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NOTES

INEFFECTIVE ASSISTANCE OF COUNSEL: A PLEA BARGAIN LOST

ABSTRACT

This Note addresses the controversial moral and legal issues presented when ineffective assistance of counsel occurs at the plea bargaining stage of a criminal prosecution. Specifically, this Note focuses on the situation where a criminal defendant lost an opportunity to accept a pre-trial plea bargain offer, due solely to defense counsel's negligence, and later, after a fair trial and a conviction, received a more severe sentence than the sentence contemplated by the lost plea bargain. Two central questions are presented in these situations and addressed in this Note. First, has such a defendant been constitutionally harmed by the loss of the plea bargain? Second, what if any is the appropriate remedy in these cases? This Note concludes that while the law in California is presently unsettled in this area, the United States Constitution, as well as the rulings from various state and federal courts, suggests that such a defendant has indeed been constitutionally harmed, and the only remedy which will adequately compensate the defendant for this injury is the forced reinstatement of the lost plea bargain.

INTRODUCTION

Pat is arrested and charged with committing a crime. Before the trial begins, the government offers a plea bargain to Pat's attorney. Unfortunately, either the attorney does not tell Pat about the offer at all, or perhaps gives Pat the wrong information about the terms of the offer. Pat then proceeds to trial after either rejecting the miscommunicated offer or after the time to accept it has passed without Pat's knowledge. After a fair trial Pat is convicted. Later, Pat discovers that the lost plea bargain would have provided a lighter sentence than the sentence actually imposed. Pat appeals.

This has not happened only to Pat. It has happened to many people throughout California and the United States and it is likely to continue to occur. Situations like this require a court to answer some very difficult questions: By what standard should the court judge the adequacy of counsel's performance at the plea bargaining stage? Has the legal representation been so inadequate as to effectively deny the defendants their Sixth Amendment right to counsel? What remedy, if any, is appropriate?

The answers to these questions may be considered by examining two recent decisions handed down simultaneously by separate panels of the California Court of Appeal, Fourth Appellate District: *In re Alvernaz*[1] and *People v. Pollard*.[2] These two cases presented nearly identical fact patterns. Each involved a claim by the defendant that the ineffective assistance of

1. 282 Cal. Rptr. 601 (Cal. Ct. App. 1991), *cert. granted*, 818 P.2d 61 (Cal. Oct. 17, 1991).
2. 282 Cal. Rptr. 588 (Cal. Ct. App. 1991), *cert. granted*, 818 P.2d 61 (Cal. Oct. 17, 1991).

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counsel had caused the defendant to reject a plea bargain offer. Both defendants received fair trials and both were sentenced more severely than they would have been under the terms of the offered plea bargains. In ruling on the cases, both panels applied the test established by the Supreme Court in *Strickland v. Washington*.[3] Nonetheless, the panels arrived at opposite conclusions as to the same issues of law. The *Alvernaz* court ruled that counsel's failings had not led to a constitutionally significant harm because the defendant had received a fair trial.[4] In contrast, the *Pollard* court ruled that if the counsel had acted as alleged by the defendant, the defendant would have been constitutionally harmed by counsel's failings regardless of the fair trial.[5] These two inconsistent rulings typify the conflict which has existed since the issue was first addressed by the courts.

To explore the issues underlying this conflict, this Note first will consider the behavior that constitutes ineffective assistance of counsel and will trace the previous California cases which have involved claims of ineffective assistance at the plea bargaining stage. Then, this Note will compare and contrast the application of the *Strickland* test in *Pollard* and in *Alvernaz*, as well as in cases from other jurisdictions. Next, the dilemma regarding the appropriate remedy for a defendant that has lost the benefit of a plea bargain due to ineffective assistance of counsel will be examined. Finally, this Note will argue that, while the case law in California is presently unsettled, the rulings from the various state and federal courts which have addressed this issue suggest that the outcome reached in *Pollard* should be favored over the outcome reached in *Alvernaz*.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

For many years the courts throughout the country were unable to generate a uniform test for judging the adequacy of counsel's performance in criminal cases.[6] Then, in 1984, the United States Supreme Court established the current federal test for judging the adequacy of representation by counsel in criminal proceedings in the landmark case of *Strickland v. Washington*.[7] Shortly after this case was decided, most states, including

3. 466 U.S. 668 (1984).

4. *Alvernaz*, 282 Cal. Rptr. at 614.

5. *Pollard*, 282 Cal. Rptr. at 598.

6. Multiple standards had emerged, but none gained universal support. *E.g.*, Gillihan v. Rodriguez, 551 F.2d 1182, 1187 (10th Cir. 1977) (granting relief for ineffective assistance of counsel only when the trial was a farce, a mockery of justice, or was shocking to the conscience of the reviewing court); United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir. 1978) (replacing 'sham' or 'mockery' test with a 'reasonably competent assistance standard'); Moore v. United States, 432 F.2d 730, 736 (3rd Cir. 1970) (standard is whether attorney exercised the customary skill and knowledge which normally prevails at the time and place).

7. 466 U.S. 668.

California, adopted *Strickland*'s "two-prong" test,[8] and today the analysis of any ineffective assistance of counsel claim invariably begins with an examination of *Strickland*.

In *Strickland*, the Court held that when a defendant claims counsel's performance was constitutionally ineffective, the defendant must establish that (1) counsel's performance was deficient, and (2) this deficient performance prejudiced the defense.[9] These two prongs establish both an objective and a subjective standard. In order to meet prong one, the objective standard, a defendant must identify the acts or omissions which are alleged to have been professionally unreasonable (i.e., outside the wide range of professionally competent assistance).[10] In order to meet prong two, the subjective standard, a defendant must convince the court that there is a reasonable probability that but-for counsel's unprofessional errors, the result of the proceeding would have been different.[11] If both prongs of this test are satisfied, then it is clear the defendant has been denied the effective assistance of counsel which is guaranteed to every criminal defendant by the Sixth Amendment.[12]

In *Strickland*, the Court used the test to judge the attorney's performance at a capital sentencing hearing.[13] With time, however, the test has been applied to other crucial stages in the proceedings. In one such decision, the

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8. Browning v. State, 465 So. 2d 1208, 1210 (Ala. Crim. App. 1984); Wilson v. State, 711 P.2d 547, 549 (Alaska Ct. App. 1985); State v. Meeker, 693 P.2d 911, 914 (Ariz. 1984); Cavin v. State, 681 S.W.2d 913, 914 (Ark. 1984); People v. Ledesma, 729 P.2d 839 (Cal. 1987); Banks v. People, 696 P.2d 293, 298 (Colo. 1985); Miller v. Angliker, 494 A.2d 1226, 1234 (Conn. App. Ct. 1985); Albury v. State, 551 A.2d 53, 58 (Del. 1988); Curry v. United States, 498 A.2d 534, 539 (D.C. 1985); Smith v. State, 457 So. 2d 1380, 1381 (Fla. 1984); Kornegay v. State, 329 S.E.2d 601, 604 (Ga. Ct. App. 1985); Davis v. State, 775 P.2d 1243, 1248 (Idaho Ct. App. 1989); People v. Flores, 538 N.E.2d 481, 485 (Ill. 1989); Bevill v. State, 472 N.E.2d 1247, 1251 (Ind. 1985); State v. Nunn, 356 N.W.2d 601, 606 (Iowa Ct. App. 1984); Chamberlain v. State, 694 P.2d 468, 471 (Kan. 1985); Brewster v. Commonwealth, 723 S.W.2d 863, 864 (Ky. Ct. App. 1986); State v. Teeter, 504 So. 2d 1036, 1040 (La. Ct. App. 1987); State v. Colvin, 548 A.2d 506, 508 (Md. 1988); Commonwealth v. Rossi, 473 N.E.2d 708, 711 (Mass. App. Ct. 1985); People v. Vicuna, 367 N.W.2d 887, 892 (Mich. Ct. App. 1985); Lambert v. State, 462 So. 2d 308, 316 (Miss. 1984); Cornman v. State, 779 S.W.2d 17, 18 (Mo. Ct. App. 1989); State v. Coates, 786 P.2d 1182, 1185 (Mont. 1990); State v. Jones, 432 N.W.2d 523, 527 (Neb. 1988); Wilson v. State, 771 P.2d 583, 584 (Nev. 1989); People v. Ploss, 105 A.D.2d 1031, 1032 (N.Y. App. Div. 1984); State v. Harbison, 337 S.E.2d 504, 506 (N.C. 1985); State v. Ronngren, 361 N.W.2d 224, 231 (N.D. 1985); State v. Bradley, 538 N.E.2d 373, 379 (Ohio 1989); Commonwealth v. Brown, 486 A.2d 441, 444 (Pa. Super. Ct. 1984); Clark v. Ellerthorpe, 552 A.2d 1186, 1188 (R.I. 1989); Butler v. State, 334 S.E.2d 813, 814 (S.C. 1985); State v. Wiegers, 373 N.W.2d 1, 12 (S.D. 1985); Hanzelka v. State, 682 S.W.2d 385, 386 (Tex. Ct. App. 1984); Perry v. Warden of Mecklenburg Correctional Center, 332 S.E.2d 791, 792 (Va. Ct. App. 1985); State v. Thomas, 743 P.2d 816, 817 (Wash. 1987); State v. Johnson, 395 N.W.2d 176, 181 (Wis. 1986); Gist v. State, 737 P.2d 336, 342 (Wyo. 1987).

9. *Strickland*, 466 U.S. at 687.

10. *Id.* at 690.

11. *Id.* at 694.

12. U.S. CONST. amend. VI ("In all criminal prosecutions the accused shall . . . have the Assistance of Counsel for his defence.").

13. *Strickland*, 466 U.S. at 686.

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Supreme Court expanded the *Strickland* test by applying it to ineffective assistance of counsel claims arising out of the plea bargaining process.[14]

Three years after *Strickland*, the Supreme Court of California reevaluated the state's rules for establishing ineffective assistance of counsel.[15] In *People v. Ledesma*,[16] the court adopted the *Strickland* test, reiterating virtually all of the language found in the *Strickland* opinion. Specifically, the court quoted *Strickland* in regard to how a defendant can satisfy each prong of the test.[17] More interestingly, however, the *Ledesma* court agreed with the Supreme Court that the Sixth Amendment right to effective assistance of counsel exists to protect the accused's fundamental right to a fair and reliable trial.[18] This language has fueled much of the controversy upon which this Note focuses.

Since *Ledesma* was decided, the California courts have uniformly applied the two-prong test to cases where attorney error at the plea bargaining stage led to the loss of an offered plea bargain.[19] Application of the test, however, has failed to generate uniform results in two distinct and important areas. The first area involves the interpretation of the *Strickland* definition of "prejudice," and the second deals with the remedy which should be granted to the accused in these cases.[20]

II. INEFFECTIVE ASSISTANCE AT THE PLEA BARGAIN STAGE IN CALIFORNIA

Can ineffective assistance of counsel at the plea bargaining stage amount

14. Hill v. Lockhart, 474 U.S. 52, 57 (1985).

15. Before *Strickland*, the standard in California for assessing the adequacy of counsel was set forth in People v. Ibarra, 386 P.2d 487 (Cal. 1963). In *Ibarra*, the court ruled that a defendant could establish ineffective assistance by showing that counsel's error was so extreme as to transform the trial into a "farce or sham." *Id.* at 490. This standard was rejected after a decade and a half as too vague and subjective. People v. Pope, 590 P.2d 859, 865 (Cal. 1979). In *Pope*, the court applied a two part test for establishing that counsel was ineffective. The *Pope* court ruled that the defendant must first establish that counsel's performance fell below an objective standard of reasonableness. *Id.* at 866. Then, the defendant must establish that counsel's errors "resulted in the withdrawal of a potentially meritorious defense." *Id.*

Later, the Supreme Court of California articulated a second test for judging the adequacy of counsel in cases where the alleged error did not amount to the loss of an actual defense. In People v. Fosselman, 659 P.2d 1144, 1151 (Cal. 1983), the court ruled that in such cases the defendant must meet a two part test slightly different from that in *Pope*. The first part did not substantially differ from the first part of the *Pope* test. To meet the second part, however, the defendant had to show prejudice as a result of counsel's errors by proving that, in the absence of the errors, it is reasonably probable that a determination more favorable to the accused would have resulted. *Id.*

16. *Ledesma*, 729 P.2d at 866.

17. *Id.* at 866-69.

18. *Id.* at 866.

19. People v. Bennett, 248 Cal. Rptr. 767 (Cal. Ct. App. 1988) (Ordered not published Pursuant to Rule 976 Cal. Rules of Ct.); *Alvernaz* 282 Cal. Rptr. 601; *Pollard*, 282 Cal. Rptr. 588.

20. These issues are discussed *infra* in Sections III.B. and IV, respectively.

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to a denial of the defendant's Sixth Amendment right to counsel? The early California case law in this area involved situations where a defendant had accepted, rather than rejected, a plea bargain because of counsel's errors.[21] In those cases, the answer to the question was clearly "yes." In *People v. McCary*,[22] for example, the defendant was charged with several crimes and a serious felony enhancement.[23] During plea negotiations, the state offered the defendant the opportunity for a dismissal of the serious felony enhancement in exchange for a guilty plea on the remainder of the charges.[24] Based on defense counsel's recommendation, the defendant accepted the plea bargain.[25] In making that recommendation, defense counsel was not aware, however, that the defendant was not legally subject to the serious felony enhancement.[26] Accordingly, the offer to dismiss it was of no real value and the plea bargain should not have been accepted. The defendant did not learn of this error, however, until the Third District brought it to his attention when he appealed on other grounds.[27]

In rendering its decision, the *McCary* court established a new test for claims of ineffective assistance at the plea bargain stage.[28] The court held that in order to show ineffective assistance of counsel during plea bargaining, the defendant must show that counsel's acts or omissions adversely affected the defendant's ability to knowingly and voluntarily decide to enter a plea of guilty.[29]

The *McCary* test, however, is not applicable to all cases where there is a claim of ineffective assistance of counsel at plea bargaining. In *McCary*, the court conducted only a limited analysis, focusing solely on whether counsel's advice was deficient.[30] Having determined that it was indeed deficient, the court perfunctorily determined that the defendant had suffered prejudice by erroneously waiving his right to receive a trial.[31] The obvious

21. *In re* Hawley, 433 P.2d 919 (Cal. 1967); *In re* Williams, 460 P.2d 984 (Cal. 1969); People v. Stanworth, 522 P.2d 1058 (Cal. 1974); People v. McCary, 212 Cal. Rptr. 114 (Cal. 1985).

22. 212 Cal. Rptr. 114.

23. *Id.* at 116.

24. *Id.*

25. *Id.*

26. As part of Proposition 8, adopted in California on June 8, 1982, the serious felony enhancement which McCary was charged with was inapplicable to offenses occurring prior to that date. McCary was charged with offenses which occurred before that date, thus, he was improperly charged with the serious felony enhancement. *Id.* at 117.

27. *Id.* at 116.

28. The *McCary* court noted that the *Pope* and *Fosselman* tests were not appropriate for the facts before it. *Id.* at 119. Although *Strickland* was decided in 1984, one year before *McCary*, the *McCary* court failed to mention the *Strickland* test, and instead applied only the California tests in existence at that time. This may be due to the fact that the Supreme Court of California still had yet to expressly adopt the *Strickland* test in *Ledesma*.

29. *Id.*

30. *Id.*

31. *Id.* at 120.

prejudice suffered by an accused who erroneously waives the fundamental right to a trial and thus, all of its inherent protections, explains why the *McCary* test did not need to focus on prejudice. In contrast, in cases like *Alvernaz* and *Pollard* the prejudice is not as clear. In those cases, counsel's error has not deprived the accused of the fundamental right to receive a trial; rather, counsel's error has caused the accused to exercise that very right. For this reason, the narrow *McCary* test has been of negligible use to courts which have been faced with an *Alvernaz* or *Pollard* type of situation.

The first time a California court was confronted with a case where counsel's failings led a defendant to reject a plea offer and proceed to trial was in *People v. Brown*.[32] In *Brown*, the defendant was charged with several serious offenses.[33] During plea negotiations, the defense attorney failed to correct a mistake appearing in a "pre-plea report."[34] As a result, the plea bargain offered a much stiffer sentence than would otherwise have been offered, the plea bargain was not completed, and the defendant proceeded to trial.[35] At trial the defendant was convicted on several serious charges and received a heavier sentence than he would have received under the plea bargain.[36] The defendant appealed, alleging that the attorney's failure to correct the errors in the pre-plea report constituted ineffective assistance of counsel.[37]

The Court of Appeal, Third District, affirmed the defendant's conviction.[38] The court initially stated that a defendant is entitled to effective assistance of counsel at the plea bargaining stage and a deficiency in that assistance might be considered reversible error.[39] The court then directed that the focus in these cases should be on whether counsel's failings resulted in a lost opportunity for the defendant to present a plea bargain to the

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32. 223 Cal. Rptr. 66 (Cal. Ct. App. 1986).

33. *Id.* at 67.

34. In a pre-plea report, a probation officer inquires into the type and circumstances of the offense committed as well as the defendant's character, history, and family environment, in order to arrive at a recommendation for or against release of the defendant on probation. CAL. CIV. PRO. CODE § 131.3 (Deering 1991). That report was to be used by the parties in order to assess the value of a plea bargain which had been offered by the district attorney. *Brown*, 223 Cal. Rptr. at 68. In *Brown*, the district attorney and the defense attorney had agreed that the pre-plea report should assess the possibility for probation if the defendant was to accept the state's offer to plead guilty to a single charge only. *Id.* at 69-70. The district attorney had promised that if the report recommended probation, and the judge was inclined to grant it, the district attorney would neither recommend nor oppose that disposition. When the report was prepared, however, it mistakenly assumed a plea of guilty to several serious charges. *Id.* Although realizing this error, the defense attorney made no effort to have the report corrected, and as a result the report recommended a prison commitment without probation. *Id.* Accordingly, the plea agreement was never reached. *Id.*

35. *Id.* at 67.

36. *Id.*

37. *Id.* at 68.

38. *Id.* at 79.

39. *Id.* at 70.

court.[40] To establish reversible error, the *Brown* court advanced a test similar to the *Strickland* test. Succinctly stated, under *Brown* the defendant must prove by a preponderance of the evidence that (1) counsel's acts or omissions fell below the standard of reasonable diligence; (2) absent those acts or omissions it would be reasonably probable that a plea bargain, which the defendant was prepared to accept, would have been presented to the court for its approval or rejection; and (3) the rejected plea bargain would have been more lenient than the sentence actually received.[41]

Applying this standard, the *Brown* court ruled that although the defendant had proved counsel's assistance was deficient, he had failed to prove that, absent counsel's errors, a plea bargain would have been presented to the court for its approval or rejection, and thus the defendant had not established prejudice.[42] The court also ruled that prejudice was lacking because by agreeing only to not oppose the defendant's request for probation, the district attorney had never actually agreed to the plea bargain.[43] Finally, the court stated that even if the district attorney had expressly agreed to the plea bargain, the existing case law prohibited the court from accepting such a plea anyway.[44] In light of these considerations, the court affirmed the defendant's conviction.[45]

Although *Brown* involved the same issues addressed in this Note, *Brown*'s test has not been applied in all later cases. In *Alvernaz*, for example, the court stated that because the *Brown* court ultimately ruled that there was no resulting prejudice under the facts before it, the *Brown* test cannot be controlling in cases where the attorney's error had caused a defendant to reject the plea bargain offer.[46]

Prior to *Alvernaz* and *Pollard*, only one other California case involved ineffective assistance leading to a rejected plea bargain. In *People v.*

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40. *Id.* at 76.

41. *Id.* at 77.

42. *Id.* at 79.

43. *Id.* After the district attorney had offered the defendant the opportunity to plead guilty to one count only, the defendant sought the additional promise that he would not be sentenced to confinement in state prison. *Id.* The defendant wanted to receive probation with not more than one year in the county jail as a condition. *Id.* This counter offer led to the preparation of the pre-plea report, and the district attorney's promise not to oppose probation if it was recommended by the report. *Id.*

44. *Id.* The court stated that even if the defendant had entered a plea pursuant to the prosecutor's offer (i.e., guilty to one count only, with no opposition by the district attorney as to sentencing), the court still could have sentenced the defendant to a prison term longer than the one year sentence which the defendant desired. It was apparently this possibility which caused the court to find no prejudice. Note, however, that a court is never obligated to accept a plea bargain which the prosecutor and defendant have agreed upon. Thus, if taken literally, the *Brown* court's reasoning for a finding of no prejudice would indicate that a defendant in Brown's position could never establish prejudice; the possibility that the court would not have accepted the offered plea bargain will exist in every case.

45. *Id.*

46. *Alvernaz*, 282 Cal. Rptr. at 608. *But see Pollard*, 282 Cal. Rptr. at 592 (holding that *Brown* is applicable). *See also infra* notes 74-81 and accompanying text.

Bennett,[47] the California Court of Appeal, Fifth District, reached a decision which foreshadowed the Fourth District's ruling in *Alvernaz*. Significantly, however, the *Bennett* opinion was de-published by the California Supreme Court shortly after it was decided, and thus, the *Alvernaz* court was not permitted to cite to it as precedent for its decision.[48] It was against this backdrop of scarce case law that the conflict between *Alvernaz* and *Pollard* arose.

III. THE PRESENT CONFLICT: *ALVERNAZ* AND *POLLARD*

In *Alvernaz*, the defendant was charged with two counts of robbery, and one count each of burglary and kidnapping, plus a weapons enhancement.[49] Prior to his trial, the district attorney offered Alvernaz the opportunity to plead guilty to one count of robbery with the weapons enhancement.[50] If accepted, this offer would have resulted in a maximum of five years of incarceration. Alvernaz' counsel erroneously advised him that should he be convicted at trial, he would face a maximum of only eight years of imprisonment. Due to this small disparity in jail time, Alvernaz elected to take his chances and go to trial.[51] He rejected the plea bargain, and after receiving a fair trial, was convicted and sentenced to life in prison. He then appealed on the ground of ineffective assistance of counsel.[52]

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47. *Bennett*, 248 Cal. Rptr. 767.

48. Rule 977 of the California Rules of Court states that an opinion which is not published, or one which is ordered de-published by the Supreme Court of California (under Rule 976), cannot be cited or relied on by a court or a party in any subsequent case. CAL. R. CT. Rules 976-977.

In *Bennett*, the defendant had rejected a plea bargain offer during pre-trial plea bargaining based on erroneous advice from his attorney. *Bennett*, 248 Cal. Rptr. at 768. That plea bargain would have resulted in a less severe sentence than he actually received, so Bennett appealed his conviction claiming ineffective assistance of counsel. *Id.* The Fifth District affirmed Bennett's conviction, relying heavily on the fact that both *Strickland* and *Ledesma* had stated that the purpose of the Sixth Amendment is to ensure the defendant a "fair trial." *Id.* at 771. The *Bennett* court stated that a "fair trial" is one where the reviewing court has confidence in the ultimate outcome which was reached. *Id.* Accordingly, the court held that the only attorney errors which can render a trial unfair are those which affect the reliability of the trial court's findings of fact or law. *Id.* This reasoning was apparent in the court's application of the *Strickland* test in its original form. *Id.* at 772. The court then went on to state that the prejudice prong of the test can only be met if the defendant establishes that the attorney error interfered with the defendant's right to a fair trial. *Id.* at 771. Since Bennett had admittedly received a fair trial, the court ruled that prejudice was lacking and affirmed the conviction. *Id.* at 778.

In so doing the *Bennett* court held that *Brown* did not apply. The court stated that since the *Brown* court misapplied *Strickland*, its conclusion was in error. *Id.* at 775. Specifically, according to *Bennett*, the *Brown* court's mistake was that it had failed to consider whether counsel's error had any relation to the "purpose" behind the Sixth Amendment right to counsel. *Id.* Thus, *Bennett* rejected *Brown* because *Brown* did not agree that the only purpose behind the right to counsel is the guarantee of a fair trial.

49. *Alvernaz*, 282 Cal. Rptr. at 602.

50. *Id.*

51. *Id.*

52. *Id.*

In *Pollard*,[53] the defendant was charged with four separate counts relating to the cultivation and possession of marijuana for sale.[54] Before trial, the prosecutor told Pollard's attorney the state would accept a guilty plea to one count of cultivation of marijuana and the count would be lowered to a misdemeanor at the end of eighteen months probation.[55] Pollard's attorney failed to communicate this offer to Pollard, and accordingly, he opted for a trial.[56] After a fair trial was conducted, Pollard was convicted of all counts and was sentenced to three years probation on the condition that he serve ninety days in custody.[57] He then appealed on the ground of ineffective assistance of counsel.[58]

A. Deficient Performance of Counsel

The first prong of the two-prong *Strickland* test requires a defendant to establish that counsel's performance was deficient.[59] In order to meet this objective standard, the defendant must identify the acts or omissions that are alleged to have been the result of unreasonable and unprofessional judgment.[60]

In *Alvernaz*, the court did not elaborate on what the defendant needed to prove in order to meet the first prong of the *Strickland* test. The court did state, however, that counsel has a duty to investigate and determine all defenses available to the client and to inform the client of all the applicable statutory penalties. In this case, the attorney's failure to provide Alvernaz with accurate advice about the potential sentence he could face constituted deficient performance. Hence, the *Alvernaz* court ruled that the first prong of the *Strickland* test was met.[61]

Unlike the *Alvernaz* court, the *Pollard* court expressly stated what the defendant must do to meet the first prong of the *Strickland* test. To demonstrate deficient performance of counsel, the defendant must establish by a preponderance of the evidence that counsel failed to communicate an offered plea bargain, or that counsel misstated some aspect of the law which

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53. 282 Cal. Rptr. 588 (Cal. Ct. App. 1991).

54. *Id.* at 590.

55. *Id.* at 591.

56. *Id.* Pollard claimed that the only offer communicated by his attorney was that the state was willing to accept his plea of guilty to two felony drug counts. Pollard stated that initially he told his attorney that he was unwilling to plead guilty to those two felonies. Later, however, Pollard claimed that he notified his attorney that he had changed his mind and would accept the offer. At that time, the attorney told Pollard that he should go to trial instead of accepting the plea bargain, because the two felonies could eventually be reduced to misdemeanors even after a conviction. This advice led Pollard to go to trial. *Id.*

57. *Id.* at 600-01.

58. *Id.* at 590.

59. *Strickland*, 466 U.S. at 687.

60. *Id.* at 690.

61. *Alvernaz*, 282 Cal. Rptr. at 604.

was important to an intelligent evaluation of the offer.[62] Since the record was insufficient with regard to counsel's conduct, the *Pollard* court remanded the case and directed the lower court to develop the record in this area.[63] After basically agreeing as to the proper application of the first prong of the *Strickland* test, the courts turned to the second prong of the test.

B. Prejudice

In *Strickland*, the Court stated that, "an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."[64] Thus, once the defendant shows that counsel made an unprofessional error, in order to prevail on appeal, the defendant must also establish that he or she was prejudiced by that error. This notion of prejudice is at the heart of the conflict between *Alvernaz* and *Pollard.*

As discussed in the preceding section, *Alvernaz* and *Pollard* agreed on the application of the first prong of the *Strickland* test. When the courts turned to the second prong of the test, however, a substantial conflict arose. *Alvernaz* ruled that errors by counsel during plea bargaining are harmless unless they have an impact on the trial, while *Pollard* applied the same *Strickland* test and ruled that those same errors are reversible if they led to a lost plea bargain opportunity. This distinction will be discussed in the two sections which follow.

1. In re Alvernaz: Harmless Error. In *Alvernaz*, the court ruled that Alvernaz's conviction should be affirmed because he failed to meet the second prong of the *Strickland* test.[65]

The cornerstone of the *Alvernaz* decision was the court's interpretation of the Sixth Amendment right to assistance of counsel. The court declared that counsel's purpose is to aid the defendant in receiving the constitutional and statutory protections which must be provided to any person who is accused of a crime.[66] The court stated that those protections prevent the accused from being wrongfully convicted and that the individual protections have all been combined to form our basic trial process.[67] Thus, according

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62. *Pollard*, 282 Cal. Rptr. at 594.

63. *Id.* at 598.

64. *Strickland*, 466 U.S. at 691.

65. *Alvernaz*, 282 Cal. Rptr. at 614. In reaching its decision, the court noted that the situation at hand did not fit into either the *Pope* or *Fosselman* tests for prejudice. *Id.* at 612. The *Pope* test was not applicable because there had not been a withdrawal of a potentially meritorious defense. *Id.* The *Fosselman* test also did not apply because counsel's error had not deprived the defendant of any advantage which he was constitutionally entitled to, nor did it effect the basic trial processes. *Id.* Also note that the *Alvernaz* rationale is remarkably similar to that of the depublished *Bennett* opinion.

66. *Id.*

67. *Id.*

to *Alvernaz*, errors by counsel which undermine the basic trial process itself will be the only grounds for a reversal and a new trial due to ineffective assistance of counsel.[68]

As an example of the type of error which undermines the trial process itself, the court pointed to the situation in *McCary* where the defendant pled guilty based on ineffective advice from his attorney, and therefore, never received a trial at all.[69] The *Alvernaz* court reasoned that in *McCary*, counsel's errors obviously undermined the basic trial process by causing the trial to not occur.[70] The *Alvernaz* court noted the sacrifice of a trial, and all of the procedural safeguards which it includes, was clearly prejudicial to a person accused of a crime.[71] Returning to the facts before it, the *Alvernaz* court stated that in order to establish the requisite prejudice, Alvernaz would have had to show that counsel's error had an impact on the trial in which he was convicted.[72] Since Alvernaz had admittedly received a fair trial, the court ruled that counsel's failings were merely harmless error and affirmed the conviction.[73]

As previously stated, *Brown*[74] was the only existing published California case which was on point at the time that *Alvernaz* and *Pollard* were decided. The *Alvernaz* court, however, distinguished *Brown* and refused to treat it as precedent.[75] Justice Froehlich, writing for the *Alvernaz* majority, stated that had the court applied *Brown* to the facts in *Alvernaz*, it would have been required to reverse the defendant's conviction.[76] Under the *Brown* test, Alvernaz was prejudiced because (1) his attorney's inaccurate advice fell below the standard of reasonable diligence, (2) he would have accepted the plea offer and submitted it to the court for its approval if his attorney had given him correct sentencing information, and (3) the life sentence he received was more severe than the five year term he would have received under the plea bargain. But, since the *Alvernaz* court was unwilling to apply *Brown*, it was not bound to this outcome.

The court offered two reasons for its dismissal of *Brown*. First, the court stated that "[because] the test outlined by the [*Brown*] court to determine prejudice was used to reach a conclusion of *no* prejudice . . . the

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68. *Id.*

69. *Id.* For full discussion of *McCary*, see *supra* notes 22-31 and accompanying text.

70. *Alvernaz*, 282 Cal. Rptr. at 612.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Brown*, 233 Cal. Rptr. 66.

75. *Alvernaz*, 282 Cal. Rptr. at 608. Since *Alvernaz* and *Brown* were decided by equal levels of the California Appellate Courts (i.e., *Brown* was decided by the Third District, and *Alvernaz* was decided by the Fourth District) the *Alvernaz* court was not bound by the ruling of the *Brown* court. Thus, *Brown* is considered persuasive but not mandatory authority among the other California District Courts of Appeal. In *Alvernaz*, however, the court did not point to this as part of its reasoning for not applying *Brown*.

76. *Id.*

case is therefore not precedent for reversing a jury verdict of guilty following an aborted plea bargain negotiation."[77] Secondly, *Alvernaz* stated that the remedy suggested in *Brown*[78] was not appropriate in most cases.[79] Thus, the *Alvernaz* court refused to apply the *Brown* test,[80] and ruled that the defendant had not suffered legal prejudice.[81]

To date, only *Alvernaz* (and the de-published *Bennett* case) stand for the proposition that constitutionally ineffective assistance of counsel which leads to the forfeiture of a favorable plea bargain is not prejudicial under *Strickland.* The basis for this position is the argument that by receiving a fair trial after counsel has made the error at the plea stage, the defendant has still received full Constitutional protection. But what value is the "protection" afforded by a fair trial to an accused who might not have even faced that trial in the first place? A showing by the accused that but-for counsel's error the plea bargain would have been accepted, necessarily means the trial would not have occurred in the absence of that error. Participation in a trial is prejudicial in and of itself when compared to the alternative of entering a plea bargain. This is so because the procedural protection contained in a fair trial cannot possibly equal the amount of protection which an accused would receive by not having to participate in the trial at all. That is what *Alvernaz* has missed by concluding the protection received at a fair trial nullifies the prejudice caused by losing the opportunity to accept a beneficial plea bargain.

The prejudice ruling reached in *Alvernaz* appears to be caused by the conflict surrounding the remedy issue in this type of case.[82] Both courts

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77. *Alvernaz*, 282 Cal. Rptr. at 608.

78. In *Brown*, the court ruled that the defendant had failed to make his requisite showing of prejudice, and thus, it affirmed his conviction. In a footnote at the end of the opinion, however, the court stated that had the defendant met his burden of proof, the only remedy the court could offer would be a reversal and a remand for a new trial. *Brown*, 223 Cal. Rptr. at 79.

79. *Alvernaz*, 282 Cal. Rptr. at 608.

80. The *Alvernaz* court did not elaborate on its decision to treat the *Brown* test in this manner beyond the two rather unclear reasons set out in the text. One possible explanation for this treatment of the *Brown* test can be found in the majority's admission that if it were to apply that test the court would be required to reverse Alvernaz's conviction. *Id.* The fact that such an outcome was clearly unsatisfactory to the *Alvernaz* court may explain the court's perfunctory dismissal of the *Brown* test.

81. In *Alvernaz*, the court created an important distinction between "legal" prejudice and "actual" prejudice. The court presumed that Alvernaz had been "actually" prejudiced because he had proven that he would have accepted the plea bargain in the absence of counsel's errors. *Id.* at 604-05. However, the court did not feel that the prejudice inquiry should end there. Instead, the court went on to rule that Alvernaz was not "legally" prejudiced because his participation in a fair trial mooted the "actual" prejudice that he had suffered from the lost plea bargain. *Id.* at 614. The distinction between "legal" and "actual" prejudice has never before been made in cases centering on ineffective assistance of counsel, and it does not appear to fit into the *Strickland* test in any way. Moreover, the *Alvernaz* determination of "actual" prejudice fully satisfies the prejudice requirement of the *Strickland* test. Proof that but-for the error, Alvernaz would have accepted the plea bargain would constitute a showing that the result of the proceeding would have been different, because a plea of guilty to a lesser offense is surely a "different outcome" than a conviction of a more serious offense.

82. The remedy issues are discussed *infra* in Section IV.

wrote extensively on the remedy issue, and it can be argued that the lack of an "acceptable" remedy caused the courts to rule that the respective defendants had suffered no prejudice. In *Alvernaz*, for example, the court inexplicably drifted into a discussion of remedy in the portion of the opinion where it claimed to be looking to other jurisdictions for a prejudice test.[83] This suggests the court linked its prejudice decision with its remedy decision. After outlining the case law from other jurisdictions, and finding there was no single remedy advanced by all courts, the *Alvernaz* court returned to its prejudice analysis and ruled that there was no prejudice in the case before it.[84] Accordingly, the atypical decision reached in *Alvernaz* may be the product of backward reasoning which looked to the remedy first and then decided the case in a way that would avoid the logical and moral dilemma involved in overturning a valid conviction and letting a presumably guilty defendant receive a lighter sentence.

As the *Alvernaz* court openly admitted, there is no persuasive authority from any other jurisdiction supporting the affirmance of a conviction where constitutionally deficient assistance of counsel cost the defendant an opportunity to enter a favorable plea.[85] Thus, its ruling is supported only by dicta and weak inferences. In an attempt to garner support for its position, the *Alvernaz* court relied most heavily on the language found in *Strickland* and *Ledesma*. Specifically, both *Strickland* and *Ledesma* state that the purpose of counsel's obligations under the Sixth Amendment is to ensure criminal defendants receive a fair trial.[86] This language was crucial to the *Alvernaz* court's decision that the defendant's Sixth Amendment rights were not violated.[87]

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83. *Alvernaz*, 282 Cal. Rptr. at 608-11.

84. *Id.* at 614. Likewise in *Bennett*, while discussing the defendant's argument that he had been prejudiced by counsel's errors and thus should be given a new trial or a chance to accept the original plea bargain, the court stated that, "[i]t strains the fabric of the system to accept as reasonable or logical the argument that a defendant who has had his day in court has a constitutional right to a windfall." *Bennett*, 248 Cal. Rptr. at 777. In the very next sentence the court stated that since the defendant had received his day in court, he was not prejudiced by the lost opportunity to accept the plea bargain. *Id.* at 777-78. This order of reasoning indicates that the *Bennett* court, like the *Alvernaz* court, somehow linked its prejudice determination with the outcome that the defendant was seeking.

85. *Alvernaz*, 282 Cal. Rptr. at 610.

86. *Strickland*, 466 U.S. at 684-87; *Ledesma*, 729 P.2d at 866.

87. The language in *Strickland* is a weak inference for two reasons. First, the language regarding the "purpose" of the Sixth Amendment right to effective assistance of counsel is not central to the Court's decision in *Strickland*. The Supreme Court's purpose in *Strickland* was to establish a framework for evaluating whether a defendant has received effective counsel. The Court was not engaged in rendering a simple interpretation of the Sixth Amendment. Therefore, the Court could not have envisioned that its statements regarding the so-called "purpose" of the amendment would become the basis for a later decision that claimed to have interpreted the true reason for the Sixth Amendment. Secondly, the *Strickland* opinion is internally inconsistent when it comes to identifying the "purpose" behind the Amendment. The section which the *Alvernaz* court relied upon is just one of the several instances where the Court made a statement as to the purpose of the Sixth Amendment. Later in the opinion, for example, the Court stated that, "[the Amendment] envisions counsel's playing a role that is critical to the ability of the *adversarial system* to produce just results." *Strickland*, 466 U.S. at 685 (emphasis added). If

The *Alvernaz* rationale is also bolstered by dicta from the Iowa Supreme Court.[88] In *State v. Kraus*, that court affirmed the defendant's conviction even though he had received ineffective assistance of counsel which led him to reject a plea bargain.[89] In reaching this decision, the *Kraus* court was similarly concerned with the inappropriateness of reversing a fair trial, and accordingly, failed to find prejudice.[90]

Additionally, *Alvernaz* referred to dicta from *Williams v. Arn*[91] to support its position further. In *Williams*, the defendant alleged that he had received ineffective assistance of counsel because his attorney had failed to communicate a plea bargain offer to him.[92] Although stating that such a failure constituted ineffective assistance of counsel, the *Williams* court ultimately ruled that prejudice was lacking because the offer was conditional and had been withdrawn before the trial.[93] The language relied upon by *Alvernaz* indicated that the *Williams* court was unwilling to reverse a fair trial or allow the defendant to accept the original offer after he was rightfully convicted.[94] But, as the *Alvernaz* court conceded, this language carries little weight since the Ohio court did not depend on this reasoning in deciding *Williams*.[95]

In sum, the position taken by *Alvernaz* in regard to prejudice does not find sufficient solid support in the existing case law. While it did point to several instances where other courts seemed reluctant to find prejudice in similar cases, the *Alvernaz* court could not garner the type or quantity of

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Alvernaz was correct in its assumption of the purpose behind the amendment, clearly the Supreme Court would have used the word "trial" in place of the words "adversarial system." It is these inconsistencies, in combination with the fact that the Supreme Court's sole purpose in *Strickland* was to promulgate a standard for judging Sixth Amendment violations, which compel the conclusion that they relied upon language that can provide nothing more than weak support for the *Alvernaz* decision.

88. State v. Kraus, 397 N.W.2d 671 (Iowa 1986).

89. *Id.* at 672. The *Kraus* court ultimately reversed the conviction, but the reversal was not based on the attorney's errors. The court reversed the conviction because the trial court had given the defendant "enthusiastic encouragement" to plead not guilty, in addition to conflicting and misleading advice regarding the plea.

90. *Id.* at 674.

91. 654 F. Supp. 226 (N.D. Ohio 1986).

92. *Id.* at 233.

93. *Id.* at 237. In *Williams*, the defendant was charged with aggravated murder and aggravated robbery. After holding an evidentiary hearing, the *Williams* court found that one month before the trial date, the prosecuting attorney told counsel for the defense that the state would accept a plea of guilty to aggravated robbery, and in return the state would nolle the aggravated murder charge. *Id.* at 235. Defense counsel did not, however, tell the defendant about the offer, and did not communicate further with the prosecuting attorney until the day of the trial. *Id.* At that time, the defense counsel asked the prosecutor if the offer still stood, and the prosecutor replied that it did not. *Id.* Thus, the *Williams* court ruled that the offer was conditional and had been withdrawn during the conversation between the prosecutor and the defense counsel on the day of the trial. *Id.*

94. "The remedy of granting the defendant a new trial or . . . permitting him to enter a guilty plea on the basis of the uncommunicated offer . . . is an anomaly where the defendant is subsequently convicted in a fair trial . . ." *Id.* at 236-37.

95. *Alvernaz*, 282 Cal. Rptr. at 611 n.9.

support which, as the next section will show, presently exists for the *Pollard* approach to prejudice.

2. *People v. Pollard: Reversible Error.* When the *Pollard* court addressed the prejudice issue, it stated that the *Strickland* test, in its original form, was not perfectly adapted to ineffective assistance claims in the rejected plea context.[96] Accordingly, the court made some minor adjustments to the second prong of the test. The court stated that in order to establish the required prejudice, the defendant must show that but for counsel's failure to convey the offer, or counsel's erroneous advice concerning the law or the plea, it is reasonably probable that the defendant would have accepted the offer.[97] As previously mentioned, the *Pollard* court did not decide whether the test had been met in that case.[98] Rather, it remanded the case to the trial court with instructions to apply the test to the facts of the case.[99]

In reaching its conclusions, *Pollard* rejected the test articulated in *Brown*, but not for the same reasons it was rejected by *Alvernaz*.[100] The *Pollard* court stated that the *Brown* prejudice test was more complex than necessary to judge the simpler cases where counsel failed to convey a plea bargain offer, or gave erroneous advice which led to the rejection of the offer.[101] The court noted the complexity of the *Brown* test was most likely a product of the unusual fact situation which was before that court.[102] Since the *Brown* test was inappropriate, the *Pollard* court looked to *Strickland* and *Ledesma* to fashion an appropriate test for prejudice.[103]

Since *Strickland* was decided, the majority of courts facing cases like *Pollard* and *Alvernaz* have decided the prejudice issue in a manner consistent with *Pollard*. One notable decision is *Turner v. Tennessee*.[104] This decision is important because the legal analysis employed by the court in *Turner* is nearly identical to that employed in *Pollard* and because the *Turner* opinion may provide the best indication of how the United States Supreme Court will rule when it decides cases like *Pollard* and *Alvernaz*.

In *Turner*, the defendant was charged with felony murder and two counts of kidnapping.[105] In the week before his trial, the state offered Turner a

96. *Pollard*, 282 Cal. Rptr. at 594.

97. *Id.*

98. *See supra* footnote 63 and accompanying text.

99. *Id.* at 598.

100. *Id.* at 593. For discussion of *Brown*, see *supra* notes 32-45 and accompanying text.

101. *Id.*

102. *See supra* notes 33-37 and accompanying text.

103. *Pollard*, 282 Cal. Rptr. at 593.

104. 664 F. Supp. 1113 (M.D. Tenn. 1987), *aff'd*, 858 F.2d 1201 (6th Cir. 1988), *vacated*, 492 U.S. 902 (1989), *remanded to* 883 F.2d 38 (6th Cir. 1989), *remanded to* 726 F. Supp. 113 (M.D. Tenn. 1989), *aff'd*, 940 F.2d 1000 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 915 (1992).

105. *Id.* at 1114.

plea bargain which included a two-year sentence.[106] Relying on the constitutionally deficient advice of his attorney, Turner rejected the plea bargain, and proceeded to trial.[107] At trial he was convicted on all counts and received a life sentence plus two forty year terms to run concurrently.[108] Turner appealed on the ground of ineffective assistance of counsel.[109]

The *Turner* court held that the attorney's performance was outside of the bounds of reasonableness established by prevailing professional norms.[110] When it moved onto the second prong of the *Strickland* test, the court held that Turner had been prejudiced by the incompetent advice in that he probably would have accepted the plea offer if he had received adequate advice.[111] This reasoning closely resembles that of the *Pollard* court. This fact is of particular importance because of the procedural history of the *Turner* case. The cited *Turner* opinion was just one in a long series which have been published as that case has worked its way up and down the federal court system.[112] At one point, the United States Supreme Court granted certiorari to decide the case,[113] but, as Justice Work noted in his *Alvernaz* concurrence, having the opportunity to do so, the Supreme Court did not question the *Turner* court's ruling in regard to the proper application of *Strickland*.[114] Rather, it merely remanded the case for further consideration of a recently decided case which dealt only with the proper remedy to be provided.[115]

Justice Work reasoned that the Court's treatment of *Turner* gives rise to the implication that the United States Supreme Court believes a defendant in Turner's situation has suffered a constitutionally significant harm, regardless of the fact that he had received a fair trial.[116] Accordingly, Justice Work would have agreed with the *Pollard* court's reasoning and ruled that Alvernaz

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106. *Id.*

107. According to the court, the attorney had an inflated estimate of his own abilities, an unrealistic estimate of the probabilities of outcome at trial, and a casual attitude toward trial preparation. Additionally, he had used cocaine and consorted with prostitutes around the time period when the plea bargain was offered. According to the court, these circumstances contributed to the attorney's erroneous advice that the defendant should reject the offer and go to trial. *Id.* at 1115 n.6.

108. *Id.* at 1114.

109. *Id.*

110. *Id.*

111. *Id.*

112. *See supra* note 104 (where case history is laid out in full).

113. *Turner*, 492 U.S. 902.

114. *Alvernaz*, 202 Cal. Rptr. at 619.

115. *Turner*, 492 U.S. at 902 (remanded for consideration in light of Alabama v. Smith, 490 U.S. 794 (1989)).

116. *Alvernaz*, 282 Cal. Rptr. at 619.

had satisfied both prongs of the *Strickland* test.[117] If the implication raised by Justice Work is true, then the Supreme Court would approve of the prejudice ruling in *Pollard* and reject the decision in *Alvernaz*. The *Pollard* position was also supported by the Court of Criminal Appeals of Texas in *Ex parte Wilson*.[118] In *Wilson*, the defendant's attorney rejected a plea bargain offered by the state without telling the defendant about the offer because the attorney felt he could win the case at trial.[119] Under the terms of the offer, the defendant would have been sentenced to no more than thirteen years in prison.[120] The defendant, later convicted after a fair trial, was sentenced to life in prison.[121] On appeal, the court applied the *Strickland* test and ruled that the defendant had met both prongs. Accordingly, it reversed the conviction and remanded for a new trial.[122] The *Wilson* court stated that the requisite prejudice had been established because the defendant testified that he would have accepted the plea bargain if he had known about it.[123] This test is similar to the prejudice test advanced by the *Pollard* court.[124]

Additionally, in *Lewandowski v. Makel*,[125] the United States District Court in Michigan employed a prejudice test which was nearly identical to the *Pollard* test in terms of the type and quantum of proof that a defendant must show. In *Lewandowski*, the defendant was charged with first degree murder.[126] Pursuant to effective advice by his original attorney, the defendant entered into a plea bargain agreement with the state.[127] Under the terms of the plea bargain, the defendant entered a plea of nolo contendere to second degree murder and in consideration, he would not be tried for first

117. In his concurrence, Justice Work stated that he agreed with the majority that Alvernaz' conviction should be affirmed, but he would have reached that decision on a purely factual basis. *Id.* at 615-16 (Work, J., concurring). Justice Work noted that Alvernaz was charged with offenses that fall under California Penal Code Section 1192.7. That section bars the court from accepting plea bargains to certain specified crimes. Since the crimes charged to Alvernaz were covered by that statute, Justice Work would have held that Alvernaz suffered no prejudice because the trial court would have been without discretion to accept the bargain that the state had offered. *Id.* at 661-17 (Work, J., concurring). Justice Work went on, however, to disagree with the majority on the legal issues which are relevant to this Note. *Id.* at 617-20 (Work, J., concurring).

118. 724 S.W.2d 72 (Tex. Crim. App. 1987).

119. *Id.* at 73.

120. *Id.*

121. *Id.*

122. *Id. See infra* Section IV for a discussion of the remedy provided by the *Wilson* court.

123. *Wilson*, 724 S.W.2d at 74.

124. The only difference between the two tests is in terms of the quantum of proof that each requires. In *Pollard*, the court held that the defendant must show that but for the errors, it is reasonably probable that the offer would have been accepted. In contrast, less proof was needed to meet the *Wilson* test. In *Wilson*, the defendant's mere testimony that he would have accepted the offer was sufficient to meet the test. This slight difference is not significant, however, and as a whole *Wilson* lends support for the *Pollard* test.

125. 754 F. Supp. 1142 (W.D. Mich. 1990).

126. *Id.* at 1144.

127. *Id.*

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degree murder.[128] Later, without the advice of counsel, the defendant attempted to withdraw his plea.[129] The trial court refused and sentenced him to a fifteen to twenty-five year prison term.[130] The defendant was then given improper advice by a new attorney which caused him to appeal the trial court's ruling and continue his campaign to have the plea withdrawn.[131] This advice was improper because the attorney failed to inform the defendant of recent changes in the law which directed that upon voluntary withdrawal of a plea, the court would remand to trial on the original charges.[132] The appeal was successful and the defendant was permitted to withdraw his plea.[133] Subsequently, he was tried and convicted of first degree murder.[134] The defendant was sentenced to life in prison with no possibility for parole, and then appealed on the ground of ineffective assistance of counsel.[135]

The *Lewandowski* court applied both prongs of the *Strickland* test. In order to establish prejudice, the court stated that the defendant must demonstrate a reasonable probability that, but for the incompetent legal assistance, he would not have gone to trial on the original charge.[136] This language is nearly identical to that used by the court in *Pollard*.[137] Additionally, the *Lewandowski* court seemed to reject the lower standard of proof which was accepted by the *Wilson* court.[138] The *Lewandowski* court stated that to meet the prejudice test, the defendant must present more than subjective evidence of intent.[139] The court stated that the defendant must set forth objective evidence that the outcome would have been different in the

128. *Id.*

129. *Id.* Apparently, the defendant had no clear memory of the offense at the time that he accepted the plea and pled nolo contendere. Later, as his memory returned, he became convinced of his innocence and sought on his own to have his plea withdrawn. This decision was not due to ineffective advice from counsel since the attorney was not aware of the defendant's actions until the day of the first hearing on the issue. At that hearing, the attorney vehemently objected to the defendant's desire to withdraw the plea, and was given permission by the court to withdraw from the case. At that time, the case law suggested that the defendant could not be charged with the original offense of first degree murder upon withdrawal of his plea. In the months that followed, however, the law changed and the Michigan courts were given the power to reinstate the original charge where a defendant was allowed to voluntarily withdraw a previous plea. *Id.* at 1144-46.

130. *Id.* at 1144.

131. *Id.*

132. *Id.* The proper advice would have been to live with the relatively light sentence he had received after entering the plea. Therefore, the attorney should have told him *not* to seek permission to withdraw the plea of guilty.

133. *Id.*

134. *Id.*

135. *Id.* at 1146.

136. *Id.* at 1148.

137. *See supra* note 97 and accompanying text.

138. *See supra* note 123 and accompanying text.

139. *Lewandowski*, 754 F. Supp. at 1147.

absence of the errors.[140]

In sum, authoritative case law from other jurisdictions plainly supports the *Pollard* application of *Strickland*, while necessarily rejecting the *Alvernaz* approach. The inquiry does not end with the proper application of *Strickland*, however, because once a defendant meets the two-prong test the court is then faced with a most interesting dilemma, determining the proper remedy for the defendant's injury.

IV. DETERMINING THE PROPER REMEDY FOR A LOST PLEA BARGAIN

Perhaps the most heated debate in this area of law has been over the remedy for a defendant who successfully establishes prejudice. To date, a uniform remedy has not been endorsed. Even the United States Supreme Court's landmark *Strickland* decision, which provides a uniform test for judging the adequacy of counsel in these types of cases, does not provide guidance for determining an appropriate remedy. Thus, the courts have been left on their own. The various options which they have proffered can be divided into two basic categories. The early decisions granted a new trial to a defendant who had been harmed in this manner. The trend in the more recent cases (including *Pollard*), however, is to reverse the defendant's conviction and mandate that the prosecutor reinstate the original plea bargain offer.

A. Granting A New Trial

The *Brown* decision marked the first time a California court discussed the remedy issue in a case where ineffective assistance of counsel led to a lost opportunity for the defendant to accept a plea bargain.[141] As previously noted, however, the *Brown* court ultimately ruled against the defendant, so its discussion of remedy is only dicta. In a footnote at the end of the opinion, the court indicated it would have simply remanded the case for a new trial.[142] The court added, however, that appellate relief is imperfect because a reversal on appeal does not compel the state to reinstate the plea bargain, nor can it dictate the sentence which the defendant will receive if he is convicted at the new trial.[143]

In the cases outside of California, where the defendant had satisfied both prongs of the *Strickland* test, several courts have also ruled that a new trial

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140. *Id.* The *Lewandowski* court then ruled that the defendant had made a sufficient showing to satisfy the prejudice test, and ordered that the original conviction and sentence for second degree murder be reinstated. *Id.* at 1150. Additionally, the court mandated that the defendant be freed from confinement immediately, because, under the original sentence, the defendant should have been paroled by the time that this case was finally decided. *Id.*

141. *Brown*, 223 Cal. Rptr. 66, 79 n.25.

142. *Id.* at 79 n.25.

143. *Id.*

was the proper remedy to a defendant harmed in this manner.[144] Unfortunately, the courts did not discuss the reasons for this choice of remedy. Nonetheless, a second fair trial does not seem to redress the defendant's injury in any way, because there is no reason to believe that the outcome of a second fair trial will be different from that of the first. Thus, the time and expenditures incurred by the state and the defendant if forced to take part in an unnecessary re-trial makes this remedy unreasonable.

B. Reinstatement Of The Original Plea Bargain

A substantial number of courts,[145] including the *Pollard* court, have held that the proper remedy in these cases is to reverse the conviction and order the prosecutor to reinstate the lost plea bargain. The question that arises, however, concerns the situation where the state refuses to reinstate its original offer. It is easy to understand that the state would be reluctant to offer a plea bargain to a person who had been sentenced to a more severe punishment by a judge or jury. Yet, on the other hand, since the defendant would have accepted the original bargain in the absence of counsel's errors, the state would be no worse off than it should have been in the first place.[146] This is a difficult issue, and the resulting split among the courts in resolving it is not surprising.

Appellate courts have only limited power with which to make judicial demands upon the prosecuting office. When faced with a state refusal to reinstate the original plea bargain, some courts have held that a presumption of vindictiveness should apply to any offer that involves a greater sentence than the defendant would have received under the original offer.[147] This presumption means that after a successful appeal, the state cannot refuse to reinstate the original plea offer unless it first overcomes a judicial presumption that the refusal is the result of vindictiveness due to the defendant's successful appeal. This presumption places a high standard upon the state to

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144. State v. Simmons, 309 S.E.2d 493 (N.C. App. Ct. 1983); State v. Ludwig, 369 N.W.2d 722 (Wis. 1985); Commonwealth v. Copeland, 554 A.2d 54 (Pa. Super. Ct. 1988); *Wilson*, 724 S.W.3d 72.

145. Turner v. Tennessee, 664 F. Supp. at 1125; *Lewandowski*, 754 F. Supp. at 1150; Tucker v. Holland, 327 S.E.2d 388, 396 (W.Va. 1985).

146. It is true that the state has unnecessarily expended its resources in conducting the trial and those resources cannot be recouped. That concern, however, cannot justify the position that a defendant in these cases should receive no remedy. Present day law embraces several situations in which the state will expend its resources in conducting a trial, only later to have the conviction overturned through no fault of its own. A grievous error committed by defense counsel during the trial, for instance, will be the basis for reversing the first conviction and ordering a new trial, thus inflicting additional expenditure of resources on the state. Yet, to date, conservation of state resources has not been accepted as a justification for refusing to give such a defendant a remedy for that injury. Therefore, the same concern should not justify a refusal to remedy the injury in *Alvernaz* and *Pollard* type cases. This is especially true if that remedy is the reinstatement of the lost plea bargain, since such a remedy calls for no additional expenditure of state resources.

147. *Turner*, 940 F.2d at 1002.

prove that there is some compelling reason, aside from animosity for the defendant, which justifies its refusal to reinstate the lost plea bargain. Whether application of this presumption is proper, however, is uncertain in light of the directions from the United States Supreme Court when it remanded *Turner* for consideration of *Alabama v. Smith*.[148]

In *Smith*, the Supreme Court held that a presumption of vindictiveness should not attach when a defendant receives a more severe punishment upon retrial after he had successfully attacked his earlier guilty plea.[149] Thus, the *Smith* case centered on *judicial* vindictiveness. This fact led the latest *Turner* court to conclude that *Smith* does not apply to a situation like *Turner* where the concern is one of *prosecutorial* vindictiveness.[150] Accordingly, the *Turner* court ruled that the presumption of vindictiveness should apply whenever the state refuses to reinstate the lost plea bargain.[151]

In contrast to *Turner*, the *Pollard* court refused to mandate the presumption of vindictiveness, and applied a much lower standard.[152] *Pollard* stated that the prosecution may withdraw the offer if they are able to articulate, to the trial court's satisfaction, a reasonable basis for such withdrawal.[153] The court did not, however, clearly define the boundaries forming a reasonable basis for the withdrawal of the offer.[154] It merely stated that the basis for a refusal may involve matters relating to the defendant, the crime charged, or the internal policies of the prosecuting office.[155] The only clear inference from this broad language is that the defendant's conviction at a fair trial will not, in itself, constitute a reasonable basis for a refusal to offer the original plea. If the conviction alone could provide such a basis, the remedy of reinstatement would be illusory since every case which gets to the remedy issue at all necessarily involves a previous conviction of the defendant at a fair trial. Thus, the state would never be obligated to offer the defendant the original plea bargain, and the actual remedy the defendant would receive would be the re-opening of the plea bargaining process or a retrial if no new agreement could be reached.

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148. 490 U.S. 794 (1989).

149. *Id.* at 801.

150. *Turner*, 940 F.2d at 1002.

151. *Id.* Note that the *Pollard* court supported its decision not to apply the presumption of vindictiveness by noting that the United States Supreme Court had remanded *Turner* in consideration of *People v. Smith*. *Pollard*, 282 Cal. Rptr. at 597. The *Pollard* court felt that this act was a recognition by the high court that no presumption of vindictiveness should apply in these cases. *Id.* *Pollard* was decided in July 1991, however, and the latest *Turner* decision was issued in August 1991. In the latest *Turner* decision, the United States Court of Appeals in Tennessee ruled that the presumption of vindictiveness *should* apply regardless of the United States Supreme Court's decision in *Smith*. *Turner*, 940 F.2d at 1002. Since the latest *Turner* opinion was not available to the *Pollard* court, it is not known how it would have influenced the *Pollard* court, and how it will influence courts in the future.

152. *Pollard*, 282 Cal. Rptr. at 597.

153. *Id.*

154. *Id.*

155. *Id.*

This is clearly not what the *Pollard* court had in mind when it ruled that the state should reinstate the original plea *unless* it could articulate a reasonable basis for withdrawing it. The *Pollard* court went on to point out that if the state is allowed to withdraw the offer, then the original conviction would be reinstated without a new trial being conducted.

The fact that most courts have not given any detailed discussion of the remedy issue in combination with the conflict existing among the few that have, leads to the conclusion that there is no clear answer to the remedy issue at present. That conclusion, along with the conflict between *Alvernaz* and *Pollard* over the application of the *Strickland* test, suggests that without additional guidance from high courts, district and appellate level courts will continue to produce inconsistent and unpredictable decisions.

V. RESOLVING THE CONFLICT IN FAVOR OF *POLLARD*

"[P]lea bargaining is an essential component of the administration of justice. Properly administered it is to be encouraged."[156] Since the United States Supreme Court made this statement in 1971, plea bargaining has proliferated throughout the country. It is now estimated that approximately ninety percent of all criminal cases will be disposed of through plea bargaining.[157] Because that statistic represents only those cases where the accused accepted the plea bargain,[158] the number of plea bargains actually offered should be higher, and a plea bargain is probably offered in nearly every criminal case today. As the number of plea bargain offers increase, so too does the probability that more and more courts will be faced with situations where the accused claims to have lost a plea bargain due to ineffective assistance of counsel. That prospect calls out for uniform rules which can be applied by all courts in the future. Otherwise, incongruous splits such as that within the California Fourth District Court of Appeal in *Alvernaz* and *Pollard*, and the drastically different results which went along with the split, are sure to resurface later in California and elsewhere. The introduction to this Note asserted that when a defendant claims to have lost a plea bargain due to ineffective assistance of counsel, the reviewing court must answer some very difficult questions.[159] An examination of the cases presented in the preceding sections of this Note indicates that the answers found in the *Pollard* line of cases should be favored.[160]

The first question faced by the courts in these situations is, by what standard should the court judge the adequacy of counsel's performance at the plea bargaining stage? Since the United States Supreme Court decided

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

157. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 5 (1988).

158. *Id.*

159. *See supra* Introduction.

160. Reference to the *Pollard* line of cases refers to *Turner*, *Lewandowski*, and *Wilson*.

Strickland,[161] every major decision dealing with the asserted ineffective assistance of counsel in regard to the rejection of a plea bargain has judged the adequacy of the attorney's performance through application of the *Strickland* two-prong test.[162] The conflicting outcomes of *Pollard* and *Alvernaz* show, however, that application of the test will not lead to consistent results without judicial agreement on the answer to a second difficult question: Does the loss of a favorable plea bargain due to ineffective assistance of counsel inflict a constitutionally significant injury under the *Strickland* test even though the defendant received a fair trial?

The first prong of the *Strickland* test requires a showing that counsel's performance was objectively unreasonable.[163] In *Pollard* and *Alvernaz*, both panels of the Fourth Appellate District agreed that either a failure to convey a plea bargain offer to a defendant, or a material misstatement by the attorney regarding the terms of the offer, would constitute deficient performance under this test. Additionally, every court which has been faced with the *Pollard* or *Alvernaz* type of case has applied the first prong of the *Strickland* test and reached the same conclusion.[164]

The outcome reached by the courts is strongly supported by the *Strickland* opinion itself. In *Strickland* the court stated that when a court applies the first prong of the test, "the prevailing norms of practice as reflected in the ABA standards and the like are to be used as guides to determining what is reasonable professional assistance."[165] Accordingly, most courts have cited section 4-6.2 of the ABA's *Standards Relating to the Administration of Criminal Justice* to support the conclusion that such acts constitute deficient performance by counsel. This section states that the attorney has a duty to keep the client advised of all proposals which are offered by the prosecutor.[166] Additionally, Rule 4-5.2 expressly states that the accused, not the attorney, must make the final decision on matters concerning plea bargains.[167] Thus, when a defendant proves that defense counsel failed to communicate a plea bargain offer, or provided misinformation which led the defendant to reject the offer, the courts will likely find that the first prong of the *Strickland* test has been met.

Since the application of the first prong of the *Strickland* test has not

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161. *Strickland*, 466 U.S. 668.

162. *Pollard*, 282 Cal. Rptr. at 593; *Turner*, 664 F. Supp. at 1117; *Ludwig*, 369 N.W.2d at 725; Johnson v. Duckworth, 793 F.2d 898, 899 (7th Cir. 1986); Lloyd v. State, 373 S.E.2d 1, 2 (Ga. 1988); *Wilson*, 724 S.W.2d at 73; State v. James, 739 P.2d 1161, 1165 (Wash. Ct. App. 1987); *Kraus*, 397 N.W.2d at 673; *Lewandowski*, 754 F. Supp. at 1147. For discussion of the *Strickland* test, *see supra* notes 7-14 and accompanying text.

163. *Strickland*, 466 U.S. at 687. *See supra* notes 7-14 and accompanying text.

164. *See, e.g., Turner*, 664 F. Supp. at 1121; *Ludwig*, 369 N.W.2d at 726; *Duckworth*, 793 F.2d at 902; *Lloyd*, 373 S.E.2d at 3; *Wilson*, 724 S.W.2d at 74; *James*, 739 P.2d at 1167.

165. *Strickland*, 466 U.S. at 688.

166. STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE Rule 4-6.2(a) (ABA 2d ed. 1980) [hereinafter CRIMINAL JUSTICE STANDARDS].

167. *Id.* at Rule 4-5.2(a)(i).

generated significant controversy, the answer to the second difficult question is ultimately grounded in the application of the second prong of the *Strickland* test. When the courts turn to the application of the prejudice prong, both *Alvernaz* and *Pollard* indicate that the outcome will be less predictable. To establish prejudice under *Strickland*, the defendant must prove that but for counsel's unprofessional errors, the outcome of the proceeding would have been different.[168] As previously noted, the *Alvernaz* court ruled that participation in a fair trial moots any claim by the defendant who received ineffective assistance of counsel which led to the loss of a favorable plea bargain.[169] Conversely, the *Pollard* court ruled that a defendant has established prejudice upon proof that but for counsel's errors, it is reasonably probable that the defendant would have accepted the plea bargain offer.[170] The existing case law indicates that the *Pollard* approach to prejudice has been more widely accepted by courts than the *Alvernaz* approach. *Turner*, *Wilson*, and *Lewandowski* each provide substantial support for the *Pollard* approach to the prejudice prong. Conversely, the *Alvernaz* test is not directly supported by any reported cases from California or any other state. But, in light of the *Alvernaz* (and *Bennett*) decisions, there still seems to be some doubt as to how the California courts will handle the prejudice issue in the future.[171]

The fundamental difference between the two approaches toward prejudice centers on how broadly the court interprets the purpose behind the Sixth Amendment's right to assistance of counsel. In *Alvernaz*, the court took a very narrow view of that right, suggesting that the sole purpose of the right to effective assistance of counsel is to guarantee a fair trial. On the other hand, the court in the *Pollard* line of cases took a broader view of that right, holding that the purpose of the right is to ensure fairness in the *prosecution as a whole*.

The wider interpretation of the right to effective assistance of counsel finds some support in the *Strickland* opinion itself. In *Strickland* the Court stated that, "[the] Sixth Amendment recognizes the right to assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results."[172] The Court's use of the words "adversarial system" rather than the word "trial" indicates that the Court interpreted the right to effective assistance of counsel more broadly than merely as a right to guarantee a "fair trial." Additionally, as noted by the concurrence in *Alvernaz*, it can be argued that, "the right to a fair trial is a separate Sixth Amendment guarantee independent from the right

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168. *Strickland*, 466 U.S. at 687.

169. *See supra* note 73 and accompanying text.

170. *See supra* note 97 and accompanying text for a discussion of *Pollard*.

171. This holds true in the other states where this issue has not been decided by the higher courts.

172. *Strickland*, 466 U.S. at 685.

to effective assistance of counsel."[173] This argument finds support in the structure and text of the Sixth Amendment itself.[174] The amendment lists several rights which seem to constitute the modern day notion of a "fair trial." These include the right to a speedy and public trial, the right to an impartial jury, the right to confront witnesses, *and* the right to have the assistance of counsel. Clearly, each one of these rights must be protected, and thus, if one is not met, the criminal defendant's constitutional rights have been violated. Suppose, for example, a defendant receives a speedy and public trial but the jury in that trial was not impartial. It is clear that the defendant's Sixth Amendment rights have been violated. Thus, even though the defendant did receive some of the protections contained in the Amendment, the court cannot and will not ignore the fact that one of the rights, the right to have an impartial jury, has not been protected. Unquestionably, the failure to protect that one right cannot be eradicated by the protection of all of the other rights in the Amendment. Therefore, the conviction must be overturned.

So, why does the same reasoning not apply in the *Alvernaz* and *Pollard* type cases? In *Alvernaz* the court said that although the defendant failed to receive "effective" assistance of counsel, and thus was denied one of the rights listed in the Sixth Amendment, he was entitled to no relief because the other rights guaranteed by the amendment were protected in the form of a fair trial. This reasoning would only be logical if the rights listed in the amendment were connected by the word 'or'. This is clearly not the case, however, and it would be absurd to suggest such an interpretation. This leads to the obvious conclusion that the *Alvernaz* decision incorrectly stands for the idea that the violation of one constitutional right can be remedied by the protection of others. If that were true, the United States Constitution would be reduced to a meaningless scrap of paper.

In sum, the support from other jurisdictions for the *Pollard* prejudice test, along with the inferences that can be drawn from the procedural history of *Turner*, suggests that courts which decide these issues in the future will likely favor the *Pollard* approach to prejudice over that employed in *Alvernaz*.

The third question which the courts will face in the future is, what, if any, is the proper remedy in these cases? As previously discussed, *Alvernaz* and the unpublished *Bennett* decision, provide no authoritative guidance in answering this question because both courts ruled that prejudice had not been shown, and thus, any discussion of remedy in those cases is merely dicta.

173. *Alvernaz*, 282 Cal. Rptr. at 619 (Work J., concurring).

174. The Amendment states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and a district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

Additionally, of those cases which have reached the remedy issue, very few have provided any detailed analysis on the issue.[175] The courts which have simply remanded for a new trial have not discussed their reasoning for so doing,[176] and lately this type of remedy has come under criticism. In *Turner*, for example, the court stated that, "when ineffective assistance of counsel results in the lost chance to accept a favorable plea bargain, simply remanding for a new trial is meaningless."[177] The point *Turner* makes is valid since a new trial does not in any way compensate the defendant for his lost opportunity to accept the plea bargain. In most cases, a new trial will be a waste of time because the defendant has already been given one fair trial, and there is no reason why another fair trial would turn out any differently. Thus, fairness to the defendant and judicial economy would both seem to support reinstatement of the lost bargain as the appropriate remedy in these cases.

However, an order to reinstate the original plea bargain will not be well received by the prosecutors. They will likely argue that because the defendant has been convicted after a fair trial, the defendant is guilty of the crime and thus deserves the sentence imposed by the court rather than the lighter sentence connected to the lost plea bargain. At first glance this argument seems logical, but in reality it fails to focus on the state's knowledge at the relevant time period. The reviewing court must look to what the prosecutor knew at the time the plea bargain was offered, not to what the prosecutor knows after conviction.[178] At the time that a state makes a plea bargain offer, it must have some incentive for wanting to avoid resolution of the case at trial. Irrespective of whether the state made the offer out of fear that it would lose at trial, or whether it merely wanted to resolve one of the many cases awaiting trial, the fact remains that the state made the offer. Since it made the offer, the state, based on its knowledge at the time, was obviously willing to have the defendant accept it. If the plea bargain is not reinstated and a new trial is ordered, prosecuting attorneys will have no incentive to offer the defendant any plea bargain at all. They will have every reason to be confident that they will convict the defendant at the second fair trial, just as they had at the first fair trial.

When assessing the remedy issue, it is important to remember that the error in these cases is not "society's" error, not the state's error, and not the defendant's error. Nonetheless, one or more of these parties will have to suffer because of that error. If a reinstatement of the plea bargain is

175. *See supra* Section IV.

176. *See, e.g.*, *Simmons*, 309 S.E.2d 493; *Ludwig*, 369 N.W.2d 722; *Copeland*, 554 A.2d 54; *Wilson*, 724 S.W.3d 72.

177. *Turner*, 664 F. Supp. at 1126.

178. *Id.* ("objective evidence supporting a non-vindictive increase in a plea offer should be based on new facts or evidence that are not direct fruits of the previous . . . trial, were unknown at the time of the previous offer, and were discovered by means either independent of information gained from the first trial or at least the product of inevitable discovery").

ordered, "society" will suffer because a guilty person will be allowed back into the community prematurely. Additionally, the state will suffer if reinstatement is ordered by losing a valid conviction and by having a guilty defendant get a lighter sentence than is deserved. On the other hand, if a new trial is ordered, the defendant would suffer by facing a sentence after a second fair trial which is not likely to be any different from the sentence imposed after the first fair trial. These competing interests must be balanced by the court. However, since the defendant's loss involves the total deprivation of his freedom, the court will be hard-pressed to justify any remedy other than reinstatement of the original plea bargain. The interests of "society" and the state, while conceded to be very serious, can hardly compete with the unconstitutional deprivation of a person's freedom.

The additional issue needing resolution if the courts opt for the remedy of reinstatement is whether to apply a presumption of vindictiveness to any subsequent plea bargain which is more severe than the original plea bargain. The reasoning which supports the remedy of reinstatement also supports the imposition of the presumption of vindictiveness. If the courts look to the circumstances which existed at the time of the offer, they should rule that any offer more severe than the original offer must be the product of the prosecutor's post-conviction awareness that the defendant is guilty of the crime. Absent the discovery of new evidence against the defendant, there is no other reasonable explanation for the state's sudden refusal to offer a plea bargain that it had previously offered to that very defendant. In order to protect the defendant from being unjustly denied the plea bargain which he would have accepted with the aid of effective counsel, the courts should require the state to prove that the more severe offer is not the product of prosecutorial vindictiveness. The *Turner* court stated that the presumption of vindictiveness is rebutted by objective evidence justifying the prosecutor's action.[179] This requirement would also further judicial economy in that it would encourage the state to comply with the appellate court's order before attempting to withhold the plea bargain absent a tenable reason for doing so. Additionally, without the requirement, the state might be tempted to leverage the defendant into succumbing to a heavier sentence. This could be accomplished if the state refused to reinstate the plea bargain, with no objective reasons for doing so, thus leaving the burden on the defendant to seek additional assistance from the courts. Practically speaking, this strategy poses a realistic threat to a defendant who is still incarcerated on the original conviction. Such a defendant is faced with all of the disadvantages inherent in pursuing further judicial assistance from jail.

CONCLUSION

This Note has discussed the issues presented by claims that ineffective

179. *Id.* (quoting Thigpen v. Roberts, 468 U.S. 27, 32 n.6 (1984)).

assistance of counsel has led to a loss of a favorable plea bargain. While the case law is relatively scarce in this area, the existing law suggests that such a claim should entitle a defendant to a reinstatement of the lost plea bargain, provided that the ineffectiveness is proven under the *Pollard* application of the *Strickland* test. Additionally, to further judicial economy and discourage prosecutorial retribution, the courts should require the state to overcome a presumption of vindictiveness if it wishes to withdraw that offer.

The conflict between *Alvernaz* and *Pollard* indicates, however, that these issues are not so easily resolved by the appellate courts in California. This conflict is likely due to the logical and moral dilemma which these types of cases present to the parties involved. The prosecutors in these cases would no doubt abhor the notion of being forced to give a lenient plea bargain sentence to a guilty defendant convicted at a fair trial. On the other hand, the defendants in these cases would be horrified at having to suffer a harsher sentence through an unremedied violation of their constitutional rights. These two competing interests are at the heart of the conflict, and unfortunately, there is no single remedy which will serve them both. When faced with this situation the courts must consider the consequences of favoring one of these interests over the other. Existing case law, as well as the United States Constitution itself, indicate that the interest of the defendant must prevail over the interest of the state in these cases.[180]

Todd R. Falzone[*]

180. This Note has focused exclusively on the rights and remedies available to a defendant seeking restitution in the criminal law courts. There are also, however, civil remedies available to a defendant in these cases in the form of professional malpractice actions against the attorney. *See* Joseph T. Bockrath, Annotation, *Attorney's Liability for Malpractice in Connection with Defense of Criminal Case*, 53 A.L.R.3d 731 (1973). Additionally, the attorney in these types of cases could face disciplinary proceedings by the state bar for failure to communicate a plea bargain offer to the accused. *See, e.g.*, CRIMINAL JUSTICE STANDARDS, *supra* note 166, at Rule 4-6.2 (an attorney has an affirmative duty to advise the accused of all proposals made by the prosecutor in regard to plea bargaining).

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