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## **Are You Satisfied with Your Representation?--The Sixth Amendment Right to Effective Assistance of Counsel**

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## Are You Satisfied with Your Representation?--The Sixth Amendment Right to Effective Assistance of Counsel

Cover Page Footnote

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**ARE YOU SATISFIED WITH YOUR REPRESENTATION?—  
THE SIXTH AMENDMENT RIGHT TO EFFECTIVE  
ASSISTANCE OF COUNSEL**

**SUPREME COURT OF NEW YORK  
NEW YORK COUNTY**

People v. Noriega<sup>1</sup>  
(Decided March 19, 2012)

A criminal defendant's right to counsel has been embedded in our nation's history for centuries. The right is codified in the Sixth Amendment of the Constitution and exists as the bedrock of our criminal justice system.<sup>2</sup> Like many other transactions in our society, the assistance of counsel is a service that is provided by one individual to another. This service is essential due to the gravity of the penalties that a criminal defendant may face when accused of a crime. Outside the legal sphere, it is somewhat simple for a consumer to fix a problem they have with a particular good or service. If a product or service does not meet the standards that a consumer expects, they can simply return the good or cancel their request for the service altogether. This is not the case in the criminal justice system. Although a competent lawyer often performs the assistance of counsel, it is not always effective in protecting all of the criminal defendant's rights. Rectifying a claim of ineffective assistance is much more difficult than standing in line at the return counter waiting for your money back.

In the recent case of *People v. Noriega*, the Supreme Court of New York County, New York, in a slip opinion, decided a matter on the issue of ineffective assistance of counsel.<sup>3</sup> The Court used the standards set forth in *Strickland v. Washington*<sup>4</sup> to dismiss the defendant's claim. At the outset, this decision appears to be a rather cut

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<sup>1</sup> No. 1776/92, 2012 WL 954270, at \*1 (N.Y. Sup. Ct. Mar. 19, 2012).

<sup>2</sup> U.S. CONST. amend. VI.

<sup>3</sup> *Id.*

<sup>4</sup> 466 U.S. 668 (1984).

and dry case where the claimant did not meet his burden of proof, and therefore, could not succeed in his request for relief. The peculiar and almost astonishing part about this Court's decision comes from outside the four corners of its opinion. *Noriega* was decided on March 19, 2012, a mere two days prior to two United States Supreme Court cases, *Missouri v. Frye*<sup>5</sup> and *Lafler v. Cooper*,<sup>6</sup> which are decisions that some speculate will have major ramifications on claims for ineffective assistance and the future practice of criminal law.<sup>7</sup> It is surprising that a state court would make a decision on a particular issue days before it knew that the United States Supreme Court would decide on that same issue.

This article will explore the decision in *Noriega*, the history of the ineffective assistance of counsel claim through *Strickland* and its successors, the ramifications of *Lafler* and *Frye* on the criminal law practice and what effect they might have had on the decision in *Noriega*.

## I. *NORIEGA* AND THE INEFFECTIVE ASSISTANCE OF COUNSEL FROM A NEW YORK PERSPECTIVE

Just like many enumerated constitutional rights, the right to counsel is also given to the residents of the State of New York through its own constitution. In Article I section 6 of the New York State Constitution, a criminal defendant “[i]n any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel.”<sup>8</sup> The existence of this right is not what is disputed; it is the extent and quality of the performance and at what stages it must be provided.

### A. *People v. Noriega*

The defendant, *Noriega*, was charged with selling a controlled substance and possession of a controlled substance, both of which were class B felonies.<sup>9</sup> *Noriega* was arrested after he had sold two containers of cocaine to an undercover officer and was found to have

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<sup>5</sup> 132 S. Ct. 1399 (2012).

<sup>6</sup> 132 S. Ct. 1376 (2012).

<sup>7</sup> Daniel W. Russo, *Criminal Law Focus, Criminal Defense Attorneys and Ineffective Assistance of Counsel*, Nassau Lawyer, June 2012, at 17.

<sup>8</sup> N.Y. CONST. art. 1, § 6.

<sup>9</sup> *Noriega*, 2012 WL 954270, at \*1.

a third container in his possession on February 28, 1992.<sup>10</sup> The defendant eventually pled guilty to a class C felony and received a five-year sentence of probation.<sup>11</sup> After failing to make his scheduled visits to the Department of Probation and to court, a warrant for his arrest was issued on May 21, 1992.<sup>12</sup> He evaded police for nine years before being arrested on that warrant on May 31, 2011.<sup>13</sup> Before sentencing, the U.S. Immigration and Customs Enforcement (“ICE”) agency “apparently lodged a detainer against the defendant.”<sup>14</sup> Noriega was sentenced to five years of probation and was then released into ICE custody.<sup>15</sup>

The defendant moved to vacate the judgment pursuant to Criminal Procedure Law, section 440.10,<sup>16</sup> claiming that he “received ineffective assistance of counsel under the standards articulated in *Padilla v. Kentucky*.”<sup>17</sup> Noriega further alleged that his attorney’s failure to tell him that he would face deportation as a result of his plea was ineffective assistance of counsel.<sup>18</sup> The defendant claimed he would have never taken the plea if his attorney made him aware of the consequences.<sup>19</sup>

The Court explained that “to prevail on an ineffective assistance of counsel claim, defendant must show that counsel’s performance was deficient.”<sup>20</sup> Counsel’s assistance must have been “unreasonable under the prevailing professional norms at the time of the representation.”<sup>21</sup> The Court also stated that under the standards of *Strickland*, the defendant must show that the “deficient performance prejudiced the defendant.”<sup>22</sup> “In order to establish prejudice under *Strickland*, defendant ‘must convince the court that a decision to re-

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Noriega*, 2012 WL 954270, at \*1.

<sup>15</sup> *Id.*

<sup>16</sup> N.Y. CRIM. PROC. § 410.10 (McKinney 2012).

<sup>17</sup> *Noriega*, 2012 WL 954270, at \*1; 130 S. Ct. 1473, 1483 (2010) (holding that counsel was ineffective because he failed to advise the defendant that his plea would result in an automatic deportation.) The Court in *Padilla* also held that defendant’s claim was subject to the standards set forth in *Strickland* not only because counsel had made explicit misrepresentations but also because of counsel’s omission. *Id.* at 1484.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Noriega*, 2012 WL 954270, at \*1.

<sup>22</sup> *Id.*

ject the plea bargain and proceed to trial would have been rational under the circumstances.’”<sup>23</sup>

Noriega was arrested and charged with a B felony, a very serious crime.<sup>24</sup> The Court explained that the defendant faced up to twenty-five years of incarceration if convicted at trial and accepted a very favorable plea.<sup>25</sup> The defendant was apprehended immediately after he was seen selling illegal drugs to an undercover officer and “also had additional drugs in his possession.”<sup>26</sup> The case against Noriega was very strong and the likelihood of being convicted at trial was almost certain.<sup>27</sup> The Court concluded that the “[d]efendant’s assertion that he would have gone to trial and risked substantial jail time strains credulity.”<sup>28</sup> In other words, the Court did not believe that Noriega’s choice to forgo the plea and proceed to trial would be rational under the circumstances. Even if he had known that he would face deportation his sentence of five years of probation plus deportation was better than even the minimum of eight years in prison he would have faced if convicted at trial.

The Court continued to explain that the defendant’s claim had little to no merit.<sup>29</sup> The defendant sparked the attention of the ICE while he was incarcerated for failing to hold up his part of the 1992 plea agreement.<sup>30</sup> “Rather than being prejudiced by his non-jail disposition in 1992, defendant, himself, actually lessened his chances of being deported by accepting the plea offer.”<sup>31</sup> It was the defendant’s unilateral actions, violating the agreed upon plea, that got him incarcerated and caused the ICE to get involved.<sup>32</sup> Noriega therefore failed to make a prima facie case for prejudice which precluded the Court from having to address his assertion that counsel “failed to properly advise him pursuant to *Padilla*.”<sup>33</sup> The defendant’s motion pursuant to Criminal Procedure Law, section 440.10, was denied and because his claim was based on unsupported facts and conclusions,

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<sup>23</sup> *Id.* at \*1 (quoting *Padilla*, 130 S. Ct. at 1485).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Noriega*, 2012 WL 954270, at \*1.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 2.

<sup>30</sup> *Id.*

<sup>31</sup> *Noriega*, 2012 WL 954270, at \*2.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

the Court denied “his motion without a hearing.”<sup>34</sup>

The Court in *Noriega* made some valid points. The fact that *Noriega* now faces deportation could only be attributed to his own actions. He did not hold up his end of the bargain in the 1992 plea, and therefore, was incarcerated causing him to come up on the ICE radar. Nevertheless, the Court’s opinion lacked any discussion of what Noriega’s attorney actually advise him of. Did counsel explain the plea bargain? Did he address the consequences of violating the plea? Had Noriega known he would be incarcerated, and therefore deported, would he still have violated it? Would any of this constitute a prejudice and a prima facie case of ineffective assistance of counsel? These are all issues that were not addressed in the Court’s opinion, which might have been the result of Noriega not raising them in his motion.

The seminal case in New York State on the issue of whether “incorrect advice as to deportation consequences of a plea may constitute ineffective assistance of counsel” is *People v. McDonald*.<sup>35</sup> The Court in *McDonald* held counsel’s incorrect advice that his guilty plea would not cause him to be deported constituted a deficiency in performance, which satisfied the first prong of the *Strickland* ineffective assistance of counsel test.<sup>36</sup> However, the defendant failed to make a prima facie case showing that counsel’s deficiency caused any prejudice, and therefore, his claim for ineffective assistance of counsel failed.<sup>37</sup>

### B. *People v. McDonald*

The defendant was a lawfully admitted alien from Jamaica.<sup>38</sup> He had lived in the United States for over 20 years, and had three children, who were all American citizens; he was also married to an American citizen.<sup>39</sup> In April 1999, the defendant was arrested for various offenses including criminal sale and possession of marihuana and criminal possession of controlled substances.<sup>40</sup> After being advised by his attorney, McDonald took a plea to lesser charges in

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<sup>34</sup> *Id.* (citing *People v. McDonald*, 803 N.E.2d 131, 135 (N.Y. 2003)).

<sup>35</sup> *McDonald*, 802 N.E.2d at 132.

<sup>36</sup> *Id.* at 134-35.

<sup>37</sup> *Id.* at 135.

<sup>38</sup> *Id.* at 132.

<sup>39</sup> *Id.*

<sup>40</sup> *McDonald*, 802 N.E.2d at 132.

which his sentence would be “concurrent indeterminate prison terms of 1 to 3 years.”<sup>41</sup> A day after the defendant took the plea, the United States Immigration and Naturalization Service (“INS”) gave McDonald notice that they would be holding a hearing for his “deportation based on his convictions.”<sup>42</sup>

The defendant made a motion to “vacate the judgment of conviction under CPL § 440.10 (1) (h),<sup>43</sup> contending that defendant had been denied effective assistance of counsel.”<sup>44</sup> Defense counsel admitted to the Court that he incorrectly told his client that his guilty plea would not cause him to be deported.<sup>45</sup> Counsel further alleged that during the plea negotiations the District Attorney made the same incorrect assertion to the defendant, and therefore, McDonald agreed to the plea, relying on counsel’s “affirmative misstatements and legal errors.”<sup>46</sup> The defendant argued that he depended on these misrepresentations, and therefore, the plea was constitutionally invalid.<sup>47</sup>

The county court denied the defendant’s motion because he failed to make a showing that the “outcome of the trial would have been any different had the defendant not plead guilty,” therefore, failing to show a prejudice occurred due to counsel’s faulty advice.<sup>48</sup> The Appellate Division affirmed, holding that the defendant failed to show that if he rejected the proposed plea the result of the proceeding would have changed.<sup>49</sup>

The Court of Appeals affirmed the Appellate Division’s decision for similar reasons.<sup>50</sup> The Court stated, “the right to effective assistance of counsel is guaranteed by the Federal and State Constitution.”<sup>51</sup> A defendant who challenges the validity of “their guilty plea on the grounds of ineffective assistance of counsel must establish that defense counsel’s advice was not within the standards set forth in *Strickland*.”<sup>52</sup> The Court conveyed the two-prong test given in *Strickland*: (1) “defendant must show that counsel’s performance was

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> N.Y. CRIM. PROC. § 410.10 (1) (h) (McKinney 2010).

<sup>44</sup> *McDonald*, 802 N.E.2d at 132-33.

<sup>45</sup> *Id.* at 133.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *McDonald*, 802 N.E.2d at 133.

<sup>50</sup> *Id.* at 135.

<sup>51</sup> *Id.* at 133.

<sup>52</sup> *Id.* at 133-34 (citing *Hill v. Lockhart*, 474 U.S. 52, 58 (1985)).

deficient;” and (2) “that the deficient performance prejudiced the defense.”<sup>53</sup> This discussion of the *Strickland* test is commonplace in cases involving a claim of ineffective assistance of counsel. The Court’s discussion of the decision in *Hill v. Lockard* is what distinguishes *McDonald* from the rest of the group.<sup>54</sup>

The Court in *Hill* conveyed that there are two types of cases involving ineffective assistance challenges in which the court must indulge in a prediction analysis: (1) “where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence” and (2) “where alleged error of counsel is a failure to advise the defendant of potential affirmative defense to the crime.”<sup>55</sup> The County Court and Appellate Division both relied on the *Hill* prediction analysis in order to dismiss the defendant’s claim under the prejudice prong of the *Strickland*.<sup>56</sup> The Court of Appeals disagreed, stating that the defendant did not allege either of the two situations stated in *Hill* and in this particular case the “sufficiency of the defendant’s factual allegations as to prejudice should be evaluated with reference to the face of the pleadings, the context of the motion and the defendant’s access to information.”<sup>57</sup> The defendant’s motion merely stated that defense counsel misinformed McDonald about the consequences of his guilty plea.<sup>58</sup> The Court of Appeals affirmed based on the fact that the defendant’s motion made no “allegations that, but for counsel’s error, defendant would not have pleaded guilty.”<sup>59</sup>

The Court in *McDonald* took the decisions of *Strickland* and *Hill* in order to come up with a thorough analysis of the ineffective assistance of counsel claim. Most ineffective assistance challenges hinge on the prejudice prong of the *Strickland* test, but the Court in *McDonald* made it a point to clarify the decision made in *Hill*. The Court in *McDonald* explained that not every prejudice analysis required the court to predict what would have occurred at trial if the defendant did not take the plea.<sup>60</sup> Instead, the Court in *McDonald* pin-

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<sup>53</sup> *Id.* at 134 (citing *Strickland*, 466 U.S. at 687).

<sup>54</sup> *Hill*, 474 U.S. at 59 (discussing that in certain circumstances, in order to fulfill the prejudice prong of the *Strickland* test there will have to be a prediction of the outcome of a trial that never happened).

<sup>55</sup> *McDonald*, 802 N.E.2d at 134 (quoting *Hill*, 474 U.S. at 59).

<sup>56</sup> *Id.* at 135.

<sup>57</sup> *Id.* (citing *People v. Menoza*, 624 N.E.2d 1017, 1021 (N.Y. 1993)).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *McDonald*, 802 N.E.2d at 135.

pointed the prejudice analysis on whether there was a “reasonable probability that, but for counsel’s errors, [the defendant] would not have plead guilty and would have insisted on going to trial.”<sup>61</sup>

## II. *STRICKLAND, PADILLA, AND THE FEDERAL PERSPECTIVE*

*Strickland v. Washington* is the starting point to all ineffective assistance challenges. The Court in *Strickland* recognized that “the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.”<sup>62</sup> A criminal defendant requires the skills and knowledge of counsel in order to guard them against the grave consequences that they may face. But a person who just happens to be an attorney, standing next to the defendant is not enough to satisfy an individuals Sixth Amendment right.<sup>63</sup> Counsel must play the “role that is critical to the ability of the adversarial system to produce [a] just result[.]”<sup>64</sup> This, in essence, is why “the right to counsel is the right to the effective assistance of counsel.”<sup>65</sup>

### A. *Strickland v. Washington*

The defendant in *Strickland* was arrested in connection with three capital murders that involved a series of burglaries.<sup>66</sup> At the plea hearing, the defendant admitted to the crimes and took responsibility for them, but also conveyed to the judge that he was under extreme stress due to his inability to support his family.<sup>67</sup> Faced with a difficult case and a strong-minded client, defense counsel did not seek out any character witnesses or request a psychiatric evaluation of his client.<sup>68</sup> These omissions by counsel were the result of his “sense of hopelessness about overcoming the evidentiary effect of the respondent’s confession to the gruesome crimes.”<sup>69</sup> Counsel based his defense at the sentencing hearing on the fact that the defendant took responsibility for his crimes and did not have a prior history of

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<sup>61</sup> *Id.* (quoting *Hill*, 474 U.S. at 59).

<sup>62</sup> *Strickland*, 466 U.S. at 684.

<sup>63</sup> *Id.* at 685.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

<sup>66</sup> *Id.* at 671-72.

<sup>67</sup> *Strickland*, 466 U.S. at 672.

<sup>68</sup> *Id.* at 673.

<sup>69</sup> *Id.*

criminal activity.<sup>70</sup>

At sentencing, the trial judge found a multitude of aggravating circumstances for all three capital murders and no mitigating circumstances.<sup>71</sup> The judge sentenced Strickland to death and the Florida Supreme Court affirmed the convictions.<sup>72</sup> On a petition for writ of habeas corpus in district court, the Southern District of Florida held that “although trial counsel made errors in judgment in failing to investigate nonstatutory mitigating evidence further than he did, no prejudice to respondent’s sentence resulted from any such error in judgment.”<sup>73</sup> The Court of Appeals overturned the district court’s decision stating that “the Sixth Amendment right to assistance of counsel accorded criminal defendants a right to counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances.”<sup>74</sup> The Supreme Court granted certiorari and established a two-prong test.<sup>75</sup>

The United States Supreme Court in *Strickland* delved into the importance of the Sixth Amendment right of counsel and to what extent the right gives protection to a criminal defendant.<sup>76</sup> As previously discussed, in order to successfully assert a claim for ineffective assistance of counsel, a criminal “defendant must [first] show that counsel’s performance was deficient.”<sup>77</sup> In order to be deficient, counsel’s errors must be “so serious that counsel was not functioning as ‘counsel’ guaranteed the defendant by the Sixth Amendment.”<sup>78</sup> In other words “counsel’s representation fell below an objective standard of reasonableness.”<sup>79</sup> These standards were not laid out by the Court, but rather left up to the professional standards of the current times.<sup>80</sup>

If the criminal defendant successfully shows that counsel’s performance was indeed deficient, he must then prove that this deficiency somehow prejudiced his defense.<sup>81</sup> “An error by counsel,

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 675.

<sup>72</sup> *Strickland*, 466 U.S. at 675.

<sup>73</sup> *Id.* at 678-79.

<sup>74</sup> *Id.* at 680 (internal quotation marks omitted).

<sup>75</sup> *Id.* at 684.

<sup>76</sup> *See generally id.*

<sup>77</sup> *Strickland*, 466 U.S. at 687.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 688.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 687.

even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.”<sup>82</sup> A criminal defendant’s reliance on counsel’s error must have had an adverse effect on his defense.<sup>83</sup> “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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”<sup>84</sup>

The Supreme Court reversed the Court of Appeals decision, stating that the defendant’s “[f]ailure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.”<sup>85</sup> Defense counsel’s trial strategy “was well within the range of professionally reasonable judgment” and the prejudice claim had little to no merit because the “evidence that respondent says counsel should have offered . . . would barely have altered the sentencing profile presented to the sentencing judge.”<sup>86</sup>

*Strickland’s* test is still the controlling standard for ineffective assistance challenges. Deficiency and prejudice are what all cases have built off of since the decision in *Strickland*. Even with the most recent Supreme Court cases coming down on the ineffective assistance issue, the *Strickland* test still survives and the Court’s decision can be looked upon as a roadmap to standards and protections provided by the Sixth Amendment right of counsel.

### B. *Padilla v. Kentucky*

Using *Strickland* as a baseline, new issues have come forward in the ineffective assistance of counsel area. In 2010, *Padilla v. Kentucky* tackled the issue of guilty pleas and the consequences of deportations.<sup>87</sup> *Padilla* was heavily cited in the *Noriega* decision and is the controlling authority on counsel’s responsibility to advise their clients about the risks of deportation and what was once known as “collateral consequences.”

*Padilla* was an immigrant from Honduras, who was a lawful

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<sup>82</sup> *Strickland*, 466 U.S. at 691 (citing *United States v. Morrison*, 449 U.S. 361, 364-65 (1981)).

<sup>83</sup> *Id.* at 692.

<sup>84</sup> *Id.* at 694.

<sup>85</sup> *Id.* at 700.

<sup>86</sup> *Id.* at 699-70.

<sup>87</sup> *See generally Padilla*, 130 S. Ct. 1473.

resident of the United States and had served in the U.S. Air Force during the Vietnam War.<sup>88</sup> Padilla pled guilty to transporting marijuana while he was a truck driver in Kentucky.<sup>89</sup> Due to his conviction, Padilla would have faced deportation.<sup>90</sup> Prior to Padilla entering a guilty plea, his attorney advised him that he “did no have to worry about immigration status since he had been in the country for so long.”<sup>91</sup> Padilla argued at a post conviction hearing that he relied on his attorney’s advice and that this misrepresentation violated his Sixth Amendment right of effective assistance of counsel.<sup>92</sup> The Supreme Court of Kentucky ruled that the Sixth Amendment “does not protect a criminal defendant from erroneous advice about deportation because it is merely a ‘collateral’ consequence of his conviction.”<sup>93</sup> The Kentucky court did not perceive “counsel’s failure to advise petitioner about the possibility of removal, nor counsel’s incorrect advice” as a legitimate claim for ineffective assistance of counsel.<sup>94</sup> The United States Supreme Court granted certiorari to determine whether counsel has the “obligation to advise [a criminal defendant] that the offense to which he was pleading guilty would result in his [deportation] from this country.”<sup>95</sup>

In reversing the Kentucky court’s decision, the United States Supreme Court held that defense attorneys have the duty to tell their clients about the risk of deportation.<sup>96</sup> The Court explained three different circumstances in which counsel must advise their clients about the risks of removal.<sup>97</sup> First, when the statute is clear and straightforward (as was the case with *Padilla*), a defense attorney should advise his client that he would be deported if he pleads guilty to the charges.<sup>98</sup> Second, if the law is uncertain or ambiguous “a criminal defense attorney need do no more than advise a noncitizen that pending criminal charges may carry risk of adverse immigration consequences.”<sup>99</sup> And finally, “[w]hen attorneys know that their clients

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1478.

<sup>91</sup> *Id.*

<sup>92</sup> *Padilla*, 130 S.Ct. at 1478.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 1487.

<sup>97</sup> *Padilla*, 130 S. Ct. at 1483.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

face possible exile from this country and separation from their families, they should not be encouraged to say nothing.”<sup>100</sup> Counsel’s omission is also subject to a *Strickland* analysis just as his affirmative actions would be.<sup>101</sup>

While recognizing that deportation is a civil penalty, the Court also observed that it is so “intimately related to the criminal process” that counsel must “inform her noncitizen client that he faces a risk of [removal].”<sup>102</sup> Although lower courts have identified the consequence of deportation as “collateral,” the Supreme Court refused to make such a classification and found that Padilla had “sufficiently alleged constitutional deficiency to satisfy the first prong of *Strickland*.”<sup>103</sup>

The holdings in *Padilla* are quite important and have expanded the scope of the duties that a criminal defense attorney owes to his or her client. Although deportation is a considerable penalty, the decision in *Padilla* could make the practice of criminal law more difficult. Having to advise clients about areas of law which one is not accustomed to practicing may result in less attorneys who are willing to take clients who are aliens. *Padilla* may also invite more ineffective assistance litigation on other so-called “collateral consequences.” Where does the criminal defense attorney’s job end? Will he be required to advise his client of all consequences that flow from a conviction or guilty plea no matter how significant or minuet? These are some concerns that the legal profession may have in the future.

### III. *FRYE, LAFLER, AND THE CONTEMPORARY ISSUES OF THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL*

#### A. *Missouri v. Frye*

Galin Frye was charged with driving with a revoked license and because he was convicted of this offense on three prior occasions, he was charged with a class “D” felony.<sup>104</sup> The prosecutor sent a letter to Frye’s counsel offering two plea bargains of more favora-

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<sup>100</sup> *Id.* at 1484.

<sup>101</sup> *Id.*

<sup>102</sup> *Padilla*, 130 S. Ct. at 1481, 1486.

<sup>103</sup> *Id.* at 1481, 1483.

<sup>104</sup> *Frye*, 132 S. Ct. 1404.

ble consequences than the maximum four years incarceration that a class “D” felony carries.<sup>105</sup> The letter stated the date that the offers would expire.<sup>106</sup> The Court stated that Frye’s counsel did not inform him about the offers and let said expire.<sup>107</sup> Frye was again arrested for driving with a revoked license, waived his right to a hearing and plead guilty.<sup>108</sup> He was sentenced to three years in jail.<sup>109</sup>

At a post-conviction proceeding, Frye claimed, “counsel’s failure to inform him of the prosecution’s plea offer denied him the effective assistance of counsel.”<sup>110</sup> The state court dismissed the motion and the Missouri Court of Appeals reversed, holding that Frye satisfied both prongs of the *Strickland* test.<sup>111</sup> Frye’s counsel was deficient because he failed to inform his client about either of the plea bargains before they expired and the deficiency caused him prejudice because Frye ended up pleading guilty to a felony instead of the proposed misdemeanor in the plea bargain.<sup>112</sup>

The United States Supreme Court began its opinion discussing the fact that the Sixth Amendment right to counsel is guaranteed “at all critical stages of the criminal proceedings.”<sup>113</sup> Therefore, effective assistance of counsel also applies to these critical stages.<sup>114</sup> The Court recognized that “plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities . . . that must be met to render the adequate assistance of counsel that the Sixth Amendment requires . . . at critical stages.”<sup>115</sup> In this language, the Court conveyed that effective assistance of counsel is required during the plea bargaining process, and therefore, comes within the scope of *Strickland*.<sup>116</sup>

Under the first prong of the *Strickland* test, the Court simply adopted the Missouri Court of Appeals findings that Frye’s counsel’s performance was deficient because he made no meaningful effort to inform his client about either of the plea bargains in the letter before

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Frye*, 132 S. Ct. at 1404.

<sup>110</sup> *Id.* at 1405.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Frye*, 132 S. Ct. at 1405.

<sup>115</sup> *Id.* at 1407.

<sup>116</sup> *Id.*

they expired.<sup>117</sup> For a defendant in Frye's position to establish the prejudice prong of *Strickland*, they must show "not only a reasonable probability that he would have accepted the lapsed plea but also a reasonable probability that the prosecution would have to adhered to the agreement and that it would have been accepted by the trial court."<sup>118</sup> Here, it was reasonably certain that Frye would have accepted the original plea offer because he had pled guilty to a greater charge.<sup>119</sup> However, the Court of Appeals failed to require a showing that the plea offers would have been adhered to by the prosecution.<sup>120</sup> The Court concluded that this matter was best received by the State, and remanded the matter for the Missouri Court of Appeals to review.<sup>121</sup>

The decision in *Frye* will be a controversial topic in the criminal law field. This decision has once again broadened the responsibilities of the criminal defense attorney and the ramifications may change the future practice of criminal law. The standard of practice in the criminal law field becomes a much higher bar to achieve. Although counsel in *Frye* should have known to disclose every offer made to his client, the expansion of *Strickland* makes being a criminal defense attorney much more risky and a prediction of heightened litigation and increasing malpractice insurance should not be conceived as radical.

### B. *Lafler v. Cooper*

The United States Supreme Court decided *Lafler* on the same day as *Frye* and the only perceived difference between the cases are the facts. The respondent fired a gun towards Kali Mundy and missed.<sup>122</sup> After the first shot, Mundy fled and the respondent followed firing again, this time hitting Mundy in the buttock, hip and abdomen.<sup>123</sup> Mundy survived and the respondent was charged "with assault with intention to murder, possession of a firearm by a felon, [and] possession of a firearm in the commission of a felony."<sup>124</sup> The

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<sup>117</sup> *Id.* at 1410.

<sup>118</sup> *Id.* at 1410-11.

<sup>119</sup> *Frye*, 132 S. Ct. at 1411.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Lafler*, 132 S. Ct. at 1383.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

prosecutor offered a favorable plea bargain in exchange for a guilty plea by Lafler.<sup>125</sup> The respondent expressed a willingness to accept the plea, but after advice from counsel he rejected the plea and proceeded to trial.<sup>126</sup> After trial, the respondent was convicted and faced anywhere from 185 to 360 months in jail.<sup>127</sup> Lafler then filed motion arguing, “his attorney’s advice to reject the plea constitute[d] ineffective assistance of counsel.”<sup>128</sup> Michigan’s highest courts rejected Lafler’s claims and the United States Supreme Court granted certiorari.<sup>129</sup>

The glaring difference between *Lafler* and *Frye* is that in *Frye* the plea offer was never communicated to the respondent, and after the offer had expired, Frye had pled guilty to a less favorable crime;<sup>130</sup> and in *Lafler*, the defendant was fully aware of the plea and was willing to plead guilty to it, but because of his attorney’s advice, he rejected the favorable plea and was convicted at trial to a more severe term.<sup>131</sup> The Court referenced its recent decision in *Frye*, directing that a criminal defendant is “entitled to the effective assistance of competent counsel” during the plea-bargaining process.<sup>132</sup> This triggered the *Strickland* test in which the first prong was dealt with quite swiftly due to the fact that all parties agreed that “performance of the respondent’s counsel was deficient when he advised respondent to reject the plea offer on the ground he could not be convicted a trial.”<sup>133</sup> Once again, the main and troubling issue, like most of the ineffective counsel cases, hinges on the second prong of the *Strickland* test; had the deficient performance by the respondent’s counsel caused a prejudice to the respondent?<sup>134</sup>

The government’s main argument that no prejudice occurred was “[a] fair trial wipes clean any deficient performance by defense counsel during plea bargaining.”<sup>135</sup> The Court made quick work with

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Lafler*, 132 S. Ct. at 1383.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 1383-84.

<sup>130</sup> *Id.* at 1383.

<sup>131</sup> *Id.* (noting that counsel advised the defendant to forego the plea bargain because he believed that the prosecution could not prove he intended to kill Mundy due to the shooting being below her waist).

<sup>132</sup> *Lafler*, 132 S. Ct. at 1384 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)); see also *Frye*, 132 S. Ct. at 1386-87.

<sup>133</sup> *Lafler*, 132 S. Ct. at 1384.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 1388.

this argument, restating the notions previously made in *Frye*, that the existence of the right to effective counsel is guaranteed during plea bargains and it is not sufficient to point to the opportunity of a fair trial to waive errors made by counsel before a trial even commences.<sup>136</sup> The respondent demonstrated that “but for counsel’s deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea.”<sup>137</sup> The Court concluded that Lafler successfully satisfied both prongs of the *Strickland* test.<sup>138</sup> As similarly stated above, the Court’s decision in *Lafler* continues the expansion of the standards conveyed in *Strickland*. New issues and litigations seem to have endless possibilities in this area. As the expansion of *Strickland* begins to accelerate over time, so do a criminal defendant’s constitutionally protected rights and defense counsel’s responsibilities.

#### IV. ANALYZING *NORIEGA* AND THE RAMIFICATIONS OF RECENT SUPREME COURT DECISIONS

At first thought, it is still somewhat concerning that a state court would render a decision knowing that the United States Supreme Court was going to decide two cases on the same issue very soon after. Although it comes as a surprise, the two decisions of *Frye* and *Lafler* do not seem to have any direct impact on the decision made in *Noriega*. The facts in *Noriega* did involve a plea bargain, which was the main focus of *Frye* and *Lafler*, but unlike the two Supreme Court cases, there was no true error made by counsel during the plea negotiations. It was Noriega’s own actions, violating his probation, which caused him to be incarcerated and therefore face deportation.

A point could certainly be made that the decisions in *Padilla*, *Frye*, and *Lafler*, if synchronized, could potentially give Noriega an argument that his right to effective assistance of counsel was violated. In *Padilla*, the Court recognized that deportation was such a serious collateral consequence that counsel had to advise his client about its risks.<sup>139</sup> Additionally, Justice Scalia’s had major concerns in his dissenting opinion that “counsel’s duties and obligation to advise

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 1391.

<sup>138</sup> *Lafler*, 132 S. Ct. at 1391.

<sup>139</sup> *Padilla*, 130 S. Ct. at 1483.

conviction's collateral consequences has no logical stopping-point."<sup>140</sup> In *Noriega*, the defendant violated his probation and a warrant was issued for his arrest.<sup>141</sup> This could be viewed, under a broadened *Padilla* holding, to constitute a serious consequence. Using the holdings in *Frye* and *Lafler*, this consequence should have been conveyed to Noriega during the plea-negotiations. Furthermore, because the consequences of a warrant being issued were not explained to Noriega, this could be viewed as a deficient performance by counsel, and therefore, satisfy the first prong of the *Strickland* test. If Noriega could show that but for counsel's error in not telling him a warrant would be issued for his arrest, there is a reasonable probability that he would not have violated his probation. This would seemingly satisfy the prejudice prong of the *Strickland* test and his ineffective assistance of counsel claim would have more merit. Although an attenuated argument, the continued expansion of *Strickland* will invite creative defenses and claims for ineffective assistance. However, it seems that no matter how broad you interpret the holdings of *Strickland* and *Padilla*, their precedents should not be used to retroactively give criminal defendants, like Noriega, a valid claim.

Of the aforementioned cases, the greatest impact on the legal profession comes from the decisions of *Frye* and *Lafler*. Plea bargains are an important part of the criminal justice system. The vast majority of criminal cases end in a conviction base on plea negotiations.<sup>142</sup> The decisions in *Frye* and *Lafler* "may very well play a serious role in changing the way criminal defense [attorneys] practice law and how the criminal justice system logistically administers it."<sup>143</sup> In order to avoid a claim of ineffective assistance of counsel, a defense attorney must not only advise his client of each and every offer that is made, but most likely will have to put the offer in a formal letter to the client or on the record.<sup>144</sup> Plea negotiations, just like their civil counter parts, settlement negotiations, are often done in a back room somewhere in private and very informally. Because of the decision in *Frye* and *Lafler*, defense attorneys will want to make a formal record in order to avoid any claim against them, which will

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<sup>140</sup> *Id.* at 1496 (Scalia, J., dissenting). Justice Scalia was concerned that if the Court is willing to mandate that counsel advise clients about deportation, what will stop it from mandating counsel to advise clients about other serious collateral consequences? *Id.*

<sup>141</sup> *Noriega*, 2012 WL 954270, at \*1.

<sup>142</sup> *Frye*, 132 S. Ct. 1406.

<sup>143</sup> Russo, *supra* note 7.

<sup>144</sup> *Id.*

cause all sorts of problems. Litigation will certainly be extended, raising the cost of legal fees. The time wasted in court making a record of every plea offered and increasing information that must be conveyed to the criminal defendant will take time away from the courts to deal with other matters. No longer will a criminal defendant be able to cop a quick deal in the interrogation room. The wheeling and dealing between defense attorneys and assistant district attorneys will drastically decrease and a system that has a reputation of a slow pace may soon come to a screeching halt.

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