasies of the particular decisionmaker.”¹³⁹ Later quoting the same *Strickland* language, the Second Circuit accepted a defendant’s argument that, but for his counsel’s failure to correct the prosecution’s erroneous belief about his prior felony status, it is reasonably likely that he would have secured a more favorable plea bargain.¹⁴⁰ In granting the defendant’s motion for either re-sentencing or a trial, the court rejected the state’s claim that the particular trial court would not have accepted a more generous plea bargain, even without the erroneous information.¹⁴¹

133. *Id.* at 1017-18.

134. *Id.* at 1015-16.

135. *Id.* at 1017.

136. See *Commonwealth v. Mohamed*, No. 00-1059, 2006 WL 2388632, at *2 (Va. Cir. Aug. 18, 2006); see also Tom Jackman, *Immigration Dispute Erupts in Va. Courts*, WASH. POST, Dec. 30, 2010, at B1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/29/AR2010122904137.html> (describing the *Mohamed* case).

137. Jackman, *supra* note 136, at B1.

138. *Id.*

139. *Strickland v. Washington*, 466 U.S. 668, 695 (1984).

140. *Mask v. McGinnis*, 233 F.3d 132, 141 (2d Cir. 2000).

141. *Id.* at 142.

These cases illustrate a prejudice inquiry that is broader than the myopic trial-outcome focused analysis, and that pays attention to the important advocacy dynamics behind plea bargaining. In a criminal justice world where more than ninety percent of convictions come from a guilty plea rather than a conviction after trial,¹⁴² those dynamics cannot be ignored.

B. Collateral Consequences, Guilty Plea Decision-Making, and Risk Aversion

If lower courts are true to *Padilla's* direction on prejudice—namely that the prejudice task is to determine whether a rational person would have declined to plead guilty under the same circumstances—then one question is: What would a rational decision-making process encompass? Collateral consequences influence the decision-making process, and severe collateral consequences often overshadow the direct penal consequence. This is particularly true with low-level charges or charges where the defendant does not face many years in prison. The vast majority of criminal cases involve misdemeanor charges with relatively low jail time exposure.¹⁴³ Yet many misdemeanor convictions lead to serious collateral consequences. A misdemeanor drug conviction can lead to deportation, loss of public housing, benefits, or federal student loans.¹⁴⁴ Misdemeanor sex crime convictions can lead to lifetime registration on a sex offense regis-

142. See SEAN ROSENMERKEL ET AL., U.S. DEP'T OF JUSTICE, NCJ 226846, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 1 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf> (stating that ninety-four percent of felony offenders sentenced in 2006 pled guilty); see also Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1415 (2003) (“The proportion of guilty pleas [in the federal system] has been moving steadily upward for over thirty years, and has seen a dramatic increase of over eleven percentage points just in the past ten years, from 85.4% in 1991.”).

143. See ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, NAT'L ASSOC. CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (2009) (“Most people who go to court in the United States go to misdemeanor courts. The volume of misdemeanor cases is staggering.”).

144. See 8 U.S.C. § 1227(a)(2)(B)(i) (Lexis Nexis 2006 & Supp. 2011) (“Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of [thirty] grams or less of marijuana, is deportable.”); 42 U.S.C. § 1437d(1)(6) (2006) (allowing for the eviction of a tenant in federal housing where the tenant, a member of the tenant's household, or even a guest of the tenant is convicted of, or involved with, drug-related activity); 20 U.S.C. § 1091(r)(1) (Lexis Nexis 2006 & Supp. 2011) (suspending student loan eligibility for varying time periods for any “student who is convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance for conduct that occurred during a period of enrollment for which the student was receiving any grant, loan, or work assistance”).

try.¹⁴⁵ Any misdemeanor conviction will create serious obstacles to future employment, due in part to the widespread electronic availability of criminal records.¹⁴⁶ In such cases, a defendant's risk aversion is going to be different than in a case involving only direct consequences. The same is also true even in some cases involving higher-level charges.

Imagine that you face felony charges in a case where the typical post-trial sentence falls close to the maximum of ten years, and where your chances of winning at trial are approximately twenty percent. You are offered a deal in which you would plead guilty to a somewhat lower-level felony with a two-year sentence as the only consequence.¹⁴⁷ A court reviewing this deal would likely find that a rational person would take it. Imagine now that in addition to two years in prison, the conviction would lead to mandatory registration under that state's sex offender registration law for the rest of your life. This means that your photo, address, and other information will be posted on a publicly-available website. The plea and ensuing conviction also comes with a five percent chance that the state would succeed in having you deemed a "sexually violent predator" ("SVP"). Such classification means that the state could continue to civilly confine you—for up to the rest of your life, in a state prison wing for "civil" SVP confinements—after you serve your criminal penalty.¹⁴⁸ Suddenly, the decision to turn down the deal does not look at all irrational. Indeed, a rational choice might be to focus on the twenty percent chance of victory at trial and not play the odds with a guilty plea followed by certain SORNA and possible highly severe civil confinement SVP consequences.

In an even easier example, imagine facing misdemeanor cocaine possession charges where conviction will lead to loss of public housing for you and the five family members who share your mother's apart-

145. See KAREN J. TERRY & JOHN S. FURLONG, *SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION: A "MEGAN'S LAW" SOURCEBOOK* (2d ed. 2006).

146. See James Jacobs & Tamara Crepet, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 420 (2006) (describing "the stigma of [a] criminal record as a 'negative curriculum vitae' "); see also James B. Jacobs, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177 (2007-2008) (documenting "how criminal history records are expanding in scope and how their dissemination is proliferating").

147. Of course, this is a somewhat unrealistic example because there are always collateral consequences, such as the difficulty finding work with any type of conviction, misdemeanor or felony.

148. See *infra* text accompanying notes 174-75 (discussing SVP Acts and registration).

ment.¹⁴⁹ You are in a jurisdiction that requires many court appearances, lasting much of the day, before you can get a suppression hearing and trial date.¹⁵⁰ Unaware of the harsh housing consequence, you decide to plead guilty after several court appearances, unwilling to lose more days of work despite the fact that your attorney advised you that you have a good chance of winning a suppression hearing and eventually having your case dismissed. Obviously, many prosecutors would be willing to work creatively with defense counsel to avoid imposition of this consequence, in particular since it would affect innocent third parties from the family who also live in the public housing apartment. However, even assuming that creative negotiation did not lead to avoidance of the consequence, it is clear that you would now reconsider taking the “easy” guilty plea in order to avoid burdensome court appearances. This burden now pales in comparison to the loss of the family home.

My own years of experience representing indigent defendants and supervising cases—many of which involved immigration, sex offender, and other serious consequences—bears out the potential reactions described in these hypotheticals. Clients who are fully informed that something severe, like certain deportation or sex offender registration, will follow a guilty plea are simply more likely to reject that plea. They might do so in the hopes of receiving a “better” offer that would avoid the consequence, even if that would lead to more jail or prison time, or might do so despite knowing that turning down the offer means taking their chances at trial.

This is particularly true where the stakes in the direct criminal case are relatively low—a misdemeanor with a maximum of one year in jail—or where the difference between the likely penalty after trial is not significantly different from the offered penalty upon a guilty plea.¹⁵¹ Mr. Padilla’s case would certainly fit into the latter category,

149. See *Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 128 (2002) (upholding the Department of Housing and Urban Development’s authority to evict tenants based on the drug activity of any visitor, “regardless of whether the tenant knew, or had reason to know, of that activity”).

150. See *infra* note 190 (describing such a situation in New York City’s lower criminal courts).

151. On the other hand, if deportation was not a concern that overshadowed the criminal case, the defendant would be less likely to file an ineffective-assistance claim based on counsel’s failure to warn about deportation. He would have already decided to accept the benefit of the plea bargain, and new information about deportation in such a situation would not change that decision. See *infra* text accompanying notes 177–79 (describing situations involving a visitor to the U.S. with few ties).

as he accepted a five-year sentence plea but only faced a maximum of ten years after trial. Further, it is reasonably probable that he would have received a lighter sentence, especially because a jury would have determined any post-trial sentence, it was a marijuana case in a jurisdiction known for leniency with marijuana, Mr. Padilla had no prior criminal convictions, and he was a veteran with a stable family and employment history.¹⁵²

The various considerations described above make it clear that applying a broader, more realistic prejudice lens, that accounts for negotiation and sentencing advocacy as well as consideration of risk aversion in the face of severe consequences, is no easy task for a judge analyzing this prong of an ineffective-assistance-of-counsel claim. However, reconstructing a trial that never occurred and doing so in the absence of attorney error that did occur, is also no easy task.¹⁵³

C. Applying a Broader Analysis to the Facts in *Padilla*

The *Padilla* facts illustrate the problems with the current prejudice analysis' trial-outcome focus and the need for a new approach. Jose Padilla, with his family, migrated to the United States from Honduras as a teen. He continued to live in the country as a legal permanent resident, living here for forty years at the time of his arrest.¹⁵⁴ Mr. Padilla served in Vietnam, worked, and raised U.S.-citizen children.¹⁵⁵ With all of these ties to the United States, deportation is quite a severe consequence for Mr. Padilla.

There was no full adversarial testing of the facts in the criminal case against him, as Mr. Padilla pled guilty after his lawyer allegedly told him that he would not suffer any immigration consequences due to the conviction. However, at least based on the state's allegations, the case against Mr. Padilla was fairly strong once he lost the suppression hearing challenging the legality of his stop and interrogation. The police found more than one thousand pounds of marijuana in his licensed commercial truck, after he signed a form to consent to the

152. See *infra* text accompanying notes 162–64 (describing the sentencing possibilities for Padilla).

153. See *infra* Part III.B.2 (discussing potential critique that this Article's proposed approach raises institutional competence concerns).

154. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1477 (2010).

155. See *supra* notes 4-5 and accompanying text (describing Padilla's personal circumstances).

search during a “driver paperwork safety inspection.”¹⁵⁶ Mr. Padilla allegedly answered “maybe drugs,” when asked about the contents of packages in the back of the truck.¹⁵⁷ The police also found a pipe and a small amount of marijuana in the cab of the truck.¹⁵⁸ Mr. Padilla was charged with felony marijuana trafficking, as well as the misdemeanors of possession of marijuana and drug paraphernalia and failing to have a weight and distance tax number on his truck.¹⁵⁹

Mr. Padilla had two potential defenses at trial on the felony trafficking count. First, Kentucky law requires that the state prove a defendant’s actual knowledge of the presence of the marijuana.¹⁶⁰ This means that the state would either have had to rely on a statement from Mr. Padilla on the issue of knowledge, or offer evidence of circumstances that would support a reasonable inference that Mr. Padilla knew what he was hauling in the back of his commercial truck. Second, even if the state proved that he knew he had marijuana in his truck, Mr. Padilla could have argued failure to prove that he had the mental state required to show “trafficking.”¹⁶¹ In short, Mr. Padilla had trial defenses, even if they were not the most promising. In addition, even if he lost the trial and faced a maximum of ten years on the felony count, he could have actually received closer to the five-year minimum.¹⁶² This is particularly true given the fact that after trial Mr.

156. Brief of Respondent at *2, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2009) (No. 08-651), 2009 WL 2473880; Brief for Petitioner, *supra* note 4, at *8.

157. Brief for Petitioner, *supra* note 4, at *3.

158. See Transcript of Oral Argument at 17-18, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651), 2009 WL 3268429 (noting how police recovered some marijuana and “drug paraphernalia,” in the truck cab); Joint Appendix at 48, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651), 2009 WL 1499270 (noting how Padilla was charged with possession of drug paraphernalia for alleged possession of “a pipe filled with marijuana and rolling papers”).

159. Brief for Petitioner, *supra* note 4, at *8 (listing charges). The marijuana and drug paraphernalia misdemeanors are punishable by up to 12 months under Kentucky law. See KY. REV. STAT. ANN. § 218A.1422 (West 2010) (categorizing first-time possession of marijuana as a Class A misdemeanor); KY. REV. STAT. ANN. § 218.500(5) (West 2010) (categorizing possession of drug paraphernalia as a Class A misdemeanor).

160. Reply Brief for Petitioner, *supra* note 4, at *26 (noting that Mr. Padilla could argue at trial that he did not know he was transporting marijuana and that he did not have the mental state required by statute); see also KY. REV. STAT. ANN. § 218A.1421(1) (West 2010) (“A person is guilty of trafficking in marijuana when he knowingly and unlawfully traffics in marijuana.”); KY. REV. STAT. ANN. § 501.020 (West 2010) (defining mental state of “knowingly”); *Martin v. Commonwealth*, 96 S.W.3d 38, 61-62 (Ky. 2003); *Love v. Commonwealth*, 55 S.W.3d 816, 824-25 (Ky. 2001) (both cases cited in Padilla’s briefs to the Supreme Court, on the issue of knowledge).

161. Reply Brief for Petitioner, *supra* note 4, at *27.

162. See KY. REV. STAT. ANN. § 218A.1421(1), (4) (West 2010) (criminalizing marijuana trafficking and classifying trafficking in five or more pounds as a Class C felony); KY. REV. STAT. ANN. § 532.060 (2)(C) (setting forth five-year minimum and ten-year maximum penalties for class C felonies); Brief for Petitioner, *supra* note 4, at *8-*9 (noting how Mr. Padilla was charged, among more minor crimes, with the Class C felony of marijuana trafficking).

Padilla would have had the right to a jury sentence. His appellate attorneys have noted “the relative leniency of Kentucky juries in sentencing for non-violent marijuana offenses.”¹⁶³ On the other hand, under the deal Mr. Padilla accepted, he got a ten-year sentence, with five years probated.¹⁶⁴ Going to trial would have also allowed Mr. Padilla, if convicted, to appeal the denial of his suppression motion based on the “driver paperwork safety inspection” stop.¹⁶⁵

Considering only the direct consequences of a loss at trial, it may have made some sense for Mr. Padilla to plead guilty and limit his sentence exposure. However, now the Supreme Court has found that he did not receive effective assistance of counsel in that plea process, if he can prove prejudice. Under a trial-outcome prejudice analysis, Mr. Padilla will almost certainly lose his claim on remand.¹⁶⁶ Such a myopic inquiry would first ask if, given correct information about the certain deportation based on the proposed plea, Mr. Padilla’s trial attorney still would have counseled him to take the plea. To answer this question, the court would look back further to ask if, in light of the correct deportation information, Mr. Padilla had a reasonable probability of success at trial. If not, then the court would find it unlikely that Mr. Padilla would have rejected the offer and chosen trial. Since the deportation information would have absolutely no effect on Mr. Padilla’s chances at trial and since this type of inquiry imagines a world in which rejected pleas always lead to trials, nothing has changed between the time Mr. Padilla and his attorney believed he would avoid deportation and the time they both knew he would certainly be deported based on his drug conviction.¹⁶⁷

Consider now a broader prejudice analysis that recognizes the full meaning of correct knowledge about collateral consequences in negotiation and sentencing advocacy as well as counseling about the plea

163. Reply Brief for Petitioner, *supra* note 4, at *29.

164. Brief for Petitioner, *supra* note 4, at *9.

165. In Kentucky, as in most states, a guilty plea forecloses appeal on denial of a suppression motion unless the plea was conditioned on the ability to appeal. *See* KY. REV. STAT. ANN § 8.09 (West 2010) (“With the approval of the court a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified trial or pretrial motion.”); *see also* Dickerson v. Commonwealth, 278 S.W.3d 145, 149 (Ky. 2009) (describing only three instances in which a court will consider issues on appeal from a conditional guilty plea).

166. Indeed, he has already lost at the trial-court level, although he is appealing that decision. *See supra* note 5.

167. *See Padilla v. Kentucky*, 130 S. Ct. 1473, 1478-81 (2010) (noting how, under immigration law, Padilla’s conviction qualified as an aggravated felony, thus making deportation certain and with no possibility of discretionary relief).

decision-making process. This inquiry requires the court to objectively step into Mr. Padilla's shoes and ask whether under all of the circumstances, including certain deportation upon conviction on the current charges, it would be rational to reject the plea.¹⁶⁸ This introduces several new aspects into the analysis. First, the difference between a possible ten-year maximum after trial (and likely less) and a certain five-year sentence with another five probated after a plea, is not so significant when compared to certain deportation from one's home country where one has worked and lived with family for forty years. The differences are even less significant in light of Kentucky's parole eligibility rules, under which Mr. Padilla would have been eligible for release after serving twenty percent of his sentence.¹⁶⁹ Indeed, Mr. Padilla pled guilty to all charges against him except for the failure to have a weight and distance tax number on his truck, and he essentially received the maximum sentence, albeit with five years probated. There was, quite simply, not much benefit to the bargain. A rational person in such a situation might well find that even a small likelihood of success at trial is a risk worth taking. In short, the risk aversion analysis has completely changed, with a much heavier hand on the scale in favor of trial and the possibility of acquittal.

In addition to recognizing varying levels of aversion to the risk of going to trial, the court must acknowledge that Mr. Padilla's rejection of the initial plea offer might not lead to a trial. Instead, the relevant inquiry would be whether rejection of the initial plea might have led to a different plea or sentence. The court would ask, for example, whether it is reasonably likely that the prosecution, had Mr. Padilla rejected the initial offer, would have been amenable to a guilty plea to some other charge, namely one that avoided automatic deportation.¹⁷⁰

168. For a potential critique of this approach, raising issues of complexity and institutional competence, and a response to that critique, see *infra* Part III.B.2.

169. See Brief for Petitioner, *supra* note 4, at *8 (noting how, even if he received the maximum ten-year sentence after trial, Mr. Padilla would have been eligible for parole after serving twenty percent of his sentence); see also 501 KY. ADMIN. REGS. 1:030 (2010) (setting forth guidelines for parole eligibility in Kentucky).

170. In Mr. Padilla's case, and with deportation based on controlled substance offenses generally, this is quite difficult. This is because

[a]ny alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable. 8 U.S.C. § 1227(a)(2)(B)(i) (2006); see also 8 U.S.C. § 1227(a)(2)(A)(iii) (2006) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."); 8 U.S.C. § 1101(a)(43)(B) (2006) (defining "aggravated felony" to mean "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in

The court would also ask whether the prosecution, or the court itself, would have offered a lower prison sentence in recognition of the fact that Mr. Padilla would be deported based on his guilty plea.¹⁷¹ These are all “different outcomes” that are not recognized under the prevailing prejudice inquiry simply because they are not “different trial outcomes.” In light of this broader analysis, Mr. Padilla’s chance of success on remand for the prejudice inquiry looks quite different and not nearly so grim.

III. A PROPOSED PREJUDICE APPROACH, AND RESPONSES TO POTENTIAL CRITIQUES

This Part proposes a prejudice test, sets out some factors that reviewing courts should take into account in applying that test, and responds to potential critiques of the proposed approach.

A. Proposed Prejudice Approach and Factors for Courts to Consider

Courts considering a claim of ineffective assistance of counsel based on the failure to warn about a collateral consequence prior to a guilty plea should take two steps in determining whether the defendant has demonstrated prejudice. First, the court should ask whether it is reasonably probable that a rational person receiving effective assistance relating to the guilty plea decision-making process would have declined to plead guilty.¹⁷² Second, the court should ask

section 924(c) of Title 18”); 18 U.S.C.A. § 924(c)(2) (West 2010) (“For purposes of this subsection, the term ‘drug trafficking crime’ means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.”); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1477 n.1 (2010) (“Padilla’s crime, like virtually every drug offense except for only the most insignificant marijuana offenses, is a deportable offense . . .”). This appears to include the misdemeanor of possession of drug paraphernalia. *See Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000). The government did not charge Padilla with any misdemeanors that involved possession for his own use of thirty grams or less, so any negotiation to avoid deportation—even if all parties agreed that such avoidance was appropriate—would have to be creative, and with an extremely flexible prosecutor. However, with other, non-deportation consequences and other types of crimes, there is much more flexibility in a typical negotiation. *See, e.g., supra* text accompanying notes 147-50 (describing such re-negotiations in the sex offender registration and other contexts).

171. This latter possibility of a lower prison sentence would not be relevant in Padilla’s case, where he has already served his sentence. But for those still serving a sentence, or who are on parole or probation, there is a clear remedy for any violation.

172. There are ineffectiveness claims based on counsel’s failure to tell her client about, or give adequate guidance on, a proposed plea bargain. In such cases, the defendant never heard of or rejected the offer, and instead went to trial. This type of reverse guilty plea case involves the claim that a defendant would have taken the offer but-for the failure to advise or inadequate advice and would have received more lenient treatment than he did after trial. *See, e.g., Boria v.*

whether, if the defendant had not taken the plea, there is a reasonable probability that there would have been a different outcome. This could be satisfied either in the traditional *Strickland* and *Hill* form of a reasonably probable successful trial outcome, or in two other forms: (1) reasonable probability of a second plea that is more favorable to the defendant; or (2) reasonable probability of a sentence that is more favorable with effective assistance than it was with ineffective assistance. The second step of this inquiry is not independent of the first, as the likelihood of a different outcome is something a defendant would factor into his decision about whether to reject or accept a proposed plea. Both steps require a court to consider the likely risk analysis of an individual facing criminal charges, but also severe collateral consequences that will flow from any conviction.

Applying this to the scenario in *Padilla*, namely defense counsel's failure to warn (or incorrect warning) about automatic deportation, the court's initial inquiry would consider whether it is reasonably probable that the defendant, had he known about the severe consequence at issue, would have rejected the offer. As part of this inquiry, the court would ask if there is a reasonable probability that defense counsel, using information about deportation in her negotiations, could have structured a different plea bargain in order to avoid it, even if that meant a higher penal sentence. The court would ask, alternatively, if it is reasonably probable that the prosecutor or judge would have offered a significantly discounted sentence to account for the harshness of deportation, if the negotiation had not led to avoidance. The court would also consider whether, in light of all of the facts and circumstances of the charges as well as the deportation consequences, a rational person in Mr. Padilla's situation would have taken his chances at trial.

This Article does not attempt to set forth each and every factor that might be relevant to such context-specific prejudice analyses.

Keane, 99 F.3d 492, 494-95, 497, 499 (2d Cir. 1996) (finding ineffective assistance when defendant got post-trial sentence of twenty-years-to-life, after turning down offer of 1-3 years when his attorney failed to share his opinion that it was a good offer, and that going to trial was "suicidal" given the facts of the case and the likely jury). The Supreme Court will consider a reverse guilty plea ineffectiveness claim in the 2011-2012 Term. See *Cooper v. Lafler*, 376 F. App'x 563 (6th Cir. 2010), cert. granted, *Lafler v. Cooper*, 131 S. Ct. 856 (2011) (No. 10-209), 2011 WL 48029. Although less common, reverse guilty plea situations can arise with failure to warn about collateral consequences claims. An example would be rejection of a plea that would have avoided deportation in favor of a trial that led to deportation, where defense counsel failed to advise the defendant that the plea had this significant merit.

Still, there are several factors likely to be common to most such determinations and the following sections describe them.

1. Severity of the Attorney Error, in Context

In deciding if it is reasonably probable that a defendant would have rejected the plea but for the attorney error, the nature and severity of that error will be a major consideration. This is essentially the risk aversion analysis that Part II.B calls for, where full disclosure about the relevant consequences will influence how much risk a defendant is willing to take in rejecting an offer.

In cases involving the failure to warn about a collateral consequence of a guilty plea, the severity of the consequence is central. *Padilla* describes how deportation is on the far end of the severity spectrum.¹⁷³ There are a few other obvious candidates on that end of the spectrum. One example is civil commitment under state or federal “sexually violent predator acts,” where a defendant first serves his criminal sentence and is then immediately confined, for as long as the rest of his life, based on predictions of future sexual dangerousness.¹⁷⁴ This consequence raises liberty concerns similar to deportation. However, this form of punishment can be more severe than deportation because individuals are banished to correctional (or similarly secure) facilities rather than to another country.¹⁷⁵ Mandatory lifetime registration as a sex offender, with all of the work and living restrictions that accompany it, as well as notification on a publicly-available website, are other severe consequences.¹⁷⁶

It is difficult to categorize the severity of the consequence in a vacuum, and thus the importance of the particular consequence to the

173. *Padilla*, 130 S. Ct. at 1481 (“We have long recognized that deportation is a particularly severe ‘penalty’ . . .”).

174. *See, e.g.*, 17 MASS. GEN. LAWS ANN., ch. 123A, § 14(d) (West 2010) (stating that period of commitment for person deemed a “sexually dangerous person” is “an indeterminate period of a minimum of one day and a maximum of such person’s natural life”).

175. *See, e.g.*, Adam Deming, *Sex Offender Civil Commitment Programs: Current Practices, Characteristics, and Resident Demographics*, 36 J. PSYCHIATRY & L. 439, 444 (2008) (noting that five states civilly commit SVPs in a separate facility within a prison).

176. *See, e.g.*, *Sex Offenders Living Under Miami Bridge*, N.Y. TIMES, Apr. 8, 2007, at 22 available at <http://www.nytimes.com/2007/04/08/us/08bridge.html> (describing how group of registered sex offenders in Miami were forced to live under a bridge, where their parole officer visited them, due to a local ordinance); Maryland Sex Offender Registry Search, MD. DEPARTMENT OF PUB. SAFETY & CORRECTIONAL SERVICES, <http://www.dpscs.state.md.us/sorSearch/> (last visited Jan. 15, 2011); *Sex Offenders Attacked in Mountain View*, (ABC 7 News television broadcast Nov. 8, 2008), available at <http://abclocal.go.com/kgo/story?section=news/local/peninsula&id=6495353> (last visited Mar. 29, 2011) (describing how individuals listed on sex offense registry may have been targeted).

particular defendant, given the objective circumstances, will also be part of a court's inquiry. Certainly, there are ways to objectively rank the severity of a collateral consequence. There would be little argument that deportation or lifetime sex offender registration is more severe for a defendant than a six-month driver's license suspension. However, a consequence can be more severe for some than others and thus the defendant's background and circumstances become relevant. To return to Mr. Padilla's case, deportation would be highly severe given his number of years in the country, family ties, and work history.¹⁷⁷ A student who recently arrived in the United States on a visa, whose entire family is in her home country, will not have the same claim to prejudice as Mr. Padilla.¹⁷⁸ Prejudice will be particularly difficult to prove for defendants who face an independent basis for imposition of the collateral consequence. Examples would include a person unlawfully in the United States, already subject to deportation, or someone facing a deportation order based on a conviction that preceded the one related to the claim of ineffective assistance.¹⁷⁹ In sum, the more severe and far reaching the consequence for the particular defendant, the heavier its weight on the scale of plea rejection.

Criminal law is replete with this type of fact-specific inquiry.¹⁸⁰ Indeed, within ineffective-assistance jurisprudence, the Supreme

177. See *supra* notes 154-55 and accompanying text (describing *Padilla* facts); see also *People v. Williams*, 899 N.Y.S.2d 438, 439 (N.Y. App. Div. 3d Dept. 2010) (remanding for evidentiary hearing where defendant filed affidavit alleging that "he initially rejected the . . . plea offer, accepting it only after allegedly being assured by counsel several times that pleading guilty would not result in his deportation" and where his girlfriend's affidavit stated "that defendant repeatedly expressed reservations about pleading guilty if such a plea might lead him to being deported.").

178. This is not to say a person in such a situation can never meet the standard, but it is certainly less likely.

179. See, e.g., *United States v. Gutierrez Martinez*, No. 07-91(5) ADM/FLN, 2010 WL 5266490, at * 4 (D. Minn. Dec. 17, 2010) (noting that Gutierrez Martinez "was subject to deportation both before and after his guilty plea. As his guilty plea had no bearing on his deportability, the information about the immigration consequences of his guilty plea would not have affected his decision whether to plead or go to trial."); *LaPorte v. Artus*, No. 9:06-cv-1459 (GLS/ATB), 2010 WL 4781475, at *2 (N.D.N.Y. Nov. 17, 2010) ("LaPorte has failed to demonstrate prejudice such that but for his trial counsel's alleged failure to advise him of the risks of deportation, he would not have pled guilty. . . . Instead, the record conclusively establishes that LaPorte's removal and deportation was ordered . . . based on a prior, unrelated conviction."); see also *Haddad v. United States*, Civil No. 07-12540, Criminal No. 97-80150, 2010 WL 2884645, at *7 (E.D. Mich. July 20, 2010) (rejecting application to withdraw guilty plea to federal drug possession misdemeanor where other, state felony conviction also rendered defendant deportable).

180. See Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. LAW & CRIMINOLOGY 71, 71(2007) ("This Article attempts to situate the Supreme Court's constitutional criminal procedure jurisprudence in the academic debates surrounding the reasonable person standard, in particular, the extent to which objective standards should incorporate a particular individual's subjective characteristics.").

Court has noted: “As with all applications of the *Strickland* test, the question whether a given defendant has made the requisite [prejudice] showing will turn on the facts of a particular case.”¹⁸¹ Similarly, courts constantly undertake “reasonableness” analyses, which require examination of the “objective” facts and circumstances of the particular situation. For example, to demonstrate a *Miranda* violation, a defendant must show that he was in custody and the police interrogated him.¹⁸² The Supreme Court’s custody-prong jurisprudence states that “custody must be determined based on how a reasonable person in the suspect’s situation would perceive his circumstances.”¹⁸³ In such inquiries into custody, courts consider factors including:

the time, place, and purpose of the interrogation; the persons present during the interrogation; the words the officers spoke to the suspect; the officers’ tone of voice and general demeanor; the length and mood of the interrogation; whether any restraint or limitation was placed on the suspect’s movement during interrogation; the officers’ response to any of the suspect’s questions; whether directions were given to the suspect during interrogation; and the suspect’s verbal or nonverbal responses to such directions.¹⁸⁴

Courts also undertake such inquiries in the plea-bargaining arena, including a consideration of the defendant’s subjective beliefs. For example, to determine whether a conversation between a government agent and a defendant is an inadmissible “plea discussion,” courts ask whether “the defendant exhibit[ed] a subjective belief that he is negotiating a plea, and that belief is reasonable under the circumstances.”¹⁸⁵ Qualified immunity is another area with a fact-specific reasonableness inquiry. In order to get qualified immunity in a civil rights action, a prosecutor must “establish that his alleged action . . .

181. *Roe v. Flores-Ortega*, 528 U.S. 470, 485 (2000); see also Hessick, *supra* note 10, at 1088 (“[T]he uncertain connection between counsel’s performance and the sentence imposed does not make ineffective assistance at sentencing in discretionary systems unique.”).

182. See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (“[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.”).

183. *Yarborough v. Alvarado*, 541 U.S. 652, 662 (2004); see also *Thompson v. Keohane*, 516 U.S. 99, 112 (1995) (noting “[t]wo discrete inquiries . . . essential to the determination [of custody]: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.”).

184. *People v. Elmarr*, 181 P.3d 1157, 1162 (Colo. 2008).

185. *United States v. Sitton*, 968 F.2d 947, 957 (9th Cir. 1992).

was done in the good faith belief as to its lawfulness and that such a belief was reasonable under all of the circumstances then existing.”¹⁸⁶

It may not be simple or formulaic to ask whether Mr. Padilla’s family ties in the United States are strong enough to make a reasonable person in his situation take a chance at trial in order to avoid deportation to a country he does not know. However, as demonstrated above, courts constantly make determinations based on the facts and circumstances of the particular case. Surely, a court that can determine the “mood” of an interrogation, or an officer’s “general demeanor” is capable of determining the factors that a person would weigh in deciding whether to plead guilty or go to trial. This is the type of inquiry that courts must undertake in order to determine if an individual was truly prejudiced by counsel’s failure to warn about a collateral consequence.

2. Strength of the Evidence Against the Defendant, Strength of Potential Defenses

The strength of the evidence against a defendant, as well as the strength of potential defenses, is a common area of inquiry for courts using trial-outcome as well as other types of analyses. Clearly, the likelihood of a conviction after trial is something that factors into the process by which rational people decide whether to accept a particular plea bargain or to plead guilty to all of the charges.

In failure-to-warn cases, this factor should not weigh as heavily. This is because the relevant initial inquiry is simply whether, given fully accurate information about the collateral consequence, it is reasonably probable that the defendant would have rejected the plea offer. Such rejection could be based on a defendant’s rational belief that re-negotiation upon disclosure and discussion of the collateral consequence will lead to an offer structured to avoid the consequence, or his belief that it will lead to a different sentence. This may happen even where the evidence against a defendant is strong, and the potential defenses are weak. This is particularly true when the criminal charge is fairly minor, the collateral consequence is severe, and the prosecution agrees that avoidance of that consequence is a legitimate goal for both sides. For example, a single misdemeanor cocaine possession conviction leads to automatic deportation for any non-citizen,

186. See *J.D. Pflaumer, Inc. v. U.S. Dep’t. of Justice*, 450 F. Supp. 1125, 1135 (E.D. Pa. 1978) (considering qualified immunity defense for federal prosecutor).

regardless of that person's immigration status and ties to this country.¹⁸⁷ In this situation, many prosecutors will be amenable to an alternative plea or some type of deferred dismissal upon completion of drug treatment. This is so even if the evidence against the defendant is strong and the case is an "easy win." As the former president of the National District Attorney's Association has noted, "How can we ignore a consequence of our prosecution that we know will surely be imposed by the operation of law?"¹⁸⁸

Still, there will be cases where the evidence is so strong and the allegations so serious that re-negotiation is not reasonably probable. One example would be a capital murder trial with strong factual evidence of guilt against the defendant as well as strong mitigating evidence that might lead the jury to impose a life sentence without parole, rather than a death sentence. Here, if the prosecution offers a plea with a life-without-parole sentence, and the defendant accepts without knowledge that the conviction will render him deportable, a strong factual case against the defendant for the guilt/innocence phase might lead to a finding of failure to demonstrate prejudice in any later ineffective-assistance claim. In such an extreme situation, it may not be reasonably probable that defense counsel, using information about automatic deportation, could have negotiated a better bargain. This is in large part because the fact that the defendant would spend life in prison renders any later deportation irrelevant.¹⁸⁹ It is also because in a murder case it is unlikely that there is any plea that would avoid deportation, or lead to a lower sentence. In general, the more serious the underlying criminal charges, the harder it will be for the defendant to prove prejudice resulting from a failure to warn about a collateral consequence.

The strength of any potential defense will also sometimes be relevant. Returning to the misdemeanor cocaine possession charge, imag-

187. See *supra* note 170 (describing how all drug convictions other than possession of a small amount of marijuana for personal use lead to automatic deportation); see also Juliet P. Stumpf, *Doing Time: Cimmigration Law and the Meaning of Time*, UCLA L. REV. (forthcoming 2011 (on file with author) (exploring "the unique role that measurements of time play in determining the exclusion of a noncitizen from U.S. society").

188. See Johnson, *supra* note 17, at 5.

189. See 8 U.S.C. § 1228(a)(1) (2006) (entitled "Expedited removal of aliens convicted of committing aggravated felonies" and stating that such expedited proceedings "shall be conducted . . . in a manner which assures expeditious removal *following the end of the alien's incarceration* for the underlying sentence") (emphasis added); see also *Pena v. United States*, No. 01 Civ. 11395, 2003 WL 22387127, at *4 (S.D.N.Y. Oct. 20, 2003) (citing 8 U.S.C. § 1231(a)(4)(A) (2006) and holding that "the general rule is that the Attorney General may not remove an alien before that alien has completed a sentence of imprisonment").

ine that the defendant pled guilty in order to expedite the process because the many required court appearances meant he risked losing his job.¹⁹⁰ He pled guilty despite knowing that he had a strong argument that the search of his pockets during the street stop was unlawful and that if he could just come to court enough, he would have a suppression hearing. Imagine also that his attorney failed to warn him that the conviction would lead to his automatic deportation. Here, even without considering the likely re-negotiation possibilities described above, a rational person would likely have risked the job loss and returned to court, rather than suffer certain deportation.

3. Probability of a Different Plea Offer, or Different Sentence

Courts applying this factor of a prejudice analysis should consider whether, given the facts and circumstances of the particular case, it is reasonably probable that rejection of the original plea that results in a collateral consequence would lead to either a different plea or a different sentence. In some cases, this will be a fairly straightforward inquiry.

Consider a hypothetical case in which a defendant in New York State is charged with rape in the third degree for statutory rape based on strict liability. This low-level felony prohibits a person who is at least twenty-one years old from “engag[ing] in sexual intercourse with another person less than seventeen years old.”¹⁹¹ Under New York’s Sex Offender Registration Act (“SORA”), a person convicted of third degree rape must register for a minimum of twenty years, and possibly for life. This person may also be listed in a public subdirectory, available on the Internet.¹⁹² This defendant decided to plead guilty to a

190. See K. Babe Howell, *Broken Lives From Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 297 (2009) (noting how in New York City lower courts, a “decision not to accept a disposition at arraignment leads to a number of court appearances which impose a considerable burden on the accused”); Ian Weinstein, *Special Feature: A Conference on New York City’s Criminal Courts, The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157, 1162 (2004) (noting the “structural features which make lower courts process, rather than adjudicate, cases”).

191. N.Y. PENAL LAW § 130.25 (McKinney 2010) (stating that rape in the third degree is a Class “E” felony); *id.* § 55.05(1) (listing Class E felonies as the lowest-level felonies).

192. See N.Y. CORRECT. LAW §§ 168-a(1)-(2) (McKinney 2010) (defining “sex offender” to include those convicted of rape in the third degree); *id.* §§ 168-h(1)-(2) (duration is either twenty years or life, and depends of risk level classification); *Id.* § 168-q (describing the subdirectory for “level two and three sex offenders” as including “the exact address, address of the offender’s place of employment and photograph of the sex offender along with the following information, if available: name, physical description, age and distinctive markings. Background information including the sex offender’s crime of conviction, modus of operation, type of victim targeted, the name and address of any institution of higher education at which the sex offender is enrolled,

reduced charge, the misdemeanor of sexual misconduct, after incorrect assurances from defense counsel that the conviction did not qualify for registration under the state's SORA.¹⁹³ Counsel, in his plea negotiations with the prosecution, mentioned his client's concern with SORA consequences, as a basis for the reduction in charges. The prosecution agreed to the offer, in part based on her agreement that avoidance of SORA in this statutory rape case was an acceptable goal.

In such a situation, it is reasonably probable that the parties would have negotiated a non-registration disposition had they been aware that the plea in fact led to mandatory registration for a minimum of twenty years. Such alternative dispositions were readily available,¹⁹⁴ and the objective evidence during negotiations demonstrated the prosecution's willingness to structure such a plea. In a recent prejudice analysis, the Seventh Circuit explored the type of "objective evidence" a defendant must demonstrate to "prove that there is a reasonable probability that he would not have pled guilty absent his attorney's deficient conduct."¹⁹⁵ Among such evidence, according to the court, was "the nature of the misinformation provided by the attorney to the petitioner and *the history of plea negotiations.*"¹⁹⁶

A similar example demonstrating the probability of a guilty plea structured to avoid a severe collateral consequence is when a judge imposes a year-long sentence where none of the parties or the court realized that a 364-day sentence would have avoided automatic deportation.¹⁹⁷ There are many cases demonstrating how judges in such situations are willing to re-visit the sentence, even years later, to help a

attends, is employed or resides and a description of special conditions imposed on the sex offender shall also be included.").

193. See N.Y. PENAL LAW § 130.20 (McKinney 2010) (misdemeanor sexual misconduct statute); N.Y. CORRECT. LAW §§ 168-a(1)-(2) (McKinney 2010) (defining "sex offender" to include those convicted of sexual misconduct).

194. See, e.g., N.Y. PENAL LAW § 260.10 (McKinney 2010) ("A person is guilty of endangering the welfare of a child when: (1) He or she knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old . . ."). This example is based in part on a case that I supervised where criminal defense clinic students successfully represented a client in his motion to withdraw a guilty plea that he had entered years prior. The client was eventually allowed to re-plead to a non-registration offense of endangering the welfare of a child.

195. *Hutchings v. United States*, 618 F.3d 693, 697 (7th Cir. 2010).

196. *Id.* (emphasis added).

197. See MARY E. KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY 250 (4th ed. 2009) (listing five general categories of offenses that "are aggravated felonies under INA Section 101(a)(43)(O) [and thus make a person mandatorily deportable] only if the sentence of imprisonment imposed is at least one year").

defendant avoid unintended collateral consequences.¹⁹⁸ In cases where the imposition of an alternative plea is readily available, and where there is no indication that the parties intended imposition of the collateral consequence, there should be little debate over prejudice.

The “different outcome” inquiry will require more probing in situations where the prosecution’s or judge’s willingness to re-structure the guilty plea is not explicit, or as easily implied. Thus, a defendant might demonstrate that a particular prosecutor’s office has re-structured pleas in similar cases. Or, a defendant might show the total absence of evidence that the prosecution sought the particular collateral consequence, combined with the ready availability of different plea options that met other prosecutorial goals—of conviction and sentence. These are simply a few examples of the many potential ways to approach such inquiries. They are also the types of inquiries that courts make in many criminal procedure contexts, an issue that is explored more fully above in Part III.A.1, and below in Part III.B.2, which addresses the institutional competence concerns of this proposed prejudice approach.

B. Potential Critiques, and Responses, to Proposed Prejudice Approach

There are a number of potential critiques of a prejudice inquiry that looks beyond a narrow likely trial-outcome analysis to consider different possible outcomes based on sentencing and negotiation advocacy, as well as risk aversion when a serious collateral consequence is part of the equation. Any proposal to broaden ineffective-assistance analyses will raise the claim of likely opening of the floodgates and the need for finality, at least from some critics. In addition, asking courts to consider potential outcomes of plea negotiations might raise institutional competence concerns.

1. Floodgates and Finality

Finality threatened by the opening of floodgates to future claims, in the wake of a particular holding, is a common cry in criminal cases. Indeed, the State of Kentucky, the Solicitor General, and some *amici*

198. See *supra* text accompanying notes 136–38 (describing two Virginia re-sentencing cases).

raised such concerns in *Padilla*.¹⁹⁹ In his majority *Padilla* opinion, Justice Stevens gave “serious consideration to the[se] concerns . . . regarding the importance of protecting the finality of convictions obtained through guilty pleas.”²⁰⁰ Justice Stevens had expressed such concerns himself before. In a 1979 case, he warned:

Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.²⁰¹

Justice Stevens gave this warning at a time when the Court had just begun its forays into plea bargaining jurisprudence in the 1970s.²⁰²

Thirty-one years later in *Padilla*, perhaps with benefit of the knowledge that the floodgates had not opened in those intervening years, Justice Stevens sounded quite a different note. Noting how the Court “confronted a similar ‘floodgates’ concern in *Hill* [*v. Lockhardt*], but nevertheless applied *Strickland*[’s ineffective-assistance test] to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty,” Justice Stevens declared that a “flood did not follow in that decision’s wake.”²⁰³

Padilla cited four reasons why floodgates are unlikely to open in the wake of the Court’s articulation of a Sixth Amendment duty to warn about deportation consequences. First, lower courts are experienced with application of *Strickland*, and “can effectively and efficiently use its framework to separate specious claims from those with substantial merit.”²⁰⁴ Second, the fact that professional norms have called for deportation warnings “[f]or at least the past [fifteen] years” should lead the Court to “presume that counsel satisfied their obliga-

199. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1484 (2010).

200. *Id.*

201. *United States v. Timmreck*, 441 U.S. 780, 784 (1979) (quoting *United States v. Smith*, 440 F.2d 521, 528–29 (7th Cir. 1971) (Stevens, J., dissenting)).

202. See Albert Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 40 (1979) (“By 1970, the due process revolution had run its course, and the Supreme Court, which bore a share of responsibility for the dominance of the guilty plea, was ready at last to confront this central feature of American criminal justice.”).

203. *Padilla*, 130 S. Ct. at 1484–85 (internal citations omitted).

204. *Id.* at 1485.

tion to render competent advice at the time their clients considered pleading guilty.”²⁰⁵ Third, in the twenty-five years since the Court first applied *Strickland* to ineffective-assistance claims following guilty pleas, “practice has shown that pleas are less frequently the subject of collateral challenges than convictions obtained after a trial. Pleas account for nearly 95% of all criminal convictions. But they account for only approximately 30% of the habeas petitions filed.”²⁰⁶ Fourth, full information about deportation “can only benefit both the State and noncitizen defendants during the plea-bargaining process.”²⁰⁷ This is because defense counsel “may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation” and other severe collateral consequences.²⁰⁸

There is no doubt that the *Padilla* decision will cause, at least temporarily, a spike in ineffective-assistance claims based on the failure to warn.²⁰⁹ This would be true almost any time the Supreme Court articulates a rule favorable to a potential litigant, particularly in criminal cases. However, for many of the reasons that *Padilla* noted, given past experience, the floodgates concern should not be exaggerated. It should certainly not stand in the way of the articulation of an important criminal procedural right.²¹⁰

2. Institutional Competence

This Article’s proposed prejudice inquiry may raise concerns of institutional competence, although for the reasons discussed in Part III.A.¹²¹¹ as well as below, those concerns are ultimately misplaced. The concern would sound like this: The proposal asks courts to speculate about the likely outcome of negotiations that included informa-

205. *Id.* Although the existence of professional norms calling for such warnings has surely shed light on the need for warnings and certainly more (but far from all) attorneys at least attempt to follow the norms, as a close observer of the lower criminal courts in several different jurisdictions, I would beg to differ with this overly-optimistic statement.

206. *Id.*

207. *Id.* at 1486.

208. *Id.*; see also Johnson, *supra* note 17, and accompanying text.

209. See Jackman, *supra* note 136, at B1 (“A recent U.S. Supreme Court ruling that noncitizens in criminal cases must be advised of the possible consequences of a conviction has sparked a flurry of appeals by defendants who claim that they didn’t know that conviction would lead to deportation.”).

210. See Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 140-45 (2009) (discussing how “[m]any criminal-justice-system actors . . . overvalue finality to the detriment of constitutional protection”).

211. See *supra* text accompanying notes 180–86.

tion about collateral consequences, and to compare this to a negotiation that happened without that information. Under most state criminal codes, negotiation is an area that courts enter lightly or not at all.²¹² The proposal also asks courts to opine about a defendant's likely aversion to the risk of trial, given correct information about a collateral consequence. In both of these areas, under an argument of institutional incompetence, the judge is not normally a part of the process, one that instead takes place between opposing counsel operating in an adversarial system that currently has little place for judicial scrutiny of the bargaining leading up to the plea, so long as the plea itself is entered knowingly and voluntarily.²¹³

While it is true that the proposed prejudice approach would require courts to reconstruct events that did not occur and to predict the reasonably likely outcomes of negotiations they did not take part in, such tasks sound quite similar to tasks courts already undertake. For example, a trial-outcome approach to prejudice in a guilty plea context requires the court to predict the probable outcome of a trial that never happened, based on evidence that was never developed in an adversarial proceeding. Even if there was a trial, the court must ask whether—but for defense counsel's error—the jury would have convicted of some lesser charge or acquitted entirely.²¹⁴ As Professor Carissa Hessick has noted, courts undertake prejudice determinations in reviewing the harm of attorney error in a capital sentencing proceeding despite such uncertainties: “Because juries do not articulate the reasoning behind their decisions, there is no definite answer in capital cases whether counsel's performance affected the sentence imposed”²¹⁵ Professor Hessick makes the important observation that such lack of a “definite answer” is why *Strickland* set forth a “rea-

212. See, e.g., FED. R. CRIM. P. 11(c)(1) (“An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. *The court must not participate in these discussions.*” (emphasis added)); see also *Louisiana v. Bouie*, 817 So. 2d 48, 54 (La. 2002) (“Although not objected to in this appeal, the judge's active participation in the plea negotiations evokes our concern. The ABA Standards recommend that the trial judge should not be involved with plea discussions before the parties have reached an agreement.”). But see N.C. GEN. STAT. ANN. § 15A-1021 (West 2010) (“The trial judge may participate in the [plea] discussions” between defense counsel and the prosecution); ILL. SUP. CT. R. 402 (same).

213. See *Brady v. United States*, 397 U.S. 742 (1970).

214. See *supra* Part I.A.

215. Hessick, *supra* note 10, at 1088 (“This ‘reasonable probability’ standard is easily applied to non-capital discretionary sentencing: in order to assess prejudice, the Court need only determine ‘the probability that a defendant would have received a shorter sentence’ had she received effective assistance.”).

sonable probability” test.²¹⁶ Such a test allows for flexibility in determining prejudice in situations where it is difficult to determine causation with any certainty.

There are significant problems with the *ex post facto* approach to prejudice, and it has received much-deserved critique in scholarship addressing the issue.²¹⁷ The fact that this Article works within this structure should not indicate approval of the general approach to ineffective-assistance jurisprudence, which has a troubling track record.²¹⁸ However, the Supreme Court has used this flawed paradigm since *Strickland* in 1984 and is unlikely to change the fundamental two-pronged structure of ineffective-assistance claims.²¹⁹ Given that, the point here is simply that if the Supreme Court believes judges are competent to look back and reconstruct trials that never happened, surely it should find that they are also competent to look back at negotiation and sentencing as well as a defendant’s risk aversion given full disclosure. After all, judges preside over far more negotiated and un-negotiated guilty pleas and sentences than trials.²²⁰

It may be challenging for a court to predict what a defendant might have decided had he been provided with correct information prior to the guilty plea. It may be similarly challenging for a court to consider what defense counsel might have been able to achieve, in terms of negotiating alternate outcomes, had she used the fact of the collateral consequence. However, courts constantly undertake “but for” inquiries that require them to re-imagine an event without one factor or aspect of that event, or to determine the casual connection between a factor and the ultimate event.²²¹ Courts also regularly ask

216. *See id.*

217. *See, e.g.,* Alan W. Clarke, *Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus (Part One)*, 29 U. RICH. L. REV. 1327, 1357-58 (1995) (“[P]recisely because so little is understood about how juries exercise their discretion, it will be difficult to prove convincingly that lawyers’ poor performance made a difference, even if it did.”); William S. Geimer, *A Decade of Strickland’s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 121 (1995) (“The difficulty inherent in hindsight is said to be of such a degree that it virtually precludes any objective evaluation of attorney performance. In the application of the prejudice prong, however, these inherent difficulties apparently disappear.”).

218. *See* Kirchmeier, *supra* note 10.

219. *See* *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

220. *See supra* note 142 and accompanying text (describing how the vast majority of convictions are secured by guilty plea and citing DOJ statistics on this well-known fact).

221. *See, e.g.,* 42 U.S.C. § 2000e-5(g)(2)(B)(ii) (2006) (stating that a court may not award damages if the respondent can show that “respondent would have taken the same action in the absence of the impermissible motivating factor”); *Henderson v. Kibbe*, 431 U.S. 145, 156-57 (1977) (“[W]e reject the suggestion that the omission of more complete instructions on the causation issue so infected the entire trial that the resulting conviction violated due process.”).

what a reasonable person would have done or experienced under the particular circumstances,²²² thus entering the realm of prediction about decision-making that the proposed approach encompasses. With ineffective-assistance claims based on a failure to warn, the court will also have the benefit of the defendant's pleadings, which will allege (and perhaps in some detail) what the defendant would have done had he known of the severe collateral consequence. If the court holds an evidentiary hearing, it will have the further benefit of testimony.

The Seventh Circuit demonstrated its ability to look at a "history of . . . plea discussions," among other factors, in considering an ineffective-assistance claim.²²³ David Julian rejected a plea offer of twenty-three years, proceeded to trial, and received a sentence of forty years.²²⁴ During post-conviction evidentiary hearings, both Julian and his trial attorney testified that the attorney had erroneously informed Julian that the maximum he could get after trial was thirty years when the maximum was in fact sixty.²²⁵ In its prejudice analysis, the court noted how the record had more than Julian's "mere allegation" that he would have accepted the twenty-three year offer, but for the erroneous advice:

In this case . . . we are faced with several pieces of evidence indicating that, but for the ill-advice, Julian would have taken the plea. First, as we just noted, Julian testified that he would not have gone to trial but for the misinformation. Second, Julian . . . altered course at the last minute just after receiving the erroneous information [by rejecting a plea he was about to enter]. Third, the information provided by Julian's attorney grossly misstated the risk of going to trial. Thus . . . we have testimonial evidence, a history of the plea discussions, and the type of mis-information likely to impact a plea.²²⁶

Institutional competence concerns raise legitimate issues about the complex nature of a prejudice inquiry that looks beyond mere probable trial outcome to consider factors that actually reflect the harm done in failure-to-warn cases. However, a closer look at these issues reveals that they are the same as, or similar to, difficulties that courts work through in a variety of contexts. In the end, they simply highlight areas in need of particular attention and development, but

222. See *supra* notes 180–86 and accompanying text.

223. *Julian v. Bartley*, 495 F.3d 487, 499 (7th Cir. 2007).

224. *Id.* at 489-90.

225. *Id.* at 489-91.

226. *Id.* at 499.

do not demonstrate any judicial incompetence to undertake the broader analysis.

CONCLUSION

The *Padilla* decision opened a new constitutional window into the attorney-client relationship, by holding for the first time—and in the face of many circuit courts of appeal and state high court decisions that went the other way—that defense counsel has an affirmative duty to inform clients about deportation consequences. The decision also provided clear guidance that the prejudice inquiry in failure-to-warn cases must ask whether severe collateral consequences would change the guilty-plea decision of a rational defendant.

In a world of convictions secured almost entirely by guilty pleas, with a number of severe consequences flowing from even minor convictions, courts must consider non-trial advocacy approaches that might improve the overall outcome of the criminal case for a defendant. This Article's proposed prejudice framework recognizes the impact that fully-informed attorneys can have in mitigating severe collateral consequences. It also recognizes how the risk calculation that a defendant facing such a consequence might make differs from a risk calculation without that factor on the scale.

Failure-to-warn cases will be a small percentage of ineffective-assistance claims, which are already small in number compared to the number of pleas. But they are cases with serious stakes. They are also cases with great potential for creative advocacy so as to avoid unintended and severe consequences of a criminal conviction. A more robust, realistic prejudice inquiry will help provide a remedy in those cases where lack of knowledge about the consequence really does harm the defendant.

