Notoriously Lousy: Applying the Strickland Test When Defense Counsel Fails to Seek to Avoid the Imposition of Collateral Consequences

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NOTORIOUSLY LOUSY: APPLYING THE \textit{STRICKLAND} TEST WHEN DEFENSE COUNSEL FAILS TO SEEK TO AVOID THE IMPOSITION OF COLLATERAL CONSEQUENCES

Alfredo Vasquez
ABSTRACT

From the 1970s through the early 2000s, plea bargains resolved the vast majority of criminal cases in the United States. While the number of guilty pleas has been consistently high, the number of collateral consequences flowing from criminal convictions has increased. The Supreme Court imposed some regulation on guilty pleas during the last part of the 1960s but it was not until its decision in Padilla v. Kentucky in 2010 that the Court began regulating defense counsel’s duties towards his client during plea negotiations. The Court so far has limited its rulings to immigration consequences in Padilla, and the attorney-client counseling process in Lafler v. Cooper and Missouri v. Frye. This paper explores the hurdles a petitioner is likely to face when pursuing an ineffectiveness claim based on his attorney’s failure to attempt to avoid the imposition of collateral consequences during plea negotiations, an issue on which the Supreme Court has yet to rule.

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INTRODUCTION

“Have you provided ineffective assistance of counsel if you are a lousy bargainer? You are just not good at the game of bargaining;
and you do a bad job in bargaining down the sentence, I mean, a notoriously bad job. Is that ineffective assistance of counsel?”

Justice Antonin Scalia

Charged with a felony simple robbery committed for the benefit of a gang, Rene Reyes Campos—a lawful permanent resident—pled guilty to an amended charge of simple robbery. The bargained-for sentence resulted in a “stay of imposition of sentence for three years and probationary conditions, including 365 days in the workhouse.” Campos and his attorney did not discuss the effect of the plea agreement on his immigration status. However, under federal immigration law, “any person convicted of a crime for which a sentence of one year or longer may be imposed is deportable.” Had Campos' attorney bargained down the charge against his client to an offense punishable with 364 days or less, Campos would not have faced deportation. Did the attorney's failure to bargain down the charge constitute ineffective assistance of counsel? In a time where prosecutors, defense attorneys, and judges increasingly rely on plea bargains, essential questions regarding the constitutional requirement of a defense attorney to avoid the imposition of collateral consequences on a client remain unanswered. This article surveys the different obstacles a defendant in Campos' situation is likely to face when trying to vacate a conviction on the basis of defense counsel's failure to seek to avoid the imposition of

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2 Campos v. Minnesota, 798 N.W.2d 565, 566 (Minn. App. 2011) (holding that Padilla does not announce a new rule of criminal procedure, and thus is not retroactive).
3 Id. (Campos did not discuss his immigration status with his attorney and was not advised about the effect of his guilty plea on his immigration status).
4 Id.
6 Campos, 798 N.W.2d at 566 (“Campos asserted that the factor triggering mandatory deportation was the condition that he serve 365 days in the workhouse and that had he been required to serve only 364 days in the workhouse, he would not be deported”).
7 Id. (Campos' claim focused only on his attorney's failure to inform Campos about immigration consequence).
collateral consequences during plea bargaining. The remainder of this introduction looks at the
implications of guilty pleas, issues regarding collateral consequences, and briefly describes the
Court's decision in Padilla v. Kentucky and defense counsel's potential duty to attempt to avoid
the imposition of collateral consequences.

From the 1970s through the early 2000s, plea bargains resolved the vast majority of
criminal cases in the United States, with guilty pleas currently account for about ninety-five
percent of all criminal convictions. As the final stage of a criminal proceeding, guilty pleas carry
serious constitutional implications. A defendant entering a guilty plea waives his privilege
against compulsory self-incrimination, his right to trial by jury, and his right to confront his
accusers. In addition, a guilty plea is more than a confession; it is itself a conviction that rests
on a defendant's own admission in open court that he committed the acts of which he is
accused. Therefore, a defendant's plea must be a voluntary and “intelligent act done with
sufficient awareness of the relevant circumstances and likely consequences.”

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8 See Stephanos Bibas, Regulating the Plea Bargaining Market: From Caveat Emptor to Consumer Protection, 99 CAL. L. REV. 1117, 1121 (2011) (arguing that, despite courts' reliance on plea bargains, the Supreme Court’s frame of reference remained the self-constrained jury trial).
10 Boykin v. Alabama, 395 U.S. 238, 242 (1969) (ruling that affirmative showing of voluntariness on the record was necessary to conclude that the defendant had waived his constitutional rights).
11 Id. (discussing the requirements for the admissibility of a confession).
12 McMann v. Richardson, 397 U.S. 759, 766 (1970) (holding that a prisoner's plea based upon competent advice of counsel was an intelligent plea not open to collateral attack on the basis that counsel may have misjudged the admissibility of defendant's confession).
13 Brady v. United States, 397 U.S. 742, 748 (1970) (arguing that an “intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney”).
awareness of these consequences depends on counsel's explanation of the law\textsuperscript{14} and prediction of the outcome of the case.\textsuperscript{15}

Even though the Supreme Court has imposed some regulations on guilty pleas since the late 1960s,\textsuperscript{16} the Court has not regulated defense counsel's duties to avoid the imposition of collateral consequences at the plea bargaining stage.\textsuperscript{17} While the number of guilty pleas has been consistently high over the last twenty years,\textsuperscript{18} the number of collateral consequences flowing from criminal convictions—including those obtained through guilty pleas—has ballooned.\textsuperscript{19} Despite this increase, the Supreme Court has not yet provided a definition of collateral consequences, relying instead on the collateral consequences rule—that “a trial court need advise

\begin{footnotesize}
\begin{enumerate}
\item McCarty v. United States, 394 U.S. 459, 466 (1969) (remanding for further proceeding because district court judge did not make personal inquiry of whether petitioner understood the nature of the charge).
\item McMann, 397 U.S. at 769-70 (stating that a defendant and his defense attorney must analyze the weight of the state's case and that a defendant's decision to plead guilty must necessarily rest upon counsel's prediction about the outcome of the case).
\item See Boykin, 395 U.S. at 242 (holding that an affirmative showing of voluntariness on the record is necessary to conclude that a defendant pled guilty voluntarily); Brady, 397 U.S. at 749 (finding that the voluntariness of a guilty plea is to be determined by considering all relevant circumstances, including the possibility of a heavier sentence following a guilty verdict); Santobello v. New York, 404 U.S. 257, 262 (1971) (ruling that a prosecutor's promise or agreement must be fulfilled if a plea rests in any significant degree on such promise).
\item See infra Part I.D.
\item In 1992, an estimated 55,513 felony cases were filed in the State courts of the country's 75 largest counties; 92 percent of convictions occurring within 1 year of May 1992 were obtained through a guilty plea. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 1992, available at http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&id=904. By May 2006, an estimated 58,100 defendants in the largest 75 counties were charged with a felony; 95 percent of convictions occurring within 1 year of May 2006 were obtained through a guilty plea. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, available at http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf.
\item Jenny Roberts, The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators”, 93 Minn. L. Rev. 670, 673 & n. 18 (2008) (mentioning the rise in collateral consequences that bar employment and housing); see also Robert A. Mikos, Enforcing State Law in Congress's Shadow, 90 Cornell L. Rev. 1411, 1413 (2005) (in 2003, nearly 80,000 aliens were deported for being convicted of assorted crimes, and more than 35,000 applicants were denied federal student financial aid because of prior drug convictions).
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\end{footnotesize}
a defendant only of direct consequences to render a plea voluntary under the Due Process
Clause” to implicitly distinguish direct from collateral consequences.\footnote{Gabriel J. Chin & Richard Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697, 726 (2002) (evaluating the widespread use of the collateral consequences rule when evaluating ineffectiveness claims). The differentiation between direct and collateral consequences stems from a brief passage in Brady v. United States in which the defendant claimed his guilty plea to be involuntarily given because the risk of a death sentence had coerced his decision to plead. 397 U.S. 742, 755 (1970). The Supreme Court stated that a guilty plea entered by one fully aware of the direct consequences must stand unless induced by threat, misrepresentation, or improper promises. Id.}

In \textit{Padilla v. Kentucky}, the Supreme Court ruled that a defense attorney must inform his client about the likelihood of deportation resulting from his guilty plea.\footnote{130 S. Ct. 1473, 1486 (2010) (stating that Sixth Amendment precedents and the seriousness and impact of deportation demand counsel to inform his client about any risk of deportation of a guilty plea).} Prior to its decision, the Court had never decided whether a defendant has a right to information about particular collateral consequences before entering a guilty plea.\footnote{See Jenny Roberts, Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process, 95 Iowa L. Rev. 119, 132-33 (2009) (citing Bustos v. White, 521 F.3d 321, 325 (4th Cir. 2008)).} Yet, the Court limited its ruling to immigration consequences and to the attorney-client counseling process, and did not provide any guidance about whether counsel must factor collateral consequences into plea negotiations. To evaluate an attorney's conduct during criminal proceedings as a Sixth Amendment matter, the Court has continued to rely on professional standards.\footnote{See Padilla, 130 S. Ct. at 1482 (relying on the weight of professional norms to determine that counsel must advise his client about the risks of deportation); Strickland v. Washington, 466 U.S. 668, 688 (1984) (stating that the proper measure of an attorney's performance are prevailing professional norms); see also infra Part I.C-D.} Such standards are only guides that help a court determine whether an attorney's conduct is reasonable; they do not impose specific duties on defense counsel. The standards, nevertheless, address the importance of collateral consequences and encourage defense counsel to find ways to avoid their imposition through charge and sentence bargaining.\footnote{See Arthur Campbell, Law of Sentencing § 105 339 (1978) (defining charge and sentence bargaining); see also infra Part II.A.} Assuming that a defense attorney follows these...
recommendations, there remain questions about what relief a defendant can seek if his attorney does a notoriously bad job at seeking to avoid the imposition of collateral consequences.

The Supreme Court has determined that claims of ineffective assistance of counsel must meet the reasonable competence and prejudice standards laid out in *Strickland v. Washington* and *Hill v. Lockhart*. Although federal and state courts have evaluated ineffectiveness claims involving collateral consequences, their decisions have largely focused on defense counsel's duty, or lack thereof, to inform clients about a particular consequence. The Supreme Court has not yet ruled on whether a petitioner is entitled to relief on the basis of ineffective assistance of counsel because his defense attorney did not seek to avoid the imposition of collateral consequences during plea negotiations. Because the Sixth Amendment right to effective assistance applies to the plea-bargaining stage, an ineffectiveness claim on the basis of counsel's failure to seek to avoid the imposition of collateral consequences must pass *Strickland's* two-prong test: (1) that defense counsel's representation fell below an objective standard of reasonableness, and (2) that counsel's error prejudiced the outcome of the proceeding. The application of the test, however, is likely to present a variety of hurdles for a petitioner making such a failure-to-bargain-claim.

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27 *See Rollins v. State*, 591 S.E.2d 796, 799 (Ga. 2004) (holding that client's guilty plea was based upon counsel's affirmative misrepresentations to client regarding her inquiries about the effects of the plea); *New Jersey v. Nunez-Valdiz*, 975 A.2d 418, 423 (N.J. 2009) (holding that when counsel provides misleading advice about deportation consequences of a guilty plea, and a defendant demonstrates that he would not have pled guilty if he had been provided with accurate information, an ineffective assistance of counsel claim has been established); *North Carolina v. Goforth*, 503 S.E.2d 676, 678 (N.C. App. 1998) (“where the client asks for advice about a collateral consequence and relies upon it in making the decision about whether to plead guilty, the attorney must not grossly misinform his client about the law”); *see also infra* Part III.B.1.

This article explores these hurdles. Part I provides a brief overview of the Sixth Amendment right to effective assistance of counsel and the development of standards used to evaluate ineffectiveness claims. Part II examines the link between professional standards and the Sixth Amendment, and their importance in evaluating ineffectiveness claims. Part III evaluates the obstacles a petitioner is likely to face under Strickland's two-prong test when presenting an ineffectiveness claim on the basis of defense counsel's failure to consider collateral consequences during a plea bargain. Even though this paper will not address potential alternatives to the Strickland test, the number of hurdles a petitioner must overcome to succeed in an ineffectiveness claim highlights the important role that state courts can play in providing defendants with more accessible procedural protections.29

I. THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT THE PLEA-BARGAINING STAGE OF A CRIMINAL PROCEEDING

The success of an ineffectiveness claim based on counsel's failure to attempt to avoid the imposition of collateral consequences during plea negotiations depends on the applicability of the Sixth Amendment at the plea-bargaining stage. Because the Supreme Court has interpreted an individual's Sixth Amendment right to effective assistance of counsel to require the individual to be formally charged with a crime and to face a “critical stage” of the criminal proceeding, a defendant is indeed entitled to the assistance of counsel during plea negotiations. Part A briefly explains basic Sixth Amendment doctrine, and identifies both the circumstances in which an

29 The Hawaii Supreme Court, for example declined to follow the Strickland test because the standard is “unduly difficult for a defendant to meet.” Hawaii v. Smith, 712 P.2d 496, 500 (Haw. 1986). Instead the court held that a defendant may demonstrate prejudice whenever counsel's errors “resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.” Id. at 501 (citing Hawaii v. Antone, 615 P.2d 101, 104 (Haw. 1980)); see also Josh Bowers, Fundamental Fairness and the Path from Santobello to Padilla: A Response to Professor Bibas, 2 CALIF. L. REV. CIR. 52, 65-66 (2011) (stating that a few lower courts have experimented with radical reforms to Strickland's prejudice prong).
individual may invoke his right to assistance of counsel and the critical stages of a prosecution. Part B identifies plea bargaining as a critical stage of a criminal proceeding during which defense counsel's error must meet the requirements laid out in *Strickland v. Washington* and *Hill v. Lockhart*. Finally, Part C analyzes recent developments in ineffective-assistance jurisprudence and their potential effect on claims involving defense counsel's failure to attempt to avoid the imposition of collateral consequences.

**A. The Sixth Amendment and its application during criminal proceeding**

The Sixth Amendment to the United States Constitution states that an accused has a right to a speedy and public trial by an impartial jury, and “to have the assistance of counsel for his defence.” The Supreme Court has regarded an accused's Sixth Amendment right to assistance of counsel as a necessary safeguard to ensure fundamental rights of life and liberty. The Supreme Court concluded in *Powell v. Alabama* that the right to have a trial would be of little avail if it did not include a defendant's right to have an attorney help him prepare his defense. The Court, however, has struggled to define the concept behind the Sixth Amendment right to assistance of counsel; specifically when the right may attach, and whether the post-attachment right applies at every stage of a criminal proceeding.

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30 U.S. Const., amend. VI.
31 See Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (holding that the Sixth Amendment's guarantee of counsel is a fundamental right obligatory on states through the Fourteenth Amendment; that it guarantees the accused the right to the assistance of counsel in all criminal prosecutions; and that it requires federal courts to provide counsel for indigent defendants).
32 287 U.S. 45, 69 (1932) (finding that that the trial court's failure to make an effective appointment of counsel and the failure to give an illiterate defendant a reasonable opportunity to secure counsel was a clear denial of due process).
33 J. COOK ET AL., CRIMINAL PROCEDURE, 419 (7th ed. 2009) (discussing the Court's difficulty in defining the application and attachment of the Sixth Amendment).
Although a criminal prosecution involves various formal and informal in-court and out-of-court stages, the right to the assistance of counsel attaches to a defendant only after criminal proceedings have been formally initiated. In *Kirby v. Illinois*, for instance, the Supreme Court refused to apply the defendant's right to assistance of counsel during a pre-trial lineup held before the defendant was properly charged.\(^{34}\) Writing for the plurality, Justice Potter Stewart stated that the explicit guarantees of the Sixth Amendment apply to criminal prosecutions only, which begin after the government has committed itself to prosecute an individual.\(^{35}\) An accused's right to assistance of counsel, nevertheless, is not limited to the trial.

The Sixth Amendment's goal is to guarantee the presence of a defendant's attorney not only at trial but also during stages of the prosecution where counsel's absence might hinder the defendant's right to a fair trial.\(^{36}\) The Supreme Court has thus defined the scope of the Sixth Amendment right to assistance of counsel to include any “critical stage” of a prosecution following a defendant's arraignment.\(^{37}\) The essence of a "critical stage" is “the adversary nature of the proceeding, combined with the possibility that a defendant will be prejudiced in some significant way by the absence of counsel.”\(^{38}\) Hence, a defendant's cooperation with the government is a “critical stage” because it is an adversarial confrontation during which the government continues to seek the imposition of a sentence for a defendant's crime while

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34 406 U.S. 682, 690 (1972) (stating that the explicit guarantees of the Sixth Amendment are applicable only to prosecutions).
35 *Id.* at 689-90 (arguing that the “initiation of judicial criminal proceedings is far from a mere formalism[;] it is the starting point of our whole system of adversary criminal justice”).
36 United States v. Wade, 388 U.S. 218, 226 (1967) (holding that the post-indictment lineup was a critical stage of the proceedings and that respondent was entitled to have his attorney present).
37 *Kirby*, 406 U.S. at 688 (mentioning that the Sixth Amendment right to counsel attaches at the time of arraignment and at a preliminary hearing) (citations omitted).
38 United States v. Leonti, 326 F.3d 1111, 1117 (9th Cir. 2003) (holding that the Sixth Amendment guarantee of competent counsel applies to the process of cooperation with the government because it is a critical stage of the proceeding).
simultaneously seeking his assistance. Critical stages also include arraignments, post-indictment interrogatories, post-indictment lineups, and the entry of a guilty plea.

Notwithstanding the expansion of the scope of the Sixth Amendment, the Supreme Court has differentiated critical stages from procedures that may be replicated in court. While the presence of an attorney is necessary to guarantee that police conduct not taint the validity of an in-person lineup performed at a police station, the Supreme Court does not require an attorney to be present during stages that pose minimal risks to the fairness of a trial. In *Gilbert v. California*, for example, the Court ruled that the taking of a defendant's handwriting exemplar was not a “critical stage” of a criminal proceeding because defense counsel could have challenged the exemplar during the adversary trial process. The assumption was that a lawyer could reconstruct the procedure and point out defects on the process used in determining the defendant's handwriting.

A defendant's right to assistance of counsel depends on two factors: (1) whether he has been officially charged with a crime and (2) whether the stage of the proceeding is critical to maintaining the fairness of the defendant's trial. The mere presence of an attorney, though, is not sufficient to satisfy a defendant's right to assistance of counsel under the Sixth Amendment. A

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39 *Id.* at 1120 (comparing a defendant's presentence cooperation to a police interrogation).
41 *See United States v. Kon Yu-Leung*, 910 F.2d 33, 39 (2d Cir. 1990) (“a pretrial photo display identification has been held not to be a critical stage”); *United States v. Oriakhi*, 57 F.3d 1290, 1299 (4th Cir. 1995) (the taking of a voice exemplar is not a critical stage).
42 388 U.S. 263, 267 (1967) (stating that the privilege against self-incrimination reaches only compulsion of an accused's communications and the compulsion of responses which are also communications).
43 *Id.* at 267 (stating that an exemplar can be brought out and corrected through the adversary process at trial and allow defendant to bring additional exemplars for analysis and comparison by government and defense experts).
defendant has the right to receive the assistance of an attorney who can ensure a fair trial. The Sixth Amendment right to assistance of counsel, after all, is the right to effective assistance.

B. The right to effective assistance of counsel during plea negotiations

The Supreme 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.” Although defendants do not have a constitutional right to plea bargain, the Court has recently ruled that “defendants have a Sixth Amendment right to counsel that extends to the plea-bargaining process.” In light of the ninety-seven percent of federal and ninety-four percent of state convictions that arise out of guilty pleas, the Court admitted that “plea bargains have become so central to the administration of the criminal justice system that defense counsel has responsibilities in the plea bargaining process.” In fact, plea bargains are “the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks.” As a consequence, “the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.”

45 Id.
48 See Weatherford v. Bursey, 429 U.S. 545, 561 (1977) (stating that an undercover agent's continued duplicity during defendant's prosecution did not lose defendant the opportunity to plea bargain because a prosecutor need not plea bargain if he prefers to go to trial).
49 Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012) (holding that, where counsel's ineffective advice led to the rejection of a plea offer, and where the prejudice alleged is having to stand trial, a defendant must show that but for the ineffective advice, there is a reasonable probability that the plea offer would have been presented to the court, that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the actual judgment and sentence imposed).
51 Frye, 132 S.Ct. at 1407 (holding that the Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected).
52 Premo v. Moore, 131 S.Ct. 733, 741 (2011) (discussing the advantages and disadvantages of guilty pleas).
53 Frye, 132 S.Ct. at 1407.
Pursuant to the Sixth Amendment, therefore, a defendant's right to effective assistance of counsel is applicable at the plea-bargaining stage.

Entitlement to the effective assistance of counsel, however, does not grant a defendant automatic relief to vacate a guilty plea on the basis that his attorney did not seek to avoid the imposition of collateral consequences during plea negotiations. The Supreme Court has expressed that “the benchmark for judging any claim for ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”54 The contours of the right to effective assistance of counsel are thus purposely vague and broadly defined.55

A successful claim for ineffective assistance of counsel, regardless of its basis, must pass the two-prong test established in Strickland. The test requires a petitioner to show that counsel's representation was deficient and that counsel's error prejudiced the outcome of the proceeding.56 For the first prong, the petitioner must establish that counsel's representation fell below an objective standard of reasonableness.57 The Court has avoided using detailed guidelines that could distract attorneys from their duties as advocates.58 Instead, it has required defendants to overcome the presumption that an attorney's alleged mistakes might be a sound trial strategy.59

The Court stated that the analysis of an ineffectiveness claim must focus on the reasonableness of

55 Id. (acknowledging that the Court has not elaborated on the meaning of the constitutional requirement of effective assistance in cases of inadequate assistance).
56 Id. at 687 (defining the components of an ineffectiveness claim).
57 Id. at 687-88 (demanding petitioners to show that counsel made errors so serious that counsel was not functioning as guaranteed defendant by the Sixth Amendment).
58 Id.
59 Id. at 688-89 (reasoning that the “Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance,” and relying instead “on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions”).
counsel's assistance considering all the circumstances of the case and determined by prevailing norms of practice.\textsuperscript{60} The petitioner must also affirmatively prove that counsel's unreasonable errors were prejudicial to the outcome of the criminal proceeding.\textsuperscript{61} Although there is not a per se rule of prejudice applicable to cases involving attorney's unreasonable errors,\textsuperscript{62} a court must examine whether there is a reasonable probability that, "but for counsel's unprofessional errors, the result of the proceeding would have been different."\textsuperscript{63}

In \textit{Hill v. Lockhart}, the Court extended \textit{Strickland}'s two-prong test to cases involving guilty pleas.\textsuperscript{64} Accordingly, the prejudice requirement focuses on "whether counsel's constitutionally ineffective performance affected the outcome of the plea process."\textsuperscript{65} The petitioner 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."\textsuperscript{66} For the purpose of ineffectiveness claims based on counsel's error during guilty pleas—including counseling errors—the assessment of prejudice depends in large part on whether correcting an attorney's

\textsuperscript{60} Strickland v. Washington, 466 U.S. 668, 688 (1984) (stating that, although counsel has a duty to advocate for and consult with a client, these duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of an attorney's performance).
\textsuperscript{61} \textit{Id.} at 692. In determining prejudice, however, a court should presume that the judge or jury acted according to the law. \textit{Id.} at 694.
\textsuperscript{62} \textit{Id.} at 686 (explaining that automatic ineffective assistance of counsel arises when the government interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense); see also Geders v. United States, 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess); Herring v. New York, 422 U.S. 853 (1975) (bar on summation at bench trial); Brooks v. Tennessee, 406 U.S. 605, 612-613 (1972) (requirement that defendant be first defense witness); Ferguson v. Georgia, 365 U.S. 570, 593-596 (1961) (bar on direct examination of defendant)).
\textsuperscript{63} Strickland v. Washington, 466 U.S. 668, 694 (1984) (stating that in making a determination, the reviewing court "should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law"); see also infra Part III.B.
\textsuperscript{64} 474 U.S. 52, 74 (1985) (stating that \textit{Strickland}'s two-part standard "seems applicable to ineffective assistance claims arising out of the plea process").
\textsuperscript{65} \textit{Id.} at 59.
\textsuperscript{66} \textit{Id.}
unreasonable error in counseling a defendant about implications of a guilty plea would have affected the outcome of a proceedings.67

C. Defense counsel's new responsibilities during plea negotiations

Although Strickland's requirements remain unchanged, recent Supreme Court decisions have reopened the debate about defense counsel's duties at the plea-bargaining stage. Since 2010, when the Court decided Padilla, the Supreme Court has addressed constitutional issues arising out of ineffective assistance of counsel at the plea-bargaining stage.

The Court determined in Padilla v. Kentucky that to be constitutionally competent, defense counsel must inform a defendant about the potential risk of deportation surrounding a plea agreement.68 Jose Padilla, a lawful permanent resident of the United States, pled guilty to the transportation of a large amount of marijuana.69 During post-conviction proceedings, Padilla alleged that his defense attorney failed to warn him about deportation consequences associated with the conviction.70 Instead, Padilla's attorney advised him “not to worry about [his] immigration status since he had been in the country for so long.”71 Had he received correct advice, Padilla argued, he would have insisted on going to trial.72 Overturning the decision of the

67 Id. The standard for analyzing the first prong of the test is nothing more than a restatement of the standard of attorney competence set forth in Tollett v. Henderson, 411 U.S. 258, 268 (U.S. 1973) (stating that a petitioner must establish that his attorney rendered advice outside the "range of competence demanded of attorneys in criminal cases") and McMann, 397 U.S at 771 (to determine whether a plea is intelligent depends upon whether counsel's advice is within the range of competence demanded of attorneys in criminal cases).
68 130 S. Ct. 1473, 1486 (2010).
69 Id. at 1477 n.1 (explaining that Padilla's crime is a deportable offense under 8 U.S.C § 1227(a)(2)(B)(i)).
70 Id. at 1478.
71 Id.; see also Kentucky v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008) (holding that counsel's failure to advise a defendant of collateral issues, or his act of advising defendant incorrectly, provides no basis for relief).
Kentucky Supreme Court, the U.S. Supreme Court recognized that Padilla's counsel was constitutionally deficient.\textsuperscript{73}

Because deportation is, as a matter of federal law, an integral part of the penalty that may be imposed on a noncitizen defendant,\textsuperscript{74} the Court reasoned, the Sixth Amendment requires defense counsel to inform a defendant whether his plea carries a risk of deportation.\textsuperscript{75} The Court did not classify deportation as a direct or collateral consequence of a conviction, concluding instead that knowledge about deportation is not categorically removed from the Sixth Amendment right to counsel.\textsuperscript{76} Applying the \textit{Strickland} test, the Court found that Padilla had sufficiently established counsel's constitutional deficiency under \textit{Strickland}'s first prong.\textsuperscript{77} As \textit{Strickland} suggested, the Court relied on prevailing professional norms that encouraged counsel to advise clients about the risk of deportation.\textsuperscript{78}

Although \textit{Padilla} involved an attorney's misadvice about the deportation consequences arising out of a plea agreement, the Court's language expressly addressed the prevalence of guilty pleas and the role of attorneys in the plea bargaining process.\textsuperscript{79} Noting how plea bargaining is a critical phase of litigation, the Court urged counsel to creatively plea bargain with the prosecutor to craft a conviction and sentence that reduce the likelihood of deportation.\textsuperscript{80} Even though

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\textsuperscript{73} \textit{Id.} The Kentucky Supreme Court stated that the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a collateral consequence of his conviction. \textit{Id.}
\textsuperscript{74} \textit{Id.} at 1480 (2010) (recognizing that changes to immigration law have raised the stakes of a non-citizen's criminal conviction).
\textsuperscript{75} \textit{Id.} at 1486.
\textsuperscript{76} \textit{Id.} at 1482.
\textsuperscript{77} \textit{Id.} at 1483 (2010). The Court did not analyze \textit{Strickland}'s prejudice prong, mandating the case for further proceedings not inconsistent with the ruling.
\textsuperscript{79} \textit{Id.} at 1485-86.
\textsuperscript{80} \textit{Id.} at 1486 (“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).
Padilla only addressed deportation consequences, the ruling did not expressly limit its application. Indeed, a number of lower states and federal courts have extended Padilla's duty-to-advise rule to other serious consequences. Additionally, the Court seemed to move away from a trial-outcome focused prejudice determination when it stated that a petitioner must show that “a decision to reject the plea bargain would have been rational under the circumstances” in order to obtain relief.

Following Padilla, the Court reinforced its adherence to the Strickland standard in Premo v. Moore, which involved an ineffectiveness claim based on counsel's assessment of a plea bargain without first seeking suppression of a confession assumed to be improperly obtained. After abducting and killing his victim, Randy Moore confessed his crime to his friends and later to the police. Once Moore consulted with his defense attorney, he pled “no contest” to felony murder in exchange for the minimum sentence. During post-conviction proceedings, Moore alleged that he had been denied his right to effective assistance of counsel because his attorney did not move to suppress his confession. Under Strickland's first prong, the Court found that Moore's attorney made a reasonable choice in opting for a quick plea bargain because a successful suppression of Moore's confession would have served little purpose in light of

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81 See Taylor v. Georgia, 698 S.E.2d 384, 388 (GA. Ct. App. 2010) (stating that the failure to advise a client that his guilty plea will require registration is constitutionally deficient performance); Webb v. Missouri 334 S.W.3d 126, 127 (Mo. 2011) (“where counsel misinforms the client as to parole eligibility of the client's plea, counsel has rendered ineffective representation”).
82 Padilla v. Kentucky, 130 S. Ct. 1473, 1485 (2010); see also Jenny Roberts, Proving Prejudice, Post-Padilla, 54 How. L. J. 693, 703 (2011) (arguing that Hill's discussion of prejudice hinted that a trial-outcome approach would not be a good fit for review of guilty pleas).
84 Id.
85 Id. In the first part of its decision, the Court focused on the need to grant deference to state courts under 28 U.S.C. § 2254(d), and concluded that the Oregon Supreme Court's decision was not an unreasonable application of the Strickland rule. Id. at 739-40.
Moore's other confessions to his friends. In light of the strength of the state's case against Moore, the Court reasoned, “the state court could have reasonably determined that Moore would have accepted the plea agreement even if his second confession had been ruled inadmissible.”

In Missouri v. Frye, and Lafler v. Cooper the Court expressly stated that a defendant does have a constitutional right to effective assistance of counsel at the plea-bargaining stage. The Court acknowledged that the plea-bargaining process has no clear standards or timelines, and no judicial limits. Although defendants have no right to be offered a plea nor must a judge accept it, if a state opts to act in a field where its actions may have significant discretionary element—such as plea bargains or appeals—it must act in accordance to the U.S. Constitution.

In fact, “if a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it.” In remanding Frye's case for further proceedings, the Court ruled that “defense counsel has the duty to communicate formal offers

86 Id. at 743.
87 Id.
88 The prosecutor in the case mailed Galin Frye's counsel a letter offering a choice of two pleas, and the date of expiration of both offers. Frye, 132 S. Ct. at 1404. Defense counsel did not advice Frye that the offers had been made. Id. On January 4, 2008, and without an underlying plea agreement, Frye pleaded guilty to the charges and was sentenced to three-years in prison. Id.
89 The defendant was charged with assault with intent to murder and three other offenses. Lafler, 132 S. Ct. at 1383. U.S. The prosecution offered to dismiss two charges and to recommend at 51-to-85 month sentence. Id. Although receptive at first, the defendant turned down the offer and decided to go to trial after his attorney convinced him that the state would not be able to prove intent to murder. At trial, defendant received a 185-to-360-month sentence. Id.
90 Frye, 132 S. Ct. at 1407 (stating that when a plea offer lapses or is rejected no formal court proceedings are involved).
91 Lafler, 132 S. Ct. at 1387 (comparing plea bargains to cases in which a defendant has a right to effective assistance of counsel in direct appeal, even though the Constitution does not require states to provide a system of appellate review)
92 Id.
93 Frye, 132 S. Ct. at 1411 (although the Missouri Court of Appeal vacated Frye's conviction, U.S. Supreme Court remanded the case to require Frye to show a reasonable probability that the prosecutor would have adhered to the terms of the initial agreement).
from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.”

The Court also determined that a defendant can be prejudiced when, in accordance to counsel's advice or lack thereof, the defendant chooses to go to trial instead of taking a more favorable plea. A defendant can show prejudice if “loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.”

A favorable sentence would be “the sentence he or others in his position would have received in the ordinary course, absent the failings of counsel.” When a plea offer has been rejected or lapsed, a defendant may show prejudice from counsel's ineffective assistance of counsel by establishing a reasonable probability, absent defense counsel's ineffectiveness, the defendant would have accepted the earlier plea offer; that the prosecution would have not canceled the offer; and that the trial court would have accepted. In addition, the end result of the criminal process must have been—by a reasonable probability—“more favorable by reason of a plea to a lesser charge or a sentence of less prison time.”

Despite the Supreme Court's recent analysis counsel's duties at the plea-bargaining stage, the Court has not yet ruled on whether a petitioner is entitled to relief on the basis of ineffective assistance of counsel because his defense attorney did not seek to avoid the imposition of

94 Id. at 1408 (stating that when Frye's counsel allowed the prosecutor's offers to expire without advising his client, defense counsel did not render constitutionally effective assistance).
95 Lafler, 132 S. Ct. at 1386 (stating that a defendant choosing to go to trial may be prejudiced even if the trial is free from constitutional flaws).
96 Id. at 1387.
97 Id. (stating that the prosecution's plea offer was deemed consistent with the sound administration of criminal justice).
98 Frye, 132 S. Ct. at 1410.
99 Id. The Court also stated that the application of Strickland to ineffectiveness claims arising out of uncommunicated, lapsed plea does not alter the standards laid out in Hill. Id. Hence, a defendant arguing and counsel's ineffectiveness led him to accept a plea offer, he will have to show “a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Id. (citations omitted).
collateral consequences. Since the Sixth Amendment right to effective assistance of counsel is applicable at the plea bargaining stage, *Strickland* and *Hill* apply to ineffectiveness claims arising out defense counsel's alleged failure to seek to avoid the imposition of collateral consequences. A petitioner alleging that his defense attorney did not seek to avoid the imposition of collateral consequence while negotiating with the government must prove that counsel's conduct fell below reasonable standards, and that his error prejudiced the outcome of the proceedings. Since a substantial part of such ineffectiveness claims requires an analysis of professional standards, the following Part focuses on the connection between professional guidelines and Sixth Amendment jurisprudence.

**II. PLEA BARGAINING, PROFESSIONAL STANDARDS AND STRICKLAND’S COMPETENCE PRONG**

Because professional standards encourage defense counsel to avoid consequences detrimental to a client's interest, an attorney may be “lousy” if he fails to seek to avoid the imposition of collateral consequences during plea negotiations with the government. However, the Supreme Court's ineffective-assistance jurisprudence refuses to use professional standards as the sole guideline for evaluation of an attorney's competence. Defense counsel may be “lousy” under professional standards but not unconstitutionally “lousy” under the Sixth Amendment. Professional standards, nevertheless, have independent importance because—although not determinative—they remain a fundamental factor in the analysis of Strickland's competence prong. This Part examines the link between professional standards and the Sixth Amendment that arises when addressing *Strickland's* competence prong. Part A provides a brief description of the components of plea bargaining. Part B looks at legal professional standards regarding collateral
consequences and the way a reviewing court is likely to apply them when evaluating an ineffectiveness claim on the basis of defense counsel's failure to seek to avoid the imposition of collateral consequences at the plea-bargaining stage.

A. Plea bargaining

Even though there is not a constitutional right to plea bargaining, the process is now an accepted practice in American criminal procedure. Plea bargaining is the process by which a defendant “relinquishes his right to go to trial in exchange for a reduction in charge and/or sentence.” Although definitions and bargaining techniques may differ, plea bargaining has two components: charge bargaining and sentence bargaining. Through these two components, judges and prosecutors may offer a defendant an array of concessions in exchange for his guilty plea.

Charge bargaining offers the reduction or dismissal of one or more of the charges in exchange for a defendant's guilty plea. The charge to which the defendant will plead guilty is the most frequently negotiated variable in plea-negotiation practices nationally. Charge bargaining can take place before or after an official indictment. In the context of federal prosecutions, a prosecutor is encouraged to charge the most serious, readily provable offenses.

100 Weatherford v. Bursey, 429 U.S. 545, 561 (1977); see supra Part I.A.
101 See Campbell, supra note 25 § 105 339.
103 See Campbell, supra note 25 § 105 339.
105 Id. (defining the component of plea bargaining).
106 Campbell, supra note 25 at 341.
107 See Letter from Dick Thornburgh, U.S. Attorney Gen., to U.S. Attorney Gens. (April, 1989) (1 Fed. Sent. R. 421). Mr. Thornburgh's policy has been the bedrock principle of different administrations. Under the
Once charges have been filed, the parties might bargain about charges which may be readily provable and reflect the seriousness of the accused's conduct. 108

Sentence bargaining includes a wide range of offers that extend beyond lighter sentences. 109 Sentence bargaining depends on the law and guidelines of the jurisdiction where a defendant is charged. Under one theory of bargaining—plea bargaining in the shadow of trial—that parties are perceived to have enough flexibility to calibrate a sentence that reflects a range of probability of conviction or seriousness of the crime; such flexibility still exists in states using this approach. 110 Other jurisdictions, including federal courts, have adopted sentencing guidelines and mandatory sentencing minimums. 111 Prosecutors, with approval of their head prosecutors, and defense attorneys may bargain for a sentence that is within the specified guidelines, 112 or if necessary may depart from the guidelines with the approval of the judge. 113

administration of U.S. Attorney General Eric Holder, federal prosecutors are still instructed to charge the most serious offense, but the determination “must always be made in the context of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purpose of the Federal criminal code, and maximize the impact of Federal resources on crime.” Memorandum from Eric Holder, U.S. Attorney Gen., to Federal Prosecutors (May, 2010), available at http://www.fd.org/pdf_lib/holdermemo.pdf.

108  Id.
109  Guidorizzi, supra note 104.
110  See Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 HARV. L. REV. 2463, 2486-87 (2004) (hereinafter Shadow of Trial) (arguing that “if a chance of conviction drops from 100% to 95%, the prosecutor's offer would become about 5% sweeter. If the amount stolen from a bank rises from $50,000 to $51,000, the punishment would rise a little, as it presumably would after trial”).
111  See e.g. FLA. STAT. § 921.00265 (LEXISNEXIS2012) (stating that the lowest permissible sentence provided by calculations from the total sentence points pursuant to the code is assumed to be the lowest appropriate sentence for the offender being sentenced); see also FLORIDA DEPARTMENT OF CORRECTIONS. 10-20 LIFE CRIMINALS SENTENCED TO FLORIDA'S PRISONS, available at http://www.dc.state.fl.us/pub/10-20-life/bg.html#mandsent (explaining that a mandatory minimum sentence of 10 years is imposed for pulling a gun during a crime).
112  See Thornburgh, supra note 107 (“when a guideline range is 18-24 months, you have discretion to agree to recommend a sentence of 18 to 20 months rather than to argue for a sentence at the top of range”). Thornburgh's memorandum, however, predates the move from mandatory to discretionary sentencing following the Supreme Court's ruling on U.S. v. Booker, 543 U.S. 220, 244 (U.S. 2005) (striking down the provision of the federal sentencing statute requiring federal judges to impose a sentence within the Federal Guidelines range, and holding any fact which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt).
113  Id.
Charge bargaining and sentence bargaining play a direct role in the imposition of collateral consequences after a conviction obtained through a guilty plea. For example, a defense attorney may help a client avoid deportation if he successfully bargains for reduced a charge for possession of thirty grams of marijuana to possession of only twenty-eight grams (one ounce).\textsuperscript{114} In the same manner, a person sentenced to 364 days in prison instead of 365 days might not face deportation consequences.\textsuperscript{115} Despite the different outcomes and collateral consequences a defendant may face after pleading guilty, the right to effective assistance of counsel in the context of collateral consequences remains limited due to many courts' reliance—even in the wake of \textit{Padilla}—on a formalistic distinction between direct and collateral consequences.\textsuperscript{116} The increasing prevalence of collateral consequences,\textsuperscript{117} however, brings up the issue of whether an attorney's failure to consider collateral consequences during plea negotiations constitutes ineffective assistance of counsel under the Sixth Amendment.

\textbf{B. Professional standards relating to defense counsel's duties during plea negotiations}

\textit{Strickland} announced that the Sixth Amendment relies “on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the

\begin{itemize}
\item \textsuperscript{114} 8 U.S.C. § 1227(a)(2)(B)(i) (any alien convicted of a violation of any law or regulation 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).
\item \textsuperscript{115} 8 U.S.C. § 1227(a)(2)(A)(i)(II) (any person convicted of a crime for which a sentence of one year or longer may be imposed is deportable).
\item \textsuperscript{116} See \textit{New York v. Gravino}, 928 N.E.2d 1048, 1049 (N.Y. 2010) (because a direct consequence has a definite, immediate and largely automatic effect on a defendant's punishment a court is not required to inform a defendant about \textit{Sex Offender Registration Act} registration); \textit{Taylor v. Georgia} 698 S.E.2d 384, 387 n.3 (2010) (“in contrast to a collateral consequence, a direct consequence of a guilty plea is one that lengthens or alters the pronounced sentence”).
\item \textsuperscript{117} Collateral consequences may include parole revocation, parole ineligibility, civil commitment, civil forfeiture, registration requirements, ineligibility to serve on a jury, disqualification to possess firearms, and disqualification from public benefits. \textit{See} ChIN, supra note 20 at 705 (listing the most common collateral consequences that affect a defendant's civil status and access to public benefits).
\end{itemize}

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role in the adversary process that the Amendment envisions.”118 The way to measure an attorney's performance is “reasonableness under prevailing professional norms.”119 The Court in Padilla embraced the same approach to conclude that a defense attorney must inform his client about the likelihood of deportation surrounding a guilty plea.120 The professional norms of practice on which the Court has constantly relied, however, grant defendants broader protections relating to collateral consequences than Padilla addressed.121 In light of Padilla's reliance on professional norms to evaluate an attorney's performance, a petitioner may rely on such norms to argue that his attorney's failure to seek to avoid the imposition of collateral consequences fell below the level of reasonableness the norms specify.

To guarantee that defendants received proper legal advice during criminal proceedings, the ABA Standards for Criminal Justice provides defense counsel with a list of procedures which suggest that:

- “defense counsel may engage in plea discussions with the prosecutor;”122
- defense counsel should advise on available alternatives and different considerations to help a defendant decide whether to plead guilty;123

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118 Strickland v. Washington, 466 U.S. 668, 688 (1984) (stating that the “Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance).
119 Id.
120 Padilla v. Kentucky, 130 S. Ct. 1473, 1482 (2010); infra Part I.D.
121 See ABA STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION § 4-4.1 (3d. ed. 1993) (“Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction) (emphasis added); see also Strickland, 466 U.S. at 688 (citing ABA STANDARDS FOR CRIMINAL JUSTICE 4-1.1 to 4-8.6 (2d ed. 1980)); Wiggins v. Smith, 539 U.S. 510, 524 (2003) (citing ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1); Williams v. Taylor, 529 U.S. 362, 396 (2000) (same).
122 ABA STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION § 4-6.1(b) (3d. ed 1993)
123 ABA STANDARDS OF CRIMINAL JUSTICE, PLEAS OF GUILTY § 14-3.2(b) (3d ed. 1999).
defense counsel must advise his client and offer a realistic appraisal of any concession offered by the prosecutor;  

defense counsel—before providing legal advice—must complete an appropriate investigation and study of the case, after assessing probable sentences a judge would impose after trial;  

defense counsel’s recommendations must come after reviewing the controlling law, the evidence to be introduced at trial, and any affirmative defenses available to the defendant;  

defense counsel should determine and advise his client as to the possible collateral consequences that might ensue from the entry of a guilty plea.

Hence, an effective investigation of the case should lead counsel to identify potential collateral consequences of particular importance to his client and ways to avoid the imposition of them.

In addition to the ABA Standards, other sources advise attorneys to familiarize themselves with their clients' interests and the collateral consequences that may affect their lives. In fact, good defense attorneys must also know whether his client's children, health, or cooperation can lower his sentence. The BNA Criminal Practice Manual, for example, recommends “investigating a variety of collateral consequences, including alternative

124  Id. § 14-3.2(b), cmt p.121.
126  Id. § 4-6.1(b) cmt at 122.
128  See Bibas, Regulating the Plea Bargaining Market, supra note 8 at 1141 (2011) (discussing the role of defense counsel during plea negotiations under complex sentencing laws).
sentencing, enhanced sentencing, eligibility for parole or probation, forfeiture, and additional ramifications of conviction on client's livelihood.\textsuperscript{129}

An attorney is encouraged to use facts that, though inadmissible at trial, can be highly significant in persuading a prosecutor to lower charges or sentence demands.\textsuperscript{130} A lawyer's familiarity with collateral consequences is crucial to understanding the risks and benefits of taking a plea.\textsuperscript{131} In fact, the impact of collateral consequences can be used to persuade a prosecutor to reduce charges or dismiss the case altogether.\textsuperscript{132} The National Prosecution Standards advise prosecutors to consider a wide variety of factors during the prosecution of a defendant.\textsuperscript{133} The standards recommend that prosecutors consider undue hardship on a defendant before charging him with a crime and before engaging in any plea negotiations.\textsuperscript{134} Both parties, therefore, have a professional duty to engage in negotiations that can avoid the imposition of collateral consequences on a defendant. Justice Stevens embraced the same approach—albeit dicta—when he stated in Padilla that “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.”\textsuperscript{135}

\textsuperscript{129} See Chin, supra note 20 at 716 (citing BNA Criminal Practice Manual, at 71:103 (1996)) (discussing the importance criminal practitioners' materials have given to collateral consequences).
\textsuperscript{130} See Campbell, supra note 25.
\textsuperscript{131} See Chin, supra note 20 at 718 (discussing how an attorney's understanding of collateral consequences can be used to persuade a judge or prosecutor not to bring charges against his client).
\textsuperscript{132} Id. at 719.
\textsuperscript{133} See Chin, supra note 20 at 720. The National Prosecution Standards list 20 different factors prosecutors should consider before charging or plea bargaining; they include defendant's personal information and background, witness credibility, defendant's cooperation, history of enforcement of the statute, among others. Nat'l Prosecution Standards §§ 4-1.3, 5-3.1 (2010).
\textsuperscript{134} Nat'L Prosecution Standards, §§ 4-1.3(k), 5-3.1(g), 5-3.1(k) (2010).
\textsuperscript{135} Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) (arguing that defense counsel and the prosecution may bring up deportation consequences to reach agreements that could satisfy the interests of both parties).
Although professional standards aim to provide defendants with sound legal advice to find ways to avoid collateral consequences, they do not set specific duties on defense counsel at the plea-bargaining stage. A court will most likely refer to professional guidelines when evaluating an ineffectiveness claim arising out of defense counsel's failure to seek to avoid the imposition of collateral consequences at the plea-bargaining stage. Yet, the fact-driven nature of the ineffectiveness claims may lead a court to find that the attorney's failure to seek to avoid the imposition of collateral consequences during plea negotiations was deemed an appropriate strategic choice.\textsuperscript{136} The next Part considers the actual requirements a petitioner must establish to succeed such ineffectiveness claim, and notes several significant hurdles a petitioner must overcome.

III. THE CHALLENGES POSED BY \textit{STRIKCLAND'S} TWO-PRONG TEST

Since the Sixth Amendment guarantees effective assistance of counsel at the plea-bargaining stage, an ineffectiveness claim arising out of counsel's failure to seek to avoid the imposition of collateral consequences must pass \textit{Strickland}'s two-prong test. Having reviewed the professional standards courts rely on when addressing the \textit{Strickland} test, this Part looks at each of the two prongs of the test and the potential obstacles a petitioner could face when seeking relief.\textsuperscript{137} This Part will first focus on an attorney's reasonable competence and then on

\textsuperscript{136} See Chin, \textit{supra} note 20 at 722-23 (stating that, since Sixth Amendment questions are raised in the context of specific cases, not every failure to consider collateral consequences will warrant vacating a plea).

\textsuperscript{137} Although filing a petition for \textit{habeas corpus} before a federal district court is the most common form to seek relief, defendants have other available means to seek relief. A defendant may, for example, seek habeas relief through state courts. See ARK. CODE ANN. §16-90-111(a) (LEXISNEXIS 2012) (“any circuit court, upon receipt of petition . . . may correct an illegal sentence . . . may correct a sentence imposed in an illegal manner”). Through a petition for a writ of error \textit{coram nobis}, a defendant may attack a conviction that carries continuing convictions after completion of his sentence. See Jenny Roberts, \textit{Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts}, 45 UC Davis L. Rev. ___ (forthcoming, Winter 2012) (on file with author). In some
prejudice. As part of the reasonable competence prong, Part A examines the potential hurdles a petitioner is likely to face when arguing that his attorney's error fell below a reasonable standard of competence. Part B then evaluates the issues that are likely to arise when trying to establish prejudice arising out of an attorney's failure to seek to avoid the imposition of collateral consequences. Part B takes into consideration two different approaches to prejudice that courts and legal advocates have developed—“trial outcome” and “plea outcome”—and highlights the obstacles a petitioner would face under each approach.

A. Reasonable Competence

As previously noted, Strickland requires a petitioner to prove that his attorney's representation fell below a reasonable objective standard of competence, which a court determines with the guidance of professional norms. Many professional norms advise counsel to learn about his client's background and circumstances in order to consider the potential for collateral consequences surrounding a guilty plea. The fact that most guides encourage attorneys to use collateral consequences during plea negotiations, however, does not automatically guarantee a claimant's success in establishing Strickland's first prong. Strickland, after all, refused to consider professional guidelines as a definite checklist of an attorney's obligations, because Strickland's first prong aims to protect an attorney's judgment in making
strategic decisions during the representation of his client.\textsuperscript{142} Although the professional norms may favor a petitioner, the nature of plea negotiations and the discretion courts grant to attorneys are likely to impede a petitioner from proving that counsel's failure to seek to avoid the imposition of collateral consequences during plea negotiations fell below reasonable standards of competence. A petitioner must first confront the secrecy surrounding plea negotiations between defense attorneys and prosecutors, and courts' view that examining negotiations brings instability to criminal proceedings. In addition, a petitioner must establish that his attorney's error did not constitute a valid strategy during negotiations.

1) The Secrecy of Plea Negotiations

In reviewing guilty pleas, the Supreme Court has focused on the voluntariness of the plea and the amount of knowledge defendants must have before entering the plea. Under this approach, plea negotiations preceding the guilty plea remain effectively unregulated.\textsuperscript{143} Professional guides advise counsel to conduct plea-negotiations outside client's immediate presence,\textsuperscript{144} so that it is “virtually unheard of” to have a defendant attend the negotiation.\textsuperscript{145} Unlike a trial, which gives the accused the chance to be present during hearings and to have access to a record, “plea bargaining is a secret area of the law.”\textsuperscript{146} Without the client's or a court's scrutiny, an inexperienced attorney can hinder his client's interest by pushing too hard, not hard
determining what is reasonable, but they are only guides”).

\textsuperscript{142} \textit{Id.} at 689 (arguing that “judicial scrutiny of counsel's performance must be highly deferential).
\textsuperscript{143} See Bibas, \textit{Regulating the Plea Bargaining Market}, supra note 8 at 1126 (arguing that the Supreme Court put great faith in competent defense counsel as the only substantial safeguard during plea bargains, and that it presumed that most defendants knew their own guilt).
\textsuperscript{144} \textsc{Campbell}, \textsc{supra} note 16 at 342.
\textsuperscript{145} \textsc{Nicholas Herman}, \textsc{Plea Bargaining} § 7:04 79 (2d. ed. 2004).
\textsuperscript{146} Bibas, \textit{Plea Bargaining Outside the Shadow of Trial}, \textsc{supra} note 110 at 2475 (arguing that one of the reasons why plea results diverge from likely trial outcomes is that plea bargaining is hidden from public view).
enough, or not in the right way. A client may also be secretly subject to a prosecutor's favoritism or antipathy towards his attorney.

Without a record or his own presence, a petitioner simply has no knowledge of what his attorney and the prosecutor said during plea negotiations, and whether collateral consequences were factored into the outcome of the negotiation. During an evidentiary hearing, the lack of a record may lead a petitioner into a “he said, she said” argument. The petitioner would be forced to interrogate his trial attorney and the prosecutor about the issues they both discussed during the negotiation. Courts may be reluctant to engage in that type of review because of their limited role in determining whether there was manifest deficiency in counsel's performance.

The Supreme Court has also expressed reluctance in scrutinizing plea negotiations beyond the limited role assigned to habeas courts because of the desire to maintain the stability and certainty of the plea process. In Premo, the Court criticized the lower court for granting “scant deference to counsel's judgment, and doubly wrong to conclude it would have been unreasonable to find that the defense attorney qualified as counsel for Sixth Amendment purposes.” The Court reasoned that the failure to respect the latitude Strickland requires can lead to distortions and instability. An after-the-fact assessment of a plea negotiation runs counter to the deference that must be granted to counsel’s judgment, particularly in cases in

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147 Id. at 2475-76 (stating that it is easier for inexperienced lawyers to fall afoul of unwritten norms during plea negotiations).
148 Id. (arguing that “the paucity of hard legal rules also leaves more room for favoritism, favor-seeking, and connections to operate”).
149 Premo v. Moore, 131 S.Ct. 733, 741 (2011) (arguing that habeas courts must respect their limited role when determining how searching and examining their review must be).
150 Id. at 745 (stating that “the plea process brings to the criminal justice system a stability and a certainty that must not be undermined by the prospect of collateral challenges in cases where . . . witnesses and evidence were not presented in the first place).
151 Id. at 740.
152 Id. at 741 (stating that the parties' various considerations when negotiating a guilty plea make adherence to the Strickland standard essential when reviewing the choices an attorney made at the plea bargain stage).
which a record is not available, and the parties have not fully developed their cases. 153 Second-guessing counsel's decisions while failing to grant him wide discretion to negotiate could lead prosecutors to forgo plea bargains for fear that a plea deal will be unraveled. 154

A petitioner arguing that his attorney did not seek to avoid the imposition of collateral consequence during plea negotiations could run into the same reluctance to second-guess counsel's judgment. In addition, a court may perceive claimant's argument as lacking necessary foundations. The petitioner in Premo had the advantage of having access to a case file to learn that his attorney had not filed a motion to suppress his confession to police officers. The petitioner frequently does not have the means to learn what exactly occurred during the plea bargaining meeting. But assuming that a claimant can successfully bring up in court what was discussed during the plea bargaining meeting—either through the testimony or affidavit of the prosecutor about the plea negotiation—the claimant must also dispute the assumption that counsel's failure to seek to avoid the imposition of collateral consequences was part of his negotiation strategy.

2) Strategic Mistakes

A petitioner arguing that his attorney did not seek to avoid the imposition of collateral consequences has the burden of establishing that his attorney's error was not a strategic mistake. Strickland, however, granted defense attorneys wide discretion when representing a client; hence an “act or omission that is unprofessional in one case may be sound or even brilliant in

153 Id. at 742 (arguing that the uncertainty surrounding an early plea leads prosecutors and defense counsel to risk consequences that may arise from circumstances yet unperceived).
154 Id. at 742 (expressing concern that courts’ “infidelity to the requirements of the AEDPA and the teachings of Strickland” could relax the standards of review and undo guilty pleas on the basis of ineffective assistance of counsel).
another.”¹⁵⁵ The Court actually mentioned that rules of conduct could interfere with an attorney's constitutionally protected independence and restrict counsel's discretion in making strategic decisions.¹⁵⁶ In fact, experienced criminal attorneys develop a “feel for cases” and can rely on the close relationship they built with prosecutors and judges.¹⁵⁷ An experienced attorney, for example, may know that particular prosecutors and judges are sympathetic towards single mothers with toddlers but not to defendants with health conditions.¹⁵⁸ Courts may be willing to disturb an attorney's judgment when his judgment is not the type of conscious and reasonable decision Strickland aims to protect,¹⁵⁹ but differences between attorney's bargaining skills and knowledge may not be enough to motivate a court to evaluate a negotiation.

Although defense counsel may negotiate a plea offer that exposes the defendant to the collateral consequences he seeks to avoid, the defendant's exposure to such risk may not be enough to persuade a reviewing court that counsel was indeed ineffective. New York v. Cristache, for instance, provides an example of how a court may interpret different circumstances in a case to conclude that exposing a defendant to the risk of collateral consequences was part of an attorney's strategy. Constantine Cristache, a permanent resident, faced six different charges, four

¹⁵⁶ Id. at 688 (explaining that rules of conduct cannot account for the variety of circumstances a defense attorney faces, or the range of legitimate decision defense counsel must making in determining how to best protect his client).
¹⁵⁷ See Bibas, Plea Bargaining Outside the Shadow of Trial, supra note 110 at 2481 (stating that public defenders and some private attorneys are repeat players who come to know prosecutors and judges, and who can develop a feel for cases and can gauge the going rate for particular types of crimes and defendants).
¹⁵⁸ Id. at 2483-84 (arguing that an attorney's familiarity with lengthy and intricate rules of sentencing can lead to possible downward departures and adjustments of the defendant's sentence).
¹⁵⁹ Pavel v. Hollins, 261 F.3d 210, 216-18 (2d Cir 2001) (noting that counsel's failure to prepare a defense and to call witnesses was constitutionally deficient); see also Bean v. Calderon, 163 F.3d 1073, 1079 (9th Cir. 1999) (noting that a decision cannot be characterized as "strategic" where it was a result only of "confusion"); Loyd v. Whitley, 977 F.2d 149, 158 & n.22 (5th Cir. 1992) (distinguishing between "strategic judgment calls" and "plain omissions").
of them carrying potential deportation consequences. Defense counsel and the prosecutor reached a plea agreement under which the Court would have vacated the defendant's pleas, and dismissed and sealed each of the cases if Cristache completed a drug treatment program. Failure to complete the program, however, would have required Cristache to complete four months' incarceration. Cristache entered his guilty plea and indicated that he understood the provision of the agreement. After violating the terms of the plea agreement, Cristache was sentenced to four months in jail, and subsequently placed in deportation proceedings. Cristache later claimed ineffective assistance of counsel based on his attorney's failure to inform him about the risk of deportation surrounding his convictions. During an evidentiary hearing, Cristache testified that had he been properly warned about the potential of immigration consequences, he would have asked his defense attorney to attempt to secure a plea offer that would not put him in trouble with immigration. Although the record of the case did not show that plea counsel brought up the risk of deportation while negotiating with the prosecutor, the court found that Cristache's attorney "pursued a very reasonable strategy on behalf of defendant, employing a holistic approach designed to address the array of problems, both legal and social,

160 New York v. Cristache, 29 Misc.3d 720, 722, (N.Y. City Crim. Ct. 2010) (defendant was charged with two counts of Criminal Possession of Stolen Property in the Fifth Degree, Criminal Possession of a Controlled Substance in the Seventh Degree, Assault in the Third Degree, Petit Larceny, and Harassment in the Second Degree).
161 Id.
162 Id.
163 Id at 722-23 (Cristache pled guilty to Criminal Possession of Stolen Property in the Fifth Degree, Criminal Possession of a Controlled Substance in the Seventh Degree, and Assault in the Third Degree).
164 Id. at 723-24 (the court imposed three concurrent four-month jail sentences, two 90-day jail terms to run consecutively to the four months terms, and a 30-day jail sentence on a new charge that would run concurrent to the other terms).
165 Id at 735 (the court noted that plea counsel warned defendant that if he failed to complete drug treatment, he would have immigration consequences).
166 29 Misc.3d 720, 726 (N.Y. City Crim. Ct. 2010).
167 Defense counsel was aware of defendant's immigration status. She testified that she negotiated the drug treatment pleas in order to keep defendant out of jail, which was important given "his green card status," and because defendant needed the drug treatment. Plea counsel stated: "the whole purpose of getting him into the program was to avoid immigration consequences and to avoid a criminal record." Id. at 728.
Facing defendant.” Pursuant to the plea agreement Cristache's case would have been dismissed and sealed after completion of a drug treatment; most importantly, it guaranteed that Cristache would have remained out of jail, “where ICE agents routinely engage in a concerted effort to identify criminal aliens for deportation.” The court went on to say that far from being deficient, counsel's strategy “effectively placed defendant in the best position to avoid actual deportation.”

Although Cristache's option of getting a plea bargain without the risk of deportation were nearly impossible, the type of analysis the court used to evaluate Cristache's ineffectiveness claim reflects the deference granted to defense counsel's decisions when negotiating plea agreements. The same type of review may be applicable to ineffectiveness claims that allege defense counsel's failure to seek to avoid the imposition of different collateral consequences. Consider for example a security guard who is charged with a first offense of assault on a family member in Virginia. Defense counsel—aware that his client needs to carry a gun to perform the essential functions of his job—reaches an agreement requiring no jail that would eventually lead to the dismissal of the charge after defendant's completion of probation. Violation of the probation conditions, however, would lead to a conviction of assault on a family member and the

168 Id. at 736. Counsel's strategic decision was not at the center of the court’s opinion. Under Strickland first prong, the court was concerned about plea counsel's failure to inform Cristache about the potential of deportation. The court declined to find that plea counsel was constitutionally deficient because the advice that there would be immigration consequences should defendant fail to complete drug treatment undeniably placed defendant on notice of the risk of removal. Id at 735-36.

169 Id. at 737 (citations omitted).

170 Id.

171 Id. (recognizing that Cristache was in a “no-win” situation when he appeared in court facing two independent removable offenses).

172 See Va. Code Ann. § 18.2-57.3 (A) (when a person is charged with a violation of assault on a family member, the court may defer the proceedings against such person, without a finding of guilt, and place him on probation under the terms of this section); § 18.2-57.3(E) (upon fulfillment of the terms and conditions specified in the court order, the court shall discharge the person and dismiss the proceedings against him).
automatic loss of defendant's right to carry firearms. Yet, defense counsel could have negotiated an agreement requiring his client to plead guilty to a misdemeanor assault charge which carried the possibility of a sentence of up to one year in jail. Assume that the defendant later violates his probation conditions, is convicted of assault on a family, and loses his job. In reviewing the defendant's claim of ineffective assistance of counsel on the basis of defense counsel's failure to seek to avoid restriction on gun ownership, the reviewing court could find the attorney's failure to be strategic because the agreement defense counsel reached allowed the defendant to continue working and would have eventually avoided any restrictions on defendant's right to carry a gun.

Even if a petitioner succeeds in overcoming the presumption that his attorney's failure to seek to avoid the imposition of collateral consequences during plea negotiations was a strategic decision, he must also establish that his attorney's failure affected the outcome of his case. The next section evaluate additional hurdles a petitioner must overcome when trying to establish *Strickland*'s prejudice prong.

**B. Prejudice**

In order to establish ineffective assistance of counsel under the Sixth Amendment, *Strickland* also requires a claimant to affirmatively prove that counsel's error prejudiced his

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173 See Va. Code Ann. § 18.2-57.3(A) (LEXISNEXIS 2012) (upon violation of a term or condition of supervised probation or of the period of good behavior, the court may enter an adjudication of guilt and proceed as otherwise provided by law); 18 U.S.C. 922(g)(9) (stating that any person convicted of a misdemeanor crime of domestic violence cannot possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce).

174 See Va. Code Ann. § 18.2-57 (2011) (any person who commits a simple assault or assault and battery shall be guilty of a Class 1 misdemeanor); § 18.2-11(a) (for Class 1 misdemeanors, confinement in jail for not more than twelve months and a fine of not more than $ 2,500, either or both).
A petitioner, however, faces a significant hurdle due to the lack of a uniform approach lower courts may use to analyze prejudice. *Strickland* stated that the appropriate test for prejudice rests on the reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The Court in *Hill* extended *Strickland*’s test to the analysis of ineffective assistance of counsel arising out of guilty pleas, stating that the prejudice prong should “focus on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.”  

In *Padilla*, however, the Court stated that a petitioner must prove that a decision to reject the plea bargain would have been rational. In addition, the Court ruled in *Frye* that a defendant may obtain relief by establishing a reasonable probability that he would have accepted the offer, and that “the plea would have been entered without the prosecution refusing to accept it, or the trial court refusing to accept it.” Although *Frye* addressed plea offers rejected or lapsed due to defense counsel's ineffectiveness, the standard the Court laid out may be useful in determining whether pleading guilty to more favorable conditions would have been reasonably probable.

The different approaches to the prejudice inquiry has lead lower courts to apply either the trial-outcome inquiry or the plea-outcome inquiry to determine *Strickland*’s prejudice prong. Under a trial-outcome approach, courts require a defendant to show that, but for counsel's

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175 Strickland v. Washington, 466 U.S. 668, 693 (1984) (explaining that, even if a petitioner shows that particular errors of counsel were unreasonable, he must show that he was prejudiced).
176 Id. at 694 (defining reasonable probability as a probability sufficient to undermine confidence in the outcome).
177 Roberts, *supra* note 78 at 703. (citing *Hill*, 474 U.S. at 59). The Court, however, concluded the case holding that “to satisfy the 'prejudice' requirement, the defendant must show that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill* v. Lockhart, 474 U.S. 52, 59 (1985) (arguing that the prejudice inquiry will resemble the inquiry courts engage in when reviewing ineffectiveness claims arising out of conviction obtained through trial).
179 Frye, 132 S. Ct. at 1409.
deficiency, “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 the one he received after pleading guilty.” On the other hand, courts applying the plea-outcome approach require defendants to demonstrate that, but for counsel's error, the outcome of the plea process would have been different. A claimant pursuing an ineffectiveness claim must be aware of the difference in inquiries, and expect the judge's approach to prejudice to have a significant impact on the outcome of his claim. This portion of the paper evaluates the difficulties a claimant could face under each form of inquiry when establishing prejudice as part of his ineffectiveness claim based on his attorney's failure to seek to avoid the imposition of collateral consequences.

1) Trial-outcome inquiry

One of the approaches in determining prejudice requires a petitioner to show that his attorney's deficient performance prejudiced his defense by so seriously affecting the process that there is a reasonable probability that, but for his attorney's deficiency, the claimant would have not pled guilty, and would have preferred to go to trial. Some courts may also require a petitioner to show the likelihood that the correction of counsel's ineffective assistance would have changed the outcome of a trial in a significant way—either through acquittal or a lower sentence. A petitioner, therefore, must point to specific evidence that his attorney's error

181 Id. at 704.
182 *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (interpreting *Strickland*'s prejudice prong in the context of guilty pleas); *see also* *Dempser v. United States*, Case Nos. 2:10-cv-85, 2:08-cr-43(1), 2010 U.S. Dist. LEXIS 114103, at *5-6 (stating that 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).
183 *See Center v. Kentucky*, 799 S.W.2d 51, 55 (Ky. App. 1990) (stating that a petitioner must establish that there is a reasonable probability that the defendant would not have pled guilty, and the outcome would have been different); *Lueptow v. Tennessee*, 909 S.W.2d 830, 833 (Tenn. Crim. App. 1995) (reversing the trial court's decision
played a significant role in his decision to plead guilty. Showing that the errors had some conceivable effect on the outcome of the proceeding or that he would not have pled guilty is insufficient.  

Many lower state and federal courts have relied on Hill's trial-outcome language to evaluate failure-to-warn cases, raising the burden a defendant needs to overcome to prove prejudice. In Hill, Justice William Rehnquist mentioned that “in many guilty plea cases, the 'prejudice' inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through trial.” Justice Rehnquist went on to provide examples that included an attorney's failure to investigate exculpatory evidence and the failure to advise defendant about affirmative defenses. According to such analysis, the finding of prejudice would depend on whether the correction of such failures would have changed the outcome of a trial. As a result, asserting that a defendant would have gone to trial had he known that defense counsel failed to seek to avoid the imposition of collateral consequences during plea negotiations, without offering evidence of the likelihood of a better outcome, may not be enough to establish prejudice.
Hence, a petitioner claiming ineffective assistance of counsel due to his attorney's failure to seek to avoid the imposition of collateral consequences has the difficult task of proving that, absent such failure, he would have gone to trial and won. His task, though, may prove to be impossible.\textsuperscript{190} A recent federal case, for example, reasoned that an attorney's failure to inform the defendant about the risk of deportation of a guilty plea had no effect on the defendant's guilt or innocence.\textsuperscript{191} Similarly, a court may find that an attorney's failure to seek to avoid the imposition of collateral consequences does not have an impact on a defendant's involvement in a crime.

2) Plea-outcome inquiry

A second approach to prejudice applies a broader inquiry by focusing on whether, given competent representation, the outcome of a defendant's plea process would have been different.\textsuperscript{192} The Court's language in \textit{Hill} gave room to the interpretation that a different outcome might mean a better plea bargain or sentence.\textsuperscript{193} Most recently, the Court in \textit{Padilla} stated that to prove prejudice a defendant must show that his “decision to reject [a] plea bargain would have been rational under the circumstances.”\textsuperscript{194} This standard does not exclude analysis of a possible

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\textsuperscript{190} Id. at 705 (arguing that a trial-outcome approach could place ineffectiveness claims arising out of failure to inform about deportation risks in category where demonstrating prejudice is impossible). \\
\textsuperscript{191} Adeyeye v. United States, No. 00 CR 233, 2009 U.S. Dist. LEXIS 91180, at *16 (N.D. Ill. Oct. 1, 2009) (stating that there was no reason for the court “to believe that if Adeyeye had known about the possibility of deportation, the outcome would have been different). \\
\textsuperscript{192} See Roberts, supra note 180 at 704. \\
\textsuperscript{193} Id. \\
\textsuperscript{194} Id. at 713; see also Padilla v. Kentucky, 130 S. Ct. 1473 1485 (2010) (“to obtain relief on this type of a claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances) (citations omitted). 
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trial outcome, but it is “much broader and allows for consideration of a different type of risk analysis by the defendant.”

Under this approach, a claimant could show that, but for counsel's failure to seek to avoid the imposition of collateral consequences during plea negotiations, it would have been possible to secure a different plea bargain so as to avoid collateral consequences. For example, the defendant in Cabrera v. United States, “on advice of counsel, pled guilty to a one-count information charging her with being part of a conspiracy involving food stamp fraud.” At no point during the proceeding did any individual advise Cabrera about the deportation consequences of her conviction. Seven years after her conviction, Cabrera was placed in deportation proceedings. In evaluating Cabrera's claim of ineffective assistance of counsel, the reviewing court found that it would have been rational for Cabrera to reject the plea bargain had she known that she could have pled to a non-deportable offense. In ordering an evidentiary hearing, the reviewing court contemplated the possibility that Cabrera could have received a lighter sentence or a conviction for a lower, non-deportable offense since she alleged that the government's evidence could have not supported a felony charge. Although the court did not

195 Id.
197 Id. at *2. Given Cabrera's minimal role in the conspiracy and her extensive cooperation in the investigation surrounding the fraud, the government moved for a downward departure, and the court sentenced Cabrera to three years probation. Id.
198 Assuming the truth of her allegations, the reviewing court found Cabrera's counsel to be defective because he did not apprise her of the possibility that she would be deported after accepting the plea agreement. Id. at *5.
199 Id. at *2.
200 Cabrera's guilty plea to fraud causing losses to the United States of greater than $10,000 was an aggravated felony under immigration laws, making her deportable. Id. at *7; see also 8 USC § 1101(a)(43)(M)(i) (the term "aggravated felony" means an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000).
201 Cabrera alleged that actual evidence presented by the Government showed that the fraud she committed was well under $10,000. Cabrera v. United States Civ. No. 10-2713-WJM, 2011 U.S. Dist. LEXIS 74866, *7
address whether Cabrera's attorney was actually ineffective for failing to put Cabrera on notice of the likely collateral consequence of deportation, it accepted the notion that it is rational for a defendant to reject a plea offer due to collateral consequences and the possibility of a better outcome.202

Lower courts could eventually apply the Supreme Court's standard for prejudice laid out in Frye to determine whether a more favorable plea bargain was reasonably probable.203 Hence, a petitioner in Cabrera's situation would have a reasonable probability that he would have accepted the better plea had his attorney negotiated a plea bargain not carrying deportable consequences. In addition the petitioner would have to demonstrate a reasonable probability that the plea to a non-deportable offense would have been entered “without the prosecution canceling it or the trial court refusing to accept it.” Similarly, the security guard in the hypothetical described in Part III.A.204 would have to show a reasonable probability that he would have pled to the charge of simple assault and that the plea would have been entered without the intervention of the prosecutor or judge.

Cabrera is an example of the approach courts have used in finding prejudice on the basis of a defendant's rationality in rejecting a plea offer.205 But even though courts have allowed

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202 Setting the deportation issue aside, the court argued, Cabrera received a light sentence instead of 10 to 16 months of imprisonment; there was no indication, however, that either Cabrera or the Government had the deportation consequences in mind at the time of the agreement. Id.
203 See Frye, 132 S. Ct. at 1409.
204 See supra pp.32-33.
205 See Washington v. Sandoval, 249 P.3d 1015, 1022 (Wash. 2011) (Although defendant would have risked a longer prison term by going to trial, it would have been rational for defendant to take his chances at trial, given the severity of deportation); Salazar v. Texas, No. 11-11-00029-CR, 2011 Tex. App. LEXIS 7229 at *3 (Tex. App. Eastland Aug. 31, 2011) (stating that it would be perfectly rational for defendant to take the chance on acquittal at the risk of a maximum of two years state jail time and a fine of $10,000 rather than facing removal proceedings due to his guilty plea); State v. Yahya, No. 10AP-1190, 2011 Ohio 6090, *p22 (Ohio Ct. App., Nov. 22, 2011)
defendants to show prejudice by establishing that counsel would have been able to negotiate a plea to other charges that would not have carried collateral consequence,206 success has not been a guarantee. For a petitioner to succeed in his claim, the law regarding the imposition of a collateral consequence must reflect that his decision to reject a plea agreement was rational. For example, although a guilty plea to lesser offenses of possession of cocaine and marijuana—not aggravated felonies for immigration purposes207—is feasible to achieve, an accused would still remain deportable under a different section of the U.S Code.208 Without establishing that avoidance of the collateral consequence was attainable, an ineffectiveness claim in these circumstances would fail under the plea-outcome inquiry.209

Regardless of the type of inquiry—trial-outcome or plea-outcome—a judge may choose to evaluate an ineffectiveness claim on the basis of defense counsel's failure to seek to avoid the imposition of collateral consequences at the plea bargaining stage, the petitioner faces a difficult task in showing prejudice. A petitioner may rely on arguments involving an attorney's failure to bargain the charges or sentence that relieved that petitioner from a collateral consequence. As previously argued, the success of an ineffectiveness claim depends on factors ranging from the

206 See Massachusetts v. Clarke, 949 N.E.2d 892, 906 (Mass. 2011) (stating that to prove a defendant's decision to reject a plea bargain was rational under the circumstances, the “defendant bears the substantial burden of showing that . . . there is a reasonable probability that a different plea bargain (absent such consequences) could have been negotiated at the time”).
207 8 U.S.C. § 1227(a)(2)(A)(iii) (“any alien who is convicted of an aggravated felony at any time after admission is deportable”).
208 8 U.S.C. § 1227(a)(2)(B)(i) (“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 30 grams or less of marijuana, is deportable”).
209 See Clarke, 949 N.E.2d at 906-07 (because the evidence stacked against the defendant left little prospect of escaping mandatory jail sentences, which would have led to the same deportation consequence, the court found that the defendant failed “to explain, let alone demonstrate, why, in view of all the considerations at issue at the time of his plea, it would have been rational to plead not guilty and proceed to trial”).

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existence of a record to a judge's determination of whether a defendant made a rational decision in rejecting a plea agreement.

CONCLUSION

The increasing rate of arrests and convictions, and the rising prevalence of collateral consequences have affected the lives of many individuals in America. As more persons enter into guilty pleas to avoid trial, they face consequences that may affect various elements of their lives, including immigration status, eligibility to hold professional licenses, and access to their children. Faced with such consequences, the role of defense counsel during plea negotiations has become crucial, not only because of the likelihood of tough jail sentences, but also in avoiding the imposition of collateral consequences. Although the Supreme Court has begun to pay close attention to the plea bargaining process, the requirements a petitioner must meet to succeed in vacating a conviction due to ineffective assistance of counsel remain stringent. This article has explored the hurdles a petitioner is likely to face when pursuing an ineffectiveness claim on the basis of counsel's failure to seek to avoid the imposition of collateral consequences at the plea-bargaining stage. In doing so, this paper has shown the different factors that may affect a reviewing court's determination of each prong of the Strickland test, including the secrecy of negotiations, the court's deference to attorney's judgment, and the existence of a clear record of previous proceedings.

Although not impossible, an ineffectiveness claim on the basis of defense counsel's failure to seek to avoid the imposition of collateral consequence at the plea-bargaining stage is likely to have slim chances of success. Because the Supreme Court has not addressed this element of Sixth Amendment jurisprudence, state courts and legislatures have a crucial role in
creating relevant procedural protections. Although it is beyond the scope of this article, it is an important public policy discussion in a time where the American criminal system relies more on the outcome of a negotiations than an actual trial.