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Deal or No Deal? Remedying Ineffective Assistance of Counsel During Plea Bargaining

ABSTRACT. What happens when a defendant receives defective counsel during plea bargaining but subsequently receives a fair trial? This Note discusses three different approaches: no remedy, specific performance of the plea bargain, and a retrial. It argues that specific performance of the plea bargain violates various judicial and constitutional principles, while ordering no remedy at all relies on a flawed understanding of the Sixth Amendment. This Note introduces the notion that ineffective assistance of counsel during plea bargaining is a structural error in the criminal process, rather than a trial error. It concludes that the only workable solution is to order a new trial.

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NOTE CONTENTS

INTRODUCTION

A bank is robbed, and the police accuse two brothers of the heist. The older brother is arrested for the robbery itself, while his younger brother is arrested for aiding and abetting. They are charged separately, and each hires his own attorney. Given the mountain of evidence against them, they are both eager to begin plea negotiations, and the State offers both brothers the same deal: ten years, if they plead guilty to their respective charges.

The younger brother's attorney erroneously advises his client that he faces a maximum sentence of fifteen years for aiding and abetting a bank robbery, five more than the plea offer, if he is found guilty at trial. Pursuant to his attorney's advice, the younger brother accepts the offer, pleads guilty, and waives his right to trial when, in fact, ten years is the maximum sentence that the younger brother faced for aiding and abetting the robber. But for the attorney's deficient counsel, the younger brother would have proceeded to trial and risked nothing. Had he been convicted he would have received a sentence no worse than the plea bargain.

The older brother's counsel is also deficient, but in a different way. His attorney misreads the relevant criminal statute and advises his client that ten years is the maximum sentence that the older brother faces for bank robbery. Actually, the older brother faces a maximum sentence of twenty-five years for the bank robbery. Relying on his attorney's erroneous advice, this brother rejects the offer, pleads not guilty, and proceeds to trial, at which he is found guilty. Pursuant to his conviction, he is given the maximum sentence—more than double the original plea offer. But for the attorney's deficient counsel, the older brother would have accepted the offer of ten years, pled guilty, and waived his right to trial. Instead, he risked fifteen additional years in prison for a slim chance at acquittal.

Both brothers immediately challenge their convictions based on ineffective assistance of counsel because each attorney committed an error when calculating his or her respective client's sentence exposure. But what is the remedy for each? The younger brother's remedy is clear: he waived his right to trial because of defective counsel, and so a court would simply vacate his conviction and restore his rights by ordering a new trial.[1] But what about his

1. *See* McMann v. Richardson, 397 U.S. 759, 770-71 (1970); *see also* Roe v. Flores-Ortega, 528 U.S. 470, 483 (2000) ("The even more serious denial of the entire judicial proceeding itself, which a defendant wanted at the time and to which he had a right, similarly demands a presumption of prejudice. Put simply, we cannot accord any 'presumption of reliability,' to judicial proceedings that never took place." (quoting Smith v. Robbins, 528 U.S. 259, 286 (2000))).

older brother? Although the older brother also received ineffective assistance of counsel during plea bargaining, he received a fair trial. Ordering a new trial to replace the fair proceeding that just took place appears both inappropriate and redundant. But how else should a court remedy the older brother's ineffective assistance of counsel, if at all?

This Note discusses the proper remedy for a criminal defendant who, as a result of ineffective assistance of counsel, rejects a favorable plea bargain, proceeds to trial, and ultimately receives a higher sentence than he would have under the plea.

When a defendant receives ineffective assistance of counsel during plea bargaining, he almost always pleads guilty, waiving his right to trial. There are, however, occasions when a defendant proceeds to trial although in reality his best option would have been to plead guilty pursuant to a plea arrangement.[2] Does a defendant suffer remedial prejudice if he is denied effective assistance of counsel during plea bargaining but subsequently receives a fair trial? Courts have answered this question in three ways. The first two ways involve courts finding that the defendant does suffer prejudice and therefore deserves a remedy: one orders another trial,[3] while the second orders specific performance of the plea bargain.[4] Unlike the first two, the third approach finds no prejudice, orders no remedy, and simply affirms the conviction and sentence.[5] Various state and federal courts have adopted each path. In 2008, the United States Supreme Court was finally set to decide this question in *Arave v. Hoffman*,[6] before both parties withdrew the case.[7] Given its interest in resolving this

2. Commonwealth v. Napper, 385 A.2d 521, 524 (Pa. Super. Ct. 1978) (noting that effective counsel "'is most often needed to convince the client to plead guilty in a case where a not guilty plea would be totally destructive'" (quoting 1 ANTHONY G. AMSTERDAM, BERNARD L. SEGAL & MARTIN K. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES 2-143 (1967))).

3. *See, e.g.*, *id.* (vacating the conviction and ordering a new trial).

4. *See, e.g.*, United States v. Blaylock, 20 F.3d 1458, 1468-69 (9th Cir. 1994) (explaining why reinstating the plea bargain is appropriate and constitutionally sound, and remedies the constitutional deprivation more effectively).

5. *See, e.g.*, State v. Greuber, 165 P.3d 1185 (Utah 2007).

6. 552 U.S. 1008 (2007) (granting certiorari).

7. After the Court granted certiorari, but before oral argument, the defendant filed an unopposed motion to vacate the Ninth Circuit's decision and dismiss the case. The defendant decided to abandon his claim for ineffective assistance during plea bargaining and no longer sought the relief ordered by the Ninth Circuit. To avoid any possibility of receiving the death penalty, both sides agreed to proceed with the resentencing ordered by the district court. The Court, in a per curiam opinion, granted Hoffman's motion and remanded the case to the Ninth Circuit with the instructions that the district court should

nationwide split, the Supreme Court will likely answer this question soon. This Note seeks to inform that decision.

Despite the extensive and conflicting case law, as well as the Supreme Court's demonstrated interest, academic literature has not kept pace. Until recently the last scholarly piece to discuss this topic was a student note from 1992, published in the *California Western Law Review*.[8] The author concluded that defendants suffer prejudice in these cases and that the only appropriate remedy is to order specific performance of the plea bargain.[9] Unfortunately, that piece would not help a court resolve this issue today, as it does not discuss federal and state case law since 1992.[10] Second, it concludes that specific performance of the plea bargain is appropriate without addressing the other constitutional principles implicated by that remedy, such as double jeopardy,[11] the abstention principle,[12] and the separation of powers.[13] A proliferating number of student notes has appeared in the last few years, but none discusses in detail how to remedy the error, while some argue against any remedy at all.[14]

dismiss the ineffective assistance of counsel during plea bargaining claim with prejudice. Arave v. Hoffman, 552 U.S. 117 (2008) (per curiam).

8. Todd R. Falzone, Note, *Ineffective Assistance of Counsel*, 28 CAL. W. L. REV. 431 (1992).

9. *Id.* at 458.

10. *See, e.g.*, Wanatee v. Ault, 259 F.3d 700 (8th Cir. 2001); United States v. Gordon, 156 F.3d 376 (2d Cir. 1998); Dew v. State, 843 N.E.2d 556 (Ind. Ct. App. 2006); State v. Williams, 83 S.W.3d 371 (Tex. App. 2002); *In re* McCready, 996 P.2d 658, 661 (Wash. Ct. App. 2000).

11. *See, e.g.*, Commonwealth v. Mahar, 809 N.E.2d 989, 1003 (Mass. 2004) (noting that the defendant was acquitted of charges found in the plea arrangement, making it "legally impossible to resurrect and impose the previously rejected plea agreement").

12. Because most of these cases originate in state court, permitting federal courts to order specific performance could implicate federalism concerns, such as the abstention principle. *See* Moore v. Sims, 442 U.S. 415, 424 (1979); Younger v. Harris, 401 U.S. 37, 49 (1971).

13. *See* State v. Eckelkamp, 133 S.W.3d 72 (Mo. Ct. App. 2004) (finding that the lower court lacked authority to mandate that the prosecutor engage in plea negotiations).

14. *See, e.g.*, Tara Harrison, Note, *The Pendulum of Justice: Analyzing the Indigent Defendant's Right to the Effective Assistance of Counsel when Pleading Not Guilty at the Plea Bargaining Stage*, 2006 UTAH L. REV. 1185 (providing an overview of the right to counsel during plea bargaining and breaking down the majority and minority positions, but not discussing why one particular approach is more appropriate than the other); Anthony E. Rufo, Note, *Opportunity Lost?–The Ineffective Assistance Doctrine's Applicability to Foregone Plea Bargains*, 42 SUFFOLK U. L. REV. 709 (2009) (discussing the issue generally, but offering no remedial recommendation); Paul J. Sampson, Note, *Ineffective Assistance of Counsel in Plea Bargain Negotiations*, 2010 BYU L. REV. 251, 266 (concluding that a defendant who receives a fair trial suffers no prejudice and so deserves no remedy); Leigh Tinmouth, Note, *The Fairness of a Fair Trial: Not Guilty Pleas and the Right to Effective Assistance of Counsel*, 50 B.C. L. REV. 1607 (2009) (arguing that a defendant has no right to counsel when entering a "not guilty" plea and concluding that a defendant cannot suffer prejudice after receiving a fair trial).

To close this gap, this Note discusses the three paths and the case law associated with each. For instance, even among states that have ordered a new trial, those states have done so for different reasons.[15] Several federal court decisions have played out the same way.[16] But although these cases have applied identical remedies, they have not followed the same line of argument. Similarly, the courts that have ordered specific performance of the plea bargain have done so for different reasons,[17] and those that have ordered no remedy at all have also differed in their analyses.[18]

The conflicting judicial decisions discussed in this review demonstrate that none of these approaches is perfect. Decisions that order no remedy ignore process so long as the "correct result" is achieved. Although specific performance of the plea offer is the most intuitive remedy, it is also the most complex; expired deals are sometimes impossible to enforce because of changed circumstances. Even if the deal is still possible, it is unclear whether a member of the judicial branch can order a member of the executive branch to reoffer a deal without violating the separation of powers. The new trial remedy is redundant and risks awarding the defendant a windfall chance at acquittal.

This Note proceeds as follows. Part I presents an overview of the right to counsel during plea bargaining. Part II discusses the difficulty of determining prejudice and the "no remedy" approach. Part III then outlines those decisions that favor specific performance of the plea and the problems associated with this remedy.

This Note then offers a new way forward. Part IV examines those decisions that have ordered a retrial, explaining why this remedy is the most appropriate solution. The Part then responds to the leading cases that support granting no remedy. This response is unique in two ways. First, this Note shows that the

15. *See, e.g.*, People v. Curry, 687 N.E.2d 877 (Ill. 1997) (remanding for a new trial and possible resumption of plea bargaining); *Dew*, 843 N.E.2d at 571 (ordering a new trial if the state did not reinstate the original plea offer); Larson v. State, 766 P.2d 261 (Nev. 1988) (ordering a new trial because the defense counsel suggested the defendant withdraw his plea to further the defense counsel's own career); *Williams*, 83 S.W.3d 371 (ruling that failure to inform the defendant of a plea bargain offer was defective assistance, warranting a new trial); *In re McCready*, 996 P.2d at 661 (granting a new trial where the defense counsel failed to inform the defendant that he would serve mandatory minimum terms totaling ten years).

16. Wanatee v. Ault, 259 F.3d 700 (8th Cir. 2001) (granting a writ of habeas corpus to a defendant who was denied effective assistance of counsel during plea bargaining); United States v. Gordon, 156 F.3d 376 (2d Cir. 1998); Turner v. Tennessee, 858 F.2d 1201 (6th Cir. 1988) (vacating the conviction and remanding back to plea negotiations), *vacated on other grounds*, 492 U.S. 902 (1989).

17. United States v. Blaylock, 20 F.3d 1458, 1468 (9th Cir. 1994).

18. State v. Taccetta, 975 A.2d 928 (N.J. 2009); State v. Greuber, 165 P.3d 1185 (Utah 2007).

courts that have denied a remedy for this constitutional violation have relied upon several arguments that have never been directly answered, either in judicial opinions or in academic articles.[19] Second, Part V of this Note argues that the courts that find no prejudice because the ensuing trial was "fair" obscure the dichotomy between trial errors and structural errors.[20] Ineffective assistance of counsel during plea bargaining that leads to a defendant proceeding to trial is a structural error because it defies analysis by traditional harmless error standards and affects "the framework within which the trial proceeds,"[21] or even "whether it proceeds at all."[22] Because structural errors must be automatically reversed, and given the logistical hurdles involved in reinstating the original plea, this Note concludes that the only workable solution is to order a new trial.

I. OVERVIEW OF THE RIGHT TO COUNSEL DURING PLEA BARGAINING

When considering claims of ineffective assistance of counsel, state and federal courts must adhere to the standards set forth in *Strickland v. Washington*, which require that defense counsel perform in such a way as will render the trial a reliable adversarial testing process.[23] To succeed on a Sixth Amendment claim of ineffective assistance of counsel, a defendant must satisfy both prongs of the *Strickland* test. A defendant first must demonstrate that defense counsel's performance was objectively and unreasonably deficient.[24] Second, a defendant must show that the deficient performance was prejudicial in some way.[25] To determine prejudice, a court asks whether there is a

19. For example, I respond to an argument in *State v. Greuber* that prejudice cannot occur because defendants do not have a right to a plea bargain. 165 P.3d at 1190. This argument misstates the question. The right that is lost here is not the right to a plea bargain as such but rather the right to counsel's assistance in making a decision after a plea bargain has already been put on the table. *See infra* Section V.B. That Section also responds to *State v. Taccetta*, which advances a rather powerful argument that because the defendant claimed innocence, he could not have pled guilty pursuant to the plea bargain without committing perjury. 975 A.2d at 935-36. Relying upon existing Supreme Court case law, the Federal Rules of Criminal Procedure, and practical concerns regarding the plea bargain process, I argue that this rule is unworkable and unfair. *See infra* Section V.C.

20. *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 150-51 (2006).

21. Arizona v. Fulminante, 499 U.S. 279, 310 (1991).

22. *Gonzalez-Lopez*, 548 U.S at 150.

23. 466 U.S. 668, 688 (1984).

24. *Id.* at 687-88.

25. *Id.* at 693.

reasonable probability that the result of the proceeding would have been different, but for counsel's unprofessional errors; if so, the deficiency is prejudicial.[26] The Court in *Strickland*, however, made clear that errors, "even if professionally unreasonable," do not warrant setting aside a judgment if the error had no effect on the disposition of the case.[27] Remedies for the deprivation of the right to counsel "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests."[28]

It is axiomatic that the Sixth Amendment's right to counsel attaches during every critical stage of the prosecution after adversarial proceedings have begun.[29] Plea bargaining is one such critical stage, not only because it is "an essential component of the administration of justice,"[30] but also because ninety-five percent of convictions end in plea bargains.[31] In 1970, the Supreme Court held that a defendant could challenge a guilty plea based on deficient counsel if that advice was not "within the range of competence" required of criminal defense attorneys.[32] Later, in *Hill v. Lockhart*, decided the year after *Strickland*, the Supreme Court directly applied the *Strickland* test to legal assistance during plea negotiations.[33] Indeed, this principle has been widely adopted on both the federal and state levels to apply where (1) defense counsel fails to disclose a plea offer to the defendant;[34] (2) defendant is erroneously

26. *Id.* at 694.

27. *Id.* at 691-92.

28. United States v. Morrison, 449 U.S. 361, 364 (1981).

29. Adversarial proceedings begin once the criminal defendant appears before a magistrate judge where he learns of the charges against him and where his liberty is subject to restriction. Rothgery v. Gillespie Cnty., 554 U.S. 191, 194-95 (2008).

30. Santobello v. New York, 404 U.S. 257, 260 (1971); *see also* State v. Simmons, 309 S.E.2d 493, 497 (N.C. Ct. App. 1983) (noting the same).

31. Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty To Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1136 (2004) ("About ninety-five percent of criminal cases end not with trials, but in plea bargains.").

32. McMann v. Richardson, 397 U.S. 759, 770-71 (1970); *see also* Julian v. Bartley, 495 F.3d 487, 494-95 (7th Cir. 2007) (discussing *Strickland*'s origins).

33. 474 U.S. 52, 58 (1985).

34. *See, e.g.*, United States v. Rodriguez, 929 F.2d 747, 752-53 (1st Cir. 1991); Johnson v. Duckworth, 793 F.2d 898, 902 (7th Cir. 1986); United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 438 (3d Cir. 1982); Lloyd v. State, 373 S.E.2d 1, 2 (Ga. 1988); People v. Whitfield, 239 N.E.2d 850 (Ill. 1968); People v. Ferguson, 413 N.E.2d 135 (Ill. App. Ct. 1980); Lyles v. State, 382 N.E.2d 991, 994 (Ind. Ct. App. 1978); *Simmons*, 309 S.E.2d at 497.

advised to plead guilty;[35] or (3) defendant is erroneously advised to plead innocent.[36]

Often, the most difficult question is whether the defendant's counsel was ineffective, while the easiest is how to remedy the deficiency.[37] When a defendant, pursuant to his attorney's advice, enters a guilty plea as part of a negotiated deal with the government, he waives his right to trial and the "full panoply" of other constitutional rights that come with it. If the attorney's advice was ineffective, the guilty plea is vacated, the process is reset, and these rights are fully restored. In fact, not a single court or jurisdiction disagrees with this remedy.

The answer is not as clear, however, when the defendant is erroneously advised to plead innocent and, in doing so, proceeds to trial where he receives the "full panoply" of constitutional protections. The next Part discusses the difficulties of determining prejudice if a defendant received a fair trial.

II. NO HARM, NO FOUL: THE CASE AGAINST PREJUDICE

A growing number of courts have held that a defendant who rejects a plea bargain to go to trial, and is ultimately convicted and sentenced, suffers no prejudice as a result of defective counsel during plea bargaining.[38] Since these

35. *Hill*, 474 U.S. at 58.

36. *See, e.g.*, *Julian*, 495 F.3d at 489; United States v. Day, 969 F.2d 39 (3d Cir. 1992); Lewandowski v. Makel, 949 F.2d 884 (6th Cir. 1991); Toro v. Fairman, 940 F.2d 1065, 1067 (7th Cir. 1991); Turner v. Tennessee, 858 F.2d 1201, 1205 (6th Cir. 1988), *vacated on other grounds*, 492 U.S. 902 (1989); Beckham v. Wainwright, 639 F.2d 262, 265-66 (5th Cir. Unit B Mar. 1981); *In re* Alvernaz, 830 P.2d 747, 759 (Cal. 1992); People v. Blommaert, 604 N.E.2d 1054 (Ill. App. Ct. 1992); Williams v. State, 605 A.2d 103 (Md. 1992); Larson v. State, 766 P.2d 261 (Nev. 1988); Commonwealth v. Napper, 385 A.2d 521 (Pa. Super. Ct. 1978); Judge v. State, 471 S.E.2d 146, 149-51 (S.C. 1996).

37. Padilla v. Kentucky, 130 S. Ct. 1473, 1485 n.12 (2010) (noting that even if the first prong of the *Strickland* test is met, "it is often quite difficult for petitioners who have acknowledged their guilt to satisfy *Strickland*'s prejudice prong").

38. *See, e.g.*, State v. Monroe, 757 So. 2d 895 (La. Ct. App. 2000); Bryan v. State, 134 S.W.3d 795 (Mo. Ct. App. 2004); State v. Taccetta, 975 A.2d 928 (N.J. 2009); State v. Greuber, 165 P.3d 1185 (Utah 2007); *see also* Rasmussen v. State, 658 S.W.2d 867, 868 (Ark. 1983) (Adkisson, C.J., dissenting) (arguing that a defendant does not suffer prejudice if he is afforded a fair trial); Garcia v. State, 736 So. 2d 89, 91 (Fla. Dist. Ct. App. 1999) (Gross, J., concurring) (arguing that "[i]t hardly seems fair to reverse a conviction for a new trial where there is no claim that defense counsel's behavior compromised the trial"); Commonwealth v. Mahar, 809 N.E.2d 989, 997 (Mass. 2004) (Sosman, J., concurring) (arguing against a new trial remedy because there is "no 'right' to a plea offer" (internal citations omitted)).

jurisdictions find no prejudice, they provide no remedy for the defendant and simply affirm the conviction and sentence.

A. The Difficulties of Determining Prejudice

The Supreme Court has consistently held that the right to counsel "has been accorded . . . 'not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.'"[39] It is self-evident that, if the defendant is not prejudiced in some way, a trial is not unfair and the Sixth Amendment's right to counsel is not implicated.[40] A prejudicial error deprives the defendant of a "substantive or procedural right to which the law entitles him."[41] As a defendant has no substantive or procedural right to a plea bargain,[42] this argument supposes that, as a matter of law, a defendant cannot claim prejudice by ineffective assistance of counsel during plea bargaining if he ultimately receives a fair trial.[43]

For instance, in the case of *In re Alvernaz*, the California Supreme Court grappled with the difficulty of determining prejudice.[44] First, the court noted that if a defense attorney simply miscalculates the sentence, this error could not alone give rise to a claim of ineffective assistance of counsel.[45] For the *Alvernaz* court, to establish prejudice the defendant has to show a reasonable probability that, but for counsel's error, he would have accepted the plea bargain.[46] But a "self-serving statement" to that effect, after the fact, was deemed to be insufficient evidence of his pretrial intentions.[47] In *Alvernaz* the court found that the defendant's "decision to reject the plea offer was motivated primarily

39. Mickens v. Taylor, 535 U.S. 162, 166 (2002) (quoting United States v. Cronic, 466 U.S. 648, 658 (1984)).

40. *See* Strickland v. Washington, 466 U.S. 668, 694 (1984).

41. Lockhart v. Fretwell, 506 U.S. 364, 372 (1993).

42. Mabry v. Johnson, 467 U.S. 504 (1984); *Monroe*, 757 So. 2d at 898 n.1.

43. *See Fretwell*, 506 U.S. at 372 (holding that unfairness or unreliability does not result unless counsel's deficiency deprives defendant of a substantive or procedural right to which the law entitles him and does not result merely because the outcome would have been different).

44. 830 P.2d 747 (Cal. 1992).

45. *Id.* at 755.

46. *Id.* at 756.

47. *Id.*; *see also* Lloyd v. State, 373 S.E.2d 1, 3 (Ga. 1988) (holding that the evidence failed to establish that the defendant would have accepted the offer had she been properly counseled).

by a persistent, strong, and informed hope for exoneration at trial, and that any evaluation of precise sentencing options was secondary in his thinking."[48]

Obligating the defendant to demonstrate that, but for counsel's ineffective assistance, he would actually have accepted the offer serves another purpose wholly separate from prejudice: since a conviction by trial almost always results in a sentence greater than a procedural conviction,[49] defendants have plenty of incentive to claim ineffective assistance of counsel, whether or not the claim has merit. Of course, assisted by hindsight, which allows a complete comparison between going to trial and accepting the offer, a defendant can assure the court that he would have chosen the latter rather than risk trial. These "buyer's remorse" claims are easily made, and they are by their nature completely dependent on after-the-fact testimony by an all-too-interested party: the defendant.[50] The *Alvernaz* court pointed out that a defendant's own stance at trial may affect a court's prejudice finding because "protestations, under oath, of complete innocence . . . detract from the credibility of a hindsight claim that a rejected plea bargain would have been accepted had a single variable (sentencing advice) been different."[51] Other courts have agreed.[52] It is hard to draw lines between where the defendant's decision calculus relied upon the counsel's erroneous advice and where it relied upon a calculated risk to stand trial. Courts struggle to determine what actually caused the defendant to reject

48. *Alvernaz*, 830 P.2d at 761.

49. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1485-86 (2010) ("Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea. Thus, a different calculus informs whether it is wise to challenge a guilty plea in a habeas proceeding because, ultimately, the challenge may result in a less favorable outcome for the defendant, whereas a collateral challenge to a conviction obtained after a jury trial has no similar downside potential.").

50. *In re* McCready, 996 P.2d 658, 662 (Wash. Ct. App. 2000) (Brown, J., dissenting); *see also Alvernaz*, 830 P.2d at 756 ("In this context, a defendant's self-serving statement–after trial, conviction, and sentence–that with competent advice he or she *would* have accepted a proffered plea bargain, is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence. A contrary holding would lead to an unchecked flow of easily fabricated claims.").

51. *Alvernaz*, 830 P.2d at 757.

52. *See, e.g.*, Rasmussen v. State, 658 S.W.2d 867 (Ark. 1983) (refusing to set aside conviction or order a new trial because the defendant did not allege that she would have accepted the plea or that she would now accept it); People v. Carmichael, 179 P.3d 47 (Colo. App. 2007) (construing the defendant's statements as self-serving and insufficient to establish prejudice under *Strickland*).

the favorable plea arrangement: strategy or deficient counsel.[53] As one court put it, the inquiry is highly complex:

> The soundness of an attorney's analysis concerning the likely outcome of trial and sentencing—an analysis involving "layers of judgment and a highly uncertain element of prognostication," . . . —is extremely difficult to measure, and the perfection of hindsight must not be allowed to influence that measurement.[54]

In addition to proving that the defendant would have accepted the plea, some courts also require the defendant to establish a probability that the trial judge would have approved the arrangement.[55] As a plea bargain is worthless until the court accepts it, "[j]udicial approval is an essential condition precedent to any plea bargain."[56] In *Mabry v. Johnson*, the prosecution withdrew a plea offer after the defendant had accepted it but before the trial judge had approved it.[57] The Supreme Court held that until a plea bargain is "embodied in the judgment of a court, [its removal] does not deprive an accused of liberty or any other constitutionally protected interest."[58]

Therefore, according to this line of reasoning, to find prejudice a court should first consider whether the defendant has shown that he would have accepted the offer and, second, whether the court would have approved the offer.[59] Any past declarations of innocence may make these two hurdles insurmountable, as they undermine the credibility of any hindsight claim that the defendant would have accepted the offer. Additionally, claims of innocence decrease the probability that the court would have accepted a guilty plea, as a

53. *See, e.g.*, *Alvernaz*, 830 P.2d at 756 (discussing various factors courts must consider to determine whether the defendant would have accepted the plea bargain offer had he received effective assistance of counsel); *McCready*, 996 P.2d at 661 (Brown, J., dissenting) (arguing that the defendant pursued a strategy of acquittal under a self-defense theory and rejected a plea offer that would have fixed his sentence at less than any sentence he understood as likely to be imposed if convicted).

54. Commonwealth v. Mahar, 809 N.E.2d 989, 999 (Mass. 2004) (Sosman, J., concurring) (quoting *id.* at 994).

55. *See, e.g.*, *Alvernaz*, 830 P.2d at 758.

56. People v. Stringham, 253 Cal. Rptr. 484, 489 (Ct. App. 1989) (quoting People v. Cardoza, 207 Cal. Rptr. 388, 391 (Ct. App. 1984)).

57. 467 U.S. 504 (1984).

58. *Id.* at 507; *see also* Bryan v. State, 134 S.W.3d 795, 803 (Mo. Ct. App. 2004) ("The law is clear that negotiations which do not result in a guilty plea, and a resultant embodiment of that plea in the court's judgment, do not implicate any constitutionally-protected rights or liberty interests.").

59. *See, e.g.*, People v. Carmichael, 179 P.3d 47, 52 (Colo. App. 2007) (requiring both).

defendant cannot plead guilty to a crime that he claims not to have committed.[60]

B. *The Leading "No Remedy" Decisions:* State v. Greuber *and* State v. Taccetta

Several courts have chafed at the idea of providing an entirely new trial to a defendant who has already been convicted after a fair one.[61] Recently, two state supreme courts took up the issue and rejected the argument that a defendant might be prejudiced by ineffective assistance of counsel during plea bargaining if he later receives a fair trial. Both decisions, one by the Utah Supreme Court in 2007 and the other by the New Jersey Supreme Court in 2009, refused to offer any remedy whatsoever.[62] To date, these are the highest judicial authorities that have actually explained their reasoning when reaching such a conclusion, and so it is worth discussing each in turn.

In *State v. Greuber*, Utah charged the defendant with murder and aggravated kidnapping.[63] During the initial stages of the trial preparation, the State offered to drop the aggravated kidnapping charge in exchange for a plea of guilty to murder.[64] Greuber rejected the offer and proceeded to trial but claims that he would not have done so had his attorneys listened to several recordings that the State had disclosed during discovery.[65] Had the attorneys reviewed the evidence, they would have discovered that their trial strategy was doomed to fail.[66] After sentencing, the defendant appealed his conviction on the grounds that he would have accepted the plea bargain offered had his attorneys listened to the tape and competently advised him.[67]

The Utah Supreme Court denied any relief. The court reasoned that effective assistance of counsel is meant to protect a defendant's right to a fair

60. State v. Ball, 887 A.2d 174, 179 (N.J. Super. Ct. App. Div. 2005).

61. *See, e.g.*, State v. Monroe, 757 So. 2d 895, 898 (La. Ct. App. 2000) ("The only purpose of the new trial in this case would be to allow the defendant to change his plea from not guilty to guilty. But there is no point in doing that when the defendant has already been found guilty."); *Bryan*, 134 S.W.3d at 803-04 (rejecting a new trial remedy because "[o]ne fair trial is all the Constitution requires").

62. State v. Taccetta, 975 A.2d 928 (N.J. 2009); State v. Greuber, 165 P.3d 1185 (Utah 2007).

63. 165 P.3d at 1185.

64. *Id.* at 1186-87.

65. *Id.* at 1187.

66. *Id.*

67. *Id.*

trial, not a defendant's right to a plea bargain.[68] Unless the challenged conduct had some effect on the trial process itself, the court held, it could not have implicated the Sixth Amendment.[69] Having established this requisite, the court then said:

> Thus, while Greuber did possess the right to effective assistance of counsel during the plea process, he could not ultimately have been prejudiced in this case because he received a trial that was fair—the fundamental right that the Sixth Amendment is designed to protect. Nothing in counsels' pretrial conduct suggests "that the trial cannot be relied on as having produced a just result."[70]

The court further stated that ineffective assistance of counsel must deprive a defendant of some "substantive or procedural right."[71] But because there is no substantive or procedural right to a plea bargain, the defendant merely lost "an opportunity, one which may present itself to some defendants but not to others."[72] The Utah court made clear that, for Sixth Amendment purposes, there is a difference between rejecting and accepting a plea bargain: "When the Supreme Court has applied the Sixth Amendment right to the plea process, it has considered whether an *accepted* guilty plea has prejudiced the defendant, and not how the right applies when a defendant *rejects* a plea and proceeds with a fair trial."[73]

Finally, the Utah court emphasized the difficulty in fashioning a remedy, even in cases where it believed prejudice existed. According to the court, when a defendant is mistakenly led to plead guilty, the remedy is simple: vacate the plea, and give the defendant the trial that he never had.[74] But the *Greuber* court acknowledged that after a defendant has received his constitutionally guaranteed fair trial, it is impossible to "recreate the balance of risks and incentives on both sides that existed prior to trial."[75] No remedy could resuscitate the original opportunity to plead guilty. Reinstating the plea would violate the doctrine of separation of powers, while "a new trial does not remedy

68. *Id.* at 1188-90.

69. *Id.* at 1188-89.

70. *Id.* at 1189 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)).

71. *Id.* at 1189-90 (quoting Lockhart v. Fretwell, 506 U.S. 364, 372 (1993)).

72. *Id.* at 1190.

73. *Id.* at 1188 (citation omitted) (citing Hill v. Lockhart, 474 U.S. 52, 58 (1985)).

74. *Id.* at 1190.

75. *Id.* (quoting Commonwealth v. Mahar, 809 N.E.2d 989, 1001 (Mass. 2004) (Sosman, J., concurring)).

the lost opportunity to plead,"[76] especially since ordering a new trial may be a "thinly veiled attempt to force the prosecution to reinstate the initial offer."[77] But most disconcerting is the fact that, if enough time has elapsed and if the evidence and witnesses are no longer available, a new trial may result in a windfall acquittal, a completely disproportionate remedy to the alleged harm.[78]

For the Utah Supreme Court, the difficulty in fashioning a remedy for defendants who opt for trial, in comparison to those who mistakenly waive their right to trial, illustrated why the two types of defendants should not be treated identically. Ultimately, the court's logic was derived from a syllogism: although the Sixth Amendment applies during plea bargaining, the guarantee is ultimately grounded in the right to a fair trial; therefore, a defendant can suffer prejudice only if he accepts a plea and waives his trial, not if he rejects his plea and receives a trial.[79] Put differently, while a decision to plead guilty waives the right to test the government's evidence at trial, a decision to plead not guilty (thereby rejecting a plea offer) is an invocation of that right and should be effective whether or not it is made with effective assistance of counsel.[80]

In July 2009, the New Jersey Supreme Court became the latest jurisdiction to hold that a defendant cannot demonstrate prejudice for ineffective assistance of counsel during plea bargaining if he subsequently receives a fair trial.[81] In *State v. Taccetta*, the defendant claimed that he would have accepted a plea bargain offer had his attorney properly advised him about his sentencing exposure if he were found guilty.[82] After more than a decade of appeals, a unanimous court found that, as a matter of law, the defendant's own proclamations of innocence prevented him from truthfully pleading guilty pursuant to the State's offer, since "[t]he notion that a defendant can enter a plea of guilty, while maintaining his innocence, is foreign to our state

76. *Id.*

77. *Id.* (citing *In re* Alvernaz, 830 P.2d 747, 760 (Cal. 1992)).

78. *Id.* at 1190-91 (citing *Mahar*, 809 N.E.2d at 1002-03 (Sosman, J., concurring)); *see also* Boria v. Keane, 99 F.3d 492, 499 (2d Cir. 1996) (finding no assurance that a witness necessary for the prosecution would still be available); Bryan v. State, 134 S.W.3d 795, 803-04 (Mo. Ct. App. 2004) (rejecting a new trial remedy because "[o]ne fair trial is all the Constitution requires"); *id.* at 804 ("[G]ranting [the defendant] a new trial would reward him for rejecting a plea offer and standing trial by allowing him to escape the consequences of that decision.").

79. *Greuber*, 165 P.3d at 1189-90.

80. *See* Williams v. Jones, 571 F.3d 1086, 1098 (10th Cir. 2009) (Gorsuch, J., dissenting).

81. State v. Taccetta, 975 A.2d 928 (N.J. 2009).

82. *Id.* at 929.

jurisprudence."[83] The New Jersey Supreme Court went on to say that a trial court cannot be complicit in a defendant's plan to commit perjury and that an appeals court cannot vacate a jury verdict following a fair trial on the grounds that the defendant would have lied under oath to accept a plea arrangement.[84] The law requires that a judge be "satisfied from the lips of the defendant" that he committed the crime before accepting a guilty plea.[85]

For most courts, when determining whether the defendant has demonstrated prejudice, the question has always been whether the defendant *would* have pled guilty. But in *Taccetta* the court asked whether the defendant *could* have pled guilty. And so the *Taccetta* decision is based on a rather intuitive syllogism: when a defendant claims that he is innocent, he cannot later plead guilty pursuant to a plea arrangement, as doing so would be perjury and a court cannot accept perjured testimony.

Ultimately, a defendant does not have a right to a plea bargain; the Constitution only guarantees the right to a fair trial. Yet, in each of these cases the defendant did not claim that the trial itself was unfair. Thus, any remedy may seem superfluous at best and redundant at worst. Indeed, the case against any remedy whatsoever is very strong. The next Part outlines a remedial response to this constitutional error: specific performance of the plea bargain.

III. THE CASE FOR REINSTATING THE PLEA

Some courts believe that ordering another trial can never adequately remedy the constitutional deficiency.[86] Instead, these courts opt to reinstate the original offer, thereby restoring the defendant to the position that he was in prior to the Sixth Amendment violation.[87] Since the Supreme Court has held that specific performance of a plea agreement may be a constitutionally permissible remedy in certain contexts,[88] some lower courts have embraced it to neutralize this particular constitutional deprivation.[89]

83. *Id.* at 935.

84. *Id.* at 936.

85. *Id.* at 935 (quoting State v. Slater, 966 A.2d 461, 467 (N.J. 2009)).

86. *See, e.g.*, United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 438 (3d Cir. 1982); State v. Kraus, 397 N.W.2d 671, 674 (Iowa 1986).

87. United States v. Blaylock, 20 F.3d 1458, 1468 (9th Cir. 1994).

88. Mabry v. Johnson, 467 U.S. 504, 510 n.11 (1984); Santobello v. New York, 404 U.S. 257, 263 (1971).

89. *See, e.g.*, Turner v. Tennessee, 858 F.2d 1201, 1208 (6th Cir. 1988), *vacated on other grounds*, 492 U.S. 902 (1989); *see also* State v. Rosario, 916 A.2d 1051 (N.J. Super. Ct. App. Div.

The remedy can be enforced in one of two ways. Courts may order the defendant to accept the offer and mandate that the trial court resentence the defendant accordingly. Alternatively, the court may simply require the government to reoffer the plea, giving the defendant the chance to reconsider, to make a counteroffer, or (in theory) to reject the offer and receive another trial. If the defendant does reject the plea, the latter scenario functionally becomes a corollary of the "new trial" remedy, with the only difference being that the state must reoffer the plea before eventually retrying the case. Even among courts that favor this remedy, there is no consensus about how to apply it. That is, the courts that order specific performance of the plea bargain cannot agree on whether the plea should be pushed through by judicial fiat or whether the defendant should simply be given the opportunity to reconsider it (and possibly re-reject it), but with effective assistance of counsel. This Section will discuss both applications of this particular remedy.

A. Reinstating the Plea, with No Option for a New Trial

Several state courts have concluded that in these situations a defendant suffers prejudice, but that because the prejudice did not affect the fairness of the trial the defendant should instead be given a choice: plead guilty in accordance with the plea agreement or accept the outcome of the trial. In *Williams v. State*, the Maryland Court of Appeals decided that a defendant was prejudiced by ineffective assistance of counsel where his attorney failed to advise him of a possible mandatory sentence.[90] However, the court observed that the most that the defendant could have done, had he received adequate counsel, would have been to accept the plea offer. Therefore, "[g]iving him that opportunity now will place him in the same position he would have been in but for the incompetence."[91] Accordingly, the court gave the defendant the choice between accepting the original convictions and sentence or pleading guilty pursuant to the plea arrangement, but refused to order a new trial. At least two other states have followed a similar model.[92] The *Williams* court did

2007) (holding that a defendant who pleaded guilty in New York pursuant to a bi-state disposition was entitled to the enforcement of the New Jersey prosecutor's plea offer).

90. 605 A.2d 103, 110 (Md. 1992).

91. *Id.* at 110-11.

92. *See, e.g.*, State v. Kraus, 397 N.W.2d 671 (Iowa 1986) (holding that the defendant was not entitled to a new trial but would be allowed the opportunity to enter a plea pursuant to the rejected plea bargain); Becton v. Hun, 516 S.E.2d 762 (W. Va. 1999) (remanding for resentencing in conformance with the plea offer).

not address the separation-of-powers doctrine when it ordered specific performance of the plea bargain.

Most of these decisions involve fairly straightforward comparisons between the length of sentence after trial and the proffered sentence in the plea bargain. But in *Hoffman v. Arave* the defendant was charged with first-degree murder, and five weeks before trial the State offered him a plea bargain: if he were to plead guilty, the State would not pursue the death penalty.[93] Defense counsel advised against accepting the plea based on an inaccurate sense of capital punishment law,[94] causing the defendant to reject the offer and proceed to trial, where he was convicted and ultimately sentenced to death.[95] On appeal, the Ninth Circuit held that the defendant's ineffective assistance of counsel was prejudicial for two reasons: not only was counsel's reasoning objectively flawed, but the defendant's chance of receiving the death penalty was also not minimal, making his counsel's mistake all the more "disastrous."[96] After finding prejudice, the panel decided that the proper remedy would be to reinstate the plea offer with "the same material terms" as the original offer, rather than order a new trial.[97]

The Sixth Circuit has also rejected retrial as an "inappropriate remedy for a defendant who had constitutionally deficient counsel during the plea negotiation process."[98] As in *Hoffman*, the Sixth Circuit gave the prosecution the choice between releasing the defendant or reoffering a plea bargain.[99] None of these decisions, however, addresses the *Greuber* court's observations that specific performance of the plea bargain violates other important constitutional principles, such as the separation of powers.[100]

93. 455 F.3d 926, 929 (9th Cir. 2006).

94. Defense counsel thought that it was only a matter of time before Idaho's capital punishment scheme would be declared unconstitutional. *Id.*

95. *Id.* at 929-30.

96. *Id.* at 941-42.

97. *Id.* at 943; *see also* Nunes v. Mueller, 350 F.3d 1045, 1057 (9th Cir. 2003) (ordering that the defendant be released unless the state offered the same plea bargain); United States v. Blaylock, 20 F.3d 1458, 1468-69 (9th Cir. 1994) (ordering specific performance of the plea bargain).

98. Magana v. Hofbauer, 263 F.3d 542, 553 (6th Cir. 2001).

99. *Id.*

100. State v. Greuber, 165 P.3d 1185, 1190 (Utah 2007).

B. Reinstating the Plea, with the Option for a New Trial

Not all courts agree that forcing the prosecution to reoffer the plea means that the defendant must then accept it. Acknowledging the difficulty of ordering specific performance, some courts order reinstatement of the plea bargain but mandate that the defendant be provided a new trial if, for whatever reason, the plea bargain does not go through. This approach is particularly favorable to the defendant, who not only is guaranteed the opportunity to reconsider the original plea arrangement, but also can leverage the possibility of another trial to negotiate an even better offer.

Several state courts have adopted this remedy. In *Dew v. State*, the Indiana Court of Appeals reversed a defendant's convictions after finding that his counsel's performance during plea negotiations was prejudicial.[101] To remedy the constitutional deficiency, the court ordered the State either to renew its plea offer or to retry the entire case. In a similar case, the Minnesota Supreme Court vacated the defendant's conviction and ordered that he accept the original plea agreement and be resentenced according to those terms.[102] However, echoing Indiana, the Minnesota court made clear that if the plea arrangement did not go through, either because the trial court rejected it or because "the state, based on valid reasons, objects to specific performance," the defendant would be entitled to a new trial.[103] Unfortunately, none of these decisions discussed the logistical and constitutional obstacles to specific performance of the plea bargain.

Although the *Hoffman* decision, which gave the prosecution the choice between reoffering the plea bargain or releasing the defendant, is written as if it were entirely consistent with Ninth Circuit precedent, the court had previously decided that the appropriate remedy may be either the modification of the judgment so that it is consistent with the terms of the plea bargain, or a new trial that resets the plea bargaining process—a choice left open to the defendant.[104] The Faustian choice presented to the prosecution in *Hoffman*—either offer an expired plea bargain or release a defendant who has already been tried and convicted—was a new development in the law.[105]

Although reinstating the plea appears to be the most intuitive—not to mention straightforward—remedy, it is easier said than done. The next Section

101. 843 N.E.2d 556 (Ind. Ct. App. 2006).

102. Leake v. State, 737 N.W.2d 531, 542 (Minn. 2007).

103. *Id.*

104. United States v. Blaylock, 20 F.3d 1458, 1469 (9th Cir. 1994).

105. Hoffman v. Arave, 455 F.3d 926, 943 (9th Cir. 2006).

illustrates the drawbacks that complicate this remedy, often rendering it impossible to administer.

C. *Reinstating the Plea Is Often Impossible and Violates Several Constitutional Principles*

Traditionally, specific performance of a plea offer has been available only when the prosecution has abused its discretion,[106] or when the prosecution reneges on an accepted plea agreement.[107] Otherwise, there are difficult logistical issues involved when a court decides to reinstate a plea bargain. For instance, as most of these cases originate in state court, permitting federal courts to order specific performance could implicate federalism concerns, such as the abstention principle, which generally bars federal interference with state criminal proceedings.[108]

Even if a court determined with precision that the defendant would have accepted the offer and that the trial court would have approved the offer, the notion that the judiciary can order a prosecutor—a member of the executive branch—to reoffer the plea implicates concerns about the separation of powers. In *State v. Greuber*, the Utah Supreme Court decided that, under the separation-of-powers doctrine, courts do not have the power to require the prosecution to reoffer a plea bargain, especially since it would often entail dismissing charges.[109] Additionally, forcing the prosecution to reoffer a plea bargain that it initially offered to avoid the expense and risk of a trial that it has already won would violate basic fairness principles enshrined in the separation-of-powers doctrine.[110] Other courts have decided that they could remand the case for retrial but have no power to require the government to reinstate the rejected plea offer.[111] Even assuming that the court vacates the conviction, the prosecution could simply refuse to offer the same deal again or refuse to engage in plea bargaining negotiations at all.[112]

106. *See* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

107. *See* Mabry v. Johnson, 467 U.S. 504, 510 n.11 (1984).

108. *See* Moore v. Sims, 442 U.S. 415, 423 (1979); Younger v. Harris, 401 U.S. 37, 49 (1971).

109. 165 P.3d 1185, 1190 (2007) ("Under the doctrine of separation of powers, we do not believe courts have the power, in the absence of prosecutorial misconduct, to require the prosecution to dismiss charges, as would often be necessary to enact the earlier rejected plea.").

110. *Id.* at 1190.

111. *See* State v. Eckelkamp, 133 S.W.3d 72, 75 (Mo. Ct. App. 2004) (finding that the court lacked authority to mandate that the prosecutor engage in plea negotiations).

112. Bryan v. State, 134 S.W.3d 795, 804 (Mo. Ct. App. 2004).

Forcing the government to reoffer the plea becomes even more difficult when significant time has elapsed. This remedy would fail to take into account the changed circumstances of both parties since the original offer was made, which would interfere with established prosecutorial discretion. After conducting a trial and obtaining a conviction, the prosecutor may come to believe that the public's interest is disserved by the original plea offer.[113] A lot can happen between the time when the original offer was made and the conclusion of an arduous post-conviction appeals process; "the prosecutor should not be locked into the proposed pretrial disposition, appropriate as it may have been at the time."[114] Not to mention that sentencing decisions are usually made at the trial level, ordering specific performance of a plea bargain, especially one that was not yet approved by the trial judge, would prevent the trial court from exercising its traditional sentencing discretion.[115]

Certain changed conditions may also make the original plea irretrievable under the Constitution's Double Jeopardy Clause, which forbids a defendant from being prosecuted a second time for the same crime if he has already been found innocent.[116] For instance, imagine a scenario where the defendant is indicted for both felonious possession of a firearm and aggravated manslaughter. The initial plea offer stipulates that, if the defendant pleads guilty to the firearm offense, the state will drop the manslaughter charge. Instead, the defendant turns down the plea and goes to trial, where he is convicted of aggravated manslaughter but found innocent of the firearms charge. The prohibition against double jeopardy would then prevent the defendant from pleading guilty to felonious possession of a firearm, a charge for which he has been declared innocent. The plea, at this point, would be impossible to resurrect.[117] Presumably, this same argument applies to the new trial remedy: the defendant could not be retried on any elements for which he was already found innocent, so a new trial remedy may not include all of the charges of the original trial.[118]

113. *See In re* Alvernaz, 830 P.2d 747, 759 (Cal. 1992).

114. *Id.* at 759-60.

115. People v. Calloway, 631 P.2d 30 (Cal. 1981) (deeming specific performance inappropriate because it would prevent the trial court from exercising sentencing discretion).

116. U.S. CONST. amend. V ("[No person shall] be subject for the same offence to be twice put in jeopardy of life or limb . . . .").

117. *See, e.g.*, Commonwealth v. Mahar, 809 N.E.2d 989, 1003 (Mass. 2004) (noting that the defendant was acquitted of charges found in the plea arrangement, making it "legally impossible to resurrect and impose the previously rejected plea agreement").

118. *Id.*

IV. TURNING BACK THE CLOCK: A NEW TRIAL TO BALANCE PREJUDICE AGAINST COMPETING INTERESTS

Remedies for ineffective assistance of counsel "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests."[119] Those competing interests include society's interest in the administration of criminal justice.[120] Ultimately, the only workable remedy for this type of constitutional error is to vacate the conviction and sentence and to order a new trial.

In fact, most courts agree that a defendant suffers prejudice if, as a result of constitutionally deficient counsel, he rejects a plea bargain and proceeds to trial only to receive a sentence much higher than the erroneously rejected plea bargain. However, by and large, these decisions do not grapple with the difficulties of both determining prejudice and fashioning a remedy, two serious obstacles that were outlined in Parts II and III. The *Greuber* and *Taccetta* decisions concluded that because the machinations of the ensuing trial were fair, the defendant suffered no cognizable prejudice and was therefore not entitled to a remedy.

Section IV.A discusses the leading state and federal decisions that have ordered a retrial and their justifications for doing so. I then rebut two arguments deeply embedded in the *Greuber* and *Taccetta* courts' reasoning. Section IV.B shows that the right claimed is not the right to a plea bargain but rather the procedural right to have effective assistance of counsel during plea negotiations. Section IV.C argues that preventing defendants from accepting a plea bargain if they have ever proclaimed innocence is an unworkable rule.

The discussion in this Part lays the groundwork for Part V's introduction of the notion that ineffective assistance of counsel during plea bargaining is a structural error, rather than a trial error. Even if the trial was otherwise fair, a structural flaw is inherently prejudicial because the error transcends the trial itself. The test is not whether the trial alone was fair but rather whether the defendant was "fairly convicted," a question that includes more than just the trial itself.[121]

After showing that a structural flaw will prejudice a defendant, despite any ostensibly fair trial that he may have received, I conclude that the conviction should be vacated and the proceedings reset. By vacating the convictions but

119. United States v. Morrison, 449 U.S. 361, 364 (1981).

120. *Id.*

121. State v. Lentowski, 569 N.W.2d 758, 761 (Wis. Ct. App. 1997) (quoting State v. Reppin, 151 N.W.2d 9, 14 (Wis. 1967)).

not forcing the prosecution to reoffer the plea, this remedy avoids entanglement with the principles of federalism and separation of powers, while still ensuring an outcome that protects both the defendant's constitutional interests and the public's interest in promoting justice.

A. State and Federal Decisions that Have Embraced the Retrial Remedy

In 1978, a Pennsylvania appellate court considered *Commonwealth v. Napper*, one of the first cases of ineffective assistance of counsel during plea bargaining.[122] In *Napper*, the defendant rejected a favorable plea bargain of up to three years because his attorney did not advise him as to the offer's relative merits.[123] He ultimately received two consecutive terms of five to twenty years.[124] Before concluding that his trial counsel was ineffective, the appellate court asked "whether the action or strategy that counsel decided against or neglected had arguable merit."[125] The court saw the plea offer as a bargain, especially because the indictment risked a sentence of up to forty years—which is what the defendant ultimately received.[126] A central tenet of the Sixth Amendment's right to counsel is that "[d]efense counsel has a duty to communicate to his client, not only the terms of a plea bargain offer, but also . . . the defendant's chances at trial."[127] The court went on to say:

> The decision whether to plead guilty or contest a criminal charge is probably the most important single decision in any criminal case. . . . But counsel may and must give the client the benefit of his professional advice . . . to convince the client that one course or the other is in the client's best interest. Such persuasion is most often needed to convince the client to plead guilty in a case where a not guilty plea would be totally destructive.[128]

The *Napper* court acknowledged several uncertainties, such as whether the defendant would have accepted the offer and whether the trial court would have approved the offer. The latter inquiry—whether a trial judge would

122. 385 A.2d 521 (Pa. Super. Ct. 1978).

123. *Id.* at 522.

124. *Id.* at 521.

125. *Id.* at 522.

126. *Id.* The court also found significant that the evidence against the defendant was overwhelming. *Id.* at 522-23.

127. *Id.* at 524.

128. *Id.* (quoting 1 AMSTERDAM ET AL., *supra* note 2, at 2-143) (emphasis omitted).

approve the proposed plea bargain—is especially troublesome in cases like these because the trial court has always imposed a sentence that is much higher than the rejected plea offer. Despite these uncertainties, the *Napper* court concluded that the deficiency was prejudicial because the defendant *might* have accepted the offered bargain.[129] As for whether the court would have rejected the offer, "as a practical matter . . . this rarely occurs."[130] Having concluded that the deficiency was prejudicial, the discussion shifted to what remedy would cure this prejudice. The court recognized that any remedy would be imperfect: the court could neither compel the state prosecutor to reinstate the plea bargain offer nor craft its own sentence.[131] Left with no other choice, the court vacated the conviction and ordered a retrial, granting the defendant a new opportunity to engage in plea bargain discussions with competent counsel.[132]

During the 1990s, two more states decided that the proper remedy for ineffective assistance of counsel during plea bargaining is a new trial. In *State v. Lentowski*, the Wisconsin Court of Appeals considered a defendant's claim of ineffective assistance of counsel where his attorney improperly advised him to reject a plea in order to pursue a mistaken defense.[133] The *Lentowski* court acknowledged that ordering a new trial is an imperfect remedy: returning the parties to the pretrial stage cannot completely recreate the conditions present before the constitutional violation occurred.[134] Nevertheless, the remedy struck an appropriate balance between the interests of the prosecution and those of the criminal defendant.[135] The prosecution arguably has increased bargaining power after having obtained a conviction.[136] The defendant, however, gains leverage afforded by a prosecutor's desire to avoid another costly and uncertain trial, where the pressure to secure another conviction would be tremendous.[137] As previously noted, ordering specific performance of a plea arrangement

129. *Id.*; *see also* State v. Hallman, 309 S.E.2d 493, 497 (N.C. Ct. App. 1983) ("We, therefore, hold that a failure to inform a client of a plea bargain offer constitutes ineffective assistance of counsel absent extenuating circumstances.").

130. *Napper*, 385 A.2d at 524.

131. *Id.* ("Finally, it should be noted that our decision gives appellant only imperfect relief. We cannot compel the Commonwealth to reinstate its plea bargain offer; nor can we dictate what sentence may be imposed if appellant pleads guilty without so advantageous an offer as he had before, or if he goes to trial and is again convicted.").

132. *Id.*

133. 569 N.W.2d 758 (Wis. Ct. App. 1997).

134. *Id.* at 762.

135. *Id.*

136. *Id.*

137. *Id.*

implicates concerns regarding federalism, the separation of powers, and double jeopardy.[138] But by ordering a retrial, the decision whether to make the same offer or any offer at all is left to the prosecutor,[139] thereby avoiding conflicts with two of those principles: federalism and the separation of powers. Additionally, since any retrial would necessarily have to exclude those charges for which the defendant was already declared innocent, this remedy would not infringe upon a defendant's protection against double jeopardy. As a result, the *Lentowski* court concluded that only a new trial remedy could balance the interests of the prosecution and defendant, while avoiding conflict with other constitutional principles.

In *People v. Curry*, the Illinois Supreme Court decided a similar case.[140] The defendant in *Curry* demonstrated that during plea negotiations his attorney did not know that he faced mandatory consecutive sentencing, a fact that would have changed the calculus about whether to risk trial.[141] The court decided that the defendant received defective counsel because his attorney was "entirely unaware" of the maximum sentence that the defendant faced.[142] The court next considered whether the deficient counsel prejudiced the defendant. The State made two arguments against a finding of prejudice. First, it argued that even if defense counsel's advice was inadequate, the defendant suffered no prejudice because he did not have a substantive or procedural right to the plea bargain that he rejected.[143] The court rejected this argument and instead reframed the issue as a question of whether a defendant deserves adequate counsel to consider a plea that has already been offered:

> It is true that a defendant has no constitutional right to be offered the opportunity to plea bargain. However, in this case, the State did engage in plea bargaining with defendant. Thus, what is at issue here is whether, having received a plea offer from the State, defense counsel's deficient performance deprived defendant of his right to be reasonably informed as to the direct consequences of accepting or rejecting that offer.[144]

138. *See supra* Section III.C.

139. *Lentowski*, 500 N.W.2d at 762.

140. 687 N.E.2d 877 (Ill. 1997).

141. *Id.* at 883-85.

142. *Id.* at 887.

143. *Id.*

144. *Id.* at 888 (internal citations omitted).

Second, the State argued that the defendant should also prove that the trial judge would have accepted the plea bargain offer in order to demonstrate prejudice.[145] The court declined to impose this requirement, however, noting that it would be at odds with the realities of the plea bargain process, not to mention unwise to require litigants to speculate about how a particular judge would have acted.[146]

Having established ineffective assistance of counsel and prejudice, the court then shifted its discussion to the proper remedy. The court acknowledged that the defendant was not deprived of a fair trial and, in turn, that another trial could not truly remedy the situation because the constitutional deprivation occurred during plea bargaining.[147] But after agreeing that specific performance of the plea agreement would not be a proper remedy, the court concluded that a retrial was the remedy best tailored to the constitutional injury.[148] Many other states also have ordered a new trial to remedy ineffective assistance of counsel during plea bargaining,[149] often without further discussion.[150]

Several federal court decisions have played out the same way. In *Turner v. Tennessee*, the Sixth Circuit considered an appeal from a habeas petitioner who claimed that he had received ineffective assistance of counsel when he rejected a two-year plea offer and proceeded to trial, where he received a sentence of life plus forty years.[151] Although both sides agreed that the right to effective

145. The State pointed out that a trial judge is not bound by the terms of a plea bargain agreement and may in fact issue a different sentence. *Id.* at 889.

146. *Id.* at 890; *see also* Turner v. Tennessee, 858 F.2d 1201, 1207 (6th Cir. 1988) ("[W]e do not believe that [the defendant] was required to demonstrate a reasonable probability that the trial court would have approved the two-year plea arrangement."), *vacated on other grounds*, 492 U.S. 902 (1989).

147. *Curry*, 687 N.E.2d at 890.

148. The court's opinion did not explain why specific performance of the plea bargain was inappropriate. *Id.*

149. *See, e.g.*, Dew v. State, 843 N.E.2d 556 (Ind. Ct. App. 2006) (ordering a new trial if the state did not reinstate the original plea offer upon remand); State v. Williams, 83 S.W.3d 371 (Tex. App. 2002) (holding that failing to inform the defendant of a plea bargain offer was defective assistance warranting a new trial); *In re* McCready, 996 P.2d 658 (Wash. Ct. App. 2000) (granting a new trial where the defense counsel failed to inform the defendant that he would serve mandatory minimum terms totaling ten years).

150. Larson v. State, 766 P.2d 261 (Nev. 1988); State v. Simmons, 309 S.E.2d 493 (N.C. Ct. App. 1983); Commonwealth v. Copeland, 554 A.2d 54 (Pa. Super. Ct. 1988) (awarding a new trial if upon remand the defendant proved ineffective assistance of counsel for failure to tell the defendant of a plea offer); Hanzelka v. State, 682 S.W.2d 385 (Tex. App. 1984) (finding ineffective assistance of counsel and awarding a new trial); State v. Ludwig, 369 N.W.2d 722 (Wis. 1985) (same).

151. 858 F.2d 1201 (6th Cir. 1988), *vacated on other grounds*, 492 U.S. 902 (1989).

assistance of counsel extends to the decision to reject a plea offer and proceed to trial, the State argued that the error did not prejudice the petitioner because he could not show that, but for the incompetent advice, he would have accepted the offer or that the trial court would have approved the arrangement.[152] The *Turner* court agreed that the defendant had to demonstrate a "reasonable probability" that he would have accepted the offer but decided that in this case the defendant had done so.[153] The court further rejected the State's argument that a defendant must also demonstrate that the trial court would have approved the arrangement; instead, the court shifted this burden onto the State to demonstrate otherwise.[154] Having established prejudice, the court then discussed the proper remedy: the court granted the equivalent of a new trial, although the decision did not couch the remedy in those terms.

In its remedy discussion, the court conceded that granting Turner a new trial could not adequately remedy the deprivation: the rejected plea offer of two years was so unlike the sentence—life imprisonment plus forty years—that there was no chance that one more fair trial could revive the lost chance.[155] Because a prosecutor would never reoffer a two-year bargain after seeing a sentence of life plus forty years, the court reasoned that ordering a new trial might not be adequate. But they acknowledged that, "[o]n the other hand, requiring specific performance of the original two-year plea arrangement might unnecessarily infringe on the competing interests of the State."[156] The court decided that "the only way to neutralize the constitutional deprivation" would be to allow the defendant "to consider the State's two-year plea offer with the effective assistance of counsel."[157] Nevertheless, because the defendant did not have to accept this offer, and because the State could withdraw the offer upon showing that the withdrawal was not the product of prosecutorial vindictiveness, this remedy functionally returned the parties to the plea bargaining stage, before trial.[158] Although increasing the probability that both sides would agree to the original two-year plea offer, the court effectively restarted the trial process.

152. *Id.* at 1206-07.

153. *Id.* at 1207.

154. *Id.*

155. *Id.* at 1208.

156. *Id.* at 1208-09.

157. *Id.* at 1208.

158. *Id.* at 1209.

In *Julian v. Bartley*, the Seventh Circuit considered a habeas petitioner's claim of ineffective assistance of counsel during plea bargaining.[159] The defendant's attorney had misinterpreted the Supreme Court's decision in *Apprendi v. New Jersey*[160] and mistakenly believed that the defendant faced a maximum thirty-year sentence. As a result, the defense counsel had advised the defendant to reject the State's plea offer of twenty-three years and to proceed to trial. However, contrary to his attorney's advice, the defendant faced a sixty-year sentence by going to trial, and after conviction he received a forty-year sentence.[161] The court decided that the defense counsel's advice about a thirty-year maximum was "clearly wrong and therefore objectively unreasonable."[162] The court concluded that this error was clearly prejudicial because the defendant believed that he was risking seven years by going to trial, when actually he was risking thirty-seven years.[163]

The court rejected specific performance of the plea bargain as an appropriate remedy because the State had no hand in denying the defendant his right to effective assistance of counsel.[164] Moreover, since the defendant never actually accepted the plea bargain, he had no absolute right to the offer now.[165] As a result, the court had no choice but to grant the defendant a new trial, even though it noted that this remedy may not always be appropriate in these circumstances.[166] Similarly, several other circuits have agreed that only a new trial adequately solves the constitutional deprivation while respecting other competing interests.[167]

159. 495 F.3d 487 (7th Cir. 2007).

160. 530 U.S. 466 (2000).

161. *Bartley*, 495 F.3d at 489-90.

162. *Id.* at 495.

163. *Id.* at 499-500.

164. *Id.* at 500.

165. *Id.*

166. *Id.* Although the court made clear that it did not believe that this remedy would be appropriate in all cases, the two conditions that the decision cites as reasons to reject specific performance of the plea bargain—that the state had no role in denying the defendant effective assistance of counsel and that the defendant never actually accepted the offer—apply equally to each case. In no case where a defendant rejects a plea bargain as a result of ineffective assistance of counsel has the state been responsible for the deprivation.

167. *See, e.g.*, United States v. Gordon, 156 F.3d 376, 382 (2d Cir. 1998) (per curiam) (affirming the district court's order to vacate the defendant's convictions due to a finding of ineffective assistance of counsel and to grant him a new trial).

B. The Right Claimed Here Is Not the Right to a Plea Bargain, but Rather the Procedural Right To Be Effectively Represented During Plea Negotiations

One key argument (central to the "no harm, no foul" approach discussed in Part II) is that defendants do not have a right to a plea bargain, and therefore prejudice cannot result because the deficient counsel did not deprive the defendant of any substantive or procedural right to which the law entitles him.[168] But this argument misstates the issue.

It is true that defendants do not have a constitutional right to a plea bargain or even the right to the opportunity to negotiate for one.[169] Nevertheless, in cases like these, the prosecution has already engaged in plea bargain negotiations with the defendant. Therefore, the issue is not whether the criminal defendant has a right to engage in these negotiations, but rather, once the negotiations start and an offer is made, whether a defendant has the right to be reasonably informed by effective counsel as to the direct consequences of accepting or rejecting the prosecution's offer.[170] Put differently, the right lost here is "not the right to a plea bargain as such, but rather the right to counsel's assistance in making an informed decision once a plea had been put on the table."[171] To reject a plea bargain voluntarily, a defendant must understand the risks of proceeding to trial.[172]

Although historically the core purpose of the right to counsel was to assure assistance at trial, the U.S. Supreme Court has come to recognize, over time, that this assistance would be less meaningful if it were limited to the formal trial itself.[173] As a result, the Court has consistently held that the right to

168. *See* Lockhart v. Fretwell, 506 U.S. 364, 372 (1993).

169. State v. Greuber, 165 P.3d 1185, 1190 (Utah 2007).

170. *See* United States v. Day, 969 F.2d 39, 43 (3d Cir. 1992); People v. Curry, 687 N.E.2d 877, 887 (Ill. 1997).

171. Nunes v. Mueller, 350 F.3d 1045, 1052 (9th Cir. 2003); *see also* Williams v. Jones, 571 F.3d 1086, 1094 (10th Cir. 2009) (per curiam) (noting that the right lost was the right to effective counsel when deciding "whether to accept or reject the plea offer").

172. *In re* McCready, 996 P.2d 658, 660 (Wash. Ct. App. 2000) ("Stated differently, Mr. McCready's rejection of the plea offer was not voluntary because he did not understand the terms of the proffered plea bargain *and the consequences of rejecting it*."); *see also* People v. Correa, 485 N.E.2d 307, 310 (Ill. 1985) (holding that the voluntariness of a guilty plea depends upon whether the defendant had effective assistance of counsel).

173. United States v. Ash, 413 U.S. 300, 309-10 (1973); *see also* Nunes v. Mueller, 350 F.3d 1045, 1052-53 (9th Cir. 2003) (citing *Powell v. Alabama*, 287 U.S. 45 (1932), and *Ash*, 413 U.S. 300, to apply the Sixth Amendment to plea bargain negotiations).

effective counsel attaches during all critical stages of the prosecution.[174] In particular, the Court in *Powell v. Alabama* concluded that pretrial arrangements could be "perhaps the most critical period of the proceedings."[175] Since plea bargaining is an "essential component"[176] of the criminal process, a defendant's counsel has a duty to provide effective assistance during this stage.[177] This ensures that a defendant retains the ultimate authority to make certain fundamental decisions, such as "whether to plead guilty, waive a jury, testify on his or her own behalf, or take an appeal."[178] When a defendant is denied effective assistance of counsel during plea bargaining, the right asserted is not the right to a plea bargain, or even the right to a fair trial, but rather the right to be properly informed before deciding his or her own fate.[179] Once attached, this guarantee necessarily extends to the decision whether to accept or reject an offer.[180] In this way, the right to counsel protects more than simply a fair trial, for it also "serves to protect the reliability of the entire trial process."[181] Therefore, incompetent advice to reject a plea bargain offer and proceed to trial constitutes a cognizable Sixth Amendment violation.[182]

The Tenth Circuit recently considered this issue in *Williams v. Jones*.[183] In *Williams*, the defendant wanted to accept the prosecution's offer of a ten-year

174. *See* Rothgery v. Gillespie Cnty., 554 U.S. 191 (2008); Brewer v. Williams, 430 U.S. 387, 398 (1977); *Powell*, 287 U.S. at 57; *see also* Hill v. Lockhart, 474 U.S. 52, 57 (1985) (applying the right to effective counsel "to ineffective-assistance claims arising out of the plea process").

175. *Powell*, 287 U.S. at 57.

176. Santobello v. New York, 404 U.S. 257, 260 (1971).

177. *See* Strickland v. Washington, 466 U.S. 668, 688 (1984).

178. *Nunes*, 350 F.3d at 1053 (quoting Jones v. Barnes, 463 U.S. 745, 751 (1983)).

179. *Id.* ("Here the right that [the defendant] claims he lost was not the right to a fair trial or the right to a plea bargain, but the right to participate in the decision as to, and to decide, his own fate—a right also clearly found in Supreme Court law.").

180. *Id.* at 1054.

181. *Id.* at 1052; *see also* United States v. Blaylock, 20 F.3d 1458, 1466 (9th Cir. 1994); United States v. Day, 969 F.2d 39, 45 (3d Cir. 1992).

182. *See* Turner v. Tennessee, 858 F.2d 1201, 1205 (6th Cir. 1988), *vacated on other grounds*, 492 U.S. 902 (1989); *see also* Engelen v. United States, 68 F.3d 238, 241 (8th Cir. 1995) ("In doing so we recognize that a defendant, after rejecting the proposed plea bargain and receiving a fair trial, may still show prejudice if the plea bargain agreement would have resulted in a lesser sentence."); United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 438 (3d Cir. 1982) ("[The criminal defendant's] decision to reject a plea bargain offer and plead not guilty is also a vitally important decision and a critical stage at which the right to effective assistance of counsel attaches."); Beckham v. Wainwright, 639 F.2d 262, 267 (5th Cir. Unit B Mar. 1981) (holding that a defendant suffers a Sixth Amendment violation when advice to reject a plea bargain and proceed to trial is incompetent).

183. 571 F.3d 1086 (10th Cir. 2009) (per curiam).

sentence in return for pleading guilty to second-degree murder, but his attorney was opposed and threatened to withdraw from the case if Williams accepted.[184] The opinion explains at length how a defendant is prejudiced by this type of error, noting that "had [the defendant] been adequately counseled, there is a reasonable probability that he would have accepted the plea offer."[185] The court made clear that a subsequent fair trial does not "vitiate the prejudice from the constitutional violation,"[186] because the defendant ultimately had the right to effective counsel "during plea negotiations, including the decision whether to accept or reject the plea offer."[187]

Indeed, the "no harm, no foul" approach is often inapplicable because there are some constitutional protections that have purposes *other than* to promote the reliability of guilty verdicts. Before a court may fashion a remedy to correct a constitutional violation, it should first assess the "fundamental purposes of the right implicated by the error."[188] In this case, the purpose of the right to effective assistance of counsel during plea bargaining is to ensure that a defendant considers and understands the plea bargain offer—and the consequences of rejecting or accepting its terms. When this right is violated, returning the defendant to the moment before the violation occurred is the only way to vindicate the right's basic purpose. But because a court cannot order a member of the executive branch to reoffer a plea bargain, the only available vindication is a new trial. The decisions in *Taccetta* and *Greuber* focus entirely on a reductionist view of the criminal process (a fair trial), while ignoring the essential purposes of this particular right.

C. *Disallowing Defendants, Who at One Point May Have Declared Their Innocence, from Later Claiming that They Would Have Accepted a Plea Is an Unworkable Rule*

Recall that the *Taccetta* court used the defendant's own proclamations of innocence against him, arguing that his plea would never have been approved because the defendant would have committed perjury by pleading guilty. Because a trial court cannot accept perjured testimony, the *Taccetta* court concluded that the defendant suffered no prejudice as a result of his lost

184. *Id.* at 1088.

185. *Id.* at 1091.

186. *Id.*

187. *Id.* at 1094.

188. Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 89-90 (1988).

plea.[189] This rule, however, is inherently flawed. To begin, it is circular: by pleading not guilty and presenting a defense, the defendant could not have pled guilty and waived his defense. But beyond that, it also misses the point. The fact that a defendant chooses to defend himself after rejecting a favorable plea offer does not show why he rejected the offer in the first place.[190]

While the *Taccetta* court held that a defendant cannot simultaneously maintain his innocence—or, for that matter, ever proclaim it—and plead guilty pursuant to a plea bargain, the Supreme Court has stated otherwise. In fact, in *North Carolina v. Alford*, the Court said the exact opposite, holding that a trial judge may accept a guilty plea from a defendant who maintains his innocence as long as there is "a strong factual basis" for the plea.[191] While the *Alford* plea was accepted so that the defendant could avoid the risk of the death penalty, *Alford* pleas for noncapital offenses are also acceptable.[192] Often, when a defendant believes that he is better served by pleading guilty than by going to trial, there exists some factual basis for that plea. Even then, this is a question that is easily handled by the trial judge during an evidentiary hearing. Federal Rule of Criminal Procedure 11(b)(3) requires only that "[b]efore entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea."[193]

A *Taccetta*-like rule is invariably unworkable because all too often defendants make claims of innocence that are vague and not specific to the legal standards found in each charge. For instance, if a defendant is indicted on murder and aggravated manslaughter, his proclamations of innocence may only refer to the murder charge. But this is hardly surprising, as one may be innocent of murder and guilty of aggravated manslaughter. Because of

189. State v. Taccetta, 975 A.2d 928, 935-36 (N.J. 2009).

190. *See* Lewandowski v. Makel, 949 F.2d 884, 889 (6th Cir. 1991) (determining that prejudice rests on the defendant's motivation for rejecting the plea offer, not on the act itself); People v. Curry, 687 N.E.2d 877, 888 (Ill. 1997) (same).

191. 400 U.S. 25, 37-38 (1970).

192. *See, e.g.*, United States v. Cox, 923 F.2d 519, 524-26 (7th Cir. 1991); United States v. Gomez-Gomez, 822 F.2d 1008, 1011 (11th Cir. 1987); United States v. O'Brien, 601 F.2d 1067, 1070 (9th Cir. 1979); United States v. Bednarski, 445 F.2d 364, 365-66 (1st Cir. 1971).

193. FED. R. CRIM. P. 11(b)(3). Additionally, the American Bar Association's *Standards for Criminal Justice* allows a plea to be withdrawn if it is necessary to correct a "manifest injustice." Standard 14-2.1(b)(i) states: "Withdrawal may be necessary to correct a manifest injustice when the defendant proves, for example, that: (A) the defendant was denied the effective assistance of counsel guaranteed by constitution, statute, or rule . . . ." AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY 81 (3d ed. 1999), *available at* http://www.abanet.org/crimjust/standards/pleasofguilty.pdf.

sentencing disparities, defendants who proclaim their innocence will often still consider a plea.[194]

If this rule is enforced, then only a defendant "who remains mute or, better yet, confesses in open court, will be able to complain of this constitutional violation."[195] But this reasoning forces a defendant to give up one constitutional right (the right to present a defense) in order to vindicate another (the right to counsel during plea bargaining). Surely, constitutional rights "cannot be held hostage in this fashion."[196] A defendant who professes his innocence should not be prohibited from entering a plea pursuant to a plea bargain, especially if there is a strong factual basis for guilt.[197]

Ultimately, the internal logic of this rule depends on two assumptions: first, that the defendant's professions of innocence are true and, second, that a guilty plea would be false (perjured) testimony. This logic, however, does not survive analytical scrutiny because the trial itself, which ended with a conviction, should outweigh the defendant's initial proclamations of innocence. For example, the *Taccetta* court ignored the possibility that the professions of innocence themselves were perjured, rather than the hypothetical guilty plea. The fact that the defendant was convicted at trial lends support to the notion that his ex ante unsubstantiated and self-serving claim of innocence was later disproved at trial. If anything, given all the information revealed at trial, an appellate judge, ex post, should be more confident—not less—that the guilty plea would not be perjured testimony. After a trial and conviction, both assumptions listed above should hardly be taken for granted.

Second, if a court were to accept these two assumptions, then it should immediately vacate the convictions and release the defendant. For if the guilty plea would have been perjury, then a finding of guilt is surely erroneous. Seen this way, the rule unfairly and unnecessarily favors the prosecution. On the one hand, the government gets to stand by its original allegations. On the other, the defendant is not allowed to concede these allegations without committing perjury. Those two conditions are untenable, not to mention contradictory.

This argument, however, is related to the twin burdens that some courts impose upon the defendant: (1) to demonstrate that he would have accepted

194. *See* Pham v. United States, 317 F.3d 178, 183 (2d Cir. 2003); Mask v. McGinnis, 233 F.3d 132, 142 (2d Cir. 2000); Cullen v. United States, 194 F.3d 401, 407 (2d Cir. 1999).

195. *In re* Alvernaz, 830 P.2d 747, 765 (Cal. 1992) (Mosk, J., dissenting).

196. *Id.*

197. North Carolina v. Alford, 400 U.S. 25, 37-38 (1970); *Cox*, 923 F.2d at 524-26; *Gomez-Gomez*, 822 F.2d at 1011; *O'Brien*, 601 F.2d at 1070; *Bednarski*, 445 F.2d at 365-66; *see also* FED. R. CRIM. P. 11(b)(3) (requiring a "factual basis for the plea").

the offer, but for counsel's advice;[198] and (2) to show that the judge would have approved the offer.[199] In the abstract, requiring the defendant to show that he would have accepted the offer is hardly unfair. For instance, the Second Circuit has expressed doubt about whether a defendant's self-serving, post-conviction testimony that he would have accepted the plea offer is sufficient, by itself, to establish a "reasonable probability" that the outcome would have been different.[200] The Seventh Circuit also requires other "objective evidence" that the defendant would have accepted the offer.[201] This requirement would reduce the risk of fabricated claims made by a self-serving party after trial.[202]

While the burden of proving that the defendant would have accepted the offer is properly placed upon the defendant, the burden of demonstrating that the judge would have accepted the offer is not. There is no statute and no Supreme Court precedent that imposes such a requirement. Indeed, it appears rather unwise to require a litigant to demonstrate how a particular judge would have acted under past circumstances.[203] The burden here should be reversed. Rather than obliging the defendant to prove that the judge would have accepted the offer, it is more appropriate to require the government to demonstrate that the trial court would not have approved the plea arrangement, especially since disapproval is so rare.[204] In this way a prosecutor may argue that, although a counsel's ineffective assistance led to the rejection of a favorable plea offer, the defendant nevertheless suffered no prejudice because the trial court would not have approved the deal in the first place.[205] Because courts so rarely reject plea bargains, after the defendant has demonstrated that he would have accepted the plea the burden should shift to the government to prove that the trial court was not prepared to approve the

198. *Alvernaz*, 830 P.2d at 749.

199. People v. Stringham, 206 Cal. App. 3d 184, 194 (Ct. App. 1988).

200. United States v. Gordon, 156 F.3d 376, 381 (2d Cir. 1998) (citing Johnson v. Duckworth, 793 F.2d 898, 902 n.3 (7th Cir. 1986)); Boria v. Keane, 99 F.3d 492, 496-97 (2d Cir. 1996).

201. Toro v. Fairman, 940 F.2d 1065, 1068 (7th Cir. 1991).

202. *See Alvernaz*, 830 P.2d at 756; *see also* Turner v. Tennessee, 858 F.2d 1201, 1206 (6th Cir. 1988) ("The State is correct in maintaining that Turner must establish that there is a reasonable probability that, but for the incompetence of counsel, he would have accepted the two-year offer and pled guilty."), *vacated on other grounds*, Tennessee v. Turner, 492 U.S. 902 (1989).

203. *See Turner*, 858 F.2d at 1207; United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 438 n.2 (3d Cir. 1982) (finding ineffective assistance of counsel in a decision to reject a plea offer even though the defendant did not rebut the possibility that the trial court would not have approved the arrangement).

204. Commonwealth v. Napper, 385 A.2d 521, 524 (Pa. Super. Ct. 1978).

205. *Turner*, 858 F.2d at 1207.

arrangement.[206] For instance, in *Turner* the court found it "much more significant" that the State could point to no evidence that indicated that the trial court would not have approved the plea arrangement.[207] After the defendant established "a reasonable probability" that he would have accepted the State's offer, the burden shifted to the State to "offer clear and convincing evidence that the trial court would not have approved the plea arrangement."[208] Allocating the burdens in this way would be fairer to both parties.

Some may argue that this arrangement unfairly burdens a prosecutor that had no part in the constitutional violation. However, as the Supreme Court said in *Kimmelman v. Morrison*, "the Constitution constrains our ability to allocate as we see fit the costs of ineffective assistance. The Sixth Amendment mandates that the State [or the government] bear the risk of constitutionally deficient assistance of counsel."[209] Therefore, placing too many of these burdens on the defendant "impermissibly shift[s] the risk of ineffective assistance of counsel" away from the prosecution.[210]

V. INEFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA BARGAINING IS A STRUCTURAL ERROR IN THE TRIAL PROCESS ITSELF, WHICH REQUIRES AN AUTOMATIC REVERSAL AND RETRIAL

A. The Current Framework for Determining When an Error Is Structural or Trial Error

As the Constitution does not mandate any particular remedy for violations of its text, courts are instead bound by Federal Rule of Criminal Procedure 52(a) to disregard any error "which do[es] not affect . . . substantial rights."[211] Congress enacted Rule 52(a) in 1919 so that courts would not automatically have to reverse convictions because of small technical mistakes that, for all

206. *Id.* ("We believe that, if the State wishes to suggest that the trial court would not have approved this plea arrangement, the State, and not Turner, bears the burden of persuasion.").

207. *Id.*

208. *Id.*

209. 477 U.S. 365, 379 (1986).

210. United States v. Blaylock, 20 F.3d 1458, 1469 (9th Cir. 1994).

211. 28 U.S.C. § 2111 (2006); *see also* Chapman v. California, 386 U.S. 18, 22 (1967) ("[J]udgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties.'" (quoting 28 U.S.C. § 2111)).

intents and purposes, did not affect the proceedings.[212] The Supreme Court applied harmless error review to constitutional errors for the first time in *Chapman v. California*.[213] Writing for the Court, Justice Hugo Black summed up the purpose of the harmless error standard: "All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial."[214] The Court went on to clarify that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."[215]

However, the *Chapman* Court acknowledged that some constitutional rights are so fundamental that their infraction can never be harmless.[216] The Court listed three of these rights, taking care to emphasize that this list was not exhaustive: the right to counsel, the right to an impartial presiding judge, and the right to be free from a coerced confession.[217] These errors "are so intrinsically harmful as to require automatic reversal . . . without regard to their effect on the outcome."[218] The Court has since expanded this "limited class of fundamental constitutional errors that 'defy analysis by harmless error standards.'"[219] For instance, the right to self-representation "when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, [and thus] its denial is not amenable to harmless error analysis. The right is either respected or denied; its deprivation cannot be harmless."[220]

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212. Charles J. Ogletree, Jr., Arizona v. Fulminante*: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 156-57 (1991).

213. 386 U.S. 18.

214. *Id.* at 22.

215. *Id.*

216. *Id.* at 23; *see also* Neder v. United States, 527 U.S. 1, 7 (1999) (recognizing that some errors "defy analysis by 'harmless error standards'" (quoting Arizona v. Fulminante, 499 U.S. 279, 309 (1991))).

217. *Chapman*, 386 U.S. at 23 n.8. Justice Stewart's concurring opinion cautioned that this list was not exhaustive and that other errors would also defy harmless error analysis. *Id.* at 42-44 (Stewart, J., concurring); *see also* Ogletree, *supra* note 212, at 158-59 (discussing *Chapman*).

218. *Neder*, 527 U.S. at 7.

219. *Id.* (internal quotations marks omitted) (quoting Arizona v. Fulminante, 499 U.S. 279, 309 (1991)).

220. McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984) (internal quotations omitted); *see also* Martinez v. Court of Appeals, 528 U.S. 152, 160 (2000) (finding that the denial of self-representation is not subject to harmless error review because the right is "grounded in part in a respect for individual autonomy").

When an appellate court confronts an error in the lower court process, it must first decide whether to treat it as a structural error (which requires an automatic reversal) or a trial error (which might not always require reversal).[221] To determine whether a particular constitutional error is a structural error or a trial error, courts use the test articulated in *Arizona v. Fulminante*.[222] In *Fulminante*, the Arizona Supreme Court had ruled that the defendant's confession had been coerced and that its use against him at trial violated the Fifth and Fourteenth Amendments of the United States.[223] The question before the Supreme Court was whether a court could subject that particular violation to harmless error analysis. To resolve the issue, the *Fulminante* Court first outlined the dichotomy between trial errors and structural errors. A trial error is one which "occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its [effect] was harmless beyond a reasonable doubt."[224] As a result, trial errors are subject to harmless error analysis. In contrast, an error is structural if: (1) it does not occur during the presentation of the case to the jury; (2) its effects on the verdict cannot be quantitatively assessed on appeal; or (3) it affects the framework within which the trial proceeds, or whether it proceeds at all.[225]

If an error meets any one of these standards, then it is structural and the verdict must be vacated automatically. Examples of structural errors, which are not subject to harmless error analysis, include: denying counsel;[226] allowing a partial judge to preside during trial;[227] excluding members of the defendant's race from a grand jury;[228] denying the right to self-representation at trial;[229] denying one's right to a public trial;[230] selecting a petit jury in a discriminatory manner;[231] and selecting jurors in capital cases in various ways deemed

221. *See* Steven M. Shepard, Note, *The Case Against Automatic Reversal of Structural Errors*, 117 YALE L.J. 1180, 1182 (2008) (discussing the difference between trial errors and structural errors).

222. 499 U.S. at 279.

223. *Id.* at 282.

224. *Id.* at 307-08.

225. *Id.* at 307-10.

226. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

227. *See* Tumey v. Ohio, 273 U.S. 510 (1927).

228. *See* Vasquez v. Hillery, 474 U.S. 254 (1986).

229. *See* McKaskle v. Wiggins, 465 U.S. 168 (1984).

230. *See* Waller v. Georgia, 467 U.S. 39 (1984).

231. *See* Batson v. Kentucky, 476 U.S. 79 (1986).

unlawful.[232] Each of these errors affects the framework within which the trial proceeds, impacting the adversarial process from beginning to end and defying analysis by harmless error standards.[233]

In *United States v. Gonzalez-Lopez*, the Supreme Court added another error to this list.[234] At the trial level, the defendant's counsel of choice was erroneously disqualified when the district court denied his motion for admission pro hac vice. The Supreme Court had to decide whether to treat the erroneous deprivation of a defendant's counsel of choice as a trial error or as a structural error. The government asserted that a Sixth Amendment violation is not "complete" unless the defendant shows that the trial was unfair, which would require a showing of prejudice.[235] Writing for the Court, Justice Scalia rejected this argument, stating that it reframes the Sixth Amendment "as a more detailed version of the Due Process Clause—and then proceeds to give no effect to the details."[236] Of course the right is designed to ensure a fair trial, but "it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair."[237] This reasoning "abstracts from the right to its purposes, and then eliminates the right."[238] The effects of wrongfully denying one's chosen counsel are necessarily unquantifiable and intangible, making the inquiry especially speculative.[239]

The *Gonzalez-Lopez* Court reasoned that, because the right to select one's counsel of choice is not derived from the Sixth Amendment's purpose of ensuring a fair trial, it is unnecessary to conduct a prejudice inquiry.[240] The Court concluded that this type of error is structural because it does not occur during trial but rather before, because it affects the trial from beginning to end, and because its impacts cannot be quantified. Therefore, erroneously depriving a defendant of his counsel of choice is a "structural error" and not subject to harmless error review.[241] When an error is deemed structural, no additional showing of prejudice is required.

232. *See* Gray v. Mississippi, 481 U.S. 648 (1987).

233. *See* Arizona v. Fulminante, 499 U.S. 279, 310 (1991).

234. 548 U.S. 140 (2006).

235. *Id.* at 144-45.

236. *Id.* at 145.

237. *Id.*

238. Maryland v. Craig, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting).

239. *Gonzalez-Lopez*, 548 U.S. at 150-51.

240. *Id.* at 147-48.

241. *Id.* at 150.

B. *Applying the* Fulminante *Test to Ineffective Assistance of Counsel During Plea Bargaining*

It is evident from a comparison of trial errors and structural errors that ineffective assistance of counsel during plea bargaining is a structural error. First, this error defies analysis by harmless error standards and affects the framework within which the trial proceeds—or whether it proceeds at all. Second, and more fundamentally, this type of error does not occur during trial and therefore cannot be a trial error. Therefore, applying all three prongs of the *Fulminante* test, ineffective assistance of counsel during plea bargaining should be considered a structural error, which warrants an automatic reversal.

Similar to the erroneous deprivation of counsel of choice, ineffective assistance of counsel during plea bargaining has "'consequences that are necessarily unquantifiable and indeterminate.'"[242] It is impossible to know exactly what would have happened had the defendant received effective assistance of counsel: he might have accepted the offer; he might have made a counteroffer; he might have accepted the offer, but the judge might have rejected it and sent the parties back to the negotiating table; or the defendant might have turned down the offer at first, gone to trial, but then signaled that he would accept the offer at some time during trial. An inquiry into the effects of this error on the criminal process is endlessly speculative because its effect on the outcome is much more difficult to assess than either the complete denial of counsel or the denial of the defendant's first-choice attorney.[243]

Even more than the denial of one's counsel of choice, this error affects "the framework within which the trial proceeds,"[244] or "whether it proceeds at all."[245] If the defendant had received effective assistance of counsel while considering the plea bargain offer, then he would have accepted the deal—meaning that the trial would not have occurred in the first place. In this way, the fact that the trial was conducted in a fair way misses the point. No matter how fair the trial may have been on its face, the fact that it never should have occurred means that the framework itself should be questioned, not the machinations within that framework. Although *Gonzalez-Lopez* dealt with a different error altogether, the Court nevertheless acknowledged that errors during plea bargaining would constitute structural flaws in the criminal process because the harmless error analysis would be problematic and

242. *Id.* (quoting Sullivan v. Louisiana, 508 U.S. 275, 282 (1993)).

243. *Id.* at 150-51.

244. Arizona v. Fulminante, 499 U.S. 279, 310 (1991).

245. *Gonzalez-Lopez*, 548 U.S. at 150.

speculative: "Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe."[246]

Additionally, the Court's recognition of the right to effective assistance of counsel goes beyond the "fair trial" context "to the ability of the adversarial system to produce just results."[247] These results necessarily include a comparison between the length of sentence and an erroneously rejected plea bargain. Focusing only on the fairness of the trial when determining the impact of this error misses the forest for the trees.[248] Ultimately, this error deprives the criminal defendant of basic protections, without which "no criminal punishment may be regarded as fundamentally fair."[249]

Finally, and rather tautologically, trial errors occur during the trial itself, but ineffective assistance of counsel during plea bargaining necessarily occurs before the trial even begins, pervading the course and conduct of the trial from beginning to end. Because a trial error occurs during the presentation of the case to the jury, an appellate court can quantify its impact.[250] For instance, the evidentiary impact of an involuntary confession, introduced to a jury during trial, is subject to harmless error analysis because it can be quantified in light of other evidence. Thus, wrongfully admitting a coerced confession is not a structural error because it does not "transcend[] the criminal process," or affect the framework within which the trial proceeds.[251] In contrast, ineffective assistance of counsel during plea bargaining does not occur during the presentation of the case to the jury. This error is not subject to harmless error analysis because once the defendant receives erroneous advice to reject the plea bargain offer "[t]he entire conduct of the trial from beginning to end is obviously affected."[252] Analytically, subjecting this error to harmless error

246. *Id.*

247. Strickland v. Washington, 466 U.S. 668, 685 (1984).

248. *See* Mickens v. Taylor, 535 U.S. 162, 166 (2001) ("We have spared the defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding. When that has occurred, the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary." (citing United States v. Cronic, 466 U.S. 648, 658-59 (1984); Geders v. United States, 425 U.S. 80, 91 (1976); Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963))).

249. Neder v. United States, 527 U.S. 1, 9 (1999) (citing Rose v. Clark, 478 U.S. 570, 577 (1986)).

250. Arizona v. Fulminante, 499 U.S. 279, 308-09 (1991).

251. *Id.* at 311.

252. *Id.* at 309-10.

standards is problematic because "[t]here is no *object* . . . upon which harmless-error scrutiny can operate."[253] Harmless error attaches to a discrepancy during trial and is assessed by comparing how the trial result would have changed had the error not occurred. For this error, however, the object would be the existence of the trial itself. The basis for harmless error review is simply absent: it is illogical to assess the error's effect on the verdict when the verdict should never have been rendered.[254] These types of errors, which "infect the entire trial process," must be automatically reversed.[255]

C. *The "No Harm, No Foul" Decisions Adopt a Flawed Results-Oriented Approach*

To justify denying a defendant any remedy for this type of error, decisions like *Greuber* and *Taccetta* rely upon the same argument that the government in *Gonzalez-Lopez* used unsuccessfully before the Supreme Court: namely, that a defendant must show how the pretrial error prejudiced the ensuing trial, which was otherwise fair. Indeed, these two decisions demonstrate how problematic it is to apply harmless error scrutiny to this type of error: on the one hand, the trial itself was not mechanically unfair as a result of the error; on the other hand, the trial never should have occurred in the first place, because the defendant would have accepted the plea offer, but for the deficient counsel.

Because this error is not amenable to harmless error review, these "no harm, no foul" decisions are not applying a harmless error test, but rather the "right result" test. The underlying theme of these decisions is that ineffective assistance of counsel during plea bargaining did not render the defendant's trial unfair because the proceedings ended in the "right result": an obviously guilty person was found guilty by a jury and sentenced accordingly. Yet the same could be said of a directed verdict against a defendant with overwhelmingly unfavorable evidence mounted against him—but this error is per se reversible.[256] As Justice Scalia commented in *Neder*, "The very premise of structural-error review is that even convictions reflecting the 'right' result are reversed for the sake of protecting a basic right."[257] Indeed, our criminal

253. Sullivan v. Louisiana, 508 U.S. 275, 280 (1993).

254. *See id.* at 279-80.

255. Brecht v. Abrahamson, 507 U.S. 619, 630 (1993).

256. Neder v. United States, 527 U.S. 1, 34 (1999) (Scalia, J., concurring in part and dissenting in part).

257. *Id.*; *see* Linda E. Carter, *The Sporting Approach to Harmless Error in Criminal Cases: The Supreme Court's "No Harm, No Foul" Debacle in* Neder v. United States, 28 AM. J. CRIM. L.

process protects values other than the acquisition of guilty verdicts.[258] For instance, in *Tumey v. Ohio*, the defendant was tried before a biased judge, but the State argued that this did not matter because the evidence clearly showed that he was guilty.[259] The Court rejected this argument, stating clearly that "[n]o matter what the evidence was against him, [the defendant] had the right to have an impartial judge."[260] Similarly, no matter how obvious the defendant's guilt may be after an ostensibly "fair trial," every criminal defendant has the right to effective assistance of counsel while considering the merits of a plea bargain.

To apply harmless error scrutiny to this error would diminish the significance of the constitutional violation and shift the emphasis from the fairness of the process to the correctness of the result.[261] This "no harm, no foul" approach both underestimates the significance of the foul (the constitutional error) and ignores the consequences of the harm—so long as the "right" result was achieved.[262] The "no remedy" option effectively denies that a constitutional violation even took place, for if the court does not remedy the error then for all practical purposes it did not occur.[263] But this approach would abrogate the right to counsel during plea bargaining, because so long as a defendant is given a fair trial afterwards any error that occurred beforehand may be "deleted" because the score is reset once the trial begins. This is entirely too myopic; if a constitutional error occurs, but the defendant is still given a fair trial, "judicial efficiency and finality" justify upholding the conviction.[264]

Indeed, this remedy's drawbacks are very serious and should not be overlooked. They include concerns about double jeopardy, judicial finality and economy, and frivolous appeals. First, under the Fifth Amendment's Double Jeopardy Clause, no defendant may be tried again for the same offense after having already been declared innocent.[265] Therefore, during any ensuing new trial, the defendant cannot be retried on any elements for which he was already found innocent. Depending on the outcome of the first trial, the retrial may be

229, 232 (2001) (acknowledging some "surface appeal to the result-oriented approach" but noting that it undermines the constitutional protections within the criminal process).

258. Stacy & Dayton, *supra* note 188, at 81.

259. 273 U.S. 510, 523-24 (1927).

260. *Id.* at 535.

261. *See* Carter, *supra* note 257, at 230-31.

262. *See id.* at 231-32.

263. *See id.* at 242.

264. Stacy & Dayton, *supra* note 188, at 86.

265. U.S. CONST. amend. V.

significantly pared down in comparison, affecting any new plea bargain negotiations. Double jeopardy certainly complicates the remedy but much less so than it would complicate specific performance of the plea bargain,[266] and certainly not enough to deny a defendant any remedy whatsoever.

The new trial remedy also directly impacts judicial economy and finality: that is, the notion that an otherwise fair proceeding, once completed, should provide a measure of closure.[267] At first blush, ordering a new trial is redundant and clogs our already backlogged judicial system. However, this argument could apply to just about any constitutional violation whose only vindication is a new trial.[268] Additionally, given the rarity of this particular constitutional deprivation, the new trial remedy would not implicate judicial economy enough to warrant denying a criminal defendant a remedy, if and when the violation occurs.

Providing a new trial for this remedy may also increase the risk of frivolous appeals and time-consuming litigation by skewing the incentives when choosing whether to go to trial or to accept a favorable plea bargain. In a recent dissent, Judge Gorsuch of the Tenth Circuit vigorously argued against any finding of prejudice because "due process guarantees a fair trial, not a good bargain."[269] According to Judge Gorsuch and others, providing a new trial is just like giving the defendant a second bite at the apple by allowing him to test the prosecution's case while still benefiting from the offer.[270] The dissenters in *Arave v. Hoffman* made a similar argument:

> [Any finding of prejudice] open[s] this court up to a cavalcade of challenges. Every defendant whose attorney reasonably predicted a likely sentence which turned out to be wrong, or who erroneously predicted the direction of the court's constitutional holdings, has a claim for deficient performance. And yet, how often does an attorney give advice that does not in some way predict future court action?[271]

266. *See supra* Section III.C.

267. *See, e.g.*, Williams v. Jones, 571 F.3d 1086, 1101 (10th Cir. 2009) (Gorsuch, J., dissenting) ("A fair trial's outcome is as reliable an outcome as we can hope to achieve. And because the plea bargain is a matter of prosecutorial grace, not a matter of legal entitlement, a defendant who loses the chance for a deal cannot be said to have been treated unfairly.").

268. Hence, the argument could apply to every other structural error discussed in Section V.A.

269. *Williams*, 571 F.3d at 1094 (Gorsuch, J., dissenting).

270. Case Comment, Williams v. Jones, *571 F.3d 1086 (10th Cir. 2009) (per curiam)*, 123 HARV. L. REV. 1795, 1797 (2010).

271. Hoffman v. Arave, 481 F.3d 686, 688 (9th Cir. 2007) (Bea, J., dissenting from denial of rehearing en banc).

Under this argument, the chance for a "second bite" may incentivize a defendant to "take his chances at a fair trial and, if dissatisfied with the result, still demand and receive the benefit of the forgone plea."[272]

Although this objection is rhetorically powerful, it does not survive rigorous scrutiny. To begin, much more goes into these decisions than a strained application of the proverbial "two bites at the apple." For instance, although defendants are rarely experts in criminal procedure, if a defendant knows enough to see the potential manipulation, he would also know enough to understand how frightfully low the probability is that any appellate court would find deficient performance in the first place. The risk of going to trial, being found guilty, and *not* getting a ruling of deficient counsel would be too great for most rational defendants. Courts must still scrutinize these self-serving statements, which are made with the benefit of hindsight, to filter out the calculated risks from the genuine errors worth remedying. Ultimately, this incentive will always be present. But it is no more present here than in other applications of the right to counsel. Moreover, requiring that the defendant prove that he would have accepted the offer but for his attorney's advice would do much to minimize this risk. Therefore, the notion that ordering a retrial will pervert the incentives of accepting a plea bargain has been overblown.

It is clear that the argument against retrial is invariably wrapped in pragmatism: why retry a defendant who is obviously guilty? Trials are expensive, time-consuming, and unpredictable. But our criminal justice system should not ignore basic violations of constitutional rights simply for convenience's sake. William Blackstone cautioned against this very mentality. In discussing courts' potential to overlook seemingly minimal abrogations of trial protections, he warned that, however convenient such a judicial approach

> may appear at first (as doubtless all arbitrary powers, well executed, are the most *convenient*), yet let it be again remembered, that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter

272. *Williams*, 571 F.3d at 1094 (Gorsuch, J., dissenting).

> disuse of [counseled decisions] in questions of the most momentous concern.[273]

So before applying harmless error analysis, courts should first ask whether this type of error is even amenable to harmless error analysis. Yet even if an appellate court were to apply the harmless error test to this violation, *Chapman v. California* made clear that the category of harmless errors is narrow: only those errors that are so "unimportant and insignificant" that they had no impact on the outcome of the proceedings are harmless.[274] But it stretches credulity to label an error that caused a defendant to reject a favorable plea bargain and receive a much higher sentence "unimportant and insignificant." Even under an analytically reworked harmless error test, these cases must be reversed because the defendant clearly suffered some error: a higher sentence than he normally would have received.

CONCLUSION

The remedy for the type of constitutional violation discussed in this Note is neither simple nor intuitive. Many courts have questioned the wisdom of ordering a new trial, as it appears redundant and disproportional. In a perfect world, the clock would be reset to the very moment at which the constitutional deprivation occurred so that the defendant could accept the plea bargain. However, changed circumstances often make this remedy impossible, while other judicial constraints caution against its use.

As for many other structural errors, resetting the adjudicative process by ordering a retrial can cure this defect. For instance, the right to represent oneself does not serve the purpose of ensuring a fair trial; rather, it serves to protect a defendant's dignity and independence.[275] If a trial court denies a defendant this right, then ordering a retrial to allow him to defend himself—although costly and repetitive—would vindicate the purposes underlying this right. Similarly, if a trial court wrongfully deprives a defendant of her counsel of choice, then ordering a retrial so that the defendant's chosen attorney may represent her cures this error.[276] In both cases, the amount of evidence, or the fact that the trial was otherwise fair, does not negate the fact that the right's

273. 4 WILLIAM BLACKSTONE, COMMENTARIES *350; *see also* Neder v. United States, 527 U.S. 1, 39-40 (1999) (Scalia, J., concurring in part and dissenting in part) (arguing against a results-oriented approach when analyzing structural errors).

274. 386 U.S. 18, 22 (1967).

275. *See* Faretta v. California, 422 U.S. 806, 820-21 (1975).

276. United States v. Gonzalez-Lopez, 548 U.S. 140 (2006).

purposes were frustrated by the constitutional violations. The purpose of the right to effective assistance of counsel during plea bargaining is to ensure that a criminal defendant understands the consequences of accepting or rejecting a plea bargain. Resetting the adjudicative process, while providing the defendant with adequate counsel, vindicates this right by returning the defendant to his pretrial position. But because a court cannot order a member of the executive branch to reoffer the plea bargain, a retrial is not just the best solution—it is the only solution.

The argument that a defendant who receives a fair trial is not prejudiced by ineffective assistance of counsel is powerful but ultimately myopic and too results-oriented. Its proponents focus solely on the fairness of the trial's machinations and not on the fairness of the framework within which the trial proceeded. This approach erroneously equates a fair process with a correct result. However, the question is not whether the events during trial were fair—that is, the events between opening argument and closing argument—but whether the defendant was adequately counseled in the decision to go to trial in the first place. A trial error necessarily occurs during trial; in contrast, a structural error often occurs before the trial begins, affecting the course of the trial from beginning to end. Put differently, the flawed process is not unlike a trial before a biased judge or one held in the absence of counsel because in those cases the defendant is denied a right that "casts the entire proceedings as fundamentally flawed."[277] No matter how fair the internal machinations of the ensuing trial may have been, the constitutional deficiency already poisoned the well of the criminal process.

Only by resetting that process by ordering a new trial can a court adequately balance competing constitutional interests while still remedying a clear constitutional violation.

277. Carter, *supra* note 257, at 241.