

Notes and Comments

INEFFECTIVE ASSISTANCE OF COUNSEL: HOW ILLINOIS HAS USED THE “PREJUDICE” PRONG OF *STRICKLAND* TO LOWER THE FLOOR ON PERFORMANCE WHEN DEFENDANTS PLEAD GUILTY

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INTRODUCTION

Roughly 95% of felony convictions are obtained through guilty pleas rather than trials.¹ Despite the integral role of plea bargains in our criminal justice system, however, the Supreme Court has declined to create a separate standard for determining whether a defendant's Sixth Amendment right to counsel² has been violated in the guilty plea context. Instead, the two-prong test for determining whether counsel was ineffective at trial, developed in *Strickland v. Washington*,³ governs.⁴ In *Strickland*, the Supreme Court held that a defendant's right to effective counsel is not violated as long as counsel's performance does not fall "below an objective standard of reasonableness"⁵ and prejudice the defendant by affecting the outcome of the proceeding.⁶

Surprisingly, in *Hill v. Lockhart*, the Court decided that the *Strickland* test was likely to function properly in the guilty plea context.⁷ The Court concluded this despite concerns both that guilty pleas are less likely to be fully investigated than trials, and that counsel's responsibilities in the plea context involve more unreviewable "off the record" activities such as advising the accused and negotiating with the prosecution than it does on "on the record" reviewable actions. Nonetheless, the Court extended the *Strickland* test to the guilty plea context in *Hill* with one slight alteration: the first prong of *Strickland* remains the same, but the second prong requires that a defendant allege that but for his attorney's deficient performance, he would have gone to trial rather than plead guilty.⁸ This Comment focuses on this second "prejudice" prong of the *Strickland-Hill* test.

Determining the effect of counsel's performance based on the outcome of a trial is difficult and subjective. The challenge is amplified in the plea setting. Guilty pleas produce thin records and leave little support for a defendant's claim of prejudice. Additionally, courts tend to rely heavily on

¹ In 2006, 94% of felony convictions in state courts were obtained through guilty pleas. See Bureau of Justice Statistics, U.S. Dep't of Justice, *Table 5.46.2006*, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, <http://www.albany.edu/sourcebook/pdf/t5462006.pdf> (last visited Oct. 30, 2011). In 2008, 97% of felony convictions in federal district courts were obtained through guilty pleas. See Admin. Office, U.S. Courts, *Table 5.24.2008*, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, <http://www.albany.edu/sourcebook/pdf/t5242008.pdf> (last visited Oct. 30, 2011).

² U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

³ 466 U.S. 668 (1984).

⁴ See *Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985) (adopting the two-prong *Strickland* test to determine whether counsel is ineffective in the guilty plea context).

⁵ *Strickland*, 466 U.S. at 688.

⁶ *Id.* at 694 ("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.").

⁷ 474 U.S. at 58–59.

⁸ *Id.* at 59.

rote assurances from the defendant at the time a plea is entered, stating that the plea is voluntary, and stating that she was not promised anything that was not disclosed to the court in exchange for her plea.⁹ These assurances provide a method of “reversal proofing” guilty pleas; the underlying purpose of establishing this record is to ensure that the defendant’s plea is voluntary and entered with knowledge of its consequences.

In its mandatory adoption of the *Strickland–Hill* standard, Illinois has tipped the scales even further in the direction of reversal-proofing pleas by requiring a defendant to do one of two things to satisfy the prejudice prong of the *Strickland* test: (1) raise a claim of innocence, or (2) raise a defense that he could have raised at trial.¹⁰ The purpose of this requirement is to demonstrate that, absent counsel’s deficient performance, the defendant would have gone to trial and had a high probability of being acquitted. Rather than focusing on the factors that influenced the defendant’s decision to enter a plea, the Illinois standard centers on the predicted outcome of a hypothetical trial.

This standard creates an almost insurmountable hurdle for a defendant who receives ineffective assistance when pleading guilty. The Illinois standard sets such a high bar that it effectively guarantees a fundamentally fair process only to those defendants who are actually innocent. This guarantee does not satisfy the Sixth Amendment and fails to meet the goals of the *Strickland* test.¹¹

While it would of course be permissible for Illinois courts to require more of defense counsel and provide greater protection to defendants than does *Strickland*,¹² it is not permissible to deny defendants the full scope of protection guaranteed by *Strickland* and insulate deficient performance from review. The *Strickland–Hill* version of the prejudice prong requires a defendant to show that she would have gone to trial but for counsel’s deficient performance.¹³ Because the Illinois prejudice prong effectively

⁹ See *Preliminary Proceedings: Guilty Pleas*, 38 GEO. L.J. ANN. REV. CRIM. PROC. 403, 412–13 (2009). A plea that is negotiated by the prosecution and defense, whether partially or fully negotiated, is not binding on the trial court; the trial court still must agree to the sentence. *Id.* at 407. A defendant may withdraw her plea if the trial court rejects the negotiated agreement. *Id.* at 409. However, when there is not a negotiated agreement between the parties and a blind plea is entered, a defendant is not entitled to withdraw her plea if the court does not follow a recommended sentence or sentencing range. *Id.* at 408.

¹⁰ See *People v. Rissley*, 795 N.E.2d 174, 205 (Ill. 2003).

¹¹ See *Strickland*, 466 U.S. at 689. The Court noted that the Sixth Amendment was designed “simply to ensure that criminal defendants receive a fair trial.” To this end, the *Strickland* test was designed to allow a court to make a fair assessment of counsel’s conduct by evaluating the challenged conduct, from counsel’s perspective, at the time it occurred. See *id.*

¹² See, e.g., Akhil Reed Amar, *Five Views of Federalism: “Converse-1983” in Context*, 47 VAND. L. REV. 1229, 1244 (1994) (“[T]he federal Constitution . . . establishes a minimum baseline—a floor—that state judges must respect upon penalty of reversal. But the floor need not become a ceiling.”).

¹³ *Hill*, 474 U.S. at 59.

requires innocence, therefore lowering the “floor” set by *Strickland*, it is unconstitutional.

At a minimum, Illinois needs to realign with the standard established by *Strickland–Hill*. Alternatively, a new standard for determining whether a defendant has been denied effective assistance when pleading guilty should be adopted. An appropriate standard could take a number of forms, and should align the defendant’s burden of proof with the *Strickland–Hill* test. Alternatives developed for application in the plea context will encourage counsel to provide defendants with effective assistance while maintaining the finality of properly entered guilty pleas.

Part I of this Comment examines the relationship between guilty pleas and ineffective assistance of counsel. It discusses the prevalence of guilty pleas in both state and federal courts and explains the relationship between the requirement that a plea be entered knowingly and voluntarily and the standards for ineffective assistance. Part II focuses on the development of the *Strickland* standard and its extension to guilty pleas in *Hill*. Part III examines the adoption of the *Strickland–Hill* standard in Illinois and traces the origins of the additional requirements that the Illinois Supreme Court has incorporated into the prejudice prong. It argues that Illinois should align its interpretation of the *Strickland–Hill* prejudice prong more closely with the underlying goals of fundamental fairness and accuracy identified in *Strickland* and *Hill*. Finally, Part IV alternatively suggests that even if the approach adopted in Illinois is constitutional, the Supreme Court should adopt a standard that is more administrable in the guilty plea context to replace the *Strickland–Hill* test.

I. THE RELATIONSHIP BETWEEN INEFFECTIVE ASSISTANCE AND GUILTY PLEAS

Because an overwhelming percentage of defendants resolve their cases through guilty pleas, representation by counsel in the guilty plea process likely constitutes the most important service a lawyer provides for his client.¹⁴

Section A explains that the vast majority of felony convictions are obtained through guilty pleas. Section B dispels the misconception that all defendants who plead guilty do so because they are actually guilty and are certain to be convicted at trial. Finally, Section C discusses the

¹⁴ Defendants are entitled to counsel in plea proceedings because the process is considered to be adversarial in nature. See *Trials: Right to Counsel*, 38 GEO. L.J. ANN. REV. CRIM. PROC. 491, 491 (2009). The Constitution requires the government to ensure that proceedings which may deprive an accused of his freedom are conducted fairly. See JAMES J. TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 155–56 (2002) (“Lawyers ensure that the adversarial system functions as a true ‘confrontation between adversaries.’ They promote the interests of the defendant and subject the prosecution’s case to meaningful ‘adversarial testing.’” (quoting *United States v. Cronin*, 466 U.S. 648, 656–57 (1984))).

interrelatedness of guilty pleas and ineffective assistance of counsel by explaining that pleas are required to be both “voluntarily” and “intelligently” entered and that ineffective assistance of counsel may render a defendant’s plea involuntary.

A. Prevalence of Guilty Pleas

Nearly 95% of convictions are obtained through guilty pleas.¹⁵ In Illinois, the percentage of convictions achieved through guilty pleas is slightly below the national average—roughly 86% in the state overall and 70% in Cook County.¹⁶ The prevalence of the use of guilty pleas is not a recent trend, and actually predates the establishment of the ineffective assistance of counsel standard.¹⁷ The Supreme Court has acknowledged both the prevalence of guilty pleas and that “[s]tate[s] to some degree encourage[] pleas of guilty at every important step in the criminal process.”¹⁸

B. Misconceptions Surrounding Guilty Pleas

One might assume that few innocent defendants plead guilty. However, anecdotal evidence suggests that some portion of innocent defendants who are accused of a crime plead guilty despite their innocence.¹⁹ Put more frankly, “once a person is facing felony charges, the issue no longer is whether he did the crime; it’s how to limit the damage.”²⁰ A former prosecutor explained, “A wise defendant, with the help of his lawyer, thinks pragmatically Sometimes trials bring surprises—

¹⁵ See Bureau of Justice Statistics, *supra* note 1.

¹⁶ In 2006, 51,766 convictions on felony charges occurred through guilty pleas in the circuit courts of Illinois, 9694 convictions were reached through bench trials, and another 715 were convicted by juries. ADMIN. OFFICE, ILL. COURTS, ANNUAL REPORT OF THE ILLINOIS COURTS: STATISTICAL SUMMARY 59 (2006), available at <http://www.state.il.us/court/SupremeCourt/AnnualReport/2006/Stat/2006%20Statistical%20Summary.pdf>. In Cook County, which encompasses the city of Chicago and surrounding suburbs, 19,343 convictions occurred through guilty pleas, 9094 were reached through bench trials, and 280 were convicted by juries. *Id.*

¹⁷ See DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 (Frank J. Remington ed., 1966) (“[T]he trial is not the most common method of convicting or acquitting defendants. Roughly 90 per cent of all criminal convictions are by pleas of guilty . . .”).

¹⁸ *Brady v. United States*, 397 U.S. 742, 750 (1970).

¹⁹ See, e.g., SAMUEL R. GROSS ET AL., EXONERATIONS IN THE UNITED STATES: 1989 THROUGH 2003 12 (2004), available at http://www.soros.org/initiatives/usprograms/focus/justice/articles_publications/publications/exonerations_20040419/exon_report.pdf (noting that nineteen of 329 exonerees in the study’s database pled guilty to avoid the risk of life imprisonment or the death penalty).

²⁰ STEVE BOGIRA, COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE 334 (2005) (quoting statements made during an interview with Kevin Bolger, a criminal defense attorney and former prosecutor practicing at Chicago’s Cook County Criminal Courthouse).

surprises that turn the flimsiest cases into convictions So you get the best deal you can and you get out of there.”²¹

The reasons that defendants enter guilty pleas are varied. In many cases, a plea provides advantages to both the defendant and the prosecution. The defendant may limit or reduce her sentence while starting the correctional process immediately.²² The prosecution may conserve scarce resources and avoid the risk that the state could not sustain its burden of proof at trial.²³

There is no way to determine what proportion of guilty pleas is entered by defendants who are not guilty. “It is well known . . . that many defendants who can’t afford bail plead guilty in return for short sentences, often probation and credit for time served, rather than stay in jail for months and then go to trial and risk much more severe punishment if convicted.”²⁴ According to one study, defendants who initially pleaded guilty and were later exonerated make up only about 6% of exonerees.²⁵ However, the existence of such cases suggests that pleading guilty does not always reliably signify actual guilt. Additionally, because pleading guilty can make innocence more difficult to establish at an eventual trial than it would otherwise have been, the proportion of exonerees in this category may be artificially low.²⁶

C. Requirement that Pleas Are Entered into “Voluntarily and Intelligently”

When entering a guilty plea,²⁷ a defendant must stand in open court and enter an admission that she committed the charged acts for which she is pleading guilty.²⁸ Because these actions require the defendant to waive his

²¹ *Id.* (internal quotation mark omitted).

²² *Brady*, 397 U.S. at 751–52; *see also* NEWMAN, *supra* note 17, at 96 (“The victim of a crime is often as reluctant to be exposed to the publicity and trauma of a trial as is the perpetrator. The guilty plea is quick and relatively anonymous. . . . The guilty plea, even if not preceded by a charge reduction, offers the sentencing judge both a rationalization for showing leniency to deserving defendants and an opportunity to do so in a setting ordinarily free from the publicity which attends trial.”).

²³ *See* NEWMAN, *supra* note 17, at 95.

²⁴ GROSS ET AL., *supra* note 19, at 12.

²⁵ *See id.* (noting that only 19 of the 328 individuals exonerated initially pleaded guilty, or roughly 6% of all exonerations included in the database).

²⁶ *See* Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 631 n.170 (2005) (suggesting that guilty plea convictions may leave fewer avenues for later legal challenges to the conviction, and that public sentiment that innocent individuals rarely plead guilty may make accessing legal and investigatory assistance more difficult).

²⁷ *See generally* *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (“A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.”).

²⁸ *See* *Brady v. United States*, 397 U.S. 742, 748 (1970). With the court’s consent, a defendant may enter a plea of *nolo contendere* rather than plead guilty; however, courts treat such pleas as admissions to all charges in the indictment. *See Preliminary Proceedings: Guilty Pleas*, *supra* note 9, at 403–04 & n.1294. Therefore, the plea of *nolo contendere* has the same effect at sentencing as a guilty plea. *See*,

trial-related constitutional rights, including the right to be tried by a jury of his peers and the right to be confronted by the witnesses against him,²⁹ a plea is not valid unless the defendant waives these protections knowingly.³⁰ Additionally, because the defendant has a Fifth Amendment right not to “be compelled in any criminal case to be a witness against himself,”³¹ the plea must be entered into voluntarily and without threat of “physical harm” or “mental coercion” in order to be valid.³² Although the requirement that a plea be both voluntary and intelligent was already well-established, *Boykin v. Alabama* added the requirement that the record of the proceeding affirmatively disclose both items when the plea is entered.³³ Reversal-proofing pleas contributed to the Court’s interest in developing this record.³⁴

When a defendant challenges the voluntariness of a plea, a court must consider “all of the relevant circumstances surrounding [the plea],”³⁵ including counsel’s representation.³⁶ After pleading guilty based upon advice from counsel, a defendant may only attack the voluntary and intelligent nature of the plea by showing that the advice he received from counsel violated the standard set forth in *Strickland–Hill*.³⁷ A guilty plea

e.g., *Gomez v. Berge*, 434 F.3d 940, 942–43 (7th Cir. 2006); *Preliminary Proceedings: Guilty Pleas*, *supra* note 9, at 404 n.1294. For purposes of this Comment, guilty pleas and *nolo contendere* will be referred to collectively as “guilty pleas.”

²⁹ U.S. CONST. amend. VI (“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 defence.”); *see also Brady*, 397 U.S. at 748.

³⁰ *See* U.S. CONST. amend. V.

³¹ *Id.*

³² *Brady*, 397 U.S. at 750. A guilty plea is not compelled, and therefore is valid, when it is motivated by a defendant’s interest in receiving a specific or lesser sentence rather than facing a wider range of possibilities at trial. *Id.* at 751.

³³ 395 U.S. 238, 242 (1969). Further, the Illinois Supreme Court adopted a rule that requires trial judges to determine that a guilty plea is entered knowingly and voluntarily. ILL. SUP. CT. R. 402(a)–(b). The judge must advise the defendant of the nature of the charges against him and the maximum and minimum sentences that he may be subject to under the law. *Id.* at 401(a)(1)–(2). The defendant also must be notified of his waiver of trial rights and the judge must determine, on the record, that the plea was not obtained by “force or threats or any promises, apart from a plea agreement.” *Id.* at 402(b).

³⁴ *Boykin*, 395 U.S. at 244 n.7 (“If these convictions are to be insulated from attack, the trial court is best advised to conduct an on the record examination of the defendant which should include, inter alia, an attempt to satisfy itself that the defendant understands the nature of the charges, his right to a jury trial, the acts sufficient to constitute the offenses for which he is charged and the permissible range of sentences.” (quoting *Commonwealth ex rel. West v. Rundle*, 237 A.2d 196, 197–98 (Pa. 1968)) (internal quotation mark omitted)).

³⁵ *Brady*, 397 U.S. at 749.

³⁶ *Hill v. Lockhart*, 474 U.S. 52, 56 (1985).

³⁷ *See id.* at 57. Prior to *Strickland*, the applicable ineffectiveness standard was governed by *McMann v. Richardson*, 397 U.S. 759 (1970). The *McMann* test asked whether a guilty plea was “a voluntary and intelligent act of the defendant.” *Id.* at 772. *Strickland* added an additional prejudice

entered by a well-informed and appropriately counseled defendant is not subject to postconviction attack because the applicable law changed or because hindsight indicates that the plea entered was not as “sensible” as it appeared to be at the time.³⁸

Courts rely heavily on the defendant’s affirmative statements to indicate that a plea was, in fact, voluntary. However, these statements should not be viewed as conclusive, judgment-proof statements of a defendant’s understanding of what she is giving up by pleading guilty. “The plea bargain is the typical last act of the courthouse drama. Judges engage defendants in monotone and sometimes mumbled plea colloquies. Defendants bark ‘yes’ and ‘no,’ as required, and are instructed to consult with their lawyers should they forget what line goes where.”³⁹ Defendants may fear that the consequences of not playing their role will negatively impact the sentence that is ultimately assigned by the judge.⁴⁰

If the court determines that a plea was not voluntary because the defendant received ineffective assistance from counsel, the applicable remedy depends upon when counsel’s errors occurred and when the defendant raised his ineffective assistance claim.⁴¹ If performance was ineffective only during the sentencing phase, the court may require a new penalty phase without vacating the conviction or ordering an entirely new trial.⁴² In many cases, the ineffective assistance claim is made in a postconviction or habeas corpus petition,⁴³ where the immediate remedy

requirement to the *McMann* test. For a discussion of the development of the *Strickland* test, see *infra* Part II.A.

³⁸ See *Brady*, 397 U.S. at 756–57 (“Often the decision to plead guilty is heavily influenced by the defendant’s appraisal of the prosecution’s case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted. Considerations like these frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time.”).

³⁹ Josh Bowers, Response, *The Unusual Man in the Usual Place*, 157 U. PA. L. REV. PENNUMBRA 260, 274 (2009), <http://www.pennumbra.com/responses/05-2009/Bowers.pdf>.

⁴⁰ See *id.*

⁴¹ See, e.g., *Strickland v. Washington*, 466 U.S. 668, 675, 686–87 (1984) (considering only whether the defendant’s sentence should be overturned and not whether the conviction should be vacated when the defendant claimed he received ineffective assistance of counsel during a capital sentencing proceeding).

⁴² *Id.*

⁴³ Typically, claims of ineffective assistance are limited to collateral review and are not considered on direct appeal. See *Trials: Right to Counsel*, *supra* note 14, at 527–28. Habeas review is permitted after a defendant has exhausted all state remedies, including state postconviction proceedings. *Id.* at 528.

Claims of ineffective assistance may be related to professional qualifications; performance before trial, during jury selection, during trial, and during sentencing; performance on appeal; and actions related to jury instructions. *Id.* at 521–25; see also *Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986) (“A layman will ordinarily be unable to recognize counsel’s errors and to evaluate counsel’s professional performance . . . [and] consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about

sought may simply be an evidentiary hearing.⁴⁴ After the hearing, the reviewing court may vacate the defendant's plea if it determines that the petitioner's claim has merit.⁴⁵

II. THE CONSTITUTIONAL STANDARD FOR INEFFECTIVENESS OF COUNSEL

This Part discusses the development of the two-prong *Strickland* test for analyzing claims of ineffective assistance of counsel. Section A lays out the *Strickland* test, which establishes the floor on a defendant's Sixth Amendment right to effective counsel in the trial setting. Section B discusses the Supreme Court's application of the *Strickland* test to guilty pleas in *Hill*.

A. Ineffective Assistance in the Trial Context

In *McMann v. Richardson*, the Supreme Court recognized that the Sixth Amendment right to counsel is the right to "effective counsel."⁴⁶ The Court did not establish, however, what qualified representation as effective. Nor did the Court directly address a claim of actual ineffectiveness of counsel until *Strickland*, fourteen years later.⁴⁷

In *Strickland*, the Court established a two-prong test to determine when counsel's performance qualifies as ineffective, and as a result, is a violation of a defendant's right to counsel.⁴⁸ Although the proceeding at issue in

his case. Indeed, an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings . . ." (citation omitted).

⁴⁴ See, e.g., *People v. Hall*, 841 N.E.2d 913, 924 (Ill. 2005) (determining that the defendant was entitled to an evidentiary hearing because he made a substantial showing that he received ineffective assistance of counsel).

⁴⁵ See, e.g., *id.* at 924 ("Following the evidentiary hearing, defendant might be allowed to withdraw his guilty plea . . ."). Defendant Hall, who pleaded guilty to one count of aggravated kidnapping, filed a postconviction petition claiming, among other issues, that his counsel was ineffective in recommending that he enter a guilty plea. *Id.* at 916–17. The postconviction petition was dismissed prior to an evidentiary hearing. *Id.* at 917. Upon finding that the defendant established both prongs of an ineffective assistance claim, the Illinois Supreme Court held that the defendant was entitled to an evidentiary hearing on his postconviction claim that his plea was involuntary. *Id.* at 924.

⁴⁶ 397 U.S. 759, 770–771 & 771 n.14 (1970) (stating that "the right to counsel is the right to the effective assistance of counsel," and that effective counsel consists of a "reasonably competent attorney" whose advice is "within the range of competence demanded of attorneys in criminal cases"). *Gideon v. Wainwright* established the modern right to counsel and applied the Sixth Amendment to the states through the Fourteenth Amendment. 372 U.S. 335, 344 (1963) (stating that the right to counsel is "fundamental" in nature and "essential to fair trials").

⁴⁷ 466 U.S. at 683. Prior to *Strickland*, the Court considered Sixth Amendment claims based on actual or constructive denial of assistance of counsel and claims based on state interference with counsel's ability to provide a defendant with effective assistance. *Id.*

⁴⁸ *Id.* at 694.

Strickland was a capital sentencing hearing, the Court said that it was “sufficiently like a trial in its adversarial format” to be evaluated as such.⁴⁹

The Court’s determination that the purpose of the Sixth Amendment guarantee of counsel was to ensure that a defendant received a fair trial guided the development of the *Strickland* test.⁵⁰ The Court defined a fair trial as one “whose result is reliable.”⁵¹ Carefully, the Court noted that the purpose of the Sixth Amendment is “not to improve the quality of legal representation” but is “simply to ensure that criminal defendants receive a fair trial.”⁵²

To succeed on a claim of ineffective assistance and show that a conviction “resulted from a breakdown in the adversary process that renders the result unreliable,” a defendant must satisfy both prongs of the *Strickland* test,⁵³ though there are some circumstances under which prejudice may be assumed and need not be established by the defendant.⁵⁴

Under the first prong, the defendant must show that counsel’s performance was deficient by falling “below an objective standard of reasonableness.”⁵⁵ The objective standard is to be based on “reasonableness

⁴⁹ *Id.* at 686. In *Strickland*, the defendant pleaded guilty to three capital murders in addition to kidnapping charges in a Florida trial court. *Id.* at 671–72. Prior to pleading, the defendant confessed to two of the murders. *Id.* at 672. The defendant told his attorney that he did not have a significant criminal record and that he was under extreme emotional stress at the time of the murders, but the attorney decided not to present any mitigating evidence at the capital sentencing hearing. *Id.* at 672–73. The trial judge found several aggravating circumstances and no significant mitigating factors. *Id.* at 675. He sentenced the defendant to death on each count of murder and to prison terms for the other crimes. *Id.*

Upon review, the attorney stated that his decision not to investigate the defendant’s background, obtain a psychiatric evaluation, or present character witnesses was strategic and intended to prevent the state from cross-examining the defendant or presenting its own psychiatric evidence. *Id.* at 673. After granting certiorari and defining the two-prong test for ineffective assistance, the Supreme Court held that the defendant failed to satisfy either prong of the test. *Id.* at 700. The Court stated that the sentencing proceeding was not “fundamentally unfair” and reversed the court of appeals, concluding that the district court properly denied habeas corpus. *Id.* at 700–01.

⁵⁰ *Id.* at 686 (“In giving meaning to the requirement [of representation by counsel], however, we must take its purpose—to ensure a fair trial—as the guide.”).

⁵¹ *Id.* at 687; see also TOMKOVICZ, *supra* note 14, at 167 (“The *Strickland* majority believed that the ‘reasonable probability’ standard strikes just the right balance between the accused’s interests in effective assistance and a fair trial and the state’s interest in finality. Under that standard, a constitutional violation is found when, but only when, the likelihood that a defendant did not enjoy the substantive protection guaranteed by the Sixth Amendment is too high to be ignored.”).

⁵² *Strickland*, 466 U.S. at 689.

⁵³ *Id.* at 687; see also *United States v. Cronin*, 466 U.S. 648, 657–62 (1984). Generally, a court may dispose of an ineffectiveness claim by evaluating either the prejudice prong or performance prong first. *Strickland*, 466 U.S. at 697.

⁵⁴ Prejudice is assumed if there was a: (1) complete denial of counsel during a critical stage of trial, (2) complete failure to subject the prosecution’s case to meaningful adversarial testing, (3) situation in which not even a fully competent attorney could provide effective assistance, or (4) situation in which counsel actively represented conflicting interests. *Cronin*, 466 U.S. at 659, 661 & n.28.

⁵⁵ *Strickland*, 466 U.S. at 688.

under prevailing professional norms.”⁵⁶ Additionally, because judicial scrutiny of counsel’s performance is intended to be “highly deferential,” the defendant must overcome a presumption that counsel’s conduct may have been a sound strategy decision when assessed from counsel’s perspective at the time of trial.⁵⁷ For example, in *Strickland*, at the sentencing hearing, defendant’s counsel argued that extreme emotional distress was a mitigating circumstance and relied on the defendant’s acceptance of responsibility for his crimes rather than on alternative approaches.⁵⁸ The Court found that counsel’s decisions were strategy choices “well within the range of professionally reasonable judgments.”⁵⁹

The second prong of *Strickland* requires the defendant to affirmatively show that he was prejudiced by counsel’s deficient performance.⁶⁰ Compared to the theoretically objective first prong, the second prong is more subjective and requires that a defendant convince the court “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”⁶¹ In determining whether prejudice exists, the court must consider the “totality of the evidence before the judge or jury.”⁶²

In *Strickland*, the Court described the relevant question as “whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and

⁵⁶ *Id.* The Court found that “[m]ore specific guidelines [were] not appropriate” because the Sixth Amendment relies on the “legal profession’s maintenance of standards sufficient to justify the law’s presumption that counsel will fulfill the role in the adversary process that the Amendment envisions.” *Id.*

⁵⁷ *Id.* at 689.

⁵⁸ For a discussion of the sentencing hearing, see *supra* note 49.

⁵⁹ *Strickland*, 466 U.S. at 699.

⁶⁰ *Id.* at 693. Prior to *Strickland* and *Cronic*, the Court had never required a convicted defendant to establish actual prejudice on the outcome of the proceeding at issue to make a Sixth Amendment claim. Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 89 (1986).

⁶¹ *Strickland*, 466 U.S. at 694; see also TOMKOVICZ, *supra* note 14, at 160 (“The defendant must demonstrate more than just ‘some conceivable effect on the outcome of the proceeding’ but does not have to establish ‘that counsel’s deficient conduct more likely than not altered the outcome in the case’; that is, he does not have to show a probability of harm greater than 50 percent. The requisite likelihood of adverse effect falls between these two levels.” (quoting *Strickland*, 466 U.S. at 693)).

⁶² *Strickland*, 466 U.S. at 695. The Court suggested that whether or not a particular error is prejudicial depends in part on the relative strength of the record. See *id.* at 695–96. For example, in a case where the record strongly supports the verdict, a particular error may have a trivial effect, but in another case where the record only weakly supports the outcome of the proceedings, the same error could be prejudicial. *Id.* For examples of egregious conduct found to be non-prejudicial, see Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 455–63 (1996) (describing cases where the *Strickland* test was not satisfied despite the fact that attorneys were intoxicated, sleeping, mentally ill, or abusing drugs while at trial).

mitigating circumstances did not warrant death.”⁶³ Subsequently, the Court found that due to the overwhelming aggravating factors, no reasonable probability existed that the presence of the omitted mitigating evidence would have changed the sentence imposed on the defendant.⁶⁴

Not all of the Justices agreed with the development of the *Strickland* approach. Justice Marshall disagreed with the majority on nearly every point of the *Strickland* decision. He pointed out that the only justification given by the majority for the adoption of a highly deferential standard was that a more receptive standard would encourage too many defendants to file ineffective assistance claims.⁶⁵ In relation to the first prong, he objected to the “malleable” nature of the test because it told the lower courts and defense attorneys “almost nothing” about what would constitute adequate representation.⁶⁶

Justice Marshall also opposed the prejudice requirement for two reasons.⁶⁷ He disagreed with the majority’s interpretation of the Sixth Amendment, arguing that the Constitution requires “fundamentally fair procedures,” including a fair trial and counsel who “vigorously” advocates for the defendant’s interests.⁶⁸ He did not believe that counsel’s performance was irrelevant in instances where the correct result was achieved at trial.⁶⁹ Marshall suggested that due process is violated whenever a defendant does not receive meaningful assistance of counsel in an adversarial proceeding.⁷⁰

⁶³ *Strickland*, 466 U.S. at 695.

⁶⁴ *Id.* at 700.

⁶⁵ *Id.* at 713 (Marshall, J., dissenting) (“I have more confidence than the majority in the ability of state and federal courts expeditiously to dispose of meritless arguments . . .”); *see also id.* at 690 (“The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel’s unsuccessful defense.”).

⁶⁶ *Id.* at 707–08 (Marshall, J., dissenting); *see also* United States v. Cronin, 466 U.S. 648, 663 (1984) (rejecting the Tenth Circuit’s use of five factors to provide a basis for determining whether the defendant was provided with competent counsel). Over time, criticism of the looseness of the *Strickland* test has been somewhat abated as courts have increasingly “tightened” counsel’s duty to investigate by looking to American Bar Association Standards for Criminal Justice as “an evaluative tool rather than mere ‘guidelines’” to analyze defense counsel’s performance. Robert R. Rigg, *The T-Rex Without Teeth: Evolving Strickland v. Washington and The Test for Ineffective Assistance of Counsel*, 35 PEPP. L. REV 77, 104 (2007).

⁶⁷ *Strickland*, 466 U.S. at 710 (Marshall, J., dissenting).

⁶⁸ *Id.* at 711.

⁶⁹ *Id.* (disagreeing with the majority and characterizing their viewpoint as standing for the principle “that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted” and that “the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney”).

⁷⁰ *Id.*

Additionally, Justice Marshall thought it “senseless” to require a defendant whose lawyer was shown to be incompetent to carry the burden of demonstrating prejudice.⁷¹ He argued that “[t]he difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.”⁷² He suggested that the *Strickland* test should instead focus on whether counsel departed from “constitutionally prescribed standards” rather than requiring prejudice.⁷³ In such cases, defendants would be entitled to a new trial regardless of whether they “suffered demonstrable prejudice.”⁷⁴

B. Extension of the Strickland Test to Guilty Pleas

About eighteen months after *Strickland*, the Supreme Court extended the two-prong approach to claims of ineffective assistance of counsel in the guilty plea context.⁷⁵ Prior to *Hill*, *McMann* provided the rule regarding the voluntariness, and therefore the validity, of a guilty plea. That decision required that attorney performance fall “within the range of competence demanded of attorneys in criminal cases.”⁷⁶ As in *Strickland*, the first prong of the test remained materially the same and required that a convicted defendant show that her attorney’s performance “fell below an objective standard of reasonableness.”⁷⁷ The Court reasoned that sentencing hearings

⁷¹ *Id.* at 710.

⁷² *Id.*; see also Berger, *supra* note 60, at 92 (“After-the-fact reconstruction of events and decisional processes is not easy; it usually requires supplementing the trial transcript at a post-trial hearing or in habeas proceedings.”).

⁷³ *Strickland*, 466 U.S. at 712 (Marshall, J., dissenting).

⁷⁴ *Id.*

⁷⁵ *Hill v. Lockhart*, 474 U.S. 52, 57 (1985) (“Although our decision in *Strickland v. Washington* dealt with a claim of ineffective assistance of counsel in a capital sentencing proceeding . . . our justifications for imposing the ‘prejudice’ requirement . . . are also relevant in the context of guilty pleas . . .”).

In *Hill*, the defendant pleaded guilty to charges of first-degree murder and theft of property after his attorney negotiated a guilty plea. *Id.* at 53–54. Under the plea agreement, the state agreed to recommend concurrent sentences of thirty-five years for the murder and ten years for the theft. *Id.* at 54. Later, the defendant alleged that his guilty plea was involuntary because his attorney provided ineffective assistance of counsel by misinforming him of when he would be eligible for parole. *Id.* at 54–55. Because the defendant had a prior conviction, he was not eligible for parole until he served half of his sentence, rather than the one-third that his attorney advised him of prior to entering his plea. *Id.*

In his petition for habeas corpus, the defendant did not allege that he would have gone to trial had his attorney correctly advised him of the collateral consequences of his plea. *Id.* at 60. Additionally, the defendant did not supply any “special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty.” *Id.* The Court affirmed the lower court’s dismissal of his habeas petition without a hearing. *Id.*

⁷⁶ See *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

⁷⁷ See *Hill*, 474 U.S. at 57 (citing *McMann*, 397 U.S. at 687–88) (internal quotation mark omitted); see also Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 733 (2002) (“The *Hill v. Lockhart* decision,

or trials were similar enough to the plea process to apply the same standard.⁷⁸

The Court also extended the application of the prejudice prong to the context of guilty pleas, determining that it served “the fundamental interest in the finality of guilty pleas.”⁷⁹ The *McMann* prejudice requirement is slightly different from its *Strickland* counterpart: it focuses on whether “counsel’s constitutionally ineffective performance affected the outcome of the plea process.”⁸⁰ To satisfy the requirement, “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.”⁸¹ The Court suggested that in many cases, this analysis would look nearly identical to the *Strickland* analysis and would hinge on whether counsel would have still recommended the plea.⁸² In *Hill*, the Court held that the defendant failed to allege the type of prejudice necessary to satisfy the *Strickland* test because he did not allege that “he would have pleaded not guilty and insisted on going to trial.”⁸³

Although Justice White and Justice Stevens concurred in the judgment, their agreement relied on a factual point: the defendant did not establish that his attorney knew of his prior criminal record before determining when the defendant would become eligible for parole.⁸⁴ The distinction between the majority opinion and Justice White’s concurrence, joined by Justice Stevens, turned on whether the defendant expected a particular sentence based on his counsel’s estimate or whether his counsel’s advice was a

however, contains no suggestion that counsel’s duty is less in the context of a plea. Earlier Supreme Court decisions recognize that a defendant’s decision to plead guilty is based on at least some of the same kind of evaluation and investigation that is necessary to go to trial.” (footnote omitted)).

⁷⁸ *Hill*, 474 U.S. at 58.

⁷⁹ *Id.*; see also *United States v. Timmreck*, 441 U.S. 780, 784 (1979) (detailing this principle more thoroughly and stating that “[e]very inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas” (quoting *United States v. Smith*, 440 F.2d 521, 528–29 (7th Cir. 1971) (Stevens, J., dissenting)) (internal quotation mark omitted)).

⁸⁰ *Hill*, 474 U.S. at 59.

⁸¹ *Id.*

⁸² *Id.* The Court pointed out that this analysis requires a court to predict how the outcome of the proceeding might have changed if a trial was held. *Id.* As in *Strickland*, evaluations of the outcome of this hypothetical trial are to be as objective as possible. *Id.* at 59–60.

⁸³ *Id.* at 60; see also TOMKOVICZ, *supra* note 14, at 169 (“A defendant must demonstrate a cognizable likelihood that he would have chosen to stand trial but apparently does not have to establish a reasonable probability that the result of the trial would have been different from the result of the guilty plea.”). See *infra* Part IV.B for further discussion of this interpretation.

⁸⁴ *Hill*, 474 U.S. at 61–62 (Stevens & White, JJ., concurring). The plea statement, signed by the defendant, stated that he did not have any prior convictions; however, the defendant had one prior conviction. *Id.* at 61.

misstatement of the law.⁸⁵ The majority viewed counsel's advice as an estimate because the negotiated plea agreement did not bind the trial court, which had the freedom to sentence the defendant to another term if it saw fit.⁸⁶ Further, determinative parole eligibility was not included in the plea agreement.⁸⁷ The extension of the *Strickland* test to the plea setting creates new challenges for defendants who must now satisfy the *Strickland* prejudice requirements to establish a claim of ineffective assistance of counsel.

III. DEVELOPMENT OF THE ILLINOIS STANDARD FOR INEFFECTIVENESS OF COUNSEL

This Part examines Illinois's adoption and development of the *Strickland–Hill*⁸⁸ standard in the guilty plea context. Section A focuses on the origin of additional requirements incorporated into the *Strickland–Hill* standard that are applied in Illinois. Section B details the Illinois standard for ineffective assistance in the guilty plea context, which requires a defendant to claim either innocence or a plausible defense that could be raised at trial to satisfy the prejudice prong.

A. Development of the “Additional Pieces” of the Illinois Standard

Although Illinois courts adopted the standard for ineffective assistance in the guilty plea context from *Hill*, they have also incorporated several additional requirements that stem from the appellate courts. The first additional piece is from the Seventh Circuit's decision in *Key v. United States*,⁸⁹ in which the court evaluated a post-*Hill* claim of ineffective

⁸⁵ *Id.* at 62 (“The failure of an attorney to inform his client of the relevant law . . . cannot be said to fall within ‘the wide range of professionally competent assistance’ demanded by the Sixth Amendment.” (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984)).

⁸⁶ *Id.* at 60 (“In the present case the claimed error of counsel is erroneous advice as to eligibility for parole under the sentence agreed to in the plea bargain.”).

⁸⁷ See Steve Clark & Alice Ann Byrns, *Hill v. Lockhart: Ineffective Assistance of Counsel: The State's Position*, 23 AM. CRIM. L. REV. 83, 91 (1985) (“[A]dvice should not be held as rendering a plea involuntary where the state court record presumptively establishes that the advice was not part of the plea bargain and did not induce the plea. Likewise important, the recommended sentence was not binding on the trial court; thus, the issue of parole eligibility amounts to no more than a sentence estimate by counsel on which the defendant based his erroneous expectation and hope for leniency. The State is aware of no precedent which indicates that all terms and conditions discussed in the plea bargaining process, whether between defense counsel and his or her client or even with the state's attorney, can be held to have induced a plea of guilty.” (footnotes omitted)).

⁸⁸ The ineffective assistance of counsel test applied in the guilty plea context is often referred to as the *Strickland* test, the *Hill* test, or by some combination of both names. For the purposes of this Comment, *Strickland–Hill* will be used to refer to the test that was initially developed in *Strickland* and was later adjusted and extended to guilty pleas in *Hill*. For a discussion of the development of this test, see *supra* Part II.

⁸⁹ 806 F.2d 133 (7th Cir. 1986).

assistance of counsel.⁹⁰ In *Key*, the convicted defendant attempted to meet the prejudice prong required by *Strickland–Hill* by stating that but for his attorney’s erroneous promise that “he would ‘be on the street in twelve months,’” he would have gone to trial.⁹¹ At trial, he contended, a jury would have been unable to convict him for “want of a corpus delicti [sic].”⁹²

In evaluating the prejudice prong, the court expressed concern over what a defendant must show to establish his claim.⁹³ The Seventh Circuit determined “that merely making bare allegations of alleged promises is insufficient to show actual prejudice” and that a defendant must supply the court with facts which indicate “the result of the proceeding would have been different.”⁹⁴ “[M]erely alleg[ing] a promise by counsel,” as the prisoner had in his habeas petition, failed to satisfy the standard laid out by the court.⁹⁵ The court suggested that evidence such as the terms of the promise made by counsel, when and where the promise was made, and the identities of any witnesses to the promise, which would allow the court to “meaningfully assess” the defendant’s claim, would be sufficient to satisfy the defendant’s evidentiary burden.⁹⁶

Building on the requirements articulated in *Key*, the Seventh Circuit clarified that a defendant’s claim that he would not have entered into a particular plea agreement or sentence if he had been better advised by counsel does not satisfy the prejudice requirement without more.⁹⁷ It held that prejudice is not established when a defendant “only suggests that he

⁹⁰ See *id.* at 138. *Key*, along with six other defendants, was indicted on eleven tax-related charges. *Id.* at 135. Partway through trial, *Key* agreed to enter a guilty plea pursuant to a negotiated plea agreement. *Id.* He was sentenced to three years in prison and ordered to pay a \$15,000 fine. *Id.* Although he did not file a direct appeal, *Key* later filed a habeas petition claiming ineffective assistance of counsel, among other collateral attacks on the guilty plea proceeding. *Id.* The court affirmed the lower court’s dismissal of *Key*’s habeas petition without an evidentiary hearing. *Id.* at 140.

⁹¹ *Id.* at 138 n.5 (quoting Pet’r’s Br.).

⁹² *Id.* (internal quotation mark omitted). *Corpus delicti* is defined as “the body of the offense” or “the substance of the crime” and is often used to describe visible evidence of a crime. BLACK’S LAW DICTIONARY 395 (9th ed. 2009) (internal quotation marks omitted).

⁹³ *Key*, 806 F.2d at 138–39 (discussing decisions reached in other appellate courts regarding the “prejudice prong,” including the First Circuit, Fifth Circuit, Ninth Circuit, and Eleventh Circuit).

⁹⁴ *Id.* at 139.

⁹⁵ *Id.*

⁹⁶ *Id.* The court cautioned that even these specific facts may not be enough to overcome the record and warrant an evidentiary hearing. *Id.*

⁹⁷ *Gargano v. United States*, 852 F.2d 886, 891 (7th Cir. 1988) (holding that although “the petitioner admitted in a memorandum that a plea-bargain would be the most likely outcome were the case to return to the active docket,” prejudice was not established). In *Gargano*, the defendant was under indictment for ten charges related to cocaine distribution and weapons possession. *Id.* at 887. He pleaded guilty and was sentenced to a term of fourteen years in prison pursuant to a negotiated agreement. *Id.* The Seventh Circuit affirmed the lower court’s dismissal of defendant’s habeas petition, which was based on a claim of ineffective assistance of counsel. *Id.* at 891. Defendant alleged that counsel was ineffective for misstating the consequences of conviction under enhanced sentencing laws. *Id.* at 889.

should have had the opportunity to strike a harder bargain with the government”;⁹⁸ the prejudice prong requires that the defendant would have gone to trial—not simply struck a harder bargain—but for counsel’s deficient performance.⁹⁹

After *Key* added to the threshold evidentiary requirements necessary to satisfy the prejudice prong of *Strickland–Hill* as applied in Illinois and the rest of the Seventh Circuit, the First Circuit contributed a new requirement later adopted by Illinois courts. In *United States v. LaBonte*,¹⁰⁰ the First Circuit heard a consolidated appeal primarily related to the interpretation of a career offender sentencing statute but which also included a claim of ineffective assistance of counsel.¹⁰¹ The defendant alleged that his plea was entered after his trial attorney “assured him that his sentence would be no more than eighteen months, and that there was simply ‘no way’ that he would be sentenced as a career offender.”¹⁰² He was sentenced to a 262-month term of imprisonment.¹⁰³

When applying the *Strickland–Hill* prejudice prong to the defendant’s claim of ineffective assistance, the court stated that “[e]ven a generous reading of this claim leaves no doubt that [the defendant] failed adequately to allege any cognizable prejudice.”¹⁰⁴ The court characterized counsel’s statements to the defendant as an “inaccurate prediction,” and thus, “standing alone, [do] not satisfy the prejudice prong of the ineffective assistance test.”¹⁰⁵ Most importantly, the court implied that the defendant needed to raise “either a claim of innocence” or articulate “any plausible defense that he could have raised had he opted for trial” to meet his burden of proof on the second prong of *Strickland–Hill*.¹⁰⁶ Because the defendant could not establish that he suffered prejudice as a result of his attorney’s performance, the court elected not to evaluate that performance under the first prong.¹⁰⁷

⁹⁸ *Id.* at 891.

⁹⁹ *See id.*

¹⁰⁰ 70 F.3d 1396 (1st Cir. 1995), *overruled on other grounds by* 520 U.S. 751 (1997).

¹⁰¹ *Id.* at 1400, 1412–13. In *LaBonte*, one of the defendants, Stephen Dyer, pleaded guilty to a charge of conspiring to possess controlled substances with intent to distribute. *Id.* at 1403.

¹⁰² *Id.* at 1413.

¹⁰³ *Id.* at 1403.

¹⁰⁴ *Id.* at 1413.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1414. Interestingly, the *LaBonte* court adopted this standard from dicta in a D.C. Circuit Court case, *United States v. Horne*, 987 F.2d 833 (D.C. Cir. 1993). *See* 70 F.3d at 1413. In *Horne*, the court discussed the difficulty in determining what the prejudice prong of the *Strickland–Hill* test required of defendants. 987 F.2d at 835–36. The court elected to leave the question of “how much more [than a bare allegation] is required of [the defendant]” unanswered because the defendant who raised the ineffectiveness claim did not allege that he would have insisted on going to trial but for counsel’s errors, and therefore altogether failed to address the prejudice prong of the test. *Id.* at 836 (“Nothing in the

B. The Illinois Standard for Ineffective Assistance in the Context of Guilty Pleas

Illinois has adopted the *Strickland–Hill* test for determining whether a defendant received ineffective assistance of counsel when she entered a plea of guilty.¹⁰⁸ In addition to the traditional *Strickland–Hill* requirements, a defendant must satisfy additional requirements that the Illinois Supreme Court adopted from the appellate courts and incorporated into its interpretation of *Strickland–Hill*¹⁰⁹ to succeed on her claim.

In *People v. Rissley*,¹¹⁰ the Illinois Supreme Court discussed the difficulty of determining the probability that a defendant would have gone to trial. The court adopted the *Key* threshold that a bare statement is not enough to establish prejudice.¹¹¹ The court then adopted the *LaBonte* requirement that a defendant must raise a claim of innocence or a plausible defense that could have been raised at trial in order to satisfy the prejudice prong.¹¹² In evaluating the defendant's claim that the "mistaken advice" he received from counsel constituted ineffective assistance,¹¹³ the court first acknowledged that the defendant's attorney lacked experience in capital cases.¹¹⁴ Second, the court noted that the attorney's co-counsel and consulting death penalty expert thought that recommending the entry of a blind plea in a death-penalty-eligible case was ill-advised.¹¹⁵ Finally, the court recognized that that counsel admitted he that he did not know or, at a

present record suggests that Horne had (or even now has) any intention of pleading not guilty and going to trial.”).

¹⁰⁸ Illinois first adopted the *Strickland* standard in *People v. Albanese* and then applied it to an ineffective assistance claim in the guilty plea context in *People v. Huante*. See *People v. Huante*, 571 N.E.2d 736, 739 (Ill. 1991); *People v. Albanese*, 473 N.E.2d 1246, 1255–56 (Ill. 1984).

¹⁰⁹ See *supra* Part II.A.

¹¹⁰ 795 N.E.2d 174 (Ill. 2003). In *Rissley*, the defendant entered a blind plea to charges of aggravated kidnapping and murder. *Id.* at 177. The plea was entered “without negotiation and without defense counsel’s conducting an extensive investigation of potential mitigation.” *Id.* at 188. At his capital sentencing hearing, he was sentenced to death on the murder charge and fifteen years in prison on the aggravated kidnapping charge. *Id.* at 188, 207. The defendant raised several claims of ineffective assistance among some fifty-six other claims in his postconviction petition. *Id.* at 178.

The defendant alleged that his attorney, along with his co-counsel and a death penalty expert retained in the case, recommended he enter blind pleas to both charges because it would prevent him from getting the death penalty. *Id.* at 195. Finally, the defendant alleged that his attorney did not inform him that his case could be heard by a judge in a bench trial rather than a jury. *Id.* Note that while the defendant raised multiple ineffective assistance claims, only the most pertinent claim is discussed here.

¹¹¹ *Id.* at 204. For a more detailed discussion of *Key*, see *supra* Part III.A.

¹¹² *Rissley*, 795 N.E.2d at 205. For a more detailed discussion of *LaBonte*, see *supra* Part III.A.

¹¹³ *Rissley*, 795 N.E.2d at 203.

¹¹⁴ *Id.* at 196. In fact, co-counsel on the case immediately prepared and filed a motion to withdraw defendant’s plea and believed that the counsel’s sworn affidavit and the death penalty expert’s testimony would be enough to withdraw the plea. *Id.* at 196–97.

¹¹⁵ *Id.* at 197 (“[T]he death penalty expert [advised [counsel] that the guilty plea was ill-advised because by pleading guilty defendant had nothing left to bargain with . . .”).

minimum, did not discuss the possibility of a bench trial for the case-in-chief.¹¹⁶ Primarily based on counsel’s failure to realize that the defendant could proceed with a bench trial, the court “assume[d]” that counsel was deficient for purposes of the appeal.¹¹⁷

In turning to the second prong of the *Strickland–Hill* test, the court focused on the fact that the defendant “[did] not now allege that he [was] innocent, nor [did] he claim to have any plausible defense that he could have raised had he chosen a bench trial.”¹¹⁸ The court relied on defendant’s admissions during the plea proceedings to draw these conclusions.¹¹⁹ Despite counsel’s deficient performance, the court concluded that the defendant entered his plea to “gain leniency from the sentencing jury” and that the court’s “confidence in the outcome [was] not ‘undermined.’”¹²⁰ Because the defendant failed to make anything more than a bare allegation, the *Rissley* court did not have to determine when the prejudice prong *would* be satisfied. It nevertheless adopted the innocence or defense requirement from *LaBonte*.¹²¹

IV. THE ILLINOIS APPLICATION OF THE PREJUDICE PRONG OF *STRICKLAND–HILL* IS UNCONSTITUTIONAL

The Illinois application of the *Strickland–Hill* prejudice prong is unconstitutional because it only addresses the effectiveness of counsel provided to a defendant in the guilty plea context if that defendant can raise a claim of innocence or a defense to the charges against him. In this Part, section A examines the difficult threshold and heightened subjectivity of this standard. Then, section B considers whether the Supreme Court has communicated that actual innocence is not part of the ineffectiveness calculation.

A. A Steep and Subjective Barrier

The Supreme Court left it to the states and appellate courts to determine what would be sufficient to satisfy the subjective prejudice

¹¹⁶ *Id.* at 198 (“No, I didn’t think of it, I didn’t discuss it, I didn’t discuss it.” (internal quotation mark omitted)).

¹¹⁷ *Id.* at 204.

¹¹⁸ *Id.* at 205. It appears that the defendant simply entered a “bare allegation” that was described by the court as “subjective, self-serving, and . . . insufficient to satisfy the *Strickland* requirement for prejudice.” *Id.* (quoting *Turner v. Tennessee*, 858 F.2d 1201, 1206 (6th Cir. 1988) (internal quotation marks omitted), *vacated on other grounds*, 492 U.S. 902).

¹¹⁹ *Id.* For a discussion of the admissions that a defendant is required to make on the record in order to enter a guilty plea, see *supra* notes 27–28 and accompanying text.

¹²⁰ *Rissley*, 795 N.E.2d at 206. The Illinois Supreme Court affirmed the defendant’s conviction and sentence. *Id.* at 207.

¹²¹ *Id.* at 205.

requirement of the *Strickland–Hill* prejudice prong.¹²² Illinois has focused the prejudice prong on requiring that a defendant show that he could be found innocent or acquitted at trial.¹²³ This standard has two fundamental flaws: first, this burden is nearly insurmountable for defendants in the guilty plea context. Second, the right to counsel has never been conditioned upon guilt or innocence.

The record in a plea hearing consists mostly of the defendant entering her plea,¹²⁴ and leaves little else for a court to evaluate on appeal beyond any available affidavits from the defendant and counsel.¹²⁵ This leaves defendants with little ammunition to meet a heavy burden of proof; in many cases, courts simply weigh the defendant's accusations of ineffective assistance against his attorney's rebuttal.¹²⁶

For example, when applying the Illinois prejudice standard in *People v. Hall*,¹²⁷ the court considered the plea hearing transcript, a copy of the charging instrument, and the defendant's affidavit in support of his claim that he was misadvised about the possibility of a defense to the charge of

¹²² See, e.g., *Key v. United States*, 806 F.2d 133, 138 (7th Cir. 1986) (expressing concern over how to interpret the defendant's burden under the prejudice prong); *Rissley*, 795 N.E.2d at 204 (“[I]t is by no means obvious how a court is to determine the probability that a defendant would have gone to trial.”).

¹²³ See the discussion of *Rissley*, *supra* Part III.B, where the court determined that the defendant did not achieve the requisite prejudice after the performance prong was satisfied because the court focused on the defendant's lack of a credible claim of innocence or defense.

¹²⁴ See *supra* notes 33–34 and accompanying text (discussing admissions that are required to be on the record when a defendant's plea is entered); see also *Preliminary Proceedings: Guilty Pleas*, *supra* note 9, at 414 (“[T]he court reporter must keep a verbatim record of the plea proceedings that take place in court, including the court's advice to the defendant, the voluntariness inquiry, the factual basis inquiry, and the details of the plea agreement.”).

¹²⁵ See Richard Klein, *The Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform*, 29 B.C. L. REV. 531, 551–52 (1988) (“Given the sparseness of the record when a plea is taken, proving prejudice to courts that desire finality will be most difficult. . . . It is, however, virtually impossible for a state appeals court, relying on the plea record, to evaluate ‘likely success.’” (footnote omitted)); see also Berger, *supra* note 60, at 110 (“As Judge Cudahy of the Court of Appeals for the Seventh Circuit correctly noted, assessing prejudice in terms of a putative outcome at trial is ‘unworkable . . . because the reviewing court has no trial record to review and consequently no way of evaluating the effect of counsel's errors in relation to the case as actually presented by the prosecution.’” (quoting *Evans v. Meyer*, 742 F.2d 371, 380 (7th Cir. 1984) (Cudahy, J., dissenting))).

¹²⁶ Reviewing a sparse, “cold” record presents additional challenges for appellate courts that must distinguish opinion from promise, misstatement from misrepresentation, and strategy decision from neglect. See *Strickland v. Washington*, 466 U.S. 668, 710 (1984) (Marshall, J., dissenting) (“On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer.”).

¹²⁷ 841 N.E.2d 913 (Ill. 2005). The defendant filed a postconviction petition, seeking withdrawal of his guilty plea and claiming that the plea was involuntary because he received ineffective assistance of counsel. *Id.* at 915. The defendant entered a negotiated plea to aggravated kidnapping based on his attorney's advice that he did not have a valid defense to the charges. *Id.* at 916–17. He received a recommended sentence of six years in prison. *Id.* at 916.

aggravated kidnapping, inducing him to enter his plea.¹²⁸ In *Hall*, the defendant was charged with aggravated kidnapping, theft of property, and aggravated and unlawful refusal of an order to stop after he stole a car that had an infant sleeping in a car seat inside of it.¹²⁹ The court read the elements of aggravated kidnapping aloud at the time the plea was entered, which included knowledge of the child's presence.¹³⁰ The trial and appellate courts determined that because the defendant was informed that the prosecution would be required to establish the element of knowledge to convict him of aggravated kidnapping before the defendant entered his plea, erroneous advice provided by defendant's trial counsel did not prejudice the defendant.¹³¹ As a result, the trial and appellate courts held the defendant's claim of prejudice insufficient.¹³²

On review, the Illinois Supreme Court explained that "[t]hese allegations indicate counsel's legal advice was rendered within the bounds of a private consultation between defendant and his attorney" and pointed out that the discussions surrounding a defendant's decision whether to enter a guilty plea or go to trial "generally occur in private to protect the confidentiality of privileged information."¹³³ The information available to the court in this case was comparable to that which was available in *Rissley*.¹³⁴

Although the court in each case determined that the defendant established the first prong of the *Strickland–Hill* test,¹³⁵ the results diverged during the prejudice prong analysis. As discussed above, the *Rissley* court determined that the defendant did not make a sufficient showing that the result at trial would be different.¹³⁶ In making this determination, the court

¹²⁸ *Id.* at 916–17. The defendant alleged that he only intended to steal the car because he needed a ride home and that he repeatedly told his lawyer that he did not realize there was an infant sleeping in the car when he took it. *Id.* at 917. Despite the fact that "knowledge" is an element of aggravated kidnapping, *id.* at 918, the defendant's lawyer "repeatedly informed defendant that his lack of awareness of the child was not a defense to the charge," *id.* at 917.

¹²⁹ *Id.* at 916–17.

¹³⁰ *Id.* at 918.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 919 ("Given these circumstances, the only affidavit defendant could have furnished to support his allegations, other than his own, was that of his attorney. . . . [T]he 'difficulty or impossibility of obtaining such an affidavit is self-apparent.'" (quoting *People v. Williams*, 264 N.E.2d 697, 698 (Ill. 1970))).

¹³⁴ The defendant filed an affidavit in support of his habeas petition which detailed discussions he had with counsel and co-counsel. *People v. Rissley*, 795 N.E.2d 174, 195 (Ill. 2003). The court also examined the transcript of the plea proceedings. *See id.* at 186–88. Additionally, the attorney's co-counsel and a death penalty expert testified at a hearing in support of counsel's ineffective assistance. *Id.* at 196–98.

¹³⁵ *Hall*, 841 N.E.2d at 920 ("[D]efendant's petition establishes a substantial showing that his attorney's advice was objectively unreasonable.").

¹³⁶ *Rissley*, 795 N.E.2d at 205.

attacked the defendant's credibility, finding it difficult to believe that counsel's deficient performance induced his plea.¹³⁷ In support of its decision, the court raised the fact that the defendant made admissions on the record during the plea hearing and stated that defendant's motivation was "leniency from the sentencing jury."¹³⁸

Few reasonable explanations exist for entering a blind guilty plea in a death-penalty-eligible case, so it is surprising that the court did not believe that counsel's deficient advice regarding the undesirability of the jury hearing the case twice¹³⁹ affected the defendant's decision. Additionally, based on the particular facts of the case, going to trial despite a probable finding of guilt was preferable to pleading guilty because the plea eliminated some of the defendant's claims, such as a jurisdictional claim that co-counsel and the death penalty expert thought had promise on appeal.¹⁴⁰ By entering a blind plea, the defendant guaranteed that he would be found guilty while leaving open the possibility that he would be sentenced to death.¹⁴¹

On the other hand, in *Hall*, the court concluded with little discussion both that the prejudice prong was satisfied and that there was a reasonable probability that defendant would have proceeded to trial absent counsel's deficient advice.¹⁴² The court held this despite the state's claim that it "strain[ed] belief" to argue that the defendant did not know the child was in the car.¹⁴³ The court did not think that the trial court's admonishments "negate[d] the effect of [the] erroneous advice from defense counsel",¹⁴⁴

¹³⁷ *Id.* at 206.

¹³⁸ *Id.* For a discussion of the requirement that a defendant make admissions on the record when a guilty plea is entered, see *supra* notes 27–28 and accompanying text.

¹³⁹ The defendant contended that he was told by his attorney that he would not get the death penalty if he waived the jury trial. *Rissley*, 795 N.E.2d at 195. His counsel corroborated these allegations in stating that he did not inform the defendant that he was entitled to a bench trial rather than a jury trial. *Id.* at 198. His attorney testified that he told the defendant that "it would be better that [the jurors] don't hear all this twice, it's better they hear it once." *Id.*

¹⁴⁰ Defendant's counsel was aware that the state was seeking the death penalty, but as indicated by the term "blind plea," he had no assurances as to what sentence the defendant would receive during sentencing. *Id.* at 185 ("[T]he prosecutor advised both defendant and the circuit court of the State's intention to seek the death penalty in the case."). A death penalty expert told counsel that "the [blind] guilty plea was ill-advised because by pleading guilty defendant had nothing left to bargain with and that the plea waived arguments such as jurisdiction." *Id.* at 197.

¹⁴¹ Although the defendant was sentenced to death, his sentence was later commuted to natural life by then-Governor George Ryan. *Id.* at 177. In fact, after the commutation, the defendant entered a motion to dismiss his postconviction petition. *Id.* The court denied his motion, resulting in this opinion. *Id.*

¹⁴² *People v. Hall*, 841 N.E.2d 913, 921 (Ill. 2005).

¹⁴³ *Id.* (internal quotation marks omitted). Here, the court described credibility arguments as "misplaced" because such judgments are not made at the second stage of postconviction proceedings. *Id.*

¹⁴⁴ *Id.*; see also *id.* at 923 ("The admonition ensured defendant was aware of the language of the charge, but it did not add to his understanding of the knowledge element of the offense.").

rather, it took the repetitive nature of the erroneous advice into consideration.¹⁴⁵

It is difficult to distinguish the facts of *Rissley* from those of *Hall*. However, one distinguishing factor between the two cases is that at the plea hearing in *Hall*, the defendant entered a guilty plea but did not admit that he was guilty of the offense.¹⁴⁶ Additionally, the defendant received the negotiated sentence of six years.¹⁴⁷

In *Rissley* and *Hall*, the proceedings focused primarily on whether the defendant could establish a viable innocence claim or defense rather than on counsel's performance or attempts to ensure that proceedings were fundamentally fair.¹⁴⁸ The defendants received substandard advice from counsel and argued that they would have made different decisions had their attorneys performed adequately.¹⁴⁹ However, in the capital case, such allegations were not enough to meet the bar set by the state's adaptation of the prejudice prong.¹⁵⁰ Providing defendants with a fundamentally fair process was one of the Supreme Court's underlying goals when it developed the Strickland test.¹⁵¹

Innocence is not explicitly required by *Strickland–Hill* or the Sixth Amendment. Only allowing a defendant to challenge counsel's performance if he can also assert a claim of innocence is unfair¹⁵² and highly subjective. For these reasons, the Illinois standard is unconstitutional.¹⁵³

¹⁴⁵ *Id.* at 923–24.

¹⁴⁶ *Id.* at 916.

¹⁴⁷ *Id.*

¹⁴⁸ *See id.* at 921 (concluding that the defendant's allegations supported a claim of innocence of aggravated kidnapping); *People v. Rissley*, 795 N.E.2d 174, 205 (Ill. 2003) (discussing the defendant's admission of guilt and lack of a plausible defense in finding that the defendant was not prejudiced by counsel's performance).

¹⁴⁹ *See Rissley*, 795 N.E.2d at 195; *Hall*, 841 N.E.2d at 917.

¹⁵⁰ *Rissley*, 795 N.E.2d at 205.

¹⁵¹ For a discussion of the Court's interests in developing the *Strickland v. Washington* test, see *supra* Part II.A.

¹⁵² *See Klein, supra* note 125, at 552 (“The requirement that in order for a defendant to obtain relief from a plea in which he was not afforded the effective assistance of counsel he must show that he would have gone to trial and perhaps have been acquitted, overlooks the many serious ways a defendant suffers from inadequate counsel.”).

¹⁵³ In *Hill*, when the Supreme Court adopted the *Strickland* prejudice requirement it acknowledged that under some circumstances, such as when the “alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence,” it may be appropriate to consider whether such investigation would have changed the outcome of the trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). However, the Court declined to determine what was required to satisfy the prejudice prong when counsel was ineffective for other conduct, such as providing erroneous advice, beyond whether “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.* at 57, 60 (quoting *McMann v. Richardson*, 397 U.S. 759 (1970) (internal quotation mark omitted)). In the case of erroneous advice, some courts require only that a defendant show that he would have proceeded to trial rather than pleaded guilty. Illinois courts have interpreted the “outcome” at issue

B. Indications that Innocence Is Not Required

Although not addressing the issue directly, the Supreme Court's decision in *Kimmelman v. Morrison*¹⁵⁴ provides some insight into the prejudice prong of *Strickland*.¹⁵⁵ The majority stated that the Court had "never intimated that the right to counsel is conditioned upon actual innocence" because "[t]he constitutional rights of criminal defendants are granted to the innocent and the guilty alike."¹⁵⁶

The Court further explained that the guarantee of effective assistance does not belong "solely to the innocent" or apply only when proceedings relate to the determination of guilt or innocence.¹⁵⁷ On remand, the framing of the issue implied that the defendant could establish the prejudice prong if she showed that her Fourth Amendment claim had merit and "that if the evidence had been excluded, there was a reasonable probability that the outcome of the trial would have been different."¹⁵⁸ Justice Powell and Justice Rehnquist concurred in the opinion and raised the objection that, if the reviewing court determined that the evidence prejudiced the defendant, it would render the "verdict[] less fair."¹⁵⁹

to be whether the defendant would have been acquitted at trial, rather than whether the defendant would have pleaded guilty or gone to trial in situations where the defendant pleaded on the basis of counsel's erroneous advice. See *Rissley*, 795 N.E.2d at 204–05 (upholding the defendant's blind plea entered upon erroneous advice from counsel that the defendant would not receive the death penalty if he pleaded guilty; the defendant received the death penalty).

¹⁵⁴ 477 U.S. 365 (1986). In *Kimmelman*, an attorney failed to make a crucial motion to exclude from evidence during the defendant's bench trial a bed sheet that was obtained during an illegal search. *Id.* at 368–69. Counsel claimed that he was unaware of the seizure; however, one month before trial, the prosecutor gave the defense a copy of a lab report detailing the stains and hairs found on the sheets. *Id.* at 369. The evidence was entered at trial and the defendant was subsequently convicted of rape. *Id.* at 370–71. The defendant filed an unsuccessful direct appeal and an unsuccessful postconviction petition. *Id.* at 371.

The Supreme Court granted certiorari to review the defendant's habeas claim. *Id.* at 373. The primary issue on review was whether restrictions on the review of Fourth Amendment claims in habeas petitions should be extended to Sixth Amendment claims of ineffective assistance of counsel. *Id.* at 368.

¹⁵⁵ Although this case relates to ineffective assistance of counsel in the trial context rather than the guilty plea context, the similarity between the *Strickland* test and *Strickland-Hill* test suggests that the Court's view of whether or not innocence is required to satisfy the prejudice prong would apply in both contexts.

¹⁵⁶ *Id.* at 380.

¹⁵⁷ *Id.*

¹⁵⁸ TOMKOVICZ, *supra* note 14, at 163; see also *Kimmelman*, 477 U.S. at 389 ("The question before the federal courts is whether a reasonable probability exists that the trial judge would have had a reasonable doubt concerning respondent's guilt if the sheet and related testimony had been excluded.").

¹⁵⁹ *Kimmelman*, 477 U.S. at 396 (Powell & Rehnquist, JJ., concurring). In some ways, this portion of the concurrence illustrates a split in opinion over the function of the Sixth Amendment guarantee to effective assistance. Like the *Strickland* majority, Justice Powell and Justice Rehnquist seemed to view the purpose of *Strickland* and its progeny as ensuring that verdicts are rendered fairly. *Id.* at 396 ("Indeed, it has long been clear that exclusion of illegally seized but wholly reliable evidence renders

Illinois should focus its application of the *Strickland–Hill* prejudice prong on the “fundamental fairness” of the proceedings and discard the unconstitutional actual innocence requirement. This change would center on whether a defendant received effective counsel rather than whether he would likely succeed at trial.

One way to create a constitutional standard is to relate the evidentiary burden of the prejudice requirement to the type of ineffectiveness at issue. In some instances, such as those in which a defendant claims that counsel’s failure to investigate was prejudicial, it may be reasonable to consider the probable effect of that evidence at trial. However, when counsel’s ineffective performance is manifested through inaccurate statements of the law or potential consequences facing a defendant, a determination of whether the information induced the defendant’s plea seems more appropriate. This determination is especially appropriate since a defendant must be adequately informed in order to make a voluntary and intelligent decision to plead guilty.¹⁶⁰

V. RECONSIDERING THE APPLICATION OF *STRICKLAND–HILL* TO GUILTY PLEAS

From its inception, the *Strickland–Hill* standard has been difficult to administer in the context of guilty pleas. Commentators,¹⁶¹ the lower appellate courts,¹⁶² and state courts¹⁶³ have struggled to define precisely what a defendant must establish in order to satisfy the prejudice prong of the test. It is worth considering whether the *Strickland–Hill* test could be improved, or if adopting an entirely new standard designed with the

verdicts less fair and just, because it ‘deflects the truthfinding process and often frees the guilty.’” (quoting *Stone v. Powell*, 428 U.S. 465, 490 (1976))).

On the other hand, Justice Marshall thought that the Court’s focus was misplaced in *Strickland* and that grossly incompetent assistance on its own violated the Sixth Amendment because of the procedural unfairness that defendants with inept counsel suffer. See *Strickland v. Washington*, 466 U.S. 668, 707, 711 (1984) (Marshall, J., dissenting). Justice Marshall disagreed with the *Strickland* majority’s analysis and with its adoption and formulation of the prejudice element. See *id.*; Klein, *supra* note 125, at 550 (“The primary objective of our criminal justice system must be justice, not finality and judicial economy. It does not seem appropriate to tell the defendant who received incorrect information from an attorney . . . that he has no recourse because ‘of the fundamental interest in the finality of guilty pleas.’” (quoting *Hill v. Lockhart*, 474 U.S. 52, 58 (1985))). Klein also notes that twenty years earlier, the Court emphasized the rights of the individual over a need for finality, stating that “conventional notions of finality . . . cannot be permitted to defeat . . . constitutional rights of personal liberty.” *Id.* at 550 n.136 (quoting *Fay v. Noia*, 372 U.S. 391, 424 (1963)) (internal quotation marks omitted).

¹⁶⁰ For further discussion of alternative approaches, see *infra* Part V.B.

¹⁶¹ See, e.g., TOMKOVICZ, *supra* note 14, at 160–61 (discussing an interpretation of the *Strickland–Hill* prejudice prong that does not require the defendant to establish innocence).

¹⁶² For a discussion of the application of the *Strickland–Hill* prejudice prong by appellate courts, see *supra* note 93.

¹⁶³ See, e.g., *supra* Part IV.A for a discussion of the application of the *Strickland–Hill* prejudice prong by Illinois courts.

realities of the plea process in mind would benefit both defendants and the courts. Section A of this Part will consider some reasons for change, section B will propose alternative standards, and section C will discuss concerns with changing the *Strickland–Hill* standard.

A. System-Legitimacy Concerns

The public's perception of procedural justice—whether the criminal justice system treats defendants fairly and respectfully regardless of the substantive outcome reached—determines the public's willingness to engage in and comply with the system.¹⁶⁴ The guilty plea process presents competing concerns relating to the legitimacy of the system. First, finality of guilty pleas is essential to maintaining confidence in the integrity of the procedure.¹⁶⁵ Additionally, finality ensures that the judicial workload is not unnecessarily increased and that the “orderly administration of justice” is not unduly delayed.¹⁶⁶ The destabilization of guilty pleas presents a special concern because of the sheer volume of criminal convictions that results from pleas.¹⁶⁷ With these considerations in mind, it is understandable that courts are concerned with protecting convictions obtained through guilty pleas against challenges from defendants who simply want “the opportunity to strike a harder bargain with the government.”¹⁶⁸ The *Hill* Court explicitly discussed these concerns when it adopted the *Strickland* prejudice prong for application in the guilty plea context.¹⁶⁹

However, if the prejudice standard is set at a level at which it is difficult for even those defendants with valid claims to meet the evidentiary burden, then all guilty pleas, including those that result from prejudicial and ineffective counsel, will be insulated from challenge.¹⁷⁰ One particular system-legitimacy concern in the guilty plea context is how ineffective assistance affects disparate groups. Indigent defendants account for more

¹⁶⁴ See generally E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 76–81 (1988) (analyzing studies on procedural justice and discussing how procedural justice affects compliance with laws).

¹⁶⁵ See *United States v. Timmreck*, 441 U.S. 780, 784 (1979).

¹⁶⁶ *Id.* (quoting *United States v. Smith*, 440 F.2d 521, 528–29 (7th Cir. 1971) (Stevens, J., dissenting)).

¹⁶⁷ See *supra* Part I.A for a discussion of the prevalence of guilty pleas.

¹⁶⁸ *Gargano v. United States*, 852 F.2d 886, 891 (7th Cir. 1988).

¹⁶⁹ See *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (“[R]equiring a showing of ‘prejudice’ from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel will serve the fundamental interest in the finality of guilty pleas . . .”).

¹⁷⁰ See, e.g., Martin C. Calhoun, Note, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 414, app. at 1 (1988) (noting that from the time of the *Strickland* decision until the time of the Note, (1) the Supreme Court rejected all of the ineffectiveness claims that it squarely addressed and (2) that a survey of circuit court ineffectiveness cases showed that only 30 of 702 claims, or 4.27%, were successful).

than 80% of the individuals who are criminally prosecuted in state courts.¹⁷¹ Approximately 90% of indigent defendants plead guilty,¹⁷² making them disproportionately more likely to suffer injustice as a result of the plea process. These defendants are typically represented by public defenders who practice under crushing caseloads and scarce resources.¹⁷³ As a result, in many cases defendants plead guilty before having had meaningful contact with a public defender.¹⁷⁴ Worse still, some public defenders are “ill-informed about their clients’ cases and circumstances before advising them to take pleas offered by prosecutors at arraignment.”¹⁷⁵ By making pleas difficult to challenge, the current prejudice standard perpetuates this system. If a change in the applicable standard opened an avenue for postconviction relief, the standard of representation at the trial level would presumably improve.¹⁷⁶ The current standard has been “universally criticized as far less demanding than the ethical and professional standards governing defense attorneys.”¹⁷⁷

Further, when a procedure is perceived by the public as operating fairly and with “procedural regularity,” it functions as a “psychological stabilizer” and promotes the acceptance of the process.¹⁷⁸ Through the adoption of the

¹⁷¹ See CAROLINE WOLFE HARLOW, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf>.

¹⁷² See Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031, 1034 (2006).

¹⁷³ See, e.g., Eric H. Holder, U.S. Attorney Gen., Address at the 2009 ABA Convention (Aug. 3, 2009) (transcript available at <http://www.justice.gov/ag/speeches/2009/ag-speech-090803.html>). Resources for public defender programs lag far behind other justice system programs, constituting only about 3% of all criminal justice expenditures in our nation’s largest counties. In many cases, contract attorneys and assigned lawyers receive compensation that does not even cover their overhead. Defenders in many jurisdictions carry huge caseloads that make it difficult for them to fulfill their legal and ethical responsibilities to their clients. And we often hear of lawyers who cannot interview their clients properly, file appropriate motions, conduct fact investigations, or perform many of the duties an attorney ought to perform as a matter of course. See THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 8 (2009), available at http://www.nlada.org/DMS/Documents/1239831988.5/Justice%20Denied_%20Right%20to%20Counsel%20Report.pdf.

¹⁷⁴ See, e.g., Holder, *supra* note 173.

¹⁷⁵ See Backus & Marcus, *supra* note 172, at 1033–34.

¹⁷⁶ An increased number of successful ineffective assistance claims through postconviction and habeas proceedings would create a trickle-down effect that would result in higher quality representation. When faced with a number of reversals on ineffective-assistance grounds, trial courts would begin to demand more of attorneys. In the same vein, an increased number of reversals may result in systematic change like increased budgets for public defenders so they can reduce their individual case loads and thoroughly prepare more cases.

¹⁷⁷ See Backus & Marcus, *supra* note 172, at 1087.

¹⁷⁸ See NEWMAN, *supra* note 17, at 44 n.45 (“It has not escaped those who have been concerned with the institution of procedural regularity that one of its prime contributions is as a psychological stabilizer; acceptance of law is substantially furthered to the extent that those subject to its rule observe its workings with consistent, scrupulous fairness.” (quoting Sanford H. Kadish, *The Advocate and the*

Federal Sentencing Guidelines and similar provisions by the states, the penal system in the United States has moved away from focusing on rehabilitation,¹⁷⁹ yet it is arguably still a goal of the penal system. That goal is furthered when a criminal defendant feels that she has been dealt with fairly by the judicial system.¹⁸⁰

B. *Alternative Approaches*

The approaches to altering the *Strickland–Hill* prejudice prong fall into two primary categories: (1) adapting the application of the existing test to provide more protection to defendants, or (2) designing a new standard aligned with the realities of the plea bargaining process.¹⁸¹

In the first category, Professor Vivian Berger raised a question as to how “*Strickland*’s outcome-prejudice test would apply to claims of inadequate assistance rendered in connection with guilty pleas” shortly before the *Hill* decision.¹⁸² Professor Berger suggested that the operative language in *Strickland* indicated that a court must assess the effect of an attorney’s deficient performance on the proceeding actually at issue.¹⁸³ Under this approach, prejudice is equated with causation: if a defendant can show that his attorney’s behavior played a substantial role in inducing the plea, he has established prejudice.¹⁸⁴ This standard does not attempt to predict the outcome of a hypothetical trial, but rather focuses on whether

Expert—Counsel in the Peno-Correctional Process, 45 MINN. L. REV. 803, 836 (1961)) (internal quotation marks omitted).

¹⁷⁹ See, e.g., Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1318 (2005) (stating that after the Federal Sentencing Guidelines were adopted, “[r]eformers doubted that rehabilitation worked, were skeptical of both the expertise and fairness of parole boards, and rebelled against the seeming arbitrariness of standardless judicial sentencing discretion”).

¹⁸⁰ See NEWMAN, *supra* note 17, at 45 n.47 (“Certainly no circumstance could further that purpose [rehabilitation] to a great[er] extent tha[t] a firm belief on the part of such offenders in the impartial, unhurried, objective, and thorough process of the machinery of the law.” (quoting *Fleming v. Tate*, 156 F.2d 848, 850 (D.C. Cir. 1946)) (first alteration in original) (internal quotation marks omitted)).

¹⁸¹ A third possibility, that the Supreme Court is trending toward relaxing the prejudice prong, has also been suggested. See Whitney Cawley, Note, *Raising the Bar: How Rompilla v. Beard Represents the Court’s Increasing Efforts to Impose Stricter Standards for Defense Lawyering in Capital Cases*, 34 PEPP. L. REV. 1139, 1176–81 (2007). Cawley suggests that a recent trio of capital cases where counsel was found ineffective during the sentencing phase demonstrates this trend. See *id.* (citing *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000)). In each case, counsel was found ineffective because “an overwhelming amount of evidence as to the defendant’s background and mental state was not presented to the jury.” *Id.* at 1181.

¹⁸² Berger, *supra* note 60, at 109.

¹⁸³ *Id.* at 110 (highlighting that only the sentencing proceeding was considered by the court in *Strickland*, rather than the likely results of a “hypothetical trial on guilt”).

¹⁸⁴ *Id.* at 111. This Comment suggests that the Supreme Court clarifies and restates this standard, which presents some line-drawing problems. However, even if the Court believes it prudent to maintain some semblance of the *Strickland–Hill* formulation, such a test would still be a significant improvement over the test currently applied in Illinois.

counsel's bad advice or poor performance induced a defendant's guilty plea. After applying this standard to *Rissley* and *Hall*, it is apparent that both defendants, rather than just Hall, would have met this burden.¹⁸⁵ Rissley entered his plea under the impression that he either had to have a jury trial, which was disadvantageous due to the nature of the charges he was facing, or enter a plea of guilty.¹⁸⁶ In addition to this incorrect advice, his attorney assured him that pleading guilty would prevent a death sentence; however, this advice was false, as there was no agreement from the prosecution to take the death penalty off the table.

This standard, if implemented, would allow more defendants to succeed on their ineffective assistance claims. Adopting this standard would not open the floodgates to all defendants who enter a plea and are unhappy with the results—defendants would still need to demonstrate that counsel provided inadequate assistance in addition to establishing prejudice.¹⁸⁷

A similar approach would be to allow defendants to establish a prima facie case of ineffective assistance by establishing the first prong of the *Strickland–Hill* test, at which point the prosecution would have the responsibility of demonstrating that counsel's performance did not prejudice the defendant.¹⁸⁸ As a threshold requirement, the defendant would be required to demonstrate that her counsel's performance fell below an objective level of reasonableness. This requirement would serve as a screening function for meritless claims. This approach is beneficial because the prosecution is better situated to rebut the claim of prejudice than a defendant.

C. *Objections to Changing the Strickland–Hill Standard*

The *Strickland–Hill* test is intended to balance competing interests of accuracy and stability with a fair process in which counsel engages in an adversarial process “as the guilty defendant's advocate.”¹⁸⁹ When the idea

¹⁸⁵ See *supra* Part IV.A for further discussion of *Hall* and *Rissley*.

¹⁸⁶ See *supra* notes 139–41 for further discussion of the circumstances surrounding Rissley's guilty plea.

¹⁸⁷ Professor Berger points out that the prejudice hurdle should be “real” but not “insurmountable.” Berger, *supra* note 60, at 112.

¹⁸⁸ This approach mirrors the *McDonnell Douglas* burden-shifting framework, which determines the burdens and nature of proof required in proving a Title VII case. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this framework, a plaintiff must allege facts that are sufficient to support a legal claim of discrimination. See *id.* at 802. The burden of production then shifts to the employer to rebut the prima facie case by “articulat[ing] some legitimate, nondiscriminatory reason for the employee's rejection.” *Id.* Finally, the employee may prevail only if he can show that the employer's defense is false. See *id.* at 804–05.

¹⁸⁹ NEWMAN, *supra* note 17, at 216 (“In short, the full-blown negotiated plea is not merely an appeal for mercy; it is an adversary process and the lawyer serves the function of the guilty defendant's advocate.”).

of change is raised, there is naturally fear that it “would multiply the number of claims and invite rampant second-guessing of trial attorneys.”¹⁹⁰

This fear of change is overstated. The plea system generally “rewards defendants who make such admissions . . . by allowing them . . . to reap the benefits of reduced sentences.”¹⁹¹ The “reward” of a lower sentence for accepting a plea incentivizes defendants not to appeal their sentences unless the process did not function properly.¹⁹² Although specific data are not available, it seems that the system does in fact function properly in the large majority of cases. Defendants who wish to backtrack in this process and risk trial while knowing that they are relinquishing the deal they already received are likely doing so because the system malfunctioned.¹⁹³ With this objection to change put into perspective, system legitimacy and fundamental fairness suggest that a new standard for addressing ineffective assistance in the guilty plea context should be adopted.

CONCLUSION

In our criminal justice system, the vast majority of defendants plead guilty. To be valid, a plea must be knowing and voluntary; that standard, according to the Sixth Amendment, requires that a defendant receive effective assistance of counsel during the guilty plea process. The volume of cases and shortage of resources, in addition to other incentives to clear cases quickly, creates a situation in which ineffective assistance of counsel is a significant concern.¹⁹⁴ The Supreme Court combated ineffective assistance through the two-prong *Strickland* test. This test does not

¹⁹⁰ Jeffrey Levinson, Note, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 163 (2001).

¹⁹¹ Allison Stephens, Note, *A Method to the Madness: The Importance of Proving Prejudice in the Context of the Guilty Plea*, 39 GA. L. REV. 1487, 1517 (2005).

¹⁹² For an illustration of this process, see BOGIRA, *supra* note 20, at 38. (“The defense lawyer sometimes serves as floor salesperson before the 402, softening up the defendant by stressing the maximum he might get if he insists on trial Next to the sticker price, the wholesale offer is attractive. Not many defendants would plead, of course, if they had nothing to lose by going to trial.”).

¹⁹³ See Emily Rubin, Note, *Ineffective Assistance of Counsel and Guilty Pleas: Toward a Paradigm of Informed Consent*, 80 VA. L. REV. 1699, 1718–19 (1994) (“Unlike the trial setting, there is . . . a built-in disincentive for those with meritless claims of ineffective assistance to bring those claims in court.”).

¹⁹⁴ See *id.* at 1715 (“The very nature of the plea bargaining system invites inadequate representation. Cases are often dealt with hurriedly, through casual interactions between the prosecutor and the defense attorney, who sometimes have longstanding bargaining relationships. Attention to the facts of individual cases may be compromised as the bargaining process becomes more and more habitual for defense attorneys and the prosecutors come to expect certain bargaining behavior. Moreover, because of the speed with which bargaining is conducted, interaction between defendants and defense attorneys will often be very limited.” (footnotes omitted)); see also Berger, *supra* note 60, at 61 (“[T]he crushing caseloads of public defenders and the cut-rate fees for appointed counsel . . . promote lackluster performance by discouraging careful investigation and making the bargained-for guilty plea an attractive option that counsel (perhaps more than clients) find extremely hard to refuse.” (footnote omitted)).

translate well from the trial setting to the plea setting because it does not provide sufficient protection of a defendant's right to effective counsel. The prejudice prong presents a nearly insurmountable burden to defendants, with the result that ineffective assistance may be insulated rather than remedied.

Further, as this test is applied in Illinois, defendants are unlikely to succeed on legitimate claims of ineffective assistance, even in cases where the court agrees that counsel's performance was deficient, because defendants must raise a claim of innocence or a defense that is sufficient to persuade a judge that the defendant was likely to succeed at trial. Not only does this standard do a disservice to defendants by tipping the scale too far in favor of reversal proofing guilty pleas, but it also fails to reflect the realities of what a judge is able to determine from a scant plea-proceeding record. Further, and most importantly, this standard shifts the court's focus from the fundamental fairness of the proceedings to ancillary issues of innocence that neither the *Strickland-Hill* standard nor the Constitution require.

At a minimum, Illinois must realign with the *Strickland-Hill* prejudice standard. However, the overall approach to ineffective assistance in the guilty plea context must be reconsidered and replaced with a standard designed to address the realities of the guilty plea process.

