**4.2: Ineffective Assistance of Counsel**

The Sixth Amendment and the Due Process clause guarantee criminal defendants the right to the effective assistance of counsel. In [***Gideon v. Wainwright*, 372 U.S. 335 (1963)**](https://scholar.google.com/scholar_case?case=694784363938594707&q=gideon+v+wainwright&hl=en&as_sdt=6,39), the Supreme Court held that indigent criminal defendants are entitled to appointed counsel in all felony cases. And in [***Strickland v. Washington,* 466 U.S. 668 (1984)**](https://scholar.google.com/scholar_case?case=16585781351150334057), it held that appointed counsel must provide a competent defense. If a criminal defendant receives ineffective assistance of counsel, then any conviction is unconstitutional and void.

However, courts evaluating ineffective assistance of counsel claims are “highly deferential” to the decisions of appointed counsel, and will provide relief *only if* counsel’s decisions are both unreasonable and prejudicial. Accordingly, ineffective assistance of counsel claims are difficult to prove, unless counsel provided no defense at all or had a conflict of interest.

| [**U.S. Const. Amend. 6**](https://www.law.cornell.edu/constitution/sixth_amendment)  In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. |
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***Strickland v. Washington*, 466 U.S. 668 (1984).**

The Supreme Court established the rules governing ineffective assistance of counsel claims in criminal cases in the landmark case *Strickland v. Washington*. In *Strickland*, the Court held that due process and the Counsel Clause of the Sixth Amendment guarantees all criminal defendants the right to the effective assistance of counsel. “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.”

In order to prove a claim for ineffective assistance of counsel, a criminal defendant must show that counsel violated the duty of care or loyalty, and that the violation prejudiced the defendant. “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”

The evaluation of counsel’s performance must be “highly deferential” and “judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” Accordingly, the defendant “must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment” and “the court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.”

In addition, the defendant must show that counsel’s unreasonable conduct was prejudicial. “Any deficiencies in counsel’s performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.” There is a legal presumption of prejudice if the defendant was actually or constructively denied the assistance of counsel, the government interfered with representation, or counsel had a conflict of interest that adversely affected performance. But if counsel violated the duty of care, the defendant must show that counsel’s unreasonable conduct was actually prejudicial. “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.”

| **CHECK YOUR KNOWLEDGE** |
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| 1. According to *Strickland*, what must a defendant show to prove a claim of defective assistance of counsel? |
| 1. Are indigent defendants entitled to representation in felony cases? |
| 1. In what instances will a legal presumption of prejudice arise in accordance with a claim for defective assistance of counsel? |

| [***Knowles v. Mirzayance*, 556 U.S. 111 (2009)**](https://scholar.google.com/scholar_case?case=16298768218862043326) |
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| **Summary:** Mirzayance confessed to killing his cousin, and pleaded both not guilty and not guilty by reason of insanity. During the guilt phase of the trial, the jury rejected evidence of insanity and convicted Mirzayance of first-degree murder. On the advice of counsel, Mirzayance withdrew his insanity plea, because his parents effectively refused to testify, and there was no other new evidence. On state and federal habeas, Mirzayance argued that counsel’s advice to withdraw his insanity plea was ineffective assistance of counsel, because he had no other defense. The district court granted habeas, because Mirzayance had “nothing to lose” by an insanity defense, and the circuit court affirmed. The Supreme Court reversed, holding that the insanity defense had no “reasonable probability” of success. |

In this case, respondent Alexandre Mirzayance claimed ineffective assistance of counsel because his attorney recommended withdrawing his insanity defense. The California courts rejected this claim on state postconviction review. We must decide whether this decision was contrary to or an unreasonable application of clearly established federal law. We hold that it was not. Mirzayance failed to establish that his counsel's performance was ineffective.

I

Mirzayance confessed that he stabbed his 19-year-old cousin nine times with a hunting knife and then shot her four times. At trial, he entered pleas of not guilty and not guilty by reason of insanity (NGI). Under California law, when both of these pleas are entered, the court must hold a bifurcated trial, with guilt determined during the first phase and the viability of the defendant's NGI plea during the second. During the guilt phase of Mirzayance's trial, he sought to avoid a conviction for first-degree murder by obtaining a verdict on the lesser included offense of second-degree murder. To that end, he presented medical testimony that he was insane at the time of the crime and was, therefore, incapable of the premeditation or deliberation necessary for a first-degree murder conviction. The jury nevertheless convicted Mirzayance of first-degree murder.

The trial judge set the NGI phase to begin the day after the conviction was entered but, on the advice of counsel, Mirzayance abandoned his NGI plea before it commenced. He would have borne the burden of proving his insanity during the NGI phase to the same jury that had just convicted him of first-degree murder. Counsel had planned to meet that burden by presenting medical testimony similar to that presented in the guilt phase, including evidence that Mirzayance was insane and incapable of premeditating or deliberating. Because the jury rejected similar evidence at the guilt phase (where the State bore the burden of proof), counsel believed a defense verdict at the NGI phase (where the burden was on the defendant) was unlikely. He planned, though, to have Mirzayance’s parents testify and thus provide an emotional account of Mirzayance’s struggles with mental illness to supplement the medical evidence of insanity. But on the morning that the NGI phase was set to begin, Mirzayance’s parents refused to testify. After consulting with co-counsel, counsel advised Mirzayance that he should withdraw the NGI plea. Mirzayance accepted the advice.

After he was sentenced, Mirzayance challenged his conviction in state postconviction proceedings. Among other allegations, he claimed that counsel’s recommendation to withdraw the NGI plea constituted ineffective assistance of counsel under *Strickland*. The California trial court denied the petition, and the California Court of Appeal affirmed without offering any reason for its rejection of this particular ineffective-assistance claim. Mirzayance then filed an application for federal habeas relief, which the District Court denied without an evidentiary hearing. The Court of Appeals reversed the District Court and ordered an evidentiary hearing on counsel’s recommendation to withdraw the NGI plea. During that evidentiary hearing, a Magistrate Judge made factual findings that the District Court later adopted.

According to the Magistrate Judge, counsel’s strategy for the two-part trial was to seek a second-degree murder verdict in the first stage and to seek an NGI verdict in the second stage. This strategy faltered when the jury instead convicted Mirzayance of first-degree murder. In the circumstances of this case, the medical evidence that Mirzayance planned to adduce at the NGI phase essentially would have duplicated evidence that the jury had necessarily rejected in the guilt phase. First-degree murder in California includes any killing that is “willful, deliberate, and premeditated.” To prove NGI, a defendant must show that he was incapable of knowing or understanding the nature of his act or of distinguishing right from wrong at the time of the offense. Highlighting this potential contradiction, the trial judge instructed the jury during the guilt phase that “the word ‘deliberate,’” as required for a first-degree murder conviction, “means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.”

When the jury found Mirzayance guilty of first-degree murder, counsel doubted the likelihood of prevailing on the NGI claim. According to the Magistrate Judge:

The defense suspected that a jury’s finding, beyond a reasonable doubt, that Mirzayance had “deliberated” and “premeditated” his killing of the victim as a practical matter would cripple Mirzayance’s chances of convincing the jury later, during the sanity phase, that Mirzayance nevertheless “was incapable of knowing or understanding the nature and quality of his act and of distinguishing right from wrong at the time of the commission of the offense.”

Any remaining chance of securing an NGI verdict now depended (in counsel’s view) on presenting some “emotional impact” testimony by Mirzayance’s parents, which counsel had viewed as key even if the defense had secured a second-degree murder verdict at the guilt phase.

But, as the Magistrate Judge found, on the morning that the NGI phase was set to begin, Mirzayance’s parents effectively refused to testify:

The parents at least expressed clear reluctance to testify, which, in context, conveyed the same sense as a refusal.

Although the parties disputed this point, the parents’ later actions supported the Magistrate Judge’s finding that the parents' reluctance to testify amounted to refusal:

Corroborating the Court's finding that Mirzayance’s parents indicated a strong disinclination to testify at the NGI phase are the facts that (1) they did not testify later at his sentencing hearing, and (2) the reason for their choosing not to do so is that it would have been “too emotional” for them. If weeks after the guilty verdict and the withdrawal of their son's NGI plea, Mirzayance’s parents’ emotions still prevented them from testifying at the sentencing hearing, then surely those emotional obstacles to their testifying in the NGI phase would have been at least as potent, and probably more so.

The Magistrate Judge found that counsel made a carefully reasoned decision not to go forward with the NGI plea:

Counsel carefully weighed his options before making his decision final; he did not make it rashly. Counsel’s strategy at the NGI phase depended entirely on the heartfelt participation of Mirzayance’s parents as witnesses. Moreover, counsel knew that, although he had experts lined up to testify, their testimony had significant weaknesses. Counsel’s NGI-phase strategy became impossible to attempt once Mirzayance’s parents expressed their reluctance to testify. All counsel was left with were four experts, all of whom reached a conclusion — that Mirzayance did not premeditate and deliberate his crime — that the same jury about to hear the NGI evidence already had rejected under a beyond-a-reasonable-doubt standard of proof. The experts were subject to other impeachment as well. Counsel discussed the situation with his experienced co-counsel who concurred in counsel’s proposal that he recommend to Mirzayance the withdrawal of the NGI plea.

Based on these factual findings, the Magistrate Judge stated that, in his view, counsel’s performance was not deficient.

Despite this determination, the Magistrate Judge concluded that the court was bound by the Court of Appeals’ remand order to determine only whether “there were tactical reasons for abandoning the insanity defense.” Even though the Magistrate Judge thought that counsel was reasonable in recommending that a very weak claim be dropped, the Magistrate Judge understood the remand order to mean that counsel’s performance was deficient if withdrawing the NGI plea would achieve no tactical advantage. The Magistrate Judge found that “Mirzayance had nothing to lose” by going forward with the NGI phase of the trial, and thus held, under the remand order, that counsel’s performance was deficient. As to prejudice, the Magistrate Judge concluded the court was similarly bound by the remand order because the Court of Appeals described the NGI defense as remaining “viable and strong.” Accordingly, the Magistrate Judge found prejudice and recommended granting the writ of habeas corpus. The District Court accepted this recommendation and granted the writ.

The Court of Appeals affirmed. It first stated that the lower court had misunderstood its remand order, which it described as requiring an examination of “counsel's reason for abandoning the insanity defense,” rather than as mandating that the District Court must find deficient performance if it found counsel had “nothing to lose” by pursuing the insanity defense. Nonetheless, the Court of Appeals affirmed the finding of deficient performance. According to the court, Mirzayance’s “parents did not refuse, but merely expressed reluctance to testify.” And because they may have been willing, “competent counsel would have attempted to persuade them to testify, which counsel here admits he did not.” The Court of Appeals also “disagreed that counsel's decision was carefully weighed and not made rashly.”

Furthermore, even though it had suggested that the District Court unnecessarily evaluated counsel’s strategy under a “nothing to lose” standard, the Court of Appeals affirmed the District Court in large part because Mirzayance’s “counsel did not make a true tactical choice” based on its view that counsel had nothing to gain by dropping the NGI defense. The court held that “reasonably effective assistance would put on the only defense available, especially in a case such as this where there was significant potential for success.” The Court of Appeals also found prejudice because, in its view, “if counsel had pursued the insanity phase of the trial, there is a reasonable probability that the jury would have found Mirzayance insane.”

We granted the petition for writ of certiorari.

Even if Mirzayance’s ineffective-assistance-of-counsel claim were eligible for de novo review, it would still fail. *Strickland* requires a defendant to establish deficient performance and prejudice. Mirzayance can establish neither.

Mirzayance has not shown “that counsel’s representation fell below an objective standard of reasonableness.”

The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. Judicial scrutiny of counsel's performance must be highly deferential, and a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.

Here, Mirzayance has not shown that his counsel violated these standards. Rather, his counsel merely recommended the withdrawal of what he reasonably believed was a claim doomed to fail. The jury had already rejected medical testimony about Mirzayance’s mental state in the guilt phase, during which the State carried its burden of proving guilt beyond a reasonable doubt. The Magistrate Judge explained this point:

All counsel was left with were four experts, all of whom reached a conclusion — that Mirzayance did not premeditate and deliberate his crime — that the same jury about to hear the NGI evidence already had rejected under a beyond-a-reasonable-doubt standard of proof. The experts were subject to other impeachment as well.

In fact, the Magistrate Judge found that counsel “convincingly detailed ways in which the experts could have been impeached, for overlooking or minimizing facts which showcased Mirzayance’s clearly goal-directed behavior.”

In the NGI phase, the burden would have switched to Mirzayance to prove insanity by a preponderance of the evidence. Mirzayance’s counsel reasonably believed that there was almost no chance that the same jury would have reached a different result when considering similar evidence, especially with Mirzayance bearing the burden of proof. Furthermore, counsel knew he would have had to present this defense without the benefit of the parents’ testimony, which he believed to be his strongest evidence. Counsel reasonably concluded that this defense was almost certain to lose.

The Court of Appeals took the position that the situation was not quite so dire because the parents “merely expressed reluctance to testify.” It explained that “competent counsel would have attempted to persuade them to testify.” But that holding is in tension with the Magistrate Judge’s findings and applies a more demanding standard than *Strickland* prescribes. The Magistrate Judge noted that the parents “conveyed the same sense as a refusal.” Indeed, the Magistrate Judge found that the parents “did not testify later at Mirzayance’s sentencing hearing” because it “would have been ‘too emotional’ for them.” Competence does not require an attorney to browbeat a reluctant witness into testifying, especially when the facts suggest that no amount of persuasion would have succeeded. Counsel’s acceptance of the parents’ “conveyance of a refusal” does not rise to the high bar for deficient performance set by *Strickland*.

Mirzayance’s failure to show ineffective assistance of counsel is confirmed by the Magistrate Judge’s finding that “counsel carefully weighed his options before making his decision final; he did not make it rashly.” The Magistrate Judge explained all of the factors that counsel considered — many of which are discussed above — and noted that counsel “discussed the situation with his experienced co-counsel” before making it. In making this finding, the Magistrate Judge identified counsel's decision as essentially an informed decision “made after thorough investigation of law and facts relevant to plausible options.” As we stated in *Strickland*, such a decision is “virtually unchallengeable.”

Without even referring to the Magistrate Judge’s finding, the Court of Appeals “disagreed that counsel’s decision was carefully weighed and not made rashly.” In its view, “counsel acted on his subjective feelings of hopelessness without even considering the potential benefit to be gained in persisting with the plea.” But courts of appeals may not set aside a district court’s factual findings unless those findings are clearly erroneous. Here, the Court of Appeals failed even to mention the clearly-erroneous standard, let alone apply it, before effectively overturning the lower court's factual findings related to counsel’s behavior.

In light of the Magistrate Judge’s factual findings, the state court's rejection of Mirzayance’s ineffective-assistance-of-counsel claim was consistent with *Strickland*. The Court of Appeals insisted, however, that “‘reasonably effective assistance’ required here that counsel assert the only defense available.” But we are aware of no “prevailing professional norms” that prevent counsel from recommending that a plea be withdrawn when it is almost certain to lose. And in this case, counsel did not give up “the only defense available.” Counsel put on a defense to first-degree murder during the guilt phase. Counsel also defended his client at the sentencing phase. The law does not require counsel to raise every available nonfrivolous defense. Counsel also is not required to have a tactical reason — above and beyond a reasonable appraisal of a claim’s dismal prospects for success — for recommending that a weak claim be dropped altogether. Mirzayance has thus failed to demonstrate that his counsel’s performance was deficient.

In addition, Mirzayance has not demonstrated that he suffered prejudice from his counsel's performance. To establish prejudice, “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.” To prevail on his ineffective-assistance claim, Mirzayance must show, therefore, that there is a “reasonable probability” that he would have prevailed on his insanity defense had he pursued it. This Mirzayance cannot do. It was highly improbable that a jury, which had just rejected testimony about Mirzayance's mental condition when the State bore the burden of proof, would have reached a different result when Mirzayance presented similar evidence at the NGI phase.

IV

Mirzayance has not shown that the state court's conclusion that there was no ineffective assistance of counsel "was contrary to, or involved an unreasonable application of, clearly established Federal law.” In fact, he has not shown ineffective assistance at all. The judgment of the Court of Appeals is reversed, and the case is remanded with instructions to deny the petition.

| **CHECK YOUR KNOWLEDGE** |
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| 1. Did Mirzayance’s insanity plea have any chance of success? Was there any reason to withdraw it? |
| 1. Could Mirzayance’s attorney have had a tactical reason for advising him to withdraw his insanity plea? |
| 1. Why does the court assess whether Mirzayance could have prevailed on the insanity defense rather than assessing the other defenses that his attorney did not raise? |

| [***Lee v. United States*, 137 S. Ct. 1958 (2017)**](https://scholar.google.com/scholar_case?case=3788737178295104749) |
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| Summary: Jae Lee was a lawful permanent resident of the United States, who was indicted for an “aggravated felony.” Lee pleaded guilty on the advice of his attorney, who assured him that he would not be deported. In fact, Lee was subject to mandatory deportation. Lee filed a motion to vacate his conviction and sentence based on ineffective assistance of counsel, arguing that he would not have pleaded guilty if he had known it would mean mandatory deportation. The district court denied relief, because Lee would “almost certainly” have been found guilty and deported anyway, and the circuit court affirmed. The Supreme Court reversed, holding that the attorney’s incompetence deprived Lee of a chance of avoiding deportation. |

Petitioner Jae Lee was indicted on one count of possessing ecstasy with intent to distribute. Although he has lived in this country for most of his life, Lee is not a United States citizen, and he feared that a criminal conviction might affect his status as a lawful permanent resident. His attorney assured him there was nothing to worry about — the Government would not deport him if he pleaded guilty. So Lee, who had no real defense to the charge, opted to accept a plea that carried a lesser prison sentence than he would have faced at trial.

Lee’s attorney was wrong: The conviction meant that Lee was subject to mandatory deportation from this country. Lee seeks to vacate his conviction on the ground that, in accepting the plea, he received ineffective assistance of counsel in violation of the Sixth Amendment. Everyone agrees that Lee received objectively unreasonable representation. The question presented is whether he can show he was prejudiced as a result.

I

Jae Lee moved to the United States from South Korea in 1982. He was 13 at the time. His parents settled the family in New York City, where they opened a small coffee shop. After graduating from a business high school in Manhattan, Lee set out on his own to Memphis, Tennessee, where he started working at a restaurant. After three years, Lee decided to try his hand at running a business. With some assistance from his family, Lee opened the Mandarin Palace Chinese Restaurant in a Memphis suburb. The Mandarin was a success, and Lee eventually opened a second restaurant nearby. In the 35 years he has spent in the country, Lee has never returned to South Korea. He did not become a United States citizen, living instead as a lawful permanent resident.

At the same time he was running his lawful businesses, Lee also engaged in some illegitimate activity. In 2008, a confidential informant told federal officials that Lee had sold the informant approximately 200 ecstasy pills and two ounces of hydroponic marijuana over the course of eight years. The officials obtained a search warrant for Lee's house, where they found 88 ecstasy pills, three Valium tablets, $32,432 in cash, and a loaded rifle. Lee admitted that the drugs were his and that he had given ecstasy to his friends.

A grand jury indicted Lee on one count of possessing ecstasy with intent to distribute. Lee retained an attorney and entered into plea discussions with the Government. The attorney advised Lee that going to trial was “very risky” and that, if he pleaded guilty, he would receive a lighter sentence than he would if convicted at trial. Lee informed his attorney of his noncitizen status and repeatedly asked him whether he would face deportation as a result of the criminal proceedings. The attorney told Lee that he would not be deported as a result of pleading guilty. Based on that assurance, Lee accepted the plea and the District Court sentenced him to a year and a day in prison, though it deferred commencement of Lee’s sentence for two months so that Lee could manage his restaurants over the holiday season.

Lee quickly learned, however, that a prison term was not the only consequence of his plea. Lee had pleaded guilty to what qualifies as an “aggravated felony” under the Immigration and Nationality Act, and a noncitizen convicted of such an offense is subject to mandatory deportation. Upon learning that he would be deported after serving his sentence, Lee filed a motion to vacate his conviction and sentence, arguing that his attorney had provided constitutionally ineffective assistance.

At an evidentiary hearing on Lee’s motion, both Lee and his plea-stage counsel testified that “deportation was the determinative issue in Lee’s decision whether to accept the plea.” In fact, Lee explained, his attorney became “pretty upset because every time something comes up I always ask about immigration status,” and the lawyer “always said why are you worrying about something that you don’t need to worry about.” According to Lee, the lawyer assured him that if deportation was not in the plea agreement, “the government cannot deport you.” Lee’s attorney testified that he thought Lee’s case was a “bad case to try” because Lee's defense to the charge was weak. The attorney nonetheless acknowledged that if he had known Lee would be deported upon pleading guilty, he would have advised him to go to trial. Based on the hearing testimony, a Magistrate Judge recommended that Lee’s plea be set aside and his conviction vacated because he had received ineffective assistance of counsel.

The District Court, however, denied relief. Applying our two-part test for ineffective assistance claims from *Strickland v. Washington*, the District Court concluded that Lee’s counsel had performed deficiently by giving improper advice about the deportation consequences of the plea. But, “in light of the overwhelming evidence of Lee’s guilt,” Lee “would have almost certainly” been found guilty and received “a significantly longer prison sentence, and subsequent deportation,” had he gone to trial. Lee therefore could not show he was prejudiced by his attorney's erroneous advice. Viewing its resolution of the issue as debatable among jurists of reason, the District Court granted a certificate of appealability.

The Court of Appeals for the Sixth Circuit affirmed the denial of relief. On appeal, the Government conceded that the performance of Lee’s attorney had been deficient. To establish that he was prejudiced by that deficient performance, the court explained, Lee was required 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.” Lee had “no bona fide defense, not even a weak one,” so he “stood to gain nothing from going to trial but more prison time.” Relying on Circuit precedent holding that “no rational defendant charged with a deportable offense and facing overwhelming evidence of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence,” the Court of Appeals concluded that Lee could not show prejudice. We granted certiorari.

II

The Sixth Amendment guarantees a defendant the effective assistance of counsel at “critical stages of a criminal proceeding,” including when he enters a guilty plea. To demonstrate that counsel was constitutionally ineffective, a defendant must show that counsel's representation “fell below an objective standard of reasonableness” and that he was prejudiced as a result. The first requirement is not at issue in today’s case: The Government concedes that Lee’s plea-stage counsel provided inadequate representation when he assured Lee that he would not be deported if he pleaded guilty. The question is whether Lee can show he was prejudiced by that erroneous advice.

A

A claim of ineffective assistance of counsel will often involve a claim of attorney error “during the course of a legal proceeding” — for example, that counsel failed to raise an objection at trial or to present an argument on appeal. A defendant raising such a claim can demonstrate prejudice by showing “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.”

But in this case counsel’s “deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself.” When a defendant alleges his counsel’s deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial “would have been different” than the result of the plea bargain. That is because, while we ordinarily “apply a strong presumption of reliability to judicial proceedings,” “we cannot accord” any such presumption “to judicial proceedings that never took place.”

We instead consider whether the defendant was prejudiced by the “denial of the entire judicial proceeding to which he had a right.” When a defendant claims that his counsel’s deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a “reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”

The dissent contends that a defendant must also show that he would have been better off going to trial. That is true when the defendant’s decision about going to trial turns on his prospects of success and those are affected by the attorney’s error — for instance, where a defendant alleges that his lawyer should have but did not seek to suppress an improperly obtained confession.

Not all errors, however, are of that sort. Here Lee knew, correctly, that his prospects of acquittal at trial were grim, and his attorney’s error had nothing to do with that. The error was instead one that affected Lee’s understanding of the consequences of pleading guilty. The Court confronted precisely this kind of error in *Hill*. Rather than asking how a hypothetical trial would have played out absent the error, the Court considered whether there was an adequate showing that the defendant, properly advised, would have opted to go to trial. The Court rejected the defendant's claim because he had “alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty.”

Lee, on the other hand, argues he can establish prejudice under Hill because he never would have accepted a guilty plea had he known that he would be deported as a result. Lee insists he would have gambled on trial, risking more jail time for whatever small chance there might be of an acquittal that would let him remain in the United States. The Government responds that, since Lee had no viable defense at trial, he would almost certainly have lost and found himself still subject to deportation, with a lengthier prison sentence to boot. Lee, the Government contends, cannot show prejudice from accepting a plea where his only hope at trial was that something unexpected and unpredictable might occur that would lead to an acquittal.

B

The Government asks that we, like the Court of Appeals below, adopt a per se rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial. As a general matter, it makes sense that a defendant who has no realistic defense to a charge supported by sufficient evidence will be unable to carry his burden of showing prejudice from accepting a guilty plea. But in elevating this general proposition to a per se rule, the Government makes two errors. First, it forgets that categorical rules are ill suited to an inquiry that we have emphasized demands a “case-by-case examination” of the “totality of the evidence.” And, more fundamentally, the Government overlooks that the inquiry we prescribed in *Hill v. Lockhart* focuses on a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial.

A defendant without any viable defense will be highly likely to lose at trial. And a defendant facing such long odds will rarely be able to show prejudice from accepting a guilty plea that offers him a better resolution than would be likely after trial. But that is not because the prejudice inquiry in this context looks to the probability of a conviction for its own sake. It is instead because defendants obviously weigh their prospects at trial in deciding whether to accept a plea. Where a defendant has no plausible chance of an acquittal at trial, it is highly likely that he will accept a plea if the Government offers one.

But common sense (not to mention our precedent) recognizes that there is more to consider than simply the likelihood of success at trial. The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea. When those consequences are, from the defendant’s perspective, similarly dire, even the smallest chance of success at trial may look attractive. For example, a defendant with no realistic defense to a charge carrying a 20-year sentence may nevertheless choose trial, if the prosecution’s plea offer is 18 years. Here Lee alleges that avoiding deportation was the determinative factor for him; deportation after some time in prison was not meaningfully different from deportation after somewhat less time. He says he accordingly would have rejected any plea leading to deportation — even if it shaved off prison time — in favor of throwing a “Hail Mary” at trial.

The Government urges that, in such circumstances, the possibility of an acquittal after trial is “irrelevant to the prejudice inquiry,” pointing to our statement in *Strickland* that “a defendant has no entitlement to the luck of a lawless decisionmaker.” That statement, however, was made in the context of discussing the presumption of reliability we apply to judicial proceedings. As we have explained, that presumption has no place where, as here, a defendant was deprived of a proceeding altogether. In a presumptively reliable proceeding, “the possibility of arbitrariness, whimsy, caprice, ‘nullification,’ and the like” must by definition be ignored. But where we are instead asking what an individual defendant would have done, the possibility of even a highly improbable result may be pertinent to the extent it would have affected his decisionmaking.

C

“Surmounting Strickland’s high bar is never an easy task,” and the strong societal interest in finality has “special force with respect to convictions based on guilty pleas.” Courts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney’s deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences.

In the unusual circumstances of this case, we conclude that Lee has adequately demonstrated a reasonable probability that he would have rejected the plea had he known that it would lead to mandatory deportation. There is no question that “deportation was the determinative issue in Lee’s decision whether to accept the plea deal.” Lee asked his attorney repeatedly whether there was any risk of deportation from the proceedings, and both Lee and his attorney testified at the evidentiary hearing below that Lee would have gone to trial if he had known about the deportation consequences.

Lee demonstrated as much at his plea colloquy: When the judge warned him that a conviction “could result in your being deported,” and asked “does that at all affect your decision about whether you want to plead guilty or not,” Lee answered “Yes, Your Honor.” When the judge inquired “how does it affect your decision,” Lee responded “I don't understand,” and turned to his attorney for advice. Only when Lee’s counsel assured him that the judge’s statement was a “standard warning” was Lee willing to proceed to plead guilty.

There is no reason to doubt the paramount importance Lee placed on avoiding deportation. Deportation is always “a particularly severe penalty,” and we have “recognized that ‘preserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.’” At the time of his plea, Lee had lived in the United States for nearly three decades, had established two businesses in Tennessee, and was the only family member in the United States who could care for his elderly parents — both naturalized American citizens. In contrast to these strong connections to the United States, there is no indication that he had any ties to South Korea; he had never returned there since leaving as a child.

The Government argues, however, that a defendant “must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.” The Government contends that Lee cannot make that showing because he was going to be deported either way; going to trial would only result in a longer sentence before that inevitable consequence.

We cannot agree that it would be irrational for a defendant in Lee’s position to reject the plea offer in favor of trial. But for his attorney’s incompetence, Lee would have known that accepting the plea agreement would certainly lead to deportation. Going to trial? Almost certainly. If deportation were the “determinative issue” for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that “almost” could make all the difference. Balanced against holding on to some chance of avoiding deportation was a year or two more of prison time. Not everyone in Lee’s position would make the choice to reject the plea. But we cannot say it would be irrational to do so.

Lee’s claim that he would not have accepted a plea had he known it would lead to deportation is backed by substantial and uncontroverted evidence. Accordingly we conclude Lee has demonstrated a “reasonable probability that, but for his counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”

Justice THOMAS, with whom Justice ALITO joins except for Part I, dissenting.

The Court today holds that a defendant can undo a guilty plea, well after sentencing and in the face of overwhelming evidence of guilt, because he would have chosen to pursue a defense at trial with no reasonable chance of success if his attorney had properly advised him of the immigration consequences of his plea. Neither the Sixth Amendment nor this Court's precedents support that conclusion. I respectfully dissent.

The Court and both of the parties agree that the prejudice inquiry in this context is governed by *Strickland v. Washington*. The Court in *Strickland* held that a defendant may establish a claim of ineffective assistance of counsel by showing that his “counsel's representation fell below an objective standard of reasonableness” and, as relevant here, that the representation prejudiced the defendant by “actually having an adverse effect on the defense.”

To establish prejudice under *Strickland*, a defendant must show a “reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland* made clear that the “result of the proceeding” refers to the outcome of the defendant’s criminal prosecution as a whole. It defined “reasonable probability” as “a probability sufficient to undermine confidence in the outcome.” And it explained that “an error by counsel does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.”

The parties agree that this inquiry assumes an “objective” decisionmaker. That conclusion also follows directly from *Strickland*. According to *Strickland*, the “assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, ‘nullification,’ and the like.” It does not depend on subjective factors such as “the idiosyncrasies of the particular decisionmaker,” including the decisionmaker’s “unusual propensities toward harshness or leniency.” These factors are flatly “irrelevant to the prejudice inquiry.” In other words, “a defendant has no entitlement to the luck of a lawless decisionmaker.” Ibid. Instead, “the assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.”

When the Court extended the right to effective counsel to the plea stage, it held that “the same two-part standard” from *Strickland* applies. To be sure, the Court said — and the majority today emphasizes — that a defendant asserting an ineffectiveness claim at the plea stage “must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” But that requirement merely reflects the reality that a defendant cannot show that the outcome of his case would have been different if he would have accepted his current plea anyway. In other words, the defendant’s ability to show that he would have gone to trial is necessary, but not sufficient, to establish prejudice.

The Hill Court went on to explain that *Strickland*'s two-part test applies the same way in the plea context as in other contexts. In particular, the “assessment” will primarily turn on “a prediction whether,” in the absence of counsel’s error, “the evidence” of the defendant's innocence or guilt “likely would have changed the outcome” of the proceeding. Thus, a defendant cannot show prejudice where it is “inconceivable” not only that he would have gone to trial, but also “that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received.” In sum, the proper inquiry requires a defendant to show both that he would have rejected his plea and gone to trial and that he would likely have obtained a more favorable result in the end.

To the extent *Hill* was ambiguous about the standard, our precedents applying it confirm this interpretation. In *Premo v. Moore*, the Court emphasized that “strict adherence to the *Strickland* standard” is “essential” when reviewing claims about attorney error “at the plea bargain stage.” In that case, the defendant argued that his counsel was constitutionally ineffective because he had failed to seek suppression of his confession before he pleaded no contest. In analyzing the prejudice issue, the Court did not focus solely on whether the suppression hearing would have turned out differently, or whether the defendant would have chosen to go to trial. It focused as well on the weight of the evidence against the defendant and the fact that he likely would not have obtained a more favorable result at trial, regardless of whether he succeeded at the suppression hearing.

The Court in *Missouri v. Frye*, took a similar approach. In that case, the Court extended *Hill* to hold that counsel could be constitutionally ineffective for failing to communicate a plea deal to a defendant. The Court emphasized that, in addition to showing a reasonable probability that the defendant “would have accepted the earlier plea offer,” it is also “necessary” to show a “reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.” In short, the Court did not focus solely on whether the defendant would have accepted the plea. It instead required the defendant to show that the ultimate outcome would have been different.

Finally, the Court's decision in *Lafler v. Cooper* is to the same effect. In that case, the Court concluded that counsel may be constitutionally ineffective by causing a defendant to reject a plea deal he should have accepted. The Court again emphasized that the prejudice inquiry requires a showing that the criminal prosecution would ultimately have ended differently for the defendant — not merely that the defendant would have accepted the deal. The Court stated that the defendant in those circumstances “must show” a reasonable probability 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.”

These precedents are consistent with our cases governing the right to effective assistance of counsel in other contexts. This Court has held that the right to effective counsel applies to all “critical stages of the criminal proceedings.” Those stages include not only “the entry of a guilty plea,” but also “arraignments, postindictment interrogation, and postindictment lineups.” In those circumstances, the Court has not held that the prejudice inquiry focuses on whether that stage of the proceeding would have ended differently. It instead has made clear that the prejudice inquiry is the same as in *Strickland*, which requires a defendant to establish that he would have been better off in the end had his counsel not erred.

B

The majority misapplies this Court's precedents when it concludes that a defendant may establish prejudice by showing only that “he would not have pleaded guilty and would have insisted on going to trial,” without showing that “the result of that trial would have been different than the result of the plea bargain.” In reaching this conclusion, the Court relies almost exclusively on the single line from *Hill* that “the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.” For the reasons explained above, that sentence prescribes the threshold showing a defendant must make to establish *Strickland* prejudice where a defendant has accepted a guilty plea. In *Hill*, the Court concluded that the defendant had not made that showing, so it rejected his claim. The Court did not, however, further hold that a defendant can establish prejudice by making that showing alone.

The majority also relies on a case that arises in a completely different context, *Roe v. Flores-Ortega*. There, the Court considered a defendant's claim that his attorney failed to file a notice of appeal. The Court observed that the lawyer’s failure to file the notice of appeal “arguably led not to a judicial proceeding of disputed reliability,” but instead to “the forfeiture of a proceeding itself.” The Court today observes that petitioner's guilty plea meant that he did not go to trial. Because that trial “never took place,” the Court reasons, we cannot “apply a strong presumption of reliability” to it. And because the presumption of reliability does not apply, we may not depend on *Strickland*'s statement “that a defendant has no entitlement to the luck of a lawless decisionmaker.” This point is key to the majority's conclusion that petitioner would have chosen to gamble on a trial even though he had no viable defense.

The majority’s analysis, however, is directly contrary to *Hill*, which instructed a court undertaking a prejudice analysis to apply a presumption of reliability to the hypothetical trial that would have occurred had the defendant not pleaded guilty. After explaining that a court should engage in a predictive inquiry about the likelihood of a defendant securing a better result at trial, the Court said: “As we explained in *Strickland v. Washington*, these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the ‘idiosyncrasies of the particular decisionmaker.’” That quote comes from the same paragraph in *Strickland* as the discussion about the presumption of reliability that attaches to the trial. In other words, *Hill* instructs that the prejudice inquiry must presume that the foregone trial would have been reliable.

The majority responds that *Hill* made statements about presuming a reliable trial only in “discussing how courts should analyze predictions of the outcome at a possible trial,” which “will not always be necessary.” I agree that such an inquiry is not always necessary — it is not necessary where, as in *Hill*, the defendant cannot show at the threshold that he would have rejected his plea and chosen to go to trial. But that caveat says nothing about the application of the presumption of reliability when a defendant can make that threshold showing.

In any event, the Court in *Hill* recognized that guilty pleas are themselves generally reliable. Guilty pleas “rarely” give rise to the “concern that unfair procedures may have resulted in the conviction of an innocent defendant.” That is because “a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case.” Guilty pleas, like completed trials, are therefore entitled to the protections against collateral attack that the *Strickland* prejudice standard affords.

Finally, the majority does not dispute that the prejudice inquiry in *Frye* and *Lafler* focused on whether the defendant established a reasonable probability of a different outcome. The majority instead distinguishes those cases on the ground that they involved a defendant who did not accept a guilty plea. According to the majority, those cases “articulated a different way to show prejudice, suited to the context of pleas not accepted.” But the Court in *Frye* and *Lafler* (and *Hill*, for that matter) did not purport to establish a “different” test for prejudice. To the contrary, the Court repeatedly stated that it was applying the “same two-part standard” from *Strickland*.

The majority today abandons any pretense of applying *Strickland* to claims of ineffective assistance of counsel that arise at the plea stage. It instead concludes that one standard applies when a defendant goes to trial (*Strickland*); another standard applies when a defendant accepts a plea (*Hill*); and yet another standard applies when counsel does not apprise the defendant of an available plea or when the defendant rejects a plea (*Frye* and *Lafler*). That approach leaves little doubt that the Court has “opened a whole new field of constitutionalized criminal procedure” — “plea-bargaining law” — despite its repeated assurances that it has been applying the same *Strickland* standard all along. In my view, we should take the Court’s precedents at their word and conclude that “an error by counsel does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.”

III

Applying the ordinary *Strickland* standard in this case, I do not think a defendant in petitioner's circumstances could show a reasonable probability that the result of his criminal proceeding would have been different had he not pleaded guilty. Petitioner does not dispute that he possessed large quantities of illegal drugs or that the Government had secured a witness who had purchased the drugs directly from him. In light of this “overwhelming evidence of guilt,” the Court of Appeals concluded that petitioner had “no bona fide defense, not even a weak one.” His only chance of succeeding would have been to “throw a ‘Hail Mary’ at trial.” As I have explained, however, the Court in *Strickland* expressly foreclosed relying on the possibility of a “Hail Mary” to establish prejudice. *Strickland* made clear that the prejudice assessment should “proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.”

In the face of overwhelming evidence of guilt and in the absence of a bona fide defense, a reasonable court or jury applying the law to the facts of this case would find the defendant guilty. There is no reasonable probability of any other verdict. A defendant in petitioner’s shoes, therefore, would have suffered the same deportation consequences regardless of whether he accepted a plea or went to trial. He is thus plainly better off for having accepted his plea: had he gone to trial, he not only would have faced the same deportation consequences, he also likely would have received a higher prison sentence. Finding that petitioner has established prejudice in these circumstances turns *Strickland* on its head.

IV

The Court's decision today will have pernicious consequences for the criminal justice system. This Court has shown special solicitude for the plea process, which brings “stability” and “certainty” to “the criminal justice system.” The Court has warned that “the prospect of collateral challenges” threatens to undermine these important values. And we have explained that “prosecutors must have assurance that a plea will not be undone years later,” lest they “forgo plea bargains that would benefit defendants,” which would be “a result favorable to no one.”

The Court today provides no assurance that plea deals negotiated in good faith with guilty defendants will remain final. For one thing, the Court’s artificially cabined standard for prejudice in the plea context is likely to generate a high volume of challenges to existing and future plea agreements. Under the majority's standard, defendants bringing these challenges will bear a relatively low burden to show prejudice. Whereas a defendant asserting an ordinary claim of ineffective assistance of counsel must prove that the ultimate outcome of his case would have been different, the Court today holds that a defendant who pleaded guilty need show only that he would have rejected his plea and gone to trial. This standard does not appear to be particularly demanding, as even a defendant who has only the “smallest chance of success at trial” — relying on nothing more than a “Hail Mary” — may be able to satisfy it. For another, the Court does not limit its holding to immigration consequences. Under its rule, so long as a defendant alleges that his counsel omitted or misadvised him on a piece of information during the plea process that he considered of “paramount importance,” he could allege a plausible claim of ineffective assistance of counsel.

In addition to undermining finality, the Court’s rule will impose significant costs on courts and prosecutors. Under the Court's standard, a challenge to a guilty plea will be a highly fact-intensive, defendant-specific undertaking. Petitioner suggests that each claim will “at least” require a “hearing to get the facts on the table.” Given that more than 90 percent of criminal convictions are the result of guilty pleas, the burden of holding evidentiary hearings on these claims could be significant. In circumstances where a defendant has admitted his guilt, the evidence against him is overwhelming, and he has no bona fide defense strategy, I see no justification for imposing these costs.

| **CHECK YOUR KNOWLEDGE** |
| --- |
| 1. Does an ineffective assistance of counsel claim more closely resemble a breach of the duty of care or a breach of the duty of loyalty? |
| 1. Is there a difference between a lawyer making a bad decision and a lawyer providing inaccurate advice? Should there be? |
| 1. Should courts apply the “case within a case” doctrine to ineffective assistance of counsel claims? |
| 1. The dissent argues that guilty pleas are reliable. But scholarship suggests that they are not. Should this affect the analysis of ineffective assistance of counsel claims in relation to plea bargains? |

**Malpractice in Criminal Cases**

Criminal defense attorneys who provide negligent representation may also be liable to their clients in tort for malpractice. However, most courts have adopted a different standard for evaluating malpractice claims in civil and criminal representation, holding that criminal defendants can recover for malpractice only if they prove “actual innocence.” In other words, where civil clients only have to prove that they would have won in order to recover in a legal malpractice action, criminal clients have to prove that they were entitled to win on the merits.

| [***Ang v. Martin*, 114 P. 3d 637 (Wash. 2005)**](https://scholar.google.com/scholar_case?case=16733425947390235006) |
| --- |
| **Summary:** Jessy and Editha Ang provided medical services to the State of Washington, and were indicted for social security fraud, among other things. The Angs hired attorneys Richard Hansen and Michael G. Martin, who advised them to accept a plea bargain. After accepting the plea bargain, the Angs hired attorney Monte Hester, who advised them to withdraw it. Eventually, the Angs were acquitted. The Angs filed a legal malpractice action against Hansen and Martin. The trial court instructed the jury that the Angs could recover only if they proved “actual innocence,” and the jury found they did not. The Angs appealed, arguing that acquittal is actual innocence, but the Court of Appeals and Supreme Court affirmed. |

We are asked to determine whether plaintiffs in a malpractice action against their former criminal defense attorneys were properly required to prove by a preponderance of the evidence that they were actually innocent of the underlying criminal charges. The Court of Appeals concluded that, as an element of their negligence claim, plaintiffs were required “to prove innocence in fact and not merely to present evidence of the government's inability to prove guilt.” We affirm the Court of Appeals.

FACTS

Psychiatrist Jessy Ang and his wife Editha jointly owned Evergreen Medical Panel, Inc., a company that provided the Washington State Department of Labor and Industries with independent medical examinations of injured workers. As a result of Dr. Ang’s contact with a target of a governmental task force investigating social security fraud, Dr. Ang himself became a person of interest. In February 1994, the task force executed a search warrant on Dr. Ang’s office and seized copies of two sets of signed tax returns that reported conflicting amounts of income. The Angs were arrested in April 1996, following the execution of a search warrant at their residence. A year later, the Angs were indicted on 18 criminal counts, including conspiracy to defraud the United States, bank and tax fraud, and filing false statements.

The Angs retained defendants Richard Hansen and Michael G. Martin for flat fees of $225,000 and $100,000, respectively. Attorneys Hansen and Martin engaged in a round of plea negotiations prior to trial, but the Angs rejected the plea bargain. The case proceeded to a jury trial before Judge Tanner in federal district court in December 1997. On the fifth day of trial, just prior to the conclusion of the government's case, Hansen and Martin recommended that the Angs accept another proffered plea, one that the Angs viewed as the least attractive of any agreement previously presented. After Dr. Ang was allegedly told that Mrs. Ang could face sexual assault in prison, the Angs agreed to plead guilty to two of the 18 counts.

The Angs then engaged attorney Monte Hester to review the plea discussions and provide a second opinion. Hester concluded that the government had not met its burden of proof and that the plea agreement provided the Angs with no material benefit. Retaining Hester and Keith A. MacFie to represent them, the Angs successfully moved to withdraw the pleas, which Judge Tanner had never formally accepted. In September 1999, the matter again proceeded to trial before Judge Tanner, with the Angs waiving their right to a jury. Although the government offered another plea bargain prior to trial, one requiring no plea on Dr. Ang's part, a misdemeanor or felony for Mrs. Ang, and a $500,000 fine, the Angs rejected the plea and were acquitted on all 18 counts.

The Angs, along with Evergreen Medical, filed the present legal malpractice action against Hansen and Martin in May 2000 in Pierce County Superior Court. The complaint stated claims for legal malpractice and for violations of the Washington Consumer Protection Act. The trial court denied the defendants' motion for summary judgment, and a jury trial began in November 2001. The trial court instructed the jury that the Angs had to prove by a preponderance of the evidence that they were innocent of the underlying criminal charges. On January 11, 2002, responding to the initial two questions on a special verdict form, the jury found that the Angs had not “proven by a preponderance of the evidence they were innocent of all the criminal charges against them.” As to the verdict form’s third question, asking whether “any of the defendants had been negligent,” the jury made a finding of negligence against Martin only.

The plaintiffs appealed, but the Court of Appeals affirmed. This court granted the plaintiffs’ petition for review.

ISSUES

Where a legal malpractice suit stems from the representation of clients in a criminal prosecution, must plaintiffs who were acquitted of the criminal charges prove their actual innocence of the crimes, or does their acquittal satisfy the innocence element of their malpractice action?

ANALYSIS

Essential Elements of Legal Malpractice Claims against Criminal Defense Counsel. A plaintiff claiming negligent representation by an attorney in a civil matter bears the burden of proving four elements by a preponderance of the evidence:

(1) The existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney’s breach of the duty and the damage incurred.

The fourth element, proximate causation, includes “cause in fact and legal causation.” Cause in fact, or “but for” causation, refers to “the physical connection between an act and an injury.” In a legal malpractice trial, the “trier of fact will be asked to decide what a reasonable jury or fact finder in the underlying trial or ‘trial within the trial’ would have done but for the attorney’s negligence.” Legal causation, however, presents a question of law: “It involves a determination of whether liability should attach as a matter of law given the existence of cause in fact.” To determine whether the cause in fact of a plaintiff’s harm should also be deemed the legal cause of that harm, a court may consider, among other things, the public policy implications of holding the defendant liable. In “criminal malpractice” suits, two elements related to proximate causation have been added. In *Falkner v. Foshaug*, the Court of Appeals “concluded that postconviction relief is a prerequisite to maintaining a criminal malpractice suit and proof of innocence is an additional element a criminal defendant/malpractice plaintiff must prove to prevail at trial in his legal malpractice action.”

The trial court in the present case thus instructed the jury as follows on the elements of the Angs criminal malpractice claims:

To prove their legal malpractice claims, the plaintiffs bear the burden of proving by a preponderance of the evidence each of the following:

First, that there is an attorney-client relationship giving rise to a duty owed by a defendant to a plaintiff;

Second, that plaintiffs have obtained a successful challenge to their convictions based on their attorneys failure to adequately defend them;

Third, that plaintiff was innocent of the crimes charged;

Fourth, that there is an act of omission by a defendant that breached the duty of care of an attorney;

Fifth, that a plaintiff was damaged; and

Sixth, that a breach of duty by a defendant is a proximate cause of a plaintiff’s damages.

The Angs assigned error to this instruction, contending that their undisputed acquittal of the criminal charges met not only the additional element of postconviction relief but also the innocence requirement.

By successfully withdrawing their guilty pleas and receiving an acquittal on all charges, the Angs unquestionably received the equivalent of postconviction relief, but contrary to their contention, they did not thereby satisfy the innocence requirement. The Angs mistakenly claim that they were simply required to prove legal innocence, not actual innocence.” Legal guilt or innocence is that determination made by the trier of fact in a criminal trial,” whereas “actual guilt is intended to refer to a determination in a civil trial, by a preponderance of the evidence, that the defendant engaged in the conduct he was accused of in the prior criminal proceeding.” But the *Falkner* court referred explicitly to the “actual innocence requirement” and at no point equated the innocence requirement with legal innocence. Plainly, a requirement of legal innocence would have been redundant alongside the additional, unchallenged requirement of postconviction relief and would have necessitated a confusing overlay of standards of proof, requiring the malpractice jury to consider whether the Angs had proved by a preponderance of the evidence that they would not have been found guilty beyond a reasonable doubt in the underlying criminal trial.

Moreover, proving actual innocence, not simply legal innocence, is essential to proving proximate causation, both cause in fact and legal causation. Unless criminal malpractice plaintiffs can prove by a preponderance of the evidence their actual innocence of the charges, their own bad acts, not the alleged negligence of defense counsel, should be regarded as the cause in fact of their harm. Likewise, if criminal malpractice plaintiffs cannot prove their actual innocence under the civil standard, they will be unable to establish, in light of significant public policy considerations, that the alleged negligence of their defense counsel was the legal cause of their harm. Summarizing the policy concerns, the *Falkner* court observed that, “requiring a defendant to prove by a preponderance of the evidence that he is innocent of the charges against him will prohibit criminals from benefiting from their own bad acts, maintain respect for our criminal justice systems procedural protections, remove the harmful chilling effect on the defense bar, prevent suits from criminals who may be guilty, but could have gotten a better deal, and prevent a flood of nuisance litigation.”

In the alternative, the Angs argue that, if a plaintiff’s actual guilt or innocence has any place in a criminal malpractice suit, the issue should be raised as an affirmative defense, not as an element of the plaintiffs cause of action. The Angs find support in *Shaw II*, the only decision adopting the actual innocence requirement and shifting to the criminal malpractice defendant “the burden of proof by a preponderance of the evidence as to the actual guilt of the plaintiff.” As respondent Martin explained, however, “the criminal defendant/malpractice plaintiff is in a far better position to bear the burden of establishing innocence,” since, unlike his defense attorney, he “knows if he is actually innocent,” “was, presumably, present or involved in the underlying events which led to the criminal charges,” “has unlimited access to the information about his own acts necessary to prove innocence,” “would know what, if any, inculpatory facts he withheld from his lawyer,” and would have the “opportunity to accept a plea, potentially an Alford plea which could preserve his malpractice claim, before all facts and witness testimony have been developed or are known to his or her attorney.” We find this practical analysis persuasive and thus decline to adopt the minority position of *Shaw II*.

In sum, we conclude that the Angs were properly required to prove by a preponderance of the evidence that they were actually innocent of the underlying criminal charges. We therefore affirm the Court of Appeals.

CONCLUSION

We conclude that, as plaintiffs in a criminal malpractice action, the Angs were properly required to prove by a preponderance of the evidence that they were actually innocent of the underlying criminal charges. We find no persuasive reasons for this court to follow the minority position and shift the burden to the defendant attorneys to prove that their former clients were actually guilty of the charged crimes.

C. JOHNSON, MADSEN, BRIDGE and FAIRHURST, JJ., concur.

SANDERS, J. (dissenting).

I dissent because the malpractice standard for criminal cases should be the same as civil. There is no reason to invite malpractice in criminal cases by heightening the plaintiff’s burden to prove postconviction relief and actual innocence. In every situation a client should rightfully expect competent legal representation.

We have clearly stated the standard for legal malpractice:

To establish a claim for legal malpractice, a plaintiff must prove the following elements: (1) The existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage incurred.

This rule does not suggest the additional requirements the majority adds to cases of criminal malpractice, namely, postconviction relief and proof of actual innocence. I see no reason to add them.

The majority cites a Court of Appeals case, *Falkner v. Foshaug*, to support additional elements. The Court of Appeals opinion *Falkner* is not binding authority, nor is case law from other jurisdictions upon which *Falkner* is based. Nor am I persuaded by its logic. Attorneys who negligently represent their clients should be responsible for any harm that results from the misconduct. It does not matter if the subject matter of the case is civil or criminal. Forcing criminal defendants to prove actual innocence does not serve any purpose except to frustrate the client’s right to competent representation.

Citing a “public policy” present in the minds of the individuals in the majority, the majority argues the defendant's acts should be viewed as the cause of any harm unless he demonstrates his innocence. However, our constitution sets the “public policy” which entitles criminal defendants to adequate representation. I prefer that policy as my guide.

The issue is causation. Under our precedent, cause in fact is determined by the jury as a question of fact. Cause in fact is a minimum threshold that asks but for the lawyer’s negligence would the client have been harmed. In other words, would the result be different if the lawyer had used reasonable care?

Legal causation is a subsequent inquiry, asking as a matter of law whether liability should attach. The majority argues a criminal defendant should not profit from his crimes, and hence the defense attorney should not be liable for his negligence unless the defendant first proves his own innocence. I disagree. The criminal defendant is equally entitled to competent representation, and the negligent attorney should take responsibility for his malpractice. The majority’s rule simply invites malpractice since the defense attorney knows he is held to a lower standard. Proving innocence is impossible since a negative cannot be proved.

Here the Angs’s defense attorneys, Michael Martin and Richard Hansen, recommended a particular plea agreement. The Angs initially agreed but later withdrew the plea on recommendation from new counsel and were acquitted on all charges at a subsequent trial. They sued their former defense attorneys and a jury found that Martin alone was negligent even though it found the Angs had not proved their innocence by a preponderance of the evidence. Since the latter consideration should be irrelevant, Martin should bear the responsibility for his negligence. I would reverse as to Martin, and remand for a trial on damages.

ALEXANDER, C.J. (concurring in dissent).

I agree with Justice Sanders that the trial court erred in instructing the jury that Jessy and Editha Ang had to prove that they were actually innocent of the crime charged in order to prevail in their legal malpractice claim against attorneys Richard Hansen and Michael Martin. For that reason, we should reverse the Court of Appeals and remand to the trial court for a new trial on the Angs’ claim against Martin.

I write separately because, in my view, we should not stop with a determination that the trial court erred but should go further to indicate that the defendant attorney may raise the issue of the plaintiff’s actual guilt in the criminal case as an affirmative defense. That was the position taken by the Supreme Court of Alaska in a similar case, *Shaw v. Department of Administration*. There, the court said that because plaintiffs in such actions must already bear the burden of proving that they have obtained postconviction relief from their criminal convictions, they should not have to prove their “actual innocence.” The court went on to indicate, however, that the defendant may raise the issue of the plaintiff’s “actual guilt” as an affirmative defense and seek to establish it by a preponderance of the evidence. Although the Alaska court did not engage in an extensive discussion of its reasons for placing the burden on the defendant to establish this affirmative defense, it did indicate that putting the burden there is consistent with the requirement that defendants establish traditional affirmative defenses that look to plaintiffs’ actions such as contributory/comparative negligence and assumption of the risk. The Alaska rule makes perfect sense to me for that reason and for the additional reason that it is consonant with the traditional notion that one is presumed innocent until proven guilty beyond a reasonable doubt. Furthermore, shifting the burden to the defendant relieves the plaintiff of the almost impossible burden of proving innocence while at the same time addressing the policy concern noted by the majority, that criminals should not benefit from “their own bad acts.”

IRELAND, J. Pro Tem., concurs.

CHAMBERS, J. (concurring in dissent).

I concur in Justice Sanders’ dissent but write separately to express my indignation that this court, based upon the policy of protecting lawyers, would carve out a special protection for criminal defense attorneys whose acts of professional negligence are harmful to their clients. Under this logic, it is not enough for the injured client to prove actual harm from the attorney’s failure to meet professional standards; the injured client must also prove that her hands were always clean. Under this logic, why not give immunity to accountants for professional negligence unless the accountant’s client can prove he or she never understated income or requested an unavailable deduction, even when the accountants’ bad acts caused actual harm to their clients or society? Surely tax dodgers should not profit from their misdeeds. Under this logic, why not give immunity to health care providers who harm their patients unless the patient can prove perfect good health but for the negligence of the provider? Surely the unhealthy should not profit from their illness.

But this logic ignores the fact that professionals owe a duty to the sick as well as the healthy; to the scrupulously honest business woman as well as the one looking for the angle; to the guilty as well as the innocent. Those of us caught in the grip of the law are always entitled to competent legal representation whether or not we are totally innocent. The heart of the criminal defense lawyer’s job is often not to prove absolute innocence; the irreducible core of the job is to make the state prove its case and make the best case for the defendant possible. Often the sole issue is the level of culpability and the sanction to be imposed upon the client. The government may seek multiple counts where a single count is appropriate, seek charges of a higher degree than the evidence supports, or seek a sentence disproportionate to the offense. The negligence of her lawyer may cost her client her fortune, her liberty, or her life. The “actual innocence” requirement is impractical and harmful in the area of criminal malpractice law; it creates an almost impossible burden and provides almost absolute immunity to criminal defense lawyers.

The most troubling aspect of the actual innocence requirement announced by the majority lies with its origin. It is based upon a policy to protect lawyers from lawsuits. Tort actions are maintained for a variety of reasons, including the deterrence of wrongful conduct. As a matter of basic policy, accountability, compensation, and deterrence of wrongful conduct should trump protecting lawyers from lawsuits.

Second, while it may be true that a majority of courts that have reached the issue require the plaintiff to establish actual innocence, the numbers do not appear to be great. Only Missouri, New York, Massachusetts, Alaska, Pennsylvania, California, New Hampshire, Nebraska, Illinois, Florida, and Wisconsin require either proof of actual innocence or that the conviction was set aside on postconviction relief. This is hardly a national consensus.

This court should protect the public from lawyers’ misdeeds, not the other way around. A plaintiff who is not categorically innocent seeking compensation under ordinary principles of tort law faces no light burden. Such a guilty plaintiff must prove a duty, a breach of that duty, injuries proximately caused by the breach, and the amount of his damages. I see no reason to provide additional protections for lawyers.

| **CHECK YOUR KNOWLEDGE** |
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| 1. Is the “actual innocence” requirement imposed by the court similar to the “case within a case” doctrine? Does it requirement a criminal defendant to prove more? |
| 1. Should a criminal defendant be required to prove actual innocence in order to show malpractice? Can a criminal defense lawyer provide negligent representation to a guilty client? |
| 1. The majority is concerned about the possibility of criminals “benefiting from their own bad acts.” What is the benefit in question? |
| 1. Criminal defense attorneys are often appointed counsel. Should that affect the standard of care? Should it affect the standard for evaluating whether they have provided negligent representation? Should the standard for malpractice differ depending on whether the client is paying for representation? |