

ABA Policy on the *Strickland* Prejudice Prong

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Strickland & Its Problems

In 1970, the Court announced for the first time that the Sixth Amendment guaranteed a defendant a right to effective assistance of counsel.¹ However, the Court did not squarely establish a test for Sixth Amendment violations.² Thus, for the next fourteen years, lower courts adopted a variety of different tests for unconstitutional ineffectiveness.³ Under almost all tests, courts would not provide relief where the result would otherwise have remained the same notwithstanding counsel's errors. However, there was no uniform approach to prejudice. Instead, the majority approach was a conventional harmless-error rule—that is, once the defendant had demonstrated a constitutional violation (specifically, a sufficient lack of attorney competence), the *burden would shift* to the state to show that that the infirmity had not “impaired the defense in a material way.”⁴ In this way, lower courts conventionally took a rebuttable presumption of prejudice upon a sufficient defendant showing of unconstitutionally inadequate attorney performance.

Enter *Strickland*. (And if there is an example of bad facts making bad law, this is it.) As compared to the defendant in *Gideon v. Wainwright*, who was a somewhat hapless and sympathetic petty criminal with a credible defense, the defendant in *Strickland* was almost certainly guilty of a ten-day crime spree that included multiple stranger killings (among them the execution of an elderly woman in front of her bound-and-gagged sisters).⁵

In *Strickland*, the Court held that the defendant must demonstrate, first, that his attorney was deficient and, second, that, without her errors, there would have been “a reasonable probability that . . . *the result of the proceeding would have been different.*”⁶ The first part of this test is known as the performance prong; the second, the prejudice prong. Both prongs are highly deferential to the government.

¹ *McMann v. Richardson*, 397 U.S. 759 (1970). Before *McMann*, a defendant had a due-process right to effective assistance of counsel, but to establish a due process violation, the defendant had to meet the onerous “mockery of justice” standard, which was almost impossible to establish (outside extreme cases of racialized “justice” in the Jim-Crow South, see, e.g., *Powell v. Alabama*, 287 U.S. 45 (1932)).

² *Richardson*, 397 U.S. 759.

³ David Cole, *Gideon v. Wainwright and Strickland v. Washington: Broken Promises*, in *Criminal Procedure Stories* 101 (Carol S. Steiker ed., 2006).

⁴ *Id.* at 112; Mark C. Brown, *Establishing Rights Without Remedies? Achieving An Effective Civil Gideon By Avoiding A Civil Strickland*, 159 U. PA. L. REV. 893, 923 (2011) (Note).

⁵ Compare *Gideon v. Wainwright*, 372 U.S. 335 (1963), with *Strickland v. Washington*, 466 U.S. 668 (1984).

⁶ *Strickland*, 466 U.S. at 694 (emphasis added).

First, as to the performance prong, the Court held that counsel’s decisions “must be directly assessed for reasonableness.”⁷ Nevertheless, the Court advised that the judiciary ought to provide counsel “a heavy measure of deference,” because “advocacy is an art and not a science,” and “strategic choices must be respected.”⁸ Moreover, the Court refused to endorse any guidelines for determining reasonableness, observing instead that the determination is context-specific.⁹ Specifically, the Court considered irrelevant ABA rules and standards that, according to the Court, are “guides” only to best practices and not indicative of constitutional demand.¹⁰ Some commentators have claimed the Court’s ostensible “reasonableness” standard for attorney performance, in fact, amounts to a gross-negligence standard, because of the Court’s significant deference to defense counsel decision-making, and its wholesale refusal to follow the lower-court trend to incorporate practice guidelines.¹¹

Second, as to the prejudice prong, the Court held that the defendant must “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”¹² The Court made the point that the defendant’s burden is not as onerous as a preponderance standard.¹³ But the burden is decidedly higher than the harmless-error standard that the majority of lower courts had previously endorsed. In fact, Professor David Cole has observed that—as to both the performance and prejudice—the Court had selected “the most pro-government of the existing [lower-court] standards of each prong.”¹⁴ Likewise, in 1994, Justice Blackmun noted that, in application, the *Strickland* test had proven all-but-toothless: “Ten years after the articulation of that standard, practical experience establishes that the *Strickland* test, in application, has failed to protect a defendant’s right to be represented by something more than ‘a person who happens to be a lawyer.’”¹⁵

⁷ Id. at __

⁸ Id. at __ (“[A]n act or omission that is unprofessional in one case may be sound or even brilliant in another.”).

⁹ Id. at __ (“No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances . . . or the range of legitimate decisions.”).

¹⁰ Id.

¹¹ See, e.g., Cole, *supra* note __.

¹² *Strickland*, 466 U.S. at 694.

¹³ Id. at __ (“[A] defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.”). In this section of the opinion, it feels like the Court “doth protest too much, me thinks.”

¹⁴ Cole, *supra* note __, at __.

¹⁵ *McFarland v. Scott*, 512 U.S. 1256, 1259 (1994) (Blackmun, J., dissenting on denial of writ of certiorari).

As a result, even though defendants commonly raise ineffectiveness claims on appeal,¹⁶ courts provide relief in just more than one-in-twenty cases.¹⁷ Even when defendants can overcome the significant deference granted to attorney decision-making, the claims often founder on the question of prejudice. And the defendant's burden is not only high as to both prongs, but there is a certain incoherence implicit to courts' analyses of both prongs. Specifically, the *Strickland* Court indicated that it would not evaluate counsel's performance in hindsight—that is, it would not second-guess even the demonstrably incorrect “*strategic*” decisions of counsel.¹⁸ Yet, when it comes to prejudice, the defendant has to make an *ex post* counterfactual claim on the basis of a cold record that the result probably would have been different with competent counsel.¹⁹ In short, the defendant is not permitted to invoke hindsight to support his readily apparent factual claim that his lawyer's performance was deficient, but he *must* invoke hindsight to support the much-harder *counter-factual* claim that he was prejudiced.

Justice Marshall implicitly recognized this incoherence in his brilliant *Strickland* dissent, indicating that it is no mean feat to show in after-the-fact how the state's witnesses and evidence might have held up against competent cross-examination, or how the defense case might have been bolstered by competent investigation.²⁰ (More than that, it would seem to be particularly hard for a defendant to demonstrate such a counterfactual in a capital-sentencing proceeding where the jury's decision is highly discretionary, and, where it is, therefore, unclear what arguments competent counsel might have made that would have resonated with a given sentencing jury.²¹)

From my perspective (and from the perspective of some other commentators), the root of *Strickland*'s failure is its overly heavy focus on accuracy over fundamental

¹⁶ They constitute 25% of all defendant appeals.

¹⁷ Cole, *supra* note __, at 117 (citing studies showing that approximately 6% of claims are successful).

¹⁸ *Strickland*, at __ (emphasis added).

¹⁹ *Id.* at __.

²⁰ *Id.* at __ (Marshall, J., dissenting).

²¹ *Lockett v. Ohio*, 438 U.S. 586 (1978) (authorizing the sentencing jury to consider “any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death”); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (“[T]he sentencer may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.”); *Payne v. Tennessee*, 501 U.S. 808, 822 (1991) (“[V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.”); *Spaziano v. Florida*, 454 U.S. 1037 (1981) (indicating that it is “desirable for the [capital sentencing] jury to have as much information as possible when it makes the sentencing decision”); cf. Sean D. O'Brien, *Capital Defense Lawyers: The Good, the Bad, and the Ugly*, 105 Mich. L. Rev. 1067, 1069 (2007); *Strickland* at __ (Marshall, J., dissenting) (noting that the Court ought, at a minimum, to adopt a more liberal prejudice test in capital cases).

fairness.²² Specifically, by adopting such a high prejudice requirement, the Court prioritized the substantive accuracy of the guilt determination over the fairness of the procedure that produced that conviction. For a defendant who is factually and demonstrably guilty, it is near impossible to demonstrate prejudice and to thereby succeed on an ineffectiveness claim. If the only value is accuracy, then this is not a terrific concern. But if we agree with Justice Marshall, as I do, that fair procedures ought to be considered *ends* in and of themselves (and that a denial of procedural fairness is, therefore, its own cognizable injury), then even a demonstrably guilty defendant ought to be able to make out a remediable constitutional violation in certain circumstances. This is what Marshall meant in dissent, when he observed:

The assumption on which the Court’s holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted. In my view, the guarantee also functions to ensure that convictions are obtained only through fundamentally fair procedures.²³

For its part, the *Strickland* majority pretended to prioritize fundamental fairness, indicating that “the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding,” but the Court then offered the significant qualification that fundamentally fair procedures are those “that our system counts on to produce just results.” Put simply, the Court’s focus was on the substantive outcome. In the Court’s estimation, an inaccurate result was *not* an unjust result. In other words, a manifestly guilty defendant could have no claim even if he were represented by manifestly incompetent counsel. In application, this has meant that defendants have failed to meet the *Strickland* test even in cases where they were represented by sleeping or drug-addicted counsel.²⁴

If the Court had genuinely prioritized fundamental fairness, it would have done more to realize Marshall’s vision that “[e]very defendant is entitled to a trial in

²² Josh Bowers, *Fundamental Fairness & The Path From Santobello to Padilla: A Response to Professor Bibas* (attached); *see also* Brown, *supra* note __, at 920; Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 438-39 (1996).

²³ *Strickland*, at __ (Marshall, J. dissenting).

²⁴ *Ivory v. Jackson*, 509 F.3d 284 (6th Cir. 2007) (rejecting ineffective-assistance-of-counsel claim even though counsel allegedly was addicted to drugs and alcohol because defendant failed to show that counsel’s deficient performance prejudiced him under *Strickland*); *Jackson v. State*, 290 S.W.3d 574, 585–87 (Ark. 2009) (rejecting ineffective-assistance-of-counsel claim even though one-of-four defense attorneys fell asleep during voir dire because defendant was never without counsel); *Ex parte McFarland*, 163 S.W.3d 743 (Tex. Crim. App. 2005) (rejecting ineffective-assistance-of-counsel claim even though one-of-two attorneys fell asleep during critical stages of trial because defendant was never without counsel); *Moore v. State*, 227 S.W.3d 421 (Tex. App. 2007) (rejecting ineffective-assistance-of-counsel claim even though counsel allegedly fell asleep briefly during prosecutor’s cross-examination).

which his interests are vigorously and conscientiously advocated by an able lawyer”²⁵—not just those defendants who reasonably might have enjoyed better substantive results.

It is important, then, for us to recognize the uphill battle we face. To argue in favor of a diminished (or no) prejudice prong, we have to reorient the Court away from accuracy and toward fundamental fairness (notwithstanding the general modern trend in the direction of accuracy as paramount principle of interpretation in constitutional criminal-procedure cases). This is something I explore in considerable detail in my *Padilla* essay (see attached).²⁶ But, to this end, we might be able to get some traction by citing any of the many cases in which justices have emphasized the importance of ensuring fundamentally fair procedures (above and beyond the procedures’ impact on substantive accuracy).²⁷ Likewise, in my *Padilla* essay, I explore the ways in which *Padilla*, itself, is a decision premised on fundamental-fairness values (and that, in fact, the Court’s guilty-plea jurisprudence, generally, has emphasized fundamental fairness over accuracy as an interpretive principle).

***Hill* & Its Problems**

I would prefer that any policy recommendation we propose take on not only the *Strickland* test for ineffectiveness at trial, but also the *Hill* test for ineffectiveness at plea.²⁸ Sometimes, the two are considered interchangeable, but they are not. In fact, the *Hill* test is even harder to satisfy than the *Strickland* test.

What follows comes almost verbatim from my *Padilla* essay:

In *Hill*, the Court left *Strickland*’s performance prong unchanged, but it customized the prejudice prong in a subtle but meaningful way. That is, the pleading defendant had 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.”²⁹ Thus,

²⁵ *Id.* at __ (emphasis added).

²⁶ Bowers, *supra* note __, at Part I (attached).

²⁷ *Medina v. California*, 505 U.S. 437, 443 (1992) (observing that the constitution is intended to promote “those fundamental conceptions of justice which lie at the base of our civil and political institution, and which define the community’s sense of fair play and decency” (internal quotation marks omitted)); *Sawyer v. Whitley*, 505 U.S. 333, 361 (1992) (Stevens, J., concurring) (“[F]undamental fairness is more than accuracy at trial; justice is more than guilt or innocence.”); *Smith v. Murray*, 477 U.S. 527, 540-45 (1986) (Stevens, J., dissenting) (“[T]he Court’s exaltation of accuracy as the only characteristic of ‘fundamental fairness’ is deeply flawed.” (internal quotation marks omitted)); *Teague v. Lane*, 488 U.S. 288, __ (1989) (Stevens, J., dissenting) (observing that the constitution is concerned with more than just errors that “undermine an accurate determination of innocence or guilt” (internal quotation marks omitted)).

²⁸ *Hill v. Lockhart*, 474 U.S. 52 (1985).

²⁹ *Id.* at 59 (emphasis added).

the *Hill* standard is designed to recognize only a *certain kind* of prejudice—that is, prejudice sufficient to impact the binary decision to plead guilty or go to trial.³⁰

Simply put, it is not enough for the pleading defendant to show that he probably would have pushed for and received a better plea had he had a better lawyer. He must show a reasonable probability that he *would not have pled guilty at all*. In the typical guilty-plea case, this is close to an impossible burden for most defendants to shoulder. After all, as a matter of sheer numbers, the overwhelming majority of criminal defendants do, in fact, plead guilty.³¹ Thus, a defendant who challenges his plea for ineffective assistance of counsel must overcome a quasi-presumption that, like most defendants, he was bound to plead guilty in any event.

In practice, this means that a pleading defendant will typically fail to demonstrate prejudice, because he typically cannot demonstrate what *Hill* requires: that he would have had a great chance of winning an acquittal had he had a competent lawyer.³² Put differently, the defendant must come close to showing that he was otherwise un-convictable (and, for that reason, that he was legally—though perhaps not factually—innocent).³³

To understand the meaningful difference between prejudice under *Hill* and *Strickland*, consider the following comparison. In *Hill*, the defendant failed to meet that case’s own prejudice prong where the defendant’s attorney misadvised him about parole eligibility. In *Boria v. Keane*, the defendant was able to establish *Strickland* prejudice where his attorney failed to push him to take a manifestly favorable plea to avoid a “suicidal” trial.³⁴ Critically, the defendant in *Boria* only had to show a reasonable probability of a different result—*any result*—because he took his case to trial. And, in *Boria*, the probable difference was manifest: the twenty-year-to-life post-trial sentence that the defendant actually received as against the one-to-three-year plea offer that he rejected. Comparatively, the defendant in *Hill* could not show prejudice, but only the probability that he would have pushed for a better (and, in his eyes, fairer) deal.

³⁰ Jenny Roberts, *Proving Prejudice, Post-Padilla*, 54 HOW. L.J. 693, 696 (2011) (criticizing *Hill* because it “assumes that rejection of a guilty plea has only one outcome—trial”).

³¹ See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2497 (2004); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1156 (2008).

³² RONALD J. ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 1184 (2d ed. 2005) (“Notice what sort of errors tend to satisfy th[e] *Hill* prejudice standard: attorney errors that suggest not only that the defendant would have gone to trial, but that he would have *won* at trial.”).

³³ And, significantly, in petty cases, even the possibility of legal innocence is probably not enough, because, as I have explored in a law review article, the costs of going to trial almost never outweigh the nominal sentences imposed upon trial conviction, and, thus, the question is, almost always, one of plea price and not potential trial outcome. Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008).

³⁴ *Boria v. Keane*, 99 F.3d 492, 497 (2d Cir. 1996).

In *Hill*, then, the Court announced a prejudice standard that is unconcerned with the *fairness* of the deal, but that is concerned, instead, only with the *accuracy* of the guilt determination. If the Court had formulated the standard to be sensitive to fundamental fairness, it would have permitted consideration of more than the plea's legal accuracy; it would have permitted consideration of the plea's equitable terms.³⁵ Jenny Roberts sketches a vision of what a more expansive understanding of prejudice might have looked like:

[A different result] can come in the traditional *Strickland* form of a likely successful trial outcome, but can also come in three other forms. First, counsel might re-negotiate, leading to a likely second plea structured to avoid imposition of the consequence (even if it means a higher penal sentence). Second, counsel might secure a sentence that is significantly discounted to account for the harshness of the collateral consequence. Third, a defendant might make a different risk calculation in deciding whether to plead guilty or go to trial. In short, trial-outcome is only one part of a more nuanced and realistic approach."³⁶

By failing to account for all of these different possible outcomes and by merely focusing on the trial outcome, the *Hill* standard does not fully recognize the variety of ways that counsel's performance can prejudice a client.

But there is some cause for optimism: there is an argument that *Padilla* may have gone some of the way toward abandoning *Hill* (and perhaps even *Strickland*). Specifically, even though the *Padilla* Court did not squarely reach the second prong of the ineffectiveness test (remanding, instead, to the trial court for a determination of prejudice),³⁷ it emphasized the ability of competent counsel to bargain "creatively."³⁸ And, by endorsing creative bargaining, the Court has potentially signaled that it understands that there is more to prejudice than just what might otherwise have happened at trial; there is also the question of what might otherwise have happened at plea.

³⁵ As Bob Scott and Bill Stuntz put it in their brilliant article, *Plea Bargaining as Contract*: "The potential unfairness in the typical plea bargain is not that the defendant gives up some legal entitlements, *but that he may not get enough from the government in return.*" Scott & Stuntz, *supra* note 165, at 1931 (emphasis supplied); see also Roberts, *supra* note __, at 698 (recognizing that impact on "trial-outcome is only one part of a more nuanced and realistic approach" to prejudice).

³⁶ Roberts, *supra* note __, at 698.

³⁷ See *Padilla*, 130 S. Ct. at 1487.

³⁸ *Id.* at 1486 ("Counsel . . . may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence."); see also *Padilla*, at 1486 ("[T]he threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.").

More than that, the *Padilla* majority indicated—albeit in passing only—that what prejudice requires may be substantially less than what *Hill* or *Strickland* previously prescribed. Specifically, the Court observed that “to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been *rational under the circumstances*.”³⁹ If this passage is taken as gospel—that is, if it had been part of the Court’s holding—then *Hill* might now be bad law, because this new test would seem to permit a defendant to succeed on a mere showing that his plea was *irrational* as compared to *any other outcome*, not just as compared to the potential trial outcome. Additionally, it is arguable that that which is “rational under the circumstances” may be less than that which has a reasonable probability of changing outcome.

Nevertheless, we must be cautious about putting too much stock in a passage that is no part of the Court’s holding. Perhaps, the passage amounts only to a few incautious words of offhand *dicta*. But, perhaps, as I hope, it is a clever effort by Justice Stevens—a friend of fundamental fairness as an interpretive principle—to plant a seed of change from *Hill* (and even *Strickland*) prejudice.

Potential Solutions & Untaken Paths

Scholars and state courts have offered a variety of different prejudice tests that, to my thinking, improve upon the *Strickland* and *Hill* prejudice prongs.⁴⁰ One idea, endorsed by some commentators, is to go back to the future—to revert to the harmless-error test that typically applied before *Strickland* and that put the burden on the state to demonstrate that counsel’s error did not “impair[] the defense in a material way.”⁴¹ In this vein, the Hawaii Supreme Court has declined to follow the *Strickland* test, reasoning that the standard is “unduly difficult for a defendant to meet,” and, holding instead, on state law grounds, that a defendant may demonstrate prejudice whenever counsel’s errors “resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.”⁴²

Significantly, the Oregon Supreme Court went even further when it rejected the *Strickland* test for ineffective-assistance-of-counsel claims at parental-termination proceedings, reasoning that “fundamental fairness” requires that meritorious ineffectiveness claims be granted except where the result would “inevitably have

³⁹ *Id.* at __ (emphasis added).

⁴⁰ See generally Susan Calkins, Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellate Courts, 6 J. App. Prac. & Process 179, 184-99 (2004) (exploring state court alternatives to *Strickland*).

⁴¹ David Cole, Gideon v. Wainwright and Strickland v. Washington: Broken Promises, in Criminal Procedure Stories 101, 112 (Carol S. Steiker ed., 2006); Brown, *supra* note at 923.

⁴² State v. Smith, 712 P.2d 496, 500 n.7 (Haw. 1986) (internal quotations omitted).

been the same.”⁴³ This would seem to be an even looser prejudice standard than harmless error. (And, to my thinking, we can make the argument that a defendant whose liberty is at stake ought to enjoy at least the same right to effective assistance of counsel as a defendant in a parental-termination proceeding.)

A separate alternative is to take a different avenue altogether—to re-examine a path not taken, to reinvigorate a separate kind of ineffectiveness claim that has become, for all intents and purposes, a dead-letter. I am talking about what is called a *Chronic* claim for ineffectiveness (as opposed to the dominant *Strickland* claim for ineffectiveness).⁴⁴ Interestingly, the Court decided *Cronic* the same day as *Strickland*, and, for a time, it was unclear which case would come to be applied most frequently. Unlike the *Strickland* test, the *Cronic* test does not require prejudice. Rather, prejudice is presumed where counsel has “failed in any meaningful sense to function as the government’s adversary.” The seeming advantage of a *Cronic* claim is not only that it presumes prejudice, but that, arguably, it could be used by indigent defendants to make systemic claims—to the effect that the local public defender’s office is so underfunded and overworked that it cannot function “in any meaningful sense as the government’s adversary.” Put differently, in a regime in which almost all defendants plea bargain, in which eighty percent of defendants are represented by appointed counsel, and in which appointed counsel often can perform almost no investigation in the mine-run of cases, it may be fair to say that the defense attorney and the prosecutor (repeat players, all) are more collaborators (whether they wish to be or not) than traditional adversaries.

The Court, however, subsequently foreclosed such a potentially broad application of *Cronic*, holding in *Bell v. Cone* that to make out a *Cronic* claim the defendant must demonstrate that the defense attorney “*entirely* fail[ed] to subject the prosecution’s case to meaningful adversarial testing.”⁴⁵ In other words, the attorney’s failure “must be *complete*.”⁴⁶ It is not enough that the attorney wholly failed to take adversarial action at *specific* points during the pretrial, trial, or plea processes; she had to be constructively absent throughout. Thus, *Bell* essentially foreclosed systemic claims, because a reviewing court is almost always able to identify *something* (anything) that even the most overtaxed indigent defender did on behalf of her client. In any event, the *Cronic* inquiry (post-*Bell*) depends upon a case-specific (and not systemic) evaluation. Moreover, after *Bell*, a defendant with, say, a sleeping lawyer cannot make a *Cronic* claim either—unless his lawyer slept

⁴³ State ex rel. Juvenile Department of Multnomah County v. Geist (In re Geist), 796 P.2d 1193, 1204 (Or. 1990) (observing that “fundamental fairness requires [that] appointed counsel exercise professional skill and judgment”); see also Calkins, supra note __, at 218 (article by Associate Justice of Oregon Supreme Court indicating that the operative prejudice standard is looser than the *Strickland* test).

⁴⁴ *United States v. Cronic*, 466 U.S. 648 (1984).

⁴⁵ *Bell v. Cone*, 535 U.S. 685 (2002) (emphasis added).

⁴⁶ *Id.* (emphasis added).

throughout the *entire* case.⁴⁷ Instead, such a defendant would have to bring his claim under *Strickland*, and, therefore, would have to demonstrate conventional *Strickland* prejudice—that there was a reasonable probability of a different result (but for sleeping counsel).

Significantly, *Cronic* is not the only instance in which the Court has presumed prejudice. To the contrary, prejudice is also presumed where the lawyer operates under an actual conflict of interest.⁴⁸ In this context, the Court reasoned that, when counsel is burdened by an actual conflict of interest, “she breaches the duty of loyalty, perhaps the most basic of counsel’s duties.”⁴⁹ Significantly, the Court indicated that prejudice is also presumed because “it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests.”⁵⁰ But, as indicated, I would argue that it is just as difficult to measure traditional *Strickland* prejudice, because it requires *ex post* supposition (based on a cold record) about what would have happened in a counterfactual world.⁵¹

One possibility, then, is to argue in favor of an expansion of the universe of attorney errors and failures that might trigger a presumption of prejudice. For instance, one scholar has suggested that “courts should presume prejudice when a defendant’s counsel sleeps, just as courts presume prejudice if counsel is absent, if counsel is not admitted to the bar, or if counsel is present but refuses to participate in the trial.”⁵² Likewise, he advocated a presumption of prejudice “if the defendant shows that counsel was operating under a substantial mental impairment and that impairment adversely affected the defense lawyer’s performance.”⁵³

There are also more modest reform possibilities. For instance, one idea, offered by a (then) student and now Harvard law professor would be to simply tweak the relevant *Strickland* language from “reasonable probability” towards “reasonable

⁴⁷ Specifically, Professor Cole observed that “[t]his result [in *Bell v. Cone*] made and systemic challenges to the inadequacy of funding and resources virtually impossible.” Cole, *supra* note __, at __.

⁴⁸ *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

⁴⁹ *Strickland* at __ (discussing *Cuyler*). However, even in conflict-of-interest cases, “[p]rejudice is presumed only if the defendant demonstrates that counsel ‘actively represented conflicting interests’ and that ‘an actual conflict of interest adversely affected his lawyer’s performance.’” *Id.* at __ (quoting *Cuyler*).

⁵⁰ *Id.*

⁵¹ And, as indicated, such prejudice is even harder to measure in capital-sentencing cases where it is far from clear which equitable arguments might have resonated with the sentencing jury. *See supra* note 21 and accompanying text.

⁵² Kirchmeier, *supra* note __, at 466.

⁵³ *Id.* at 472.

possibility”⁵⁴—the argument being that that “probability” is often associated with a “preponderance” standard, whereas possibility denotes something substantially less.⁵⁵ Personally, I don’t see much value in the suggestion, beyond my semantic preference for it over the present *Strickland* formulation. After all, the *Strickland* Court made clear that, by the term “reasonable probability,” it did not intend a preponderance standard.

Another modest proposal would be to leave *Strickland* untouched but to align *Hill* to it—that is, the Court should permit relief whenever a defendant can show a reasonable probability of *any* kind of improved outcome, including a better plea. Significantly, some lower courts have endorsed just such an aligned standard—*Hill*’s language to the contrary notwithstanding.⁵⁶ And, in a forthcoming article, Jenny Roberts explores this as a tangible option in light of *Padilla*:

Courts considering a claim of ineffective assistance of counsel based on the failure to warn about a collateral consequence prior to a guilty plea should take two steps in determining whether the defendant has demonstrated prejudice. First, the court should ask whether it is reasonably probable that a rational person receiving effective assistance relating to the guilty plea decision-making process would have declined to plead guilty. Second, the court should ask whether, if the defendant had not taken the plea, there is a reasonable probability that there would have been a different outcome. This could be satisfied either in the traditional *Strickland* and *Hill* form of a reasonably probable successful trial outcome, or in two other forms: (1) reasonable probability of a second plea that is more favorable to the defendant; or (2) reasonable probability of a sentence that is more favorable with effective assistance than it was with ineffective assistance.”⁵⁷

A final note: The reform that I would prefer most (but that I think is least tenable) is to take a pure fundamental-fairness approach and abandon prejudice altogether.⁵⁸ This was Justice Marshall’s vision in his *Strickland* dissent. And,

⁵⁴ Jed Handelsman Shugerman, *Unreasonable Probability of Error* (Note), 111 YALE L.J. 435, 440-41 (2001).

⁵⁵ *Id.* at 440.

⁵⁶ See *Frye v. Missouri*, 311 S.W.3d 350, 357 (Mo. Ct. App. 2010) (“[R]eliance on *Hill*’s ‘template’ completely ignores *Strickland*’s looser emphasis on whether a defendant can establish ‘an adverse effect on the defense.’”); *Mask v. McGinnis*, 233 F.3d 132, 141 (2d Cir. 2000) (considering as potential prejudice the reasonable likelihood that the defendant might have secured a better bargain); cf. *United States v. Kwan*, 407 F.3d 1005, 1017 (9th Cir. 2005) (“Had counsel and the court been aware that a nominally shorter sentence would enable [the defendant] to avoid deportation, there is a reasonable probability that the court would have imposed a sentence of less than one year.”).

⁵⁷ Roberts, *supra* note 14, at 732-33.

⁵⁸ Cf. Mark C. Brown, *Establishing Rights Without Remedies? Achieving An Effective Civil Gideon By Avoiding A Civil Strickland*, 159 U. PA. L. REV. 893, 920 (2011) (Note) (arguing that the *Strickland*

although it does not seem to be a realistic reform proposal, it is more realistic today—post-*Padilla*—than at any other time since *Strickland*, because (as I argue in my *Padilla* essay) the *Padilla* Court seemed to be more concerned with fundamental fairness than accuracy. Thus, *Padilla* lines up with Marshall’s fundamental-fairness vision—a vision in which an infringement on the right to counsel is its own injury.

To this end, it might be worth exploring further what Norm Lefstein discussed briefly during the *Padilla* conference. Specifically, Lefstein endorsed the notion of attorney “competence” over attorney “effectiveness.” I didn’t entirely follow his train of thought, but I took him to be saying that incompetence—that is, a violation of practice norms and professional obligations—exposes a defendant to fundamentally unfair procedures and thereby ought to constitute a cognizable and remediable constitutional violation. It might be useful to reach out to Lefstein to see whether he might expand upon this concept or to determine whether he has written at all about the difference between incompetence and ineffectiveness, as it relates to prejudice.

In any event, it is, at least, notable that, in *Padilla*, the Court finally seemed to take an interest in practice norms and professional obligations (whereas, as I indicated earlier, in *Strickland* the Court had deemed best practices to be irrelevant). Accordingly, this is yet one more way that we can cast *Padilla* as a potential harbinger of a paradigm shift away from *Strickland* on the prejudice score.

Court put too much emphasis on accuracy, while devaluing the need for fundamentally fair procedures).