

**THE FUTURE OF EFFECTIVE ASSISTANCE OF
COUNSEL: REREADING *CRONIC* AND
STRICKLAND IN LIGHT OF *PADILLA*, *FRYE*, AND
*LAFLER***

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The right to the effective assistance of counsel is . . . the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred.¹

“[A]ny amount of [additional] jail time has Sixth Amendment significance.”²

I. INTRODUCTION

Two cases decided in March of 2012, *Lafler v. Cooper*³ and *Missouri v. Frye*,⁴ when read in conjunction with *Padilla v. Kentucky*⁵ from 2010, suggest

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1. *United States v. Cronin*, 466 U.S. 648, 656 (1984) (footnotes omitted).

2. *Missouri v. Frye*, 132 S. Ct. 1399, 1409 (2012) (alterations in original) (quoting *Glover v. United States*, 531 U.S. 198, 203 (2001)).

3. *Lafler v. Cooper*, 132 S. Ct. 1376 (2012). The Court was split 5-4 along the traditional left/right designation. Justice Kennedy wrote the majority opinion. Justices Scalia, Thomas, Roberts, and Alito dissented.

that there is significantly more room for judicial intervention in the relationship between defense counsel and the defendant under the guise of the Sixth Amendment than previously thought.⁶ These cases, taken together, squarely place the courts in the business of regulating the attorney-client advising relationship, including advice regarding whether or not to accept a plea or go to trial; the forecasts of the risks associated with going to trial and counsel's estimate of the likelihood of conviction; and the potential collateral consequences of conviction.⁷

The Supreme Court has opened the doors to the previously privileged conversations, notwithstanding the majority's acknowledgment in *Frye* that this will be very difficult because no formal court proceedings are involved.⁸ This leaves the supervising court and opposing counsel out of the picture.⁹ "Indeed, discussions between client and defense counsel are privileged. So the prosecution has little or no notice if something may be amiss and perhaps no capacity to intervene in any event."¹⁰ It also leaves recounting the details of the conversation to the memories of a probably untrained and inherently biased defendant.¹¹ The Court dismissed those concerns without meaningful discussion, not because the majority had good answers to offer, but because it felt that the pretrial plea-bargaining system was too important.¹² "[P]lea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages."¹³ As the dissenters noted, the Court has placed all trial courts squarely in the business of the "newly created constitutional field of plea-bargaining law."¹⁴ This Symposium offers the opportunity for a very limited initial foray into framing some of the questions that arise from the creation of the new field.

4. *Frye*, 132 S. Ct. 1404. The Court was split 5-4, along the traditional left/right designation. Justice Kennedy wrote the majority opinion. Justices Scalia, Thomas, Roberts, and Alito dissented.

5. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2012).

6. *Cf.* U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.")

7. *See Lafler*, 132 S. Ct. at 1388-89; *Frye*, 132 S. Ct. at 1408-11; *Padilla*, 130 S. Ct. at 1486.

8. *See Frye*, 132 S. Ct. at 1402.

9. *See id.* at 1407.

10. *Id.*

11. *See id.* at 1406-07.

12. *See id.* at 1407-08.

13. *Id.* at 1407.

14. *Id.* at 1413 (Scalia, J., dissenting).

II. PRIOR LAW

A. *Gideon and Strickland—The Core Cases*

The Supreme Court incorporated the federal right to counsel against the states in *Gideon v. Wainwright*, a case in which Clarence Earl Gideon challenged his conviction because he had not been provided with appointed counsel under Florida law to represent him in his felony trial.¹⁵ The Supreme Court held that Florida violated the Sixth Amendment of the United States, which the Court incorporated against the states through the Due Process Clause of the Fourteenth Amendment.¹⁶ The Court thought that Gideon needed the assistance of counsel for his trial to have any chance of being fair.¹⁷ Procedural complexity, waiver, sometimes-arcane evidentiary rules, and the fact that felonies are often heard before a lay jury all combine to make the assistance of a lawyer crucial if the system is to work as designed. The notion of effective assistance of counsel was tied inextricably to the adversarial process.¹⁸

The very definition of counsel has traditionally been cast in adversarial terms. The Supreme Court held in *United States v. Cronin* that so long as counsel is sufficiently competent to ensure that the process was adversarial in nature, the constitutional standard of providing counsel has been met.¹⁹ The Court held,

The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred.²⁰

The test for the provision of counsel focuses on whether there has been an “actual breakdown of the adversary process.”²¹ Over the years between *Gideon* and *Strickland v. Washington*, the federal courts found a violation of the right to counsel in a limited number of instances in which a defendant was systematically deprived of defense counsel but, for the most part, found ineffectiveness only when the actions of counsel were so poor as to reduce the trial to a “mockery of justice.”²² One could be assigned the attorney who most closely ekes past the minimal standards of competence in the jurisdiction, and

15. *Gideon v. Wainwright*, 372 U.S. 335, 336-38 (1963).

16. *Id.* at 342-43.

17. *See id.* at 344.

18. *See id.*

19. *See United States v. Cronin*, 466 U.S. 648, 655-56 (1984).

20. *Id.* at 656 (footnotes omitted).

21. *Id.* at 657.

22. RONALD J. ALLEN ET AL., *COMPREHENSIVE CRIMINAL PROCEDURE* 169 (2d ed. 2005); *see Strickland v. Washington*, 466 U.S. 668 (1984).

he would meet the standard so long as he was allowed to contest the state—and in fact did so.²³ To show a constitutional violation based on ineffective assistance of counsel, two factors must be present: the attorney must be incompetent, and the incompetence must have affected the outcome of the case.²⁴ According to *Strickland*, “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”²⁵ There are a limited number of circumstances where the prejudicial effect required in the second prong will be presumed—the complete denial of counsel,²⁶ counsel’s refusal to participate,²⁷ and perhaps cases in which there is an unwaived conflict of interest that would so substantially interfere with counsel’s ability to act as an advocate that he would be deemed not to have participated.²⁸

As commentators have noted, enforcing competence while maintaining an arm’s-length relationship between the state and the defense is extremely difficult.²⁹

The mockery of justice standard seems inordinately low, but there are some justifications for it. The higher the level of scrutiny, the greater is the impetus on the part of the trial judge to intervene in derogation of basic premises of the adversary system. Moreover, intervention may occur at a point of what appears to be problematic action by counsel but in fact is an integral part of a trial strategy known only to counsel.³⁰

In *Strickland*, the Court was careful to note that wide latitude must be given to defense counsel to represent the defendant and that judicial scrutiny must be “highly deferential.”³¹ According to the opinion,

No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.³²

23. See ALLEN ET AL., *supra* note 22, at 169.

24. *Strickland*, 466 U.S. at 687.

25. *Id.* at 686.

26. *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963).

27. *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980).

28. See *id.*

29. ALLEN ET AL., *supra* note 22, at 169.

30. *Id.*

31. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

32. *Id.* at 688-89.

Since *Strickland*, there has been widespread criticism of the standard and the courts' hands-off attitude toward structural challenges to the provision of counsel.³³ Notwithstanding *Gideon*'s promise that there would be counsel and *Strickland*'s promise that counsel would be competent, the states have underfunded the defense to the point that lawyers labor under crippling workloads, where triage is necessary in deciding which cases to aggressively defend, and vigorous representation is available only to those who can afford it and some lucky subset of indigent defendants.³⁴

The state must provide the defendant in a criminal case with effective adversarial counsel at all critical stages of the proceeding.³⁵ Adversarial trial counsel need not be perfect, or even regarded as good; they need to be minimally competent judged by the standards of the jurisdiction and must be sufficient to permit the courts to find that the state was put to an adversarial test.³⁶ "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."³⁷ To win a *Strickland* challenge, the burden has traditionally been on the defendant to show that counsel's actions fell below that low bar for adequate performance.³⁸

Once the defendant has met that burden, he must show that counsel's substandard performance resulted in prejudice—the second prong of the two-prong test. The question, according to *Strickland*, has been, "Would the outcome have been different, but for the failures of counsel?"³⁹ History has shown this to be a difficult showing in the ordinary case, at least when the actions take place at trial in the presence of the judge.⁴⁰ Essentially, in appeals challenging counsel's performance at trial, the successful cases can be loosely grouped into three subsets: inattention or impairment; glaring legal errors, such as failing to plead the statute of limitations or double jeopardy; or failure to contest the admission of illegally-seized evidence when suppression would be case-dispositive.⁴¹ Otherwise, the courts have repeatedly told us that considerable leeway must be given to judgment calls made by trial counsel.⁴²

In a different subset of cases, the courts have already been raising the bar for counsel's performance—by requiring better investigation and presentation

33. See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1841-43 (1994) (discussing several sources of criticism).

34. See *id.* at 1835-38.

35. See *Strickland*, 466 U.S. at 685-86.

36. See *id.* at 689-90.

37. *Id.* at 686.

38. See *id.* at 687-88.

39. *Id.* at 687.

40. *Id.* at 689.

41. See WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 11.10, at 666-70 (5th ed. 2009) (discussing cases).

42. See *id.* at 662.

of mitigating evidence in death penalty cases.⁴³ The death-is-different cases suggested that the courts were more willing to find prejudice where the defendant was sentenced to death.⁴⁴ There appeared to be a constitutionally mandated set of higher qualifications for capital defenders, and some jurisdictions have written the higher qualifications into their rules of professional conduct and rules governing court-appointed practice.⁴⁵ At the time, Professor Donald Dripps underscored the limits of the Court's oversight: While "[t]he Court's concern is certainly welcome[,] it is equally limited, confined to a procedural context that can benefit only a few individuals charged with the most serious crimes."⁴⁶

It was once possible to suggest that innocence and death cases were the two islands of prejudice where the Court was most interested in raising standards on counsel and to suspect that in that small subset, the nature of the harm in the prejudice prong was bleeding over into the determination of whether attorney conduct met the constitutional floor under the performance prong.

III. PADILLA, LAFLER, AND FRYE

As previously noted, *Padilla*, *Lafler*, and *Frye*, taken together, have significantly altered the expectations regarding the contours of effective assistance of counsel. The Court has created a new field not only of plea-bargaining law, but also of pretrial advice law. So, what are the components so far of this new field? Under the Sixth Amendment, the Supreme Court has ordered the lower courts to entertain claims that defendants chose to plead guilty or go to trial, or to accept or reject plea offers, as a result of faulty advice from counsel.⁴⁷ Over time we can expect to get more clarification, but in the interim, as the dissenters suggest, we should expect extensive litigation.⁴⁸

A. *Padilla v. Kentucky*

Padilla v. Kentucky held that failure to inform a defendant of his deportation risk before he enters a plea is a sufficient—and sufficiently definite—collateral consequence to prove deficient performance under the first

43. See *Wiggins v. Smith*, 539 U.S. 510, 536-38 (2003); *Williams v. Taylor*, 529 U.S. 362, 362 (2000); Stephen F. Smith, *Taking Strickland Claims Seriously*, 93 MARQ. L. REV. 515, 516 (2009).

44. See Smith, *supra* note 43, at 537. Perhaps this is because some judges believe that any finding of death is inherently suspect. See Bright, *supra* note 33, at 1835 (arguing that quality of lawyering is the largest factor in who receives the death penalty).

45. See, e.g., CAL. R. CT. 8.605 (referencing qualifications of counsel in death penalty appeals and habeas corpus proceedings).

46. See Donald A. Dripps, *Ineffective Litigation of Ineffective Assistance Claims: Some Uncomfortable Reflections on Massaro v. United States*, 42 BRANDEIS L.J. 793, 804 (2004).

47. See, e.g., *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010).

48. See *id.* at 1496 (Scalia, J., dissenting).

prong of the *Strickland* test.⁴⁹ In *Padilla*, the defendant was a Vietnam veteran and forty-year resident of the United States, but a Guatemalan citizen.⁵⁰ He pled guilty to transporting a large amount of marijuana.⁵¹ Under the immigration laws, that guilty plea also meant that the defendant was virtually certain to be deported.⁵² The Court held that defense counsel's failure to inform the defendant of that likelihood was *Strickland* error.⁵³ Whether that deficient performance entitled Padilla to a remedy was not before the Court.⁵⁴ The Court remanded to the trial court to determine whether Padilla was prejudiced by the failure to advise him of the consequences.⁵⁵ The Court was able to reach the performance prong without considering prejudice at all.⁵⁶ But *Padilla* opened the door to an inquiry into the advice the defendant received, not only about the crime at issue in the criminal case, but also about the collateral consequences of his plea.⁵⁷ It left as an open question the range of collateral consequences that might qualify and the nature and quality of the legal advice that might suffice.⁵⁸ But the door of the attorney's office had been opened, and privileged conversations about collateral consequences were deemed an appropriate subject of judicial inquiry.⁵⁹

B. *Missouri v. Frye*

Perhaps the simplest new rule regarding performance comes from *Frye*: formal plea offers must be communicated to clients and failure to do so violates the Sixth Amendment.⁶⁰ According to the opinion,

This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Any exceptions to that rule need not be explored here, for the offer was a formal one with a fixed expiration date. When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires.⁶¹

49. *Id.* at 1482 (majority opinion); see *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

50. *Padilla*, 130 S. Ct. at 1477.

51. *Id.*

52. *Id.* at 1483.

53. *Id.* at 1483-84.

54. See *id.*

55. See *id.*

56. See *id.*

57. See *id.* at 1481.

58. See *id.* at 1482.

59. See *id.* at 1486.

60. See *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012).

61. *Id.*

In *Frye*, the defendant was a repeat offender for driving without a license.⁶² His attorney failed altogether to notify Frye about the existence of the plea agreement, which offered him the opportunity to plead guilty to a misdemeanor, which would have capped his criminal liability at one year with a prosecution recommendation of a ten-day “shock” incarceration.⁶³ When the agreement expired, the defendant pled guilty instead to a felony charge, which exposed him to a four-year sentence.⁶⁴ The prosecutor recommended a three-year sentence (presumably suspended) and ten days of shock time.⁶⁵ Frye, who had once again been cited for driving without a license between the expiration of the plea offer and his guilty plea, received three years of imprisonment.⁶⁶ The Court held that the total failure to inform the defendant of the offer was constitutionally inadequate performance and that the additional sentence was sufficient prejudice—so long as the defendant could prove that he would in fact have received a reduced sentence if his counsel had performed adequately.⁶⁷ The failure to communicate the offer was concededly error under *Strickland*, and the Supreme Court decided that notwithstanding defendant’s later guilty plea and conviction, the error required resentencing, albeit under a somewhat murky relief standard.⁶⁸

According to the Court,

In order to complete a showing of *Strickland* prejudice, defendants who have shown a reasonable probability they would have accepted the earlier plea offer must also show that, if the prosecution had the discretion to cancel it or if the trial court had the discretion to refuse to accept it, there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented. This further showing is of particular importance because a defendant has no right to be offered a plea, nor a federal right that the judge accept it. In at least some States, including Missouri, it appears the prosecution has some discretion to cancel a plea agreement to which the defendant has agreed.⁶⁹

Recall the defendant’s citation for his fifth count of driving without a license between the plea offer at issue and his entry of a guilty plea and the prosecutor’s recommendation that exactly matched one of those in the original offer.⁷⁰ Those facts, coupled with the state’s discretion to withdraw a plea

62. *Id.* at 1404.

63. *Id.* (internal quotation marks omitted).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 1408-09.

68. *Id.*

69. *Id.* at 1410 (citations omitted).

70. *Id.* at 1404-05.

offer, made it possible that the defendant would fail to meet his burden on remand.⁷¹

But there was no question that the communications between the defendant and his counsel about matters other than his guilt or innocence were at issue.⁷² It was also clear that the Court believed that plea bargaining was too important not to regulate.⁷³

C. Lafler v. Cooper

In *Lafler v. Cooper*, the Court held that a conceded error regarding the application of the facts in a particular case to the elements of a crime—attempted murder—was sufficiently poor performance to lead the Court to order a remedy.⁷⁴ Lafler claimed *Strickland* error led him to reject a plea deal and go to trial, “allegedly after his attorney convinced him that the prosecution would be unable to establish intent to murder [the victim] because [she] had been shot below the waist.”⁷⁵

Lafler is an odd case because the error was conceded, but the Court seemed skeptical, even in the majority opinion, about whether the defendant was truly given that advice.⁷⁶

However, the remedy in *Lafler* was sufficiently indeterminate to leave the dissenters and other readers scratching their heads.⁷⁷ The defendant bears the burden of showing that there was error under the first prong and, under the second, that the defendant would have accepted the plea offered but for the bad advice; that the prosecutor would have left that agreement in place up to the point of entry of the plea under the agreement; that the court would have accepted the plea; and that the sentence the defendant received would have been different.⁷⁸ How those particular showings would be made—and with whose testimony (e.g., counsel’s, the prosecutor’s, the trial judge’s)—remains to be seen.

Nevertheless, it opens the door to judicial inquiry into conversations between the defendant and counsel about the application of law to fact, even as

71. *See id.* at 1410-11.

72. *See id.* at 1404.

73. *See id.* at 1412-14 (Scalia, J., dissenting).

74. *Lafler v. Cooper*, 132 S. Ct. 1376, 1377 (2012) (“The instant case comes to the Court with the concession that counsel’s advice with respect to the plea offer fell below the standard of adequate assistance of counsel guaranteed by the Sixth Amendment, applicable to the States through the Fourteenth Amendment.”).

75. *Id.*

76. *See id.*

77. *See id.* at 1392-93 (Scalia, J., dissenting) (“In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed.”).

78. *Id.* at 1385 (majority opinion).

part of the decision to go to trial. And it dispenses with the argument that a full and fair trial on the merits obviates a *Strickland* claim.⁷⁹

D. Implications of These Cases

1. Pretrial Conduct Leading to Trial

Taken together, *Padilla*, *Frye*, and *Lafler* demonstrate that the Court is endorsing a new set of inquiries into counsel's actions, which opens up the range of cases in which ineffective assistance cases may be successful.⁸⁰ *Padilla* was decided on a question of law, requiring no additional information other than the charges and an understanding of their immigration consequences.⁸¹ *Frye* was based on the absolute failure to communicate a plea, not on judgments and information exchange underlying those judgments.⁸² *Lafler*, arguably, could be limited to the application of the law of homicide to the facts alleged in the indictment, requiring no inquiry into defense strategy or value judgments.⁸³ Moreover, *Lafler* was based on a concession by the State regarding the insufficiency of the advice given by counsel under the performance prong, and that concession does not seem likely to recur in the "mine-run of cases," now that the prejudice principle has been established.⁸⁴

Attorneys for the prosecution are understandably concerned that the new pretrial standards will open the door to multiple rounds of litigation in every case. At the very least, any defendant willing to allege *Strickland* error will have a chance of getting a hearing on a writ of habeas corpus once trial is complete.⁸⁵ And there may be less chance to contract around *Frye* issues by securing an appellate waiver as part of the plea process.⁸⁶ Where the very constitutional error that the defendant alleges is his attorney's deficient performance in having him sign the plea agreement that contains an appellate waiver, agreements that contain such waivers will not be binding as a bar to litigation.⁸⁷

The problem is sure to arise in cases in which there has been a conviction at trial because defendants will be highly motivated to allege ineffective assistance post-trial and seek to reinstate an earlier more favorable plea offer. If practiced collusively, which some prosecutors fear, defense counsel could

79. See *id.* at 1386-88.

80. See *Missouri v. Frye*, 132 S. Ct. 1399 (2012); *Lafler*, 132 S. Ct. at 1383; *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), for discussions of inquiries into prior actions by attorneys during ineffective assistance cases.

81. See *Padilla*, 130 S. Ct. at 1494.

82. See *Frye*, 132 S. Ct. at 1403.

83. See *Lafler*, 132 S. Ct. at 1383.

84. See *id.* at 1384.

85. See *Strickland v. Washington*, 466 U.S. 668, 682-84 (1984).

86. See *Frye*, 132 S. Ct. at 1402-03.

87. See *Lafler*, 132 S. Ct. at 1380.

deliberately document bad advice of some kind, proceed to trial hoping for an acquittal, or seek beneficial sentencing on an open plea while retaining the *Lafler* or *Frye* claims as backstops.⁸⁸

Some courts will seek to head this practice off as to *Frye* claims by asking defendants pre-trial if they are aware of and understood any plea offers extended by the prosecutor. These claims should be manageable, as the Court suggests, with written offer requirements, thoughtful scheduling of plea hearings relative to trial, and notice to the court by the prosecution of plea offers.⁸⁹ Prosecutors could also limit their exposure unilaterally by making all plea offers completely revocable by the prosecutor at any time prior to the entry of the plea or, perhaps, by formal filing of a signed plea agreement by the prosecutor. Of course, if the questioning takes place on the eve of trial, the prosecution and all prosecution witnesses will have been subpoenaed, and much of the expenditure sought by the plea agreement will already have been made.

Adding to the complexity is the possibility of *Lafler* claims, where the issue is counsel's explanation of the risks of going to trial and his assessment of the relative strength of the prosecutor's case. If the court seeks to inquire about such explanations early, for example at a pretrial conference, it risks injecting the judge into the privileged relationship. And there may be good, but very secret, reasons for deciding to pursue a plea early when the available evidence suggests a possibility of success at trial. For example there may be as yet unknown but potentially (or probably) discoverable inculpatory evidence that the lawyer fears will come out in trial preparation that will increase his client's exposure. In white-collar cases, for example, often the loss amount can be stipulated to early, and that amount can get significantly worse as more victims are found and interviewed.⁹⁰ Similarly, drug prosecutors often stipulate to the drug weight at issue as part of their plea offers, cabining the defendant's sentencing exposure.⁹¹

Trying to sort out all of these risks will place a new and difficult-to-manage burden on trial courts.⁹² In the past, *Strickland* challenges have been

88. See *id.* at 1385; *Frye*, 132 S. Ct. at 1406. Such practices would be highly unethical and would expose defense counsel to sanctions, bar discipline, and malpractice claims, so they would be unlikely. That has not stopped prosecutors from worrying (off the record) to this author about the prospect.

89. See *Frye*, 132 S. Ct. at 1408-09.

90. Derick R. Vollrath, Note, *Losing the Loss Calculation: Toward a More Just Sentencing Regime in White-Collar Criminal Cases*, 59 DUKE L.J. 1001, 1009-10 (2010).

91. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(a)(5), (c)(1)-(17) (2007).

92. See *infra* Part IV. The burden is on the defendant to prove a different outcome. In the wildly indeterminate area of plea negotiations, where different individual prosecutors will have different standards for pleas and different levels of trial aversion, proving a different outcome with the requisite specificity will at the very least be an interesting exercise. ABA Standards, the laws of most states, and federal law preclude judges from participating in plea negotiations. See ABA CRIMINAL JUSTICE STANDARD 14-3.3(d) (3d ed. 1999) ("A judge should not ordinarily participate in plea negotiation discussions among the parties."); FED. R. CRIM. P. 11(c)(1) ("An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these

based on actions or omissions that took place in the presence of the prosecutor, under the watchful eye of the court, and in many cases, with a written transcript.⁹³ Now, some courts may be inclined to inquire in camera about defense counsel's decisions to avoid *Lafler* claims. Doing so ex parte will bring with it all of the issues associated with such proceedings in an adversarial system. Prosecutors will be left to the vagaries of the talent (and potentially, honesty) of opposing counsel.

Although some of the foregoing is clearly speculative, at the very least, *Lafler* and *Frye* reinforce the holding in *Padilla* that the Court is ordering the lower courts into the business of overseeing conduct that takes place outside the presence of the court and the prosecutor, in the privileged space of consultation between the defendant and his lawyer.⁹⁴ These cases also demonstrate that pretrial conduct that results in additional time in custody is sufficient to constitute prejudice that can be remedied under the Sixth Amendment.⁹⁵

It is possible that the Court might ultimately conclude that *Padilla* was about the collateral consequences of a plea, *Frye* was about the existence of a plea offer, and *Lafler* was about conceded misunderstandings of the legal arguments that attach to the allegations in the indictment—all of which the court can inquire into without impinging on a defendant's Fifth Amendment rights. Because these cases do not require the courts to invade privileged communications outside their narrow contexts—that line of argument would go—they are inherently limited and do not create the risk of undermining the adversarial system.

The courts should be cautious about establishing a standard for pretrial effectiveness significantly higher than the prior *Strickland/Cronic* baseline, especially if it exposes the government to two-track litigation in the ordinary run of cases. As a constitutional matter, there is a Fifth Amendment counterweight to the Court's assurances that the government can protect itself from defendants seeking two bites at the apple, particularly because establishing prophylaxes against that practice could impinge on the ordinary defendant's Fifth Amendment rights.⁹⁶

2. *Rewriting the Strickland Standard*

While pretrial practice is certain to be affected, the significance of these cases for trial counsel remains to be seen. Recall that under *Strickland*, there

discussions.”); Jenny Roberts, *Proving Prejudice, Post-Padilla*, 54 HOW. L.J. 693, 744 (2011) (“Under most state criminal codes, negotiation is an area that courts enter lightly or not at all.”).

93. See, e.g., *Frye*, 132 S. Ct. at 1404; *Lafler*, 132 S. Ct. at 1383; *Strickland v. Washington*, 466 U.S. 668, 672 (1984).

94. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1473 (2010) (addressing discussions, which generally occur solely between the defendant and his lawyer, considered by the courts in determining whether to grant defendant's claim of ineffective assistance).

95. *Frye*, 132 S. Ct. at 1409.

96. See U.S. CONST. amend. V.

are two prongs to the test, both of which the defendant has to establish.⁹⁷ Counsel must have failed to meet the constitutional minimum of performance, and the failure under the performance prong must have been one that would cause the outcome of the trial to change.⁹⁸ Under *Strickland*, that requirement has been read to mean that the defendant would not have been convicted at trial.⁹⁹ But, according to the opinion in *Frye*, at least in the pretrial context, exposure to *any* additional incarceration constitutes remediable prejudice if it is sufficiently traceable to performance by defense counsel that falls below the Sixth Amendment bar.¹⁰⁰ In *Frye*, the Court quoted (and expanded) *Glover v. United States* for the proposition that “[a]ny amount of [additional] jail time has Sixth Amendment significance.”¹⁰¹ If a future majority were to import that prejudice standard into the trial context, another—and much wider—door may be opening for judicial action.¹⁰²

And one can see how there might be important, but not case-dispositive errors that might meet such a revised standard. A sentencing court may be influenced by a fact not challenged at trial, or more critically, by a fact not sought out and presented at trial or at sentencing. In many states, the sentencing stage in non-capital cases is not separated, and sentencing takes place immediately after trial.¹⁰³ In other cases, sentencing judges may weigh their in-court opportunities to listen to the evidence more than a pre-sentencing report.¹⁰⁴ Evidence that was not case-dispositive might very well expose the defendant to at least *some* additional incarceration.¹⁰⁵ If facts deemed proven at trial can be used as sentencing factors, and any additional time is prejudice, then cases subject to Sixth Amendment challenge have dramatically expanded. This movement is significant if it occurs because in a two-pronged test, courts could decide either one first.¹⁰⁶ A high trial bar for prejudice would mean that

97. *Strickland*, 466 U.S. at 687.

98. *See id.*

99. *Id.* For an extensive discussion of the lower courts’ approaches to prejudice, both pre- and post-*Padilla*, see Roberts, *supra* note 92, at 696-719.

100. *See Frye*, 132 S. Ct. at 1409-10.

101. *Id.* at 1409 (second alteration in original) (quoting *Glover v. United States*, 531 U.S. 198, 203 (2001)).

102. *See* Roberts, *supra* note 92, at 698. Professor Roberts suggested after *Padilla* that the opinion supported multiple approaches to redefining prejudice, with the courts asking “whether, if the defendant had not taken the plea, it is reasonably probable that there would have been a different outcome.” *Id.* Pleas might be structured to avoid collateral consequences, prosecutors made aware of the collateral consequences might offer better pleas, and courts might give lower sentences. Professor Carissa Hessick has argued that floodgates concerns notwithstanding, the courts need to open their doors to new arguments about ineffective assistance at sentencing. *See* Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. REV. 1069, 1072-73 (2009).

103. *See, e.g.*, Hessick, *supra* note 102, at 1091.

104. *See id.* at 1079.

105. *See id.* at 1081-82.

106. *See* Roberts, *supra* note 92, at 709-12. For a thoughtful discussion of the issues associated with analyses that start with the existence of remedies to avoid litigating rights, see Stephen I. Vladeck, *AEDPA, Saucier, and the Stronger Case for Rights-First Constitutional Adjudication*, 32 SEATTLE U. L. REV. 595, 599-601 (2009).

many courts could decide cases there and never reach the competence prong.¹⁰⁷ In fact, that was the order required by *Strickland*.¹⁰⁸ As Roberts noted however, *Padilla* flipped the order.¹⁰⁹ So do *Lafler* and *Frye*.¹¹⁰ Courts will now be able to reach the performance prong in a wide range of cases.¹¹¹

The alternative, and more likely, outcome to the possible “any additional time” standard is maintaining a high prejudice standard, which will allow the courts to set performance standards in what are essentially dicta, while denying defendants relief. As others have noted, over-regulation and finality concerns and concerns over opening the floodgates to litigation are likely to make the courts cautious in expanding the scope of cases eligible for review.¹¹²

And the movement may not only be on the prejudice prong. If the *Strickland* formulation is in play, then defense counsel can also be expected to argue that the standards for performance established in the death and innocence cases should alter the expectations for competent representation in *all* cases.¹¹³ If it is ineffective not to find and introduce mitigation evidence in a death penalty case, they will argue, it is likewise ineffective not to introduce it in a speeding case.¹¹⁴

Another possible outcome is that the *Lafler* and *Frye* decisions are the first steps away from the two-pronged performance/prejudice test established by *Strickland* toward a totality-of-the-circumstances test.¹¹⁵ Where the error on the performance prong is egregious—absolute failure to inform the defendant of the existence of a plea offer—the harm on the prejudice prong can be low, i.e., any additional incarceration.¹¹⁶ Where the error on the performance prong is *de minimis*, it can be overlooked, even if it is plausible that it might result in some additional incarceration.¹¹⁷ I doubt that the Court intended to open that door,

107. See Roberts, *supra* note 92, at 709-10 (“The prejudice prong is particularly significant because *Strickland* encouraged lower courts to analyze ineffective-assistance claims to first determine prejudice, or lack thereof, and to evaluate any attorney error only after the defendant has met that burden.”).

108. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984); accord Roberts, *supra* note 92, at 711.

109. See Roberts, *supra* note 92, at 711 (“Whether *Padilla* is entitled to relief on his claim will depend on whether he can satisfy *Strickland*’s second prong, prejudice, a matter we leave to the Kentucky courts to consider in the first instance.” (citing *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478, 1483-84 (2010))).

110. See *supra* notes 78-95 and accompanying text.

111. See Roberts, *supra* note 92, at 709-12.

112. See, e.g., *id.*

113. See Smith, *supra* note 43, at 516-18 (“[T]he more stringent standard of attorney effectiveness, though undoubtedly motivated by concerns over the administration of the death penalty, should not be limited to capital cases. In this respect, ‘death’ is not ‘different’: If the legal system truly does value the goals of accuracy and reliability, the right to counsel should be taken seriously in *all* criminal proceedings, not just capital cases.”); John H. Blume & Stacey D. Neumann, “*It’s Like Deja Vu All Over Again*”: Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel, 34 AM. J. CRIM. L. 127, 144-45 (2007) (arguing that the Supreme Court’s recent jurisprudence is making ABA Standards for attorney conduct relevant in determining the effectiveness of counsel in all cases).

114. See Smith, *supra* note 43, at 517-18.

115. See *supra* notes 102-09 and accompanying text.

116. See Smith, *supra* note 43, at 524-25.

117. See *id.*

but appellate defense counsel can certainly be expected to make the argument in appropriate cases.

In the short term, we should expect a wave of litigation based on secret and privileged conversations between the defendant and his lawyer. The incentive for the defendant to misrepresent the content of such conversations is high. If defendants can convince the courts that they received bad advice, they can attempt to roll back a bad result to a more favorable plea offer.¹¹⁸ The incentives for defense counsel will be mixed. Some may be inclined to fall on their swords to permit their clients to litigate back to the more favorable offer. Others will be inclined to deny that they gave the poor advice because it will adversely affect their reputations as competent defense counsel. Falling below the new bar is also likely to have collateral consequences for defense counsel—licensure, the potential outcomes of malpractice lawsuits, the availability of malpractice insurance, future court-appointed work, and even future job prospects may all hang in the balance. Unraveling this complex set of questions will create a wave of litigation with interventions from multiple directions by parties other than the defendant and his original counsel. Prosecutors, malpractice insurers, and post-conviction counsel will all be added to the mix.

3. *Adversarialism*

These new decisions have the potential to impact the adversarial system more generally. The attorney-client privilege creates room for defendants to confer with their lawyer in confidence.¹¹⁹ The defense may know things that the court does not, and second guessing counsel's decisions, which may be based on information known only to counsel and his client, threatens to widely expose now-private conversations to judicial scrutiny. Adversarial defense ethics require the defense attorney to seek the truth if his client is innocent and to obscure the truth if his client is guilty (and if doing so will ultimately redound to his client's benefit).¹²⁰

The commitments to adversarialism that we have made serve other limited government values.¹²¹ We all have the right to put the government to its proof, guilty or not.¹²² Criminal defendants protect the rights of the general public against search and seizure because the enforcement mechanism that is routinely used is the exclusionary rule.¹²³

118. *See id.*

119. *See id.* at 489-90.

120. *See id.* at 542.

121. *See id.* at 544.

122. *See id.*

123. *See ALLEN ET AL.*, *supra* note 22, at 336 (noting that the exclusionary rule is the enforcement mechanism "invoked most often by far").

But the politics of distrust make the public unwilling to pay for defense counsel whose goal is deemed by opponents to be subversion of the truth.¹²⁴ These attitudes are compounded by defense counsel's role in enforcing truth, obscuring rules of evidence, and using the exclusionary rule as the enforcement mechanism for police violations of criminal suspects' constitutional rights.¹²⁵ Placing the onus of these limited government functions on defense counsel and criminal defendants has resulted in a politics of stinginess.¹²⁶ It appears that the public is willing to fund defense counsel at the absolute constitutional floor and that the states are willing to litigate to keep that floor as low as possible.¹²⁷

It is against this political backdrop that the Court must weigh its decisions to order the states to provide competent defense counsel through the Due Process Clause. The courts' relative stinginess in finding violations under any of the criminal-procedure-related amendments makes sense when one considers the inherent limitations the courts labor under; ultimately, they are engaged in creating an unfunded and unpopular mandate.¹²⁸ The case-or-controversy limitation, limited judicial resources (political and material), and the fact that in the absence of a harmless error consideration, the courts will be held responsible for overturning the convictions of many very guilty people make it remarkable that we have *Gideon* and *Strickland* at all. Expecting *Lafler* and *Frye* to result in much more oversight—and constitutionally mandated allocation of resources—than the Court is already doing is to ignore political reality.

And all that is before one considers the constitutional legitimacy of making these decisions in the federal appellate courts at all.¹²⁹ It is possible to believe that the selection and compensation of talented defense counsel is a social good, but to be skeptical of whether reimagining the potential content of plea negotiations conducted by such lawyers is constitutionally mandated—a point made quite forcefully by Justice Scalia, dissenting in *Frye*:

The plea-bargaining process is a subject worthy of regulation, since it is the means by which most criminal convictions are obtained. It happens not to be, however, a subject covered by the Sixth Amendment, which is concerned not with the fairness of bargaining but with the fairness of conviction.¹³⁰

124. See *supra* text accompanying note 34.

125. See generally *United States v. Leon*, 468 U.S. 897, 915-20 (1984) (discussing the exclusionary rule's uses).

126. See *id.*

127. See NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 52-64 (2009), available at <http://www.constitutionproject.org/pdf/139.pdf> (discussing the crisis in indigent defense funding).

128. See *supra* text accompanying note 22.

129. The constitutional legitimacy of the decisions are beyond the scope of this limited essay, but federalism, judicial restraint, strict constructionism, and original public meaning originalism all point in the opposite direction.

130. *Missouri v. Frye*, 132 S. Ct. 1399, 1413-14 (2012) (Scalia, J., dissenting).

IV. CONCLUSION

Under *Strickland*, the bar to ineffectiveness claims based on decisions at trial is fairly high.¹³¹ A defendant must show not only that trial counsel made errors but also that those errors undermined the reviewing court's confidence in the reliability of the outcome.¹³²

After *Padilla*, *Lafler*, and *Frye*, the pretrial bar has been set, and it is lower. The defendant need not show that the ultimate outcome was unreliable; indeed he can make a *Lafler* claim after having received an acknowledgedly fair trial. It is now apparent that a current majority has unhinged the right to counsel from the crucible of adversarial testing and is substituting for it an evolving court-administered standard of some kind.

These changes raise a host of questions. The *Strickland* test has been seen as a two-pronged test, with failure on either prong knocking a defendant out of court. But if unreliability of outcome is no longer the standard for effectiveness when judging the pretrial actions of counsel, does it remain the standard at trial? Is the time ripe for a full relitigation of the prongs of *Strickland* itself? Is the Court ready to back away from a two-pronged analysis and go for a blended totality-of-the-circumstances test? Will it accept less "prejudice" when the error by counsel is egregious (e.g., failure to inform a defendant entirely of the existence of a plea agreement pretrial, or complete miscomprehension by counsel of the existing legal standard)?

And what new standards are the courts supposed to use on each prong? Does the any-additional-time standard apply to establish prejudice at trial as well? As a logical matter it should. How egregious must the pretrial error be? Will failure to adequately explain legal issues to the defendant open the door to *Lafler* claims?

Over time we should expect aggressive post-conviction counsel to raise all of these challenges to the *Strickland* regime. Rewriting *Strickland* may harm defense counsel in an unanticipated way. The hands-off standard of *Strickland* is integrally connected to the reason that defense counsel is considered critical in the first instance: the adversarial system, and the notion that an arm's-length relationship between defense counsel and the court, is part and parcel of that system. More oversight means less independence from the state—for good or ill.

In the meantime, I predict that the trial bar will increase its defensive lawyering. More communications between lawyer and client will be in writing. More oral communication will be recorded or transcribed. A better record may ultimately prove to be a good thing for all of us. But many defense lawyers—especially public defenders—already have a hard time establishing rapport with their distrustful clients. Extending the court's oversight into strategic

131. See *supra* text accompanying notes 37-42.

132. See *supra* text accompanying notes 37-42.

discussions has the potential to damage the attorney-client relationship. Defensive lawyering by committed and competent lawyers will divert time and energy away from preparing their defendants' cases. The results will be impossible to quantify. In a world of constrained resources, though, it may be that the unintended consequence of the reallocation of time into defensive lawyering will result in less—not more—effective representation.

The ultimate impact of the new line of effective assistance of counsel cases remains to be seen, but it is unlikely that they were intended to open the floodgates for successful challenges. Both the *Lafler* and *Frye* decisions were 5-4, along ideologically divided lines, and many judges on the lower courts will not be inclined to be expansive in their reading of the cases' implications.