

advice on deportation.³³⁶ Because of its severity, historical association with the criminal justice system, and increasing certainty following conviction and imprisonment, deportation was found to be of a “unique nature”: the Court pointedly stated that it was not addressing whether distinguishing between direct and collateral consequences of conviction was appropriate in bounding defense counsel’s constitutional duty in a criminal case.³³⁷ Further, the Court held that defense counsel failed to meet prevailing professional norms in representing to Padilla that he did not have to worry about deportation because of the length of his legal residency in the U.S. The Court emphasized that this conclusion was not based on the attorney’s mistaken advice, but rather on a broader obligation to inform a noncitizen client whether a plea carries a risk of deportation.³³⁸ Silence is not an option. On the issue of prejudice to Padilla from ineffective assistance, the Court sent the case back to lower courts for further findings.³³⁹

What constitutes prejudice from attorney error, the second *Strickland* requirement, has proved to be a more difficult issue, and one that gained additional doctrinal salience after *Lafler* and *Frye*.³⁴⁰ The touchstone of “prejudice” under *Strickland* is that the defendant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”³⁴¹ Nevertheless, de-

³³⁶ *Padilla v. Kentucky*, 559 U.S. ___, No. 08–651, slip op. (2010).

³³⁷ 559 U.S. ___, No. 08–651, slip op. at 8.

³³⁸ 559 U.S. ___, No. 08–651, slip op. at 12–16.

³³⁹ In *Chaidez v. United States*, 568 U.S. ___, No. 11–820, slip op. (2013), the Court held that *Padilla* announced a “new rule” of criminal procedure that did not apply “retroactively” during collateral review of convictions then already final. Retroactive application of the Court’s criminal procedure decisions is discussed under the topic “Retroactivity Versus Prospectivity” in Article III, *supra*.

³⁴⁰ The *Frye* Court observed that, according to the Bureau of Justice Statistics, ninety-seven percent of recent federal convictions and ninety-four percent of recent state convictions had resulted from guilty pleas. *Hill v. Lockhart* had earlier established a basis for a Sixth Amendment challenge to a conviction arising from a plea bargain if a defendant could show he accepted the plea after having received ineffective assistance of counsel. By laying a basis for a Sixth Amendment challenge to a failure to accept a plea offer from the prosecution, *Frye* and *Lafler* recognized the possibility of prejudice from ineffective bargaining alone regardless of the fairness of a subsequent conviction after a later plea to the court or a full trial.

³⁴¹ *Strickland*, 466 U.S. at 694. This standard does not require that “a defendant show that counsel’s deficient conduct more likely than not altered the outcome in the case.” *Strickland*, 466 U.S. at 693. See also *Porter v. McCollum*, 558 U.S. ___, No. 08–10537, slip op. at 15 (2009). Also, presentation of a plausible mitigation theory supported by evidence does not foreclose prejudice based on counsel’s earlier failure to have conducted an adequate mitigation investigation. *Sears v. Upton*, 561 U.S. ___, No. 09–8854, slip op. (2010) (counsel presented evidence of supportive family ties as a mitigating factor in the penalty phase of a capital case, but a fuller inves-