Denver Law Review

Volume 87
Issue 3 *Tenth Circuit Surveys*

Article 5

December 2020

# The Sixth Amendment: The Operation of Plea Bargaining in Contemporary Criminal Procedure

Ana Maria Gutierrez

# THE SIXTH AMENDMENT: THE OPERATION OF PLEA BARGAINING IN CONTEMPORARY CRIMINAL PROCEDURE

*It's not every day we overturn a state jury verdict for first-degree murder when the defendant admits he received a fair trial and no one questions that his conviction is supported by overwhelming evidence. It's not every day that we exacerbate a split of authority over the recognition of a new constitutional right, and do so despite warning signs from the Supreme Court against our course. And it's not every day we refuse to rehear a panel decision that every single state within our jurisdiction has urged us to revisit. Today we do all these things. . . .*[1]

## INTRODUCTION

The Sixth Amendment of the United States Constitution guarantees that a defendant has counsel present at all critical stages of the criminal procedure.[2] The Supreme Court has made clear that plea bargaining is one of these critical stages; therefore, the Sixth Amendment right to effective assistance of counsel applies to representation during the plea bargaining process.[3] In addition, the Supreme Court has repeatedly emphasized that the right to effective assistance of counsel serves the purpose of protecting the right to a fair trial.[4] Generally, these doctrines coexist in the analysis of a Sixth Amendment claim for ineffective assistance of counsel.[5] However, because the increased use of plea bargaining has largely circumvented the need for a full-fledged trial, an unnerving tension has developed between these fundamental principles—the right to counsel during plea bargaining and the Sixth Amendment's purpose of ensuring a fair trial. In the ordinary Sixth Amendment challenge to plea bargaining, the petitioner argues that as a result of deficient counsel he did not get a fair trial; and, as a consequence, his resulting conviction is unlawful.[6] The problem that arises, and the question that was recently presented to United States Court of Appeals for the Tenth Circuit in *Williams v. Jones* (*Williams II*),[7] is "[w]hat, if any, remedy should be pro-

1. Williams v. Jones (*Williams III*), 583 F.3d 1254, 1256 (10th Cir. 2009) (emphasis added) (Gorsuch, J., dissenting).

2. Montejo v. Louisiana, 129 S. Ct. 2079, 2085 (2009) (citing United States v. Wade, 388 U.S. 218, 227–28 (1967)).

3. *See* Santobello v. New York, 404 U.S. 257, 261 (1971).

4. United States v. Gonzalez-Lopez, 548 U.S. 140, 147 (2006); Strickland v. Washington, 466 U.S. 668, 685 (1984); United States v. Cronic, 466 U.S. 648, 658 (1984) (holding that the "right to . . . effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial").

5. *See, e.g.*, Hill v. Lockhart, 474 U.S. 52, 56–59 (1985).

6. *See* Williams v. Jones (*Williams II*), 571 F.3d 1086, 1089 (10th Cir. 2009) (Gorsuch, J., dissenting).

7. 571 F.3d 1086 (10th Cir. 2009).

vided for ineffective assistance of counsel during plea bargain negotiations if the petitioner was later convicted and sentenced pursuant to a fair trial?"[8]

There are very few principles within American jurisprudence that resonate stronger than that stated in *Marbury v. Madison*[9]: for every violation of a right, there must be a remedy.[10] Nonetheless, constitutional law scholars recognize that in reality, the law of remedies is "inevitably 'a jurisprudence of deficiency, of what is lost between declaring a right and implementing a remedy.'"[11] While full remediation remains the ideal, the current constitutional landscape gives rise to a prominent right–remedy gap.[12] This right–remedy gap demands compromise in the modern criminal justice system rather than adherence to strict constitutional remediation. Remedy requirements should only be bound by "a general structure of constitutional remedies adequate to keep government within the bounds of law."[13] This Comment will illustrate that in the context of plea bargaining, a Sixth Amendment claim of ineffective assistance of counsel has the potential to exacerbate the right–remedy gap. The petitioner in *Williams II* was ultimately successful on his claim of ineffective assistance of counsel, yet the Tenth Circuit found that "[i]n the end, no remedy may restore completely the parties' original positions."[14] The question remains whether, and to what extent, plea bargaining is one such instance where a Sixth Amendment violation can be adequately remedied.

Through an in-depth analysis of case law involving the Sixth Amendment, as well as the Tenth Circuit's decision in *Williams II* and the ensuing circuit split, this Comment demonstrates that neither the con-

---

8. Arave v. Hoffman, 552 U.S. 1008, 1008 (2007) (directing parties to brief and argue this question), *vacated as moot*, 552 U.S. 117 (2008) (petitioner abandoned ineffective assistance of counsel claim). *See Williams II*, 571 F.3d at 1088 (addressing "whether, having determined that Mr. Williams received ineffective assistance of counsel in rejecting a plea offer, the Oklahoma Court of Criminal Appeals ("OCCA") fashioned a constitutionally permissible remedy") (per curiam); *see also infra* notes 47–61 and accompanying text.

9. 5 U.S. 137 (1803).

10. *See id.* at 147.

11. John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 87 (1999) (quoting Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 587 (1983)).

12. *See* Jeffries, *supra* note 11, at 88–90 (arguing that the doctrine of qualified immunity increases the right remedy-gap because the plaintiff has limited capacity to receive a remedy that is equivalent to the alleged constitutional violation); *see also* Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 6 (2002) (arguing that "harmless error, alone among these doctrines, has the capacity to make the separation of rights from remedies permanent"). The right-remedy gap is further exacerbated by the interplay between judicial interpretation and state or congressional legislation. *See* Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1552–53 (1972) ("[W]here the judiciary independently infers remedies directly from constitutional provisions, Congress may legislate an alternative remedial scheme which it considers equally effective in enforcing the Constitution and which the Court, in the process of judicial review, deems an adequate substitute for the displaced remedy.").

13. *See* Jeffries, *supra* note 11, at 88 (quoting Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1736 (1991)).

14. Williams v. Jones (*Williams II*), 571 F.3d 1086, 1093 (10th Cir. 2009).

stitutional right of effective assistance of counsel in the context of plea bargaining nor its appropriate constitutional remedy has been clearly defined. Naturally, the adequacy of the imposed remedy "cannot be evaluated without first determining the scope, if any, of the constitutional violation."[15] This Comment argues that the lack of clarity as to Sixth Amendment rights and remedies arises because of the inexorable presence and influence of plea bargaining in the contemporary criminal process. First, this Comment demonstrates that the nature of plea bargaining within our adversarial system of justice has cultivated an often overlooked but dangerously influential dynamic: strategic overcharging.[16] Second, this Comment argues that, in a system where plea bargaining is encouraged and overcharging is commonplace, a defendant's rejection of a plea due to deficient counsel has the potential to produce fundamentally unfair results for the defendant. To wit, the defendant may still suffer prejudice notwithstanding a subsequent fair trial. The role and influence of plea bargaining has made a significant impact upon the modern landscape of constitutional criminal procedure such that it is necessary for the Supreme Court to revisit to what extent the Sixth Amendment right to effective assistance of counsel applies during plea bargaining.

This Comment proceeds in five parts. Part I recounts the history of U.S. Supreme Court cases addressing the scope of the Sixth Amendment to provide the context within which the Tenth Circuit's decision in *Williams II* emerged. Part II discusses a defendant's constitutional right to effective assistance of counsel. Additionally, Part II addresses a petitioner's burden in proving a violation of his Sixth Amendment rights as set forth by the two-part *Strickland* test, which requires the petitioner to prove both deficient performance and prejudice. Part II also contrasts the *Williams II* decision with the Seventh Circuit's decision in *United States v. Springs*[17] in order to exemplify the larger body of case law in which courts are struggling with the application and interpretation of *Strickland*'s prejudice element in the context of plea bargaining. Part III argues the ubiquity of plea bargaining and the prevalence of overcharging in contemporary criminal prosecution suggest that even if a petitioner receives a fair and impartial trial, he can still be prejudiced by deficient counsel during the plea bargaining process. Part IV then addresses the various constitutional remedies employed by circuit courts for Sixth

15. *Id.* at 1095 (Gorsuch, J., dissenting).

16. Strategic overcharging is a prosecutorial tool used to charge one criminal act under overlapping and multiple charges for the purpose of inducing a guilty plea. *See* Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 728 (2006). There are two types of overcharging: horizontal and vertical. Horizontal charging occurs when the public prosecutor charges the alleged criminal with multiple counts of the same or similar offense. *See* Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1254 (2008). Vertical overcharging takes place when a prosecutor charges the defendant with an offense higher than the accumulation of evidence may reasonably support. *Id.* at 1254–55.

17. 988 F.2d 746 (7th Cir. 1993).

Amendment violations in the context of plea bargaining, and suggests that the most judicious remedy is to simply reinstate the original plea offer. Finally, this Comment concludes the Supreme Court must clarify the indeterminate nature of the law governing the rights and remedies under the Sixth Amendment by revisiting the issue with particular emphasis on plea bargaining.

## I. U.S. SUPREME COURT PRECEDENT: THE SCOPE OF THE SIXTH AMENDMENT

The U.S. Constitution guarantees the right to a fair trial through the Due Process Clause of the Fifth Amendment.[18] The basic elements of a fair trial are defined through several provisions of the Sixth Amendment, including the Counsel Clause:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the Assistance of Counsel for his defence.*[19]

In *McMann v. Richardson*,[20] the Supreme Court interpreted the Sixth Amendment and determined that "the right to counsel is the right to *effective* assistance of counsel."[21] As a consequence, "effective assistance of counsel" has been the key language and touchstone justification for a Sixth Amendment challenge to effective counsel.[22] It was not until *Strickland v. Washington*,[23] fourteen years later, that the Supreme Court assessed the scope of the right to effective assistance of counsel and its role in ensuring the fundamental right to a fair trial.[24]

### A. *U.S. Supreme Court Cases Interpreting the Right to Effective Assistance of Counsel*

#### 1. *Strickland v. Washington*

In *Strickland*, the Court recognized that "[t]he right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to ac-

---

18. U.S. CONST. amend. V.
19. U.S. CONST. amend. VI (emphasis added).
20. 397 U.S. 759 (1970).
21. *Id.* at 771 n.14 (emphasis added).
22. *See id.* at 771; *see also* Reece v. Georgia, 350 U.S. 85, 90 (1955); Glasser v. United States, 315 U.S. 60, 70 (1942); Avery v. Alabama, 308 U.S. 444, 446 (1940); Powell v. Alabama, 287 U.S. 45, 57 (1932).
23. 466 U.S. 668 (1984).
24. *Id.* at 684.

cord defendants the 'ample opportunity to meet the case of the prosecution.'"[25] Thus, in articulating the breadth of the Sixth Amendment, the Supreme Court established a two-prong test for evaluating a claim of ineffective assistance of counsel.[26]

In order to assert a valid claim of ineffective assistance of counsel under the Sixth Amendment, the petitioner must prove (1) counsel's performance was deficient and (2) the petitioner suffered prejudice as a result of counsel's deficient performance.[27] With respect to the first prong, the appropriate standard for determining attorney performance is that of "reasonably effective assistance."[28] This standard is objective, and there is a strong presumption that counsel's performance is reasonable. Indeed, courts will presume that counsel's challenged conduct "might be considered sound trial strategy."[29] According to the Court, deferential treatment of counsel's performance enables a fair assessment of attorney conduct that "eliminate[s] the distorting effects of hindsight" and allows the Court to "evaluate the conduct from counsel's perspective at the time."[30]

The second prong of the *Strickland* test requires the petitioner to demonstrate that the deficiencies in counsel's conduct resulted in prejudice to his defense.[31] The Court made clear that "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[32]

2. *Hill v. Lockhart*

*Strickland* marked the first time the Court articulated a clear test to determine the constitutionality of a Sixth Amendment claim of ineffective assistance of counsel. Nonetheless, the Court had occasion to revisit the *Strickland* test just a year later in *Hill v. Lockhart*.[33] There, the petitioner pled guilty to charges of theft and first-degree murder.[34] Two years after his conviction, the petitioner filed a habeas corpus petition alleging ineffective assistance of counsel on the ground that his "court-appointed attorney had failed to advise him that, as a second offender, he was required to serve one-half of his sentence before becoming eligible for parole."[35] The Supreme Court granted certiorari to determine whether the two-part standard adopted in *Strickland* applied to a claim of ineffective

25. *Id.* at 685 (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 275 (1942)).
26. *Strickland*, 466 U.S. at 687.
27. *Id.*
28. *Id.*
29. Michel v. Louisiana, 350 U.S. 91, 101 (1955); *see also Strickland*, 466 U.S. at 689.
30. *Strickland*, 466 U.S. at 689.
31. *Id.* at 692.
32. *Id.* at 694 (holding that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome").
33. 474 U.S. 52 (1985).
34. *Id.* at 53.
35. *Id.*

assistance of counsel when the petitioner alleged incompetent advice of counsel during plea-bargaining, and if so, whether the petitioner satisfied this test.[36]

The Supreme Court affirmed the judgment of the Eighth Circuit, concluding not only that the *Strickland* test applies to challenges of guilty pleas under the Sixth Amendment, but also that the petitioner failed to meet his burden of proving prejudice from the alleged deficient performance.[37] Though the Court applied the *Strickland* test, it promulgated a slightly modified and exacting analysis for Sixth Amendment challenges in the context of plea-bargaining.[38]

Under *Hill*, the petitioner must still prove that counsel's performance was deficient as compared to a reasonable and competent attorney under prevailing professional norms.[39] However, in order to satisfy *Strickland*'s second prong, the petitioner "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[40] Following case precedent, the Court acknowledged that "[t]he longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'"[41] Thus, in *Hill*, the Court determined that when counsel's advice or conduct falls outside of "the range of competence demanded of attorneys in criminal cases,"[42] and when "counsel's constitutionally ineffective performance affect[s] the outcome of the plea process," guilty pleas can be considered involuntary.[43]

The Supreme Court's recognition and evaluation of the Sixth Amendment right to effective assistance of counsel has not been explored for its own sake, "but because of the effect it has on the ability of the accused to receive a fair trial."[44] In fact, the Court makes clear that a "plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest."[45] It is the subsequent guilty plea as

---

36. *Id.* at 53–55.
37. *Id.* at 53, 58.
38. *Id.* at 59.
39. *See id.* at 56 (citing McMann v. Richardson, 397 U.S. 759, 771 (1970)).
40. *Hill*, 474 U.S. at 59. The Court in *Hill* noted that "several courts of appeals have adopted this general approach." *Id.* at 59 n.** (citing Thomas v. Lockhart, 738 F.2d 304, 307 (8th Cir. 1984)).
41. *Hill*, 474 U.S. at 56 (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)); *see also* Boykin v. Alabama, 395 U.S. 238, 242 (1969); Machibroda v. United States, 368 U.S. 487, 493 (1962).
42. *McMann*, 397 U.S. at 771.
43. *Hill*, 474 U.S. at 59.
44. United States v. Cronic, 466 U.S. 648, 658 (1984).
45. Mabry v. Johnson, 467 U.S. 504, 507 (1984). A cursory look at the United States Constitution seems to lend a potential source of law that would guarantee a defendant legal entitlement to

embodied in a judgment of the court that leads to a defendant's conviction and which may potentially give rise to a violation of the Sixth Amendment right to effective assistance of counsel.[46]

### *B. The Tenth Circuit Addresses the Right to Counsel in* Williams II

In *Williams II*, petitioner–appellant Michael Williams was arrested and charged with first-degree murder.[47] Concerned about a lack of sufficient evidence on the eve of the trial, the assistant district attorney offered Williams a ten-year sentence in exchange for a guilty plea to first-degree murder.[48] Williams expressed his desire to accept the plea; however, his attorney threatened to withdraw from the case and force Williams to retain new counsel if Williams accepted the plea offer.[49] The case proceeded to trial, and the jury found Williams guilty of first-degree murder and sentenced him to life imprisonment *without* parole.[50]

In reviewing Williams's subsequent ineffective assistance of counsel claim, the Oklahoma Court of Criminal Appeals ("OCCA") found

---

accept or reject a pre-trial plea offer, namely, the Due Process Clause. *See* Williams v. Jones (*Williams III*), 583 F.3d 1254, 1259 (10th Cir. 2009) (Gorsuch, J., dissenting); U.S. CONST. amend. V; *see also* Medina v. California, 505 U.S. 437, 445 (1992). However, the Supreme Court has declined to apply the Due Process Clause in order to essentially draft a new and unenumerated constitutional right. *See Medina*, 505 U.S. at 443. This is because in the realm of criminal law, the framers of the Constitution "have defined the category of infractions that violate fundamental fairness very narrowly based on the recognition that, '[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.'" *Id.* (alteration in original) (internal quotation marks omitted).

Furthermore, it is clear from case precedent that the Supreme Court has consistently held that crime prevention as well as criminal prosecution are police powers; these are state powers not to be infringed by the Federal Government. *See id.* at 445. Thus, state criminal procedures, convictions, and sentencings will not be held to offend the Due Process Clause unless they "offend[ ] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* As a result, it seems the plea process has successfully circumvented the Due Process Clause of the United States Constitution. *See, e.g.*, *Mabry*, 467 U.S. at 511 (noting that the Due Process Clause "is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty").

46. *Mabry*, 467 U.S. at 507–08.

47. *See Williams II*, 571 F.3d, 1086, 1088 (10th Cir .2009).

48. Williams v. Jones (*Williams I*), No. CIV-03-201-RAW, 2006 WL 2662795, at *10 (E.D. Okla. Sept. 14, 2006), *rev'd*, 571 F.3d 1086 (10th Cir. 2009).

49. *Williams II*, 571 F.3d at 1088; *infra* note 69 and accompanying text.

50. *Williams II*, 571 F.3d at 1088. Mr. Williams conceded that he had a fair trial. *Williams III*, 583 F.3d at 1256 (Gorsuch, J., dissenting). The government had a very compelling argument and produced overwhelming evidence of Williams's guilt, such that the jury unanimously reached a guilty verdict. *Id.* at 1257. The evidence in summation is as follows:

> In 1997, someone entered the home of Larry and Dolores Durrett with a gun. The gunman shot Mr. Durrett three times in his sleep, and twice more when the victim tried to pursue him. Mr. Durrett later died of his wounds. During a routine traffic stop the next day, police discovered Mr. Williams and his girlfriend, Debra Smith, with packed suitcases and a rifle matching the shell casings left at the Durrett's home. At trial, several witnesses reported hearing Mr. Williams threaten to kill Mr. Durrett over a botched drug deal. Evidence also revealed that Mr. Williams's friend and eventual co-defendant, Stacy Pearce, drove Mr. Williams to the Durretts's home the day of the murder and watched Mr. Williams exit the car with a gun in hand. Mr. Pearce testified that when Mr. Williams returned to the car he confessed to shooting Mr. Durrett. Ms. Smith also testified that Mr. Williams confessed to her that he killed Mr. Durrett.

*Id.* at 1257 n.2.

Williams's counsel was deficient, and that Williams was prejudiced as a result of his deficient counsel due to the lost opportunity to pursue the plea offer.[51] To remedy the violation of Williams's Sixth Amendment right to effective assistance of counsel, the OCCA modified his sentence to life imprisonment *with* the possibility of parole.[52] Williams then filed a habeas corpus[53] petition in federal district court challenging the OCCA's modified sentence and requesting either reinstatement of the ten-year plea or a new trial.[54] The United States District Court for the Eastern District of Oklahoma denied the petition, and Williams appealed to the Tenth Circuit.[55]

The Tenth Circuit granted a "certificate of appealability,"[56] but only agreed to address whether the OCCA imposed a constitutionally adequate remedy.[57] The court held that the modified sentence (life imprisonment *with* the possibility of parole) was not an appropriate constitutional remedy.[58] Thus, it reversed and remanded with orders that the district court "impose a remedy that comes as close as possible to remedying the constitutional violation, and is not limited by state law."[59]

*Williams II* is part of a larger body of case law in which courts are struggling with the application of the Sixth Amendment right to effective assistance of counsel during plea bargaining.[60] In *Williams II*, the Tenth Circuit minimized the fact that its decision not only created a circuit

---

51. *Williams II*, 571 F.3d at 1088.

52. *Id.*

53. The district court has the power to grant a writ of habeas corpus conditionally as "law and justice require." 28 U.S.C. § 2243 (2006). As part of this discretion, a habeas petition may be denied on the merits despite a failure to exhaust all remedies. *Id.* § 2254(b)(2). However, in order to grant a habeas petition, the petitioner must have exhausted all available state remedies, unless an exception to exhaustion applies. *See id.* § 2254(b)(1). Although a state may waive exhaustion, it is required that such a waiver must be express and made through counsel. *Id.* § 2254(b)(3). In this case, Williams appealed the district court's denial of his *habeas corpus* petition. *Williams II*, 571 F.3d at 1088. The Court of Appeals reviews a district court's legal analysis in a habeas proceeding de novo. *Id.* at 1089.

54. *Williams II*, 571 F.3d at 1088–89.

55. *Id.* at 1088.

56. "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from the final order in a *habeas corpus* proceeding in which the detention complained of arises out of process issued by a State court . . . ." 28 U.S.C. § 2253(c)(1)(A) (2006). Furthermore, a certificate of appealability may only be issued "if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2).

57. *Williams II*, 571 F.3d at 1088.

58. *See id.* at 1090.

59. *Id.* at 1093–94.

60. *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 147 (2006) (holding that in the context of Sixth Amendment choice of counsel cases, effective assistance serves the purpose of protecting the right to a fair trial); Hill v. Lockhart, 474 U.S. 52, 56–59 (1985) (extending the two-prong test for deficient performance and prejudice to the context of plea bargains); Strickland v. Washington, 466 U.S. 668, 687 (1984) (establishing the general rule that a defendant may prevail on an ineffective assistance claim by demonstrating deficient performance and prejudice); Weatherford v. Bursey, 429 U.S. 545, 560–61 (1977) (holding that a lost opportunity to pursue a negotiated plea was of no significance because the defendant was not denied a fair trial); McMann v. Richardson, 397 U.S. 759, 771 (1970) (holding that federal habeas relief is not available after a guilty plea based on a coerced confession unless the defendant's counsel was deficient during plea bargaining); *see also infra* Part II.

split, but was "inarguably in conflict with the decisions of various state courts"[61] with respect to both constitutional issues underlying a Sixth Amendment challenge: (1) whether there is a constitutional *right* to effective assistance of counsel in the context of plea bargaining when the petitioner receives a subsequent fair trial; and (2) in the event that there is a violation of such a constitutional right, What is the appropriate constitutional *remedy*? Parts II and IV discuss these unanswered questions. Part III introduces the prosecutorial tool of overcharging and demonstrates that the constitutional rights and remedies associated with the right to counsel at plea bargaining can only be thoroughly and absolutely resolved through consideration of the impact overcharging has on the pre-trial plea process.

## II. CONSTITUTIONAL RIGHT

The *Strickland* test requires a showing of both deficient performance and prejudice to the petitioner.[62] Although deficient performance is the primary issue in many cases, this Part only briefly discusses the first prong because it is largely uncontested in the Tenth and Seventh Circuit cases that reflect the prevailing approaches to claims of ineffectiveness during plea bargaining.[63] Where the defendant received ineffective assistance of counsel at plea bargaining, the circuits are split as to whether a subsequent fair trial vitiates a claim of ineffectiveness or whether a defendant can be sufficiently prejudiced due to the lost opportunity to accept a plea bargain.[64] The Tenth Circuit has held that a defendant may still be prejudiced notwithstanding a subsequent fair trial.[65] By contrast, the Seventh Circuit has held that a subsequent fair trial vitiates any claim of ineffective assistance of counsel at plea bargaining.[66]

---

61. Williams v. Jones (*Williams III*), 583 F.3d 1254, 1258 n.3 (10th Cir. 2009) (Gorsuch, J., dissenting).

62. *Supra* Part I; *see* Strickland v. Washington, 466 U.S. 668, 687 (1984). There is, however, an exception to the *Strickland* two-part test, in which prejudice may be presumed on certain occasions. *See* United States v. Cronic, 466 U.S. 648, 658–59 (1984). Under the standard discussed in *Cronic*, prejudice may be presumed when "circumstances [exist] that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.* at 658. One circumstance warranting a presumption of prejudice is if the defendant is completely denied counsel; that is, when counsel is either altogether absent or in some way prevented from assisting the defendant during a critical stage of the adversarial proceeding. *Id.* at 659. The exception discussed in *Cronic* is not applicable to Williams's case, nor to the discussion presented in this Comment. *See Williams II*, 571 F.3d at 1090 (approving the district court's application of the Strickland two-part test).

63. Because both prongs are necessary elements, however, failure to satisfy either element will defeat an ineffectiveness claim. *Strickland*, 466 U.S. at 700.

64. *Compare Williams II*, 571 F.3d at 1091, *with* United States v. Springs, 988 F.2d 746, 749 (7th Cir. 1993).

65. *Williams II*, 571 F.3d at 1091.

66. *See Springs*, 988 F.2d at 749.

*A.* Strickland*'s First Prong: Deficient Counsel*

In *Williams II*, it was uncontested that Williams received deficient counsel during plea bargaining.[67] The Tenth Circuit affirmed the OCCA's finding of deficient performance on the factual basis that counsel insisted that Williams take his case to trial or retain new counsel.[68] Williams's attorney testified that:

> If he maintained his innocence to me that he were to, in fact, plead guilty to something that he did not do, that would constitute perjury and I would be suborning perjury and I was not prepared to, based upon what he told me had happened regarding the night of the killing, stand next to him when he perjured himself . . . . The decision to go to trial was entirely his, up to and including the day before and during the trial the decision was his. His other option was if he wanted to enter a plea, he was going to have to find someone else to represent him . . . .[69]

The Tenth Circuit found that counsel's performance—proposing an ultimatum that Williams either reject the plea offer and go to trial, or accept the plea and retain new counsel—fell below an objective standard of reasonableness and amounted to deficient performance under the first prong of the *Strickland* test.[70]

*B.* Strickland*'s Second Prong: Prejudice*

In recent cases, prejudice has been the crux of claims involving ineffective assistance of counsel at plea bargaining. The majority in *Williams II* affirmed the OCCA's holding that Williams satisfied both prongs of the *Strickland* test.[71] The Tenth Circuit reasoned that Williams was prejudiced by his counsel's deficient performance because there was a reasonable probability that, but for his counsel's ineffective assistance, Williams would have accepted the plea offer for second-degree murder with a ten-year sentence.[72] This point is uncontested by the *Williams II* dissent.[73] It has been conceded that ineffective assistance of counsel during plea bargaining may cause such harm to a defendant's rights in the adversarial process that he may clearly suffer prejudice.[74] The critical issue is whether a petitioner can demonstrate prejudice even after he receives a fair and impartial trial. On this point, the circuits are split.

---

67. *Williams II*, 571 F.3d at 1088.
68. *Id.* at 1091.
69. Williams v. Jones (*Williams I*), No. CIV-03-201-RAW, 2006 WL 2662795, at *10 (E.D. Okla. Sept. 14, 2006), *rev'd*, 571 F.3d 1086 (10th Cir. 2009) (alterations in original).
70. *Williams II*, 571 F.3d at 1090–91.
71. *Id.* at 1088, 1091.
72. *Id.*
73. *See Williams II*, 571 F.3d at 1096–97 (Gorsuch, J., dissenting).
74. *See, e.g.*, State v. Greuber, 165 P.3d 1185, 1188 n.3 (Utah 2007) (holding that a subsequent *fair* trial vitiates a *Strickland* claim for ineffective counsel during plea bargaining).

This Comment argues that in *Williams II*, the Tenth Circuit correctly held that a subsequent fair trial should *not* vitiate a claim of ineffective assistance of counsel at plea bargaining, but that it reached this conclusion based on faulty reasoning.[75] The Tenth Circuit alluded to the importance of the pre-trial plea process as a part of the adversarial system, but failed to give proper weight to the ubiquitous practice of plea bargaining.[76] On the other hand, this Comment argues the Seventh Circuit came to an incorrect conclusion. By omitting practical considerations of plea bargaining and overcharging, the Seventh Circuit hastily determined that a petitioner who receives a fair trial after rejecting a plea due to ineffective counsel cannot demonstrate prejudice under the Sixth Amendment.[77] Furthermore, the Supreme Court has recognized the disparate treatment appellate courts accord to whether a fair trial remedies a claim of ineffective assistance of counsel during plea bargaining. When the Supreme Court accepted this precise issue for review, however, the Court failed to remedy the unsettled substantive law because the case was dismissed on procedural grounds. Thus, questions remain unanswered.

1. The Seventh Circuit's Approach: *United States v. Springs*

In *United States v. Springs*, the Seventh Circuit held that even if a petitioner's counsel was deficient, and such performance may have rendered prejudice against the petitioner, a subsequent fair trial nullifies a claim under the Sixth Amendment.[78] In *Springs*, the defendant was charged and convicted of three felonies, including extortion and attempting to possess illegal narcotics.[79] He was sentenced to 135 months in prison.[80] Prior to his conviction, the prosecution presented a plea bargain of seventy-two months in exchange for his testimony against other members affiliated with the same drug gang.[81] The defendant later brought a Sixth Amendment claim asserting that his attorney did not sufficiently insist that he accept the plea bargain prior to his conviction by trial.[82] The petitioner alleged that his counsel ineffectively advised him that a sentence by judge or jury would be substantially less than seventy-two months, and that he might not have rejected the plea bargain had he been adequately advised.[83]

Notwithstanding the possibility of deficient performance, the Seventh Circuit promptly dismissed the Sixth Amendment claim on the

75. *Williams II*, 571 F.3d at 1091.
76. *See id.* at 1091–92.
77. *Springs*, 988 F.2d at 749.
78. *Springs*, 988 F.2d at 749.
79. *Id.* at 746.
80. *Id.*
81. *Id.* at 747.
82. *Id.* at 748.
83. *Id.*

grounds that the petitioner had no prospect of establishing prejudice under the *Strickland* test.[84] The Seventh Circuit emphasized that "[t]he guarantee of counsel in the [S]ixth [A]mendment is designed to promote fair trials leading to accurate determinations of guilt or innocence."[85] The court continued by suggesting that the "Constitution does not ensure that lawyers will be good negotiators, locking in the best plea bargains available."[86] The Seventh Circuit grounded its argument on the point that defendants have no substantive or procedural rights to plea bargaining and that they have no legal entitlement to the plea process as a matter of law.[87] As a result, where a fair trial was rendered, any Sixth Amendment claim challenging pre-trial plea bargaining was necessarily void.[88]

2. The State Perspective: *State v. Greuber*[89]

Several states have also struggled to define the right to effective counsel during the plea bargaining phase of the criminal process. In *State v. Greuber*, the Utah Supreme Court held that "while the Sixth Amendment right to the effective assistance of counsel generally applies during the plea process, [the defendant's] rejection of the plea offer in this case did not result in prejudice because he received a fair trial."[90] In *Greuber*, the State offered the defendant the opportunity to plead guilty to murder

---

84. *Id.* at 749.

85. *Id.*

86. *Id.*

87. *Id.* Following this line of reasoning, the dissent in *Williams II* reasoned that:

> Mr. Williams doesn't have, and never did have, a right to the plea offer. Unless we decide to assume control of the executive prerogatives of the State of Oklahoma and force the prosecution to keep the offer open, the government would be free to alter or withdraw the plea offer the moment it is extended-or even after it is accepted-for any reason, or for no reason. The trial court, too, would be free to reject any plea. All we could guarantee Mr. Williams at the end of the day is a new trial for first degree murder.

Williams v. Jones (*Williams II*), 571 F.3d 1086, 1110 (2009) (Gorsuch, J., dissenting).

88. *Springs*, 988 F.2d at 749. Consistent with the Seventh Circuit, the State of Delaware recently submitted an answering brief in response to an appeal from the Superior Court of Delaware to address whether the petitioner was prejudiced by his counsel's alleged deficient performance during plea negotiations. State's Answering Brief at 21, Richardson v. State, No. 86, 2009 (Del. Sept. 8, 2009), 2009 WL 3005572. The petitioner claimed that his counsel was deficient because he summarily rejected a plea offer extended by the state. *Id.* In it's brief, the state emphasized that the defendant was not present when the plea was offered, and that the petitioner never stated that he would have accepted the plea were he given the opportunity to do so. *Id.* at 21–22. Petitioner's counsel testified that the plea was in fact a mandatory fifty year sentence, making the offer unacceptable not only because counsel believed they had a meritorious defense, but also because either way the defendant was facing a life sentence. *Id.* at 22.

Similar to the Seventh Circuit, the State of Delaware hinged its argument on the point that the petitioner is not entitled to a plea offer as a matter of law. *Id.* at 24. Even if all facts were in favor of the petitioner such that he could show deficient performance at plea bargaining, the State of Delaware argued that the Delaware Supreme Court should still dismiss that claim because the petitioner, "was tried before an impartial jury; he confronted and cross-examined witnesses against him; he was presented his own evidence; and he had the assistance of counsel. The jury unanimously determined that Richardson committed the charged offenses . . . . His conviction was both just and reliable." *Id.* at 27. In short, there was arguably no prejudice.

89. 165 P.3d 1185 (Utah 2007).

90. *Id.* at 1188.

in exchange for dismissal of an aggravated kidnapping charge.[91] On the advice of his attorney, the defendant rejected the offer.[92] At his subsequent trial, the jury convicted the defendant of both murder and aggravated kidnapping.[93] On appeal, the petitioner claimed ineffective assistance of counsel due to his attorney's failure to investigate evidence that would have significantly favored accepting the plea bargain.[94] Affirming the district court's holding, the Utah Supreme Court determined there was an indispensable difference between an accepted plea offer and a rejected plea offer, insofar as the rejected plea does not waive a defendant's right to a fair trial.[95]

The conflict between *Greuber* and *Williams II* is conspicuous: the Utah Supreme Court held that a defendant cannot ultimately be prejudiced if provided a subsequent fair trial, whereas the Tenth Circuit held that a defendant can still be prejudiced regardless of a subsequent fair trial.[96] As noted by the Tenth Circuit in *Williams II*, it is necessary to determine the nature of the alleged violation in order to fashion a constitutionally adequate remedy.[97] Such an inquiry necessarily requires the court to critically analyze every aspect of the criminal process that may effectively prejudice a petitioner who is asserting a Sixth Amendment right to ineffective assistance of counsel, including the plea process.

3. U.S. Supreme Court Fails to Resolve Unsettled Case Law

By denying a petition for a rehearing en banc in *Williams II*, the Tenth Circuit failed to undertake a critical and judicious analysis with respect to prejudice under the *Strickland* test. The Tenth Circuit sidestepped the fact that there is a conflict among courts as to whether a fair trial remedies a claim of ineffective assistance of counsel during plea bargaining, by stating that this particular issue was not within the scope of the certificate of appealability.[98] The Tenth Circuit acknowledged "this split in authority contributed to the Supreme Court's previous decision to grant certiorari to resolve [this specific] question."[99] In 2007, in

91. *Id.* at 1186–87.
92. *Id.* at 1187.
93. *Id.*
94. *Id.* Prior to trial, prosecution made a discovery request for the recordings of Greuber's phone conversations while he was in prison. *Id.* The recordings contained incriminating information; however, Greuber's counsel did not listen to the recordings before trial. *Id.* Upon realization of the contents of the recordings, counsel for Greuber made a motion for mistrial, which was denied, and the jury found Greuber guilty of murder and aggravated kidnapping. *Id.*
95. *Id.* at 1188 (citing State v. Knight, 734 P.2d 913, 919 n.7 (Utah 1987)); *cf.* Carmichael v. People, 206 P.3d 800, 807 (Colo. 2009) (requiring that, in order for petitioner to demonstrate prejudice, he must provide corroborating evidence that proves the reasonable probability that the defendant would have accepted the plea offer if not for his deficient counsel).
96. *Compare Greuber*, 165 P.3d at 1188, *with* Williams v. Jones (*Williams II*), 571 F.3d 1086, 1091 (10th Cir. 2009).
97. *Williams II*, 571 F.3d at 1090, 1092.
98. *See Williams III*, 583 F.3d at 1255.
99. *Id.* at 1258.

*Arave v. Hoffman*,[100] the Supreme Court directed the parties to brief and argue the question: "What, if any, remedy should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial?"[101] Arguments and briefs were never presented to the Supreme Court for analysis because the petitioner abandoned his claim that counsel was ineffective during the plea process and the Court deemed the issue moot.[102]

In *Mabry v. Johnson*,[103] and *Weatherford v. Bursey*,[104] the Supreme Court held that a plea bargain is executory in nature such that a prosecutor has the discretion to decline to make or withdraw an offer.[105] As the law stands today, "[a] plea bargain standing alone is without constitutional significance."[106] This is the principle adhered to by the Seventh Circuit as well as the Utah Supreme Court.[107] It is significant to note, however, that the decisions in *Mabry* and *Weatherford* were rendered in 1984 and 1977 respectively.[108] Much has changed in the criminal process since then, especially the role of plea bargaining.[109] The view opposing the Tenth Circuit argues that prejudice can only be found where deficient performance renders fundamentally unfair results, and this unfairness results only if counsel's deficiency deprives the defendant of a substantive or procedural right to which he is entitled as a matter of law.[110] As a determinative substantive and procedural aspect of the contemporary criminal process, deficient performance during plea bargaining has the capability of rendering these fundamentally unfair results.

## III. THE ROLE OF PLEA BARGAINING IN CONTEMPORARY CRIMINAL PROSECUTION

Plea bargaining is not merely an addendum to contemporary criminal prosecution; it *is* contemporary criminal prosecution.[111] In fiscal year 2004, there were an estimated 83,391 federal criminal cases.[112] A total of

100. 552 U.S. 1008 (2007), *vacated as moot*, 552 U.S. 117, 118 (2008).

101. *Arave*, 552 U.S. at 1008 (granting *certiorari*).

102. *See Arave*, 552 U.S. at 118 (vacating as moot because petitioner abandoned ineffective assistance of counsel claim).

103. 467 U.S. 504 (1984), *abrogated on other grounds by* Puckett v. United States, 129 S. Ct. 1423 (2009).

104. 429 U.S. 545 (1977).

105. *Mabry*, 467 U.S. at 507; *Weatherford*, 429 U.S. at 561.

106. *Mabry*, 467 U.S. at 507; *see also Weatherford*, 429 U.S. at 561.

107. United States v. Springs, 988 F.2d 746, 749 (7th Cir. 1993); State v. Greuber, 165 P.3d 1185, 1189–90 (Utah 2007).

108. *Mabry*, 467 U.S. at 504; *Weatherford*, 429 U.S. at 545.

109. *Infra* Part III.

110. *Springs*, 988 F.2d at 749 (citing Lockhart *v.* Fretwell, 506 U.S. 364, 372 (1993)).

111. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992).

112. UTILIZATION OF CRIMINAL JUSTICE STATISTICS PROJECT, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbl.5.17.2004 (Ann L. Pastore & Kathleen Maguire eds., 2004), *available at* http://www.albany.edu/sourcebook/pdf/t5172004.pdf.

74,782 defendants were convicted.[113] An astonishing ninety-five percent of all federal convictions were disposed of without a trial through the entry of guilty pleas.[114] Despite these statistics, the dissent in *Williams II* stated, "The historical happenstance of why Mr. Williams's plea remained executory is neither here nor there."[115] This blind literalism for the glory of trial and dismissal of plea negotiations is both the fallacy in the dissent's opinion and the missing link in the majority's opinion.

In *Williams II*, the majority correctly held that a subsequent fair trial does not vitiate a claim of ineffective assistance of counsel in the context of plea bargaining pursuant to the Sixth Amendment.[116] Nonetheless, the majority's argument lacks a key component because it fails to address the nature and scope of plea bargaining in the contemporary criminal justice system. In short, the majority fails to articulate why a defendant may still suffer prejudice even after a fair and impartial trial. An analysis of the evolution of the plea process, as well as the modern nature of plea bargaining, will demonstrate that the concept of overcharging is the residual inequity that has the potential to prejudice a defendant even after a fair trial.[117]

In *Strickland*, the Supreme Court held that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[118] This Part argues that plea bargaining, as a dominating power in the process of criminal prosecution, has the influence and control to severely undermine the proper functioning of the criminal justice system. As a direct result of overcharging, a pre-trial plea offer that is rejected as a result of ineffective assistance of counsel may prejudice the defendant even if that defendant receives a subsequent fair and impartial trial.

### *A. Plea Bargaining and Modern Criminal Prosecution*

The structure of United States criminal process facilitates the ubiquitous use of plea bargaining. Although plea bargaining is an indirect and perhaps discrete power, it has become a prevalent prosecutorial tool in the criminal justice system as a result of two significant changes in trial practice.[119] First, an increasing number of defendants began retaining counsel during the first half of the nineteenth century.[120] The presence of lawyers in court who were well-versed in the law and trained in the art of

113. *Id.*
114. *Id.*
115. Williams v. Jones (*Williams II*), 571 F.3d 1086, 1101 (2009) (Gorsuch, J., dissenting).
116. *Id.* at 1091 (majority opinion).
117. *See infra* notes 165–93 and accompanying text.
118. Strickland v. Washington, 466 U.S. 668, 686 (1984).
119. GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 92 (2003).
120. *Id.*

argument elevated the adversarial nature of the criminal process.[121] Second, during the second half of the nineteenth century, criminal defendants were given the right to testify on their own behalf.[122] Granting defendants the ability to testify in their own defense was almost certainly for their own benefit.[123] This right to testify is intrinsically linked to the Fifth Amendment, which guarantees that a defendant will not be forced to incriminate herself.[124] It follows that a criminal defendant cannot be forced to accept a guilty plea because accepting such a plea bargain is, in essence, self-incrimination.[125] Although intended to help defendants, the ability of defendants to testify on their own behalf—as applied to modern trial practice—has had a limited benefit because the structure of plea bargaining allows the prosecutor to inflate charges purely for the purpose of inducing a guilty plea.[126] This overcharging not only convinces defendants "that a good bargain [is] their best hope[,]" it also eliminates defendants' opportunity to testify at trial.[127] Through the use of the overcharging dynamic in the contemporary criminal process, prosecutors now have leverage; where increased charges at trial narrow a defendant's odds of victory, reduced charges in the pre-trial plea offer can convince a defendant that self-incrimination may be the better option.[128] Thus, a defendant who rejects a plea and proceeds to trial on multiple and overlapping charges (because of ineffective assistance of counsel) is not in the same position as a defendant from an earlier era who was never offered a plea.

These changes, among many others, have catalyzed the change to a modern criminal process that greatly accommodates plea bargaining. The most influential factors in the contemporary criminal process that have contributed to the ascendance of plea bargaining include: (1) the adversarial nature of the criminal process;[129] (2) the legitimate function plea bargaining serves for the courts;[130] and (3) the proliferation of innocuous

121. *See* FISHER, *supra* note 119, at 92, 100.

122. *See id.* at 92.

123. *See id.*

124. U.S. CONST. amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself . . . .").

125. *See, e.g.*, Brady v. United States, 397 U.S. 742, 748 (1970) (recognizing that a guilty plea is a "grave and solemn act to be accepted only with care and discernment" because the defendant stands as a witness against himself); United States v. Jackson, 390 U.S. 570, 581 (1968) (recognizing that a defendant cannot be penalized for exercising his Fifth Amendment right, notwithstanding a guilty plea); Boykin v. Alabama, 395 U.S. 238, 242–43 (1969) (holding that, because guilty pleas inevitably implicate a defendant's Fifth Amendment right against compulsory self-incrimination, the plea must be voluntary and without ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats).

126. *See* Ross, *supra* note 16, at 728.

127. *See* FISHER, *supra* note 119, at 92.

128. *See id.*

129. *See* Ross, *supra* note 16, at 717.

130. *See* FISHER, *supra* note 119, at 178.

criminal offenses.[131] As the criminal process has transformed, these factors have aggregated to enable plea bargaining to flourish in the modern landscape of criminal law.

1. The Adversarial Nature of the Criminal Process

First, the adversarial nature of the criminal process validates an antagonistic system of competition between two parties.[132] While it is presumed that the prosecutor's ultimate goal is the pursuit of justice and not solely obtaining convictions, the highly combative nature of the criminal process subsists on expedient results.[133] In the ideal system, the prosecutor would decide whether to offer a pre-trial plea based on available evidence, the severity of the crime, the defendant's criminal history, and the justification for punishment.[134] However, in addition to these underlying public policy concerns, the adversarial nature of criminal prosecution demands an efficient approach to the prosecution of defendants.[135] A full-fledged trial is both costly and time consuming; it requires pre-trial preparation, discovery, witness interrogation, jury selection, and a multitude of other procedural obligations. Ultimately, the cost of a trial and all of its due process guarantees has the potential to create a situation in which a trial may not be an affordable endeavor. Consequently, the demands of trial are significant motivating factors for all parties in the adversarial process to encourage plea bargaining.[136]

A prosecutor is able to use plea bargaining to his advantage not only by relieving excessive caseloads, but also to increase the productivity of his office and free up resources to pursue other criminals.[137] Similarly, defense attorneys have a financial incentive not only to reduce their case load, but also to eliminate the excessive costs of going to trial.[138]

Attorneys are not the only actors who stand to gain from the practice of plea bargaining; judges and defendants also benefit from an efficient approach to plea bargaining.[139] Plea bargains allow judges to manage overloaded dockets while saving the court the costs of a full trial.[140] Lastly, defendants, who often have limited resources, are relieved of a financial burden. They are able to circumvent the cost of a trial by ac-

131. *See* Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 287 (2006).

132. Ross, *supra* note 16, at 717.

133. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2470–71 (2004).

134. *Id.* "[P]rosecutors should decide to prosecute based on the likelihood of conviction and the need to deter, incapacitate, rehabilitate, reform, and inflict retribution." *Id.*

135. *See* Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975 (1992).

136. *See* Bibas, *supra* note 133, at 2470–71, 2476.

137. *See* Easterbrook, *supra* note 135, at 1975.

138. *See* Bibas, *supra* note 133, at 2476.

139. *See* Covey, *supra* note 16, at 1246, 1267.

140. *Id.* at 1267.

cepting a pre-trial plea offer and get the benefit of a negotiated conviction.[141] Thus, with financial incentives in favor of plea bargaining, a defendant's acceptance or rejection of a plea sets the price of crime.[142] With all of the criminal system's power holders now sharing a common interest in plea bargaining, one would expect trials to be exceedingly rare, and indeed, they have been largely replaced by plea bargains.[143]

2. Plea Bargaining as a Legitimizing Function

Second, the need for expedient justice and the desire to portray the appearance of truthful verdicts bolsters the preeminence of plea bargaining and enables it to surpass the practice of trials.[144] The dissent in *Williams II* explained that "[t]he American Constitution, our Bill of Rights, and our common law tradition place faith in the trial as the best means of protecting a defendant's rights, testing the government's case, and ensuring a reliable result."[145] Notwithstanding the foundational and constitutional stronghold of the trial, plea bargaining has become a defining and critical feature of the criminal law system.[146] In the face of an adversarial system, plea bargaining serves a legitimizing function: it increases prosecutors' conviction rates and reduces judicial reversals, which filters all but the most controversial cases from the presence of a courtroom.[147]

It is a prosecutor's duty to ensure punishment as justice demands. Prosecutors, however, also have an interest in obtaining convictions.[148] Often, a prosecutor's win–loss record matters much more than the ultimate punishment rendered.[149] Throughout the plea process, prosecutors can dictate the presence or absence of a trial in a way that is advantageous for them.[150] For instance, a prosecutor may chose to offer a plea in a low-profile case or a case where evidence is scarce in order to secure a conviction.[151] Conversely, a prosecutor may not offer a plea to a defendant in a high-profile case in hopes of gaining publicity and marketable

141. *See id.* at 1246.
142. *See* Easterbrook, *supra* note 135, at 1975.
143. FISHER, *supra* note 119, at 137.
144. *Id.* at 178.
145. Williams v. Jones (*Williams II*), 571 F.3d 1086, 1102 (10th Cir. 2009) (Gorsuch, J., dissenting).
146. Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1064 (2006).
147. *See* FISHER, *supra* note 119, at 179–80.
148. Bibas, *supra* note 133, at 2471.
149. *Id.*
150. *See* Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL L. REV. 1471, 1489 (1993).
151. *See* Dean J. Champion, *Private Counsels and Public Defenders: A Look at Weak Cases, Prior Records, and Leniency in Plea Bargaining*, 17 J. CRIM. JUST. 253, 257 (1989) (reporting a 1989 study that found prosecutors have "an overwhelming propensity" to cut light deals in weak cases).

experience.[152] The fact remains that a conviction by guilty plea is still a conviction, and a win for the prosecutor.[153]

Judges also have an incentive to pursue and promote plea negotiations. As dockets swell and the demand for convictions surge, the judicial truth-seeking inquiry by trial has been quelled by the presence of the plea bargain.[154] Within the adversarial process, the primary goal of prosecution is "to give a fair disposition to the case."[155] Thus, the judge must balance the benefits and hindrances of a trial against the benefits and efficiencies of a negotiated plea.[156] Often, the most efficient and effective manner to render a fair disposition to a case is through the use of plea bargaining. Additionally, when a case ends in a plea bargain, "the judge escapes the danger of being reversed on some point of law."[157] Judges—who's decisions are scrutinized by both their peers and the public—do not want to be reversed on appeal for the simple reason that they do not want to be proven wrong and expose their error to the world at large. Plea negotiations are "a means to guard their reputations from the scent of fecklessness or incompetence."[158]

3. The Proliferation of Innocuous Criminal Offenses

In response to public concern over high crime rates, the persuasion of advocacy groups, and high-profile criminal cases, both state and federal legislation have been passed to create new criminal offenses, incorporate layers of criminal offenses, and amend existing criminal definitions to loosen the definition of the offense.[159] The result has been the proliferation of innocuous criminal offenses.[160] The development of both

---

152. *See* Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 50 (1988); *see also* Bibas, *supra* note 133, at 2474.

153. *See* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 106–07 (1968) ("Conviction statistics seem to most prosecutors a tangible measure of their success. Statistics on sentencing do not."); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. Rev. 125, 137 (2004) (reporting practice in prosecutors's offices of publicly tracking prosecutors's win-loss records or maintaining "batting averages"); *see also* FISHER, *supra* note 119, at 48–49 (noting that plea bargaining inflates conviction statistics).

154. *See* Covey, *supra* note 16, at 1267.

155. *See* Langer, *supra* note 131, at 226.

156. *See* FISHER, *supra* note 119 at 124–29 (discussing the factors that persuade "a principled judge" to endorse plea negotiations "without first hearing all the information normally supplied by a trial or sentencing hearing").

157. *Id.* at 177 (quoting Raymond Moley, *The Vanishing Jury*, 2 S. CAL. L. REV. 97, 103 (1928) (commenting on judges' attitudes towards plea bargaining in the newly discovered practice of plea bargaining)).

158. *See id.* at 178.

159. *See* Langer, *supra* note 131, at 287.

160. For example, Illinois, like most other states, has a general criminal offense for property damage. 720 ILL. COMP. STAT. 5/21-1 (2009). However, legislation has been passed, which has added special offenses for property damage to library materials, damaging animal facilities, defacing delivery containers, and even a specific offense for damaging anhydrous ammonia equipment. Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Second Save the States from Themselves?*, 1 OHIO ST. J. CRIM. L. 169, 170 (2003). In addition, the federal criminal code has promulgated several broadly defined criminal offenses. William J. Stuntz, *The Pathological Politics of*

finite criminal definitions as well as ambiguous criminal definitions has helped make plea proposals a very coercive prosecutorial tool.[161] The array of offenses from which a prosecutor may charge enables the prosecutor to bring multiple and overlapping charges, which gives prosecutors substantial power in sentencing and places pressure on the defendant to take the guilty plea.[162] It is this prosecutorial overcharging that creates the potential prejudice for a defendant who rejects a pre-trial plea offer as a result of ineffective assistance of counsel.[163]

It seems apparent that "[p]lea bargaining entered the twentieth century with all the staying power that comes from serving the interests of power."[164] Early guilty pleas were not necessarily uncommon in the late eighteenth century, but these pleas were not like the plea bargains and negotiations the United States criminal system has today.[165] Instead, the early pleas were seen as a gesture of remorse and perhaps desperation in hopes to obtain mercy from the justice system.[166] As the landscape of criminal proceedings began to change—including an influx of cases, an increase in the length and cost of trials, the development of a sharp adversarial system, near limitless prosecutorial discretion, and the desire for the perception of truth and justice—plea-bargaining became an entrenched legal institution. In fact, the Supreme Court has recognized that plea bargaining:

> Leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.[167]

---

*Criminal Law*, 100 MICH. L. REV. 505, 517 (2001). One such example is its broad definition of mail and wire fraud that covers a broad spectrum of breaches of fiduciary duties in order to protect "the intangible right of honest services." *Id.* (quoting 18 U.S.C. § 1346 (2006)). Additionally, "the federal criminal code includes 100 separate misrepresentation offenses, some of which criminalize not only lying but concealing or misleading as well, and many of which do not require that the dishonesty be about a matter of any importance." *Id.* (citations omitted). "Taken together, these misrepresentation crimes cover most lies (and, as just noted, almost-but-not-quite-lies) one might tell during the course of any financial transaction or transaction involving the government." *Id.*

161. *See* Langer, *supra* note 131, at 286 (noting that "since U.S. criminal jurisdictions moved from common law, judge-created offenses to legislatively-created statutory offenses, criminal statutes have presented several layers of overlapping criminal offenses incorporated over time, many of which are loosely defined").

162. *Id.* at 286–87.

163. *Infra* Part III.B.

164. FISHER, *supra* note 119, at 153.

165. *Id.* at 154.

166. *Id.*

167. Williams v. Jones (*Williams II*), 571 F.3d 1086, 1102 (2009) (Gorsuch, J., dissenting) (citing Santobello v. New York, 404 U.S. 257, 261 (1971)).

When it comes to the confidence the modern court will repose in the outcome of criminal proceedings, the landscape of contemporary criminal procedure makes clear that plea bargaining has become the prominent practice and standard. Ultimately, "[t]his collective, systemic interest in plea bargaining promoted the rise of those institutions of criminal procedure that helped plea bargaining and hindered those that stood in its way."[168]

*B. The Overcharging Dynamic*

As the role of plea bargaining has developed in the criminal justice system, it has become clear that a defendant who waives a plea bargain and proceeds to trial as a result of deficient counsel may still be prejudiced, notwithstanding a subsequent fair trial. This is because the absence of compulsory prosecution enables prosecutors to exploit their discretion by charging one criminal act under multiple overlapping criminal statutes for the purpose of inducing a guilty plea.[169] The current state of the law does not treat overcharging as constitutionally defective because, as the Supreme Court has emphasized, "the Executive Branch has exclusive authority and absolute discretion" to select its charge.[170] This unbridled authority to charge defendants allows a prosecutor to threaten a defendant with overly broad and weighty charges that would not have been invoked, but for the possibility of procuring a guilty plea.[171] This notion of overcharging is the missing piece in *Williams II* that both the majority and dissent failed to recognize: dismissing a plea bargain due to deficient counsel and subsequently going to trial overcharged is precisely what prejudices the defendant.

There are two general types of strategic overcharging.[172] The first is known as horizontal overcharging.[173] Notwithstanding the fact that the illicit conduct sought to be punished is adequately penalized by a single count, prosecutors will engage in horizontal overcharging by charging

168. FISHER, *supra* note 119, at 16.

169. Scott & Stuntz, *supra* note 111, at 1962; *see also* Jacqueline E. Ross, *Damned Under Many Headings: The Problem of Multiple Punishment*, 29 AM. J. CRIM. L. 245, 259 (2002); Ross, *supra* note 16, at 728. Compulsory prosecution is largely employed in continental criminal justice systems and is a constitutional or statutory enactment that obligates the public prosecutor "to initiate investigations and prosecutions if there is a sufficient basis on which to believe that a crime has been committed." Zsuzsanna Deen Racsmány, *A New Passport to Impunity: Non-Extradition of Naturalized Citizens Versus Criminal Justice*, 2 J. INT'L CRIM. JUST. 761, 775 (2004). Principles of compulsory prosecution are considered an indispensible check on state power—particularly executive power—because compulsory prosecution dictates what cases and charges the public prosecutor can pursue, eliminating prosecutorial discretion altogether. See Jacqueline E. Ross, *Impediments to Transnational Cooperation in Undercover Policing: A Comparative Study of the United States and Italy*, 52 AM. J. COMP. L. 569, 608 (2004). This regime does not exist in the United States, where prosecutors enjoy wide discretion in the criminal cases and charges they may pursue.

170. Greenlaw v. United States, 128 S. Ct. 2559, 2565 (2008) (quoting United States v. Nixon, 418 U.S. 683, 693 (1974)).

171. Ross, *supra* note 16, at 728.

172. *See* Covey, *supra* note 16, at 1254.

173. *Id.* at 1254.

"nonoverlapping counts of a similar offense type, or . . . multiple counts of the same offense type."[174] For example, in *Leopard v. United States*,[175] the prosecutor successfully employed horizontal overcharging by charging the defendant for "carrying a firearm during and in relation to a drug trafficking offense"[176] as well as for "being a felon in possession of a firearm."[177] Both charges stemmed from the defendant's possession of a .22 caliber firearm.[178] The court determined that under the respective statutory definitions of each count, there were unique elements of proof that were required to sustain each separate conviction.[179]

Furthermore, prosecutors wield heightened power when the added criminal counts carry mandatory minimum sentencing provisions that must be imposed consecutively.[180] With a colorful pallet of criminal offenses to choose from, horizontal charging gives prosecutors formidable leverage in the criminal justice system.[181] Strategic horizontal overcharging offers prosecutors the opportunity to propose persuasively favorable pre-trial pleas to defendants by decreasing the original charge.[182]

The second type of strategic overcharging is vertical overcharging.[183] Vertical overcharging takes place when a prosecutor charges the defendant with an offense higher than the accumulation of evidence may reasonably support.[184] As long as the prosecutor can make a colorable argument that the case against the defendant establishes potential for the prosecutor to convict the defendant of the elevated charge at trial, the

174. Covey, *supra* note 16, at 1254; *see also* FISHER, *supra* note 119, at 22–24. Fisher linked the triumph of plea bargaining to the practice of horizontal overcharging in liquor cases. *Id.* In his study of Middlesex County, Massachusetts, Fisher recognized that prosecutors were able to charge multiple counts of liquor offenses, and each offense carried a fixed fine of approximately four pounds. *Id.* Thus, Fisher's study revealed that the earliest recorded examples of plea bargaining occurred in these cases where prosecutors invoked horizontal overcharging.

175. 141 F. Supp. 2d 1326 (E.D. Okla. 2001).

176. *Id.*; *see* 18 U.S.C. § 924(c) (2006).

177. *Leopard*, 141 F. Supp. 2d at 1332; *see* 18 U.S.C. § 922(g)(1) (2006).

178. *Leopard*, 141 F. Supp. 2d at 1332.

179. *Id.* at 1332–33. Not only can prosecutors pursue multiple counts with consecutive terms, but if recidivist statutes apply in the jurisdiction, prosecutors can charge a defendant under a habitual-offender statute for a single criminal act. *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 573 n.19 (1996). Under a habitual defender statute, multiple convictions for a single incident can constitute a continuing pattern of criminal behavior, which in turn increases the subsequent sentences as a result of prior convictions. *See id.*

180. *See* FISHER, *supra* note 119, at 216.

181. Prosecutors must be very savvy in employing horizontal overcharging so as not to be defeated by claims of double jeopardy. For example, double jeopardy concerns arise when there is the threat of multiple convictions and sentences for the same offense. *See* United States v. Johnson, 130 F.3d 1420, 1424 (10th Cir. 1997). The test to be applied in double jeopardy cases was set forth by the Supreme Court in Blockburger v. United States, 284 U.S. 299 (1932). "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304.

182. *See* FISHER, *supra* note 119, at 224.

183. *See* Covey, *supra* note 16, at 1254.

184. *Id.*

charge will likely withstand the court's scrutiny.[185] Vertical overcharging places undue pressure on the defendant "to plead guilty to a lesser offense—often to the charge that absent strategic considerations would have been selected initially—simply to avoid risking conviction on the higher charge."[186]

The overcharging dynamic is exacerbated by the limited institutional capacity of the courts, which in turn significantly increases a defendant's sentencing exposure at trial. The separation of powers prohibits the judiciary from governing the prosecutor's power to charge because the prosecutor is an entity of the executive branch.[187] Furthermore, there is limited judicial oversight of prosecutorial charge discretion because the court does not have the proper investigative tools to conduct independent evaluations of charges.[188] As the Second Circuit noted, "In the absence of statutorily defined standards governing reviewability, or regulatory or statutory policies of prosecution, the problems inherent in the task of supervising prosecutorial decisions do not lend themselves to resolution by the judiciary."[189]

The practice of overcharging has enabled unilateral prosecutorial adjudication; what has become, in a sense, a prosecutorial bluff.[190] The resultant effect of overcharging has created a dramatic gap between plea sentences and trial sentences.[191] This is because prosecutors enjoy expansive discretion to threaten the defendant with multiple and overlapping charges for the same illicit conduct, such that a negotiated pre-trial plea offer is more often than not the defendant's most favorable option.[192] Thus, as a defining feature of the plea process and modern criminal prosecution, it is necessary for the court to consider overcharging as an inte-

185. *See* Alschuler, *supra* note 153, at 86.

186. Covey, *supra* note 16, at 1254–55.

187. *Id.* at 1266.

188. *Id.* at 1266–67.

189. Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 380 (2d Cir. 1973); *see also* Nancy J. King, *Regulating Settlement: What is Left of the Rule of Law in the Criminal Process?*, 56 DEPAUL L. REV. 389, 396 (2007) (recognizing that trial judges are not in a good position to scrutinize plea agreements because they "are under more pressure to facilitate deals than to scrutinize them").

190. *See, e.g.*, Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 43 (1983) ("Where there is doubt as to whether the defendant can be convicted on the original charge, it is often because the prosecutor has 'overcharged' to gain additional leverage to induce the defendant to plead to the 'real offense.'").

191. *See* Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 653 (1981) (citing a study conducted in New York City by Hans Zeisel finding that sentences rendered after a conviction by trial were 136% longer than sentences proposed by prosecutors as pre-trial plea offers).

192. *See* FISHER, *supra* note 119, at 215. *See, e.g.*, Williams v. Jones (*Williams II*), 571 F.3d 1086, 1088 (10th Cir. 2009) (receiving a post-trial conviction of first-degree murder and life without parole after rejecting a guilty plea to second degree murder and ten year imprisonment); People v. Dennis, 328 N.E.2d 135, 136 (Ill. App. Ct. 1975) (sentencing the defendant to a term of forty to eighty years at trial after the defendant had rejected a plea offer carrying a prison term of two to six years).

gral component in its analysis of a Sixth Amendment claim of ineffective assistance of counsel.

The driving force behind the dissent in *Williams II*, as well as the Seventh Circuit's argument, is that counsel's deficient performance at plea bargaining cannot render a prejudicial outcome after a subsequent fair trial because the defendant has no legal entitlement to the plea process.[193] While it is not necessary and highly implausible to change the system such that prosecutors are *required* to offer a plea, it *is* necessary to evaluate a claim of ineffective assistance of counsel in light of the operational framework of plea bargaining. Plea bargaining is a defining feature of the criminal justice system—a feature that largely circumvents "the preferred way of resolving criminal cases: a jury trial with full legal due process."[194]

In the context of plea bargaining, prosecutors have the luxury to take risks, while defendants are stuck between a rock and a hard place.[195] Do defendants waive their right to a trial and accept a "lessened" charge in exchange for a guilty plea? Or should defendants take their chances at trial and face the risk of being convicted of the overcharged offenses? Even worse, what if this choice is taken away altogether? Defendants accept plea bargains because trials are risky; with elevated charges there is a viable "threat of much harsher penalties after trial."[196] In fact, the Supreme Court recognized that "[w]hile confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'—and permissible—'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.'"[197] Thus, where plea bargaining is encouraged and overcharging is an overwhelmingly common practice, in the context of Sixth Amendment claims, if a defendant rejects a plea due to ineffective assistance of counsel, rejecting that pre-trial plea offer has the potential consequence of producing a fundamentally unfair result for the defendant. The defendant may still suffer prejudice notwithstanding a subsequent fair trial. In *Williams II*, it was the Tenth Circuit's failure to recognize the impact overcharging has on the pre-trial plea process that debased its interpretation and definition of the Sixth Amendment right to effective assistance of counsel. It is this recognition that must shape the appropriate remedy.

---

193. *See Williams II*, 571 F.3d at 1101 (Gorsuch, J., dissenting); United States v. Springs, 988 F.2d 746, 749 (7th Cir. 1993).

194. Brown & Bunnell, *supra* note 146, at 1064.

195. *Cf.* FISHER, *supra* note 119, at 91. A defendant's incentive and capacity to plea bargain "[lie] in the difference between the severe sentence that loomed should the jury convict at trial and the more lenient sentence promised by the prosecutor or judge in exchange for a plea." *Id.*

196. *See* Scott & Stuntz, *supra* note 111, at 1912.

197. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (second alteration in original) (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1973)).

## IV. CONSTITUTIONAL REMEDIES

"It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress."[198] The second substantial inquiry that arises from a discussion regarding a Sixth Amendment challenge to effective assistance of counsel is the appropriate constitutional remedy. This portion of the discussion assumes that a petitioner bringing a Sixth Amendment claim has demonstrated deficient performance of counsel during plea bargaining, has established prejudice as a result of that deficient performance, and has received a subsequent fair trial.[199] In *Williams II*, having determined that the defendant Williams received ineffective assistance of counsel and was subsequently prejudiced as a result of such deficient performance, the Tenth Circuit was presented with the question of whether the lower court had "fashioned a constitutionally permissible remedy."[200] Neither the Supreme Court nor any governing body of law has made clear what the scope and parameters of a constitutionally acceptable remedy specific to this situation should be. The indeterminate nature of binding authority on this issue has resulted in a deluge of various remedies imposed by the circuit courts.

In *Williams II*, the jury found Williams guilty of first-degree murder and sentenced him to life imprisonment *without* the possibility of parole.[201] On appeal, the Oklahoma Court of Criminal Appeals ("OCCA") found that Williams's Sixth Amendment right to effective assistance of counsel had been violated.[202] The OCCA attempted to remedy the violation of Williams's constitutional right by instating a modified sentence of life imprisonment *with* the possibility of parole, which was the lowest punishment for first-degree murder in Oklahoma.[203]

The Tenth Circuit upheld the OCCA's finding of ineffective assistance of counsel during plea bargaining, but reversed the imposed remedy and remanded the case for the district court to render a remedy comparable to the injury suffered from the constitutional violation, and one not limited by state law.[204] Specifically, the Tenth Circuit ordered that "the remedy 'should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.'"[205] This language, which comes directly from the Supreme Court in *United States v. Morrison*,[206] has been the guiding principle in

198. Marbury v. Madison, 5 U.S. 137, 147 (1803).
199. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (outlining the applicable legal standard for a Sixth Amendment claim of ineffective assistance of counsel).
200. Williams v. Jones (*Williams II*), 571 F.3d 1086, 1088 (10th Cir. 2009).
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.* at 1090 (quoting United States v. Morrison, 449 U.S. 361, 364 (1981)).
206. 449 U.S. 361 (1981).

fashioning a constitutionally permissible remedy.[207] Following this nebulous precedent, the Tenth Circuit held that the OCCA's remedy was objectively unreasonable.[208] In so holding, the Tenth Circuit reasoned that it is axiomatic that any remedy for a constitutional violation must be consistent with federal law and not limited by state law.[209] However, given the lack of guidance in this area of law, even the Tenth Circuit recognized that it is unclear what remedy the OCCA should have imposed.[210]

The OCCA was faced with the challenge of balancing valid and competing claims between the State's efficiency interest in upholding a modified sentence from a fair trial with the petitioner's interest in reinstating the plea offer to obtain justice where he has been prejudiced.[211] Despite the highly controversial nature of these competing claims, the Tenth Circuit remanded with scant instructions on how to adopt a remedy that comes closest to restoring the original positions of both parties.[212] What's more, the OCCA will find little guidance from other circuit courts as this juxtaposition of competing interests manifests a landscape ripe with inconsistencies.[213]

The Second Circuit's opinion in *United States v. Gordon*[214] illustrates the lack of clarity in this area of law. In an attempt to reconcile the competing interests of the state and the petitioner, the *Gordon* court held that "the district court did not abuse its discretion in vacating [the defendant's] convictions and granting him a new trial."[215] The court reasoned that to judiciously weigh these competing interests and render the appropriate remedy, the court must consider "the necessity for preserving society's interest in the administration of criminal justice."[216] Nonetheless, the Second Circuit recognized that the trial court had virtually unconditional discretion to accord different remedies in similar situations[217] by citing to the Third Circuit's holding in *United States v. Day*.[218] In *Day*,

207. *See, e.g.*, *Williams II*, 571 F.3d at 1090; United States v. Gordon, 156 F.3d 376, 381 (2d Cir. 1998); United States v. Day, 969 F.2d 39, 47 (3d Cir. 1992).

208. *Williams II*, 571 F.3d at 1090.

209. *Id.* at 1090, 1092.

210. *See id.* at 1092–93.

211. *See id.*

212. *See id.* at 1093–94. The Tenth Circuit has considered a claim for specific performance of a plea agreement, but rejected it based on an inadequate showing of deficient performance and prejudice. *See* United States v. Carter, 130 F.3d 1432, 1441–42 (10th Cir. 1997).

213. *See, e.g.*, Hoffman v. Arave, 455 F.3d 926, 942 (9th Cir. 2006) (determining that the proper remedy is reinstatement of plea offer), *vacated in part*, 552 U.S. 117 (2008); Satterlee v. Wolfenbarger, 453 F.3d 362, 368–69 (6th Cir. 2006) (holding that the defendant should be given an opportunity to accept the original offer); United States v. Gordon, 156 F.3d 376, 382 (2d Cir. 1998) (holding that granting a new trial was an appropriate remedy); Jiminez v. State, 144 P.3d 903, 907 (Okla. Crim. App. 2006) (holding that the appropriate remedy is to modify the sentencing to conform to terms in plea agreement).

214. 156 F.3d 376 (2d Cir. 1998).

215. *Id.* at 382.

216. *Id.* at 381 (quoting United States v. Morrison, 449 U.S. 361, 364 (1981)).

217. *See Gordon*, 156 F.3d at 381.

218. 969 F.2d 39 (3d Cir. 1992).

the Third Circuit held that "a second opportunity to accept a plea agreement ought not be automatic, but it does not follow that the relief of 'specific performance' of a plea bargain is never appropriate."[219] As evidenced by the continuing circuit split, the definition of a permissible constitutional remedy for a Sixth Amendment violation when a defendant has received a subsequent fair trial is indeterminate.

As the Tenth Circuit concedes, "In the end, no remedy may restore completely the parties' original positions."[220] Implicit in this statement is the Tenth Circuit's recognition of the right–remedy gap that plagues constitutional law.[221] In the context of plea bargaining, a Sixth Amendment claim of ineffective assistance of counsel exacerbates the right–remedy gap. The inevitable limitations between "declaring a right and implementing a remedy"[222] demand that we diverge from the strict contours of the *Marbury* maxim[223] and render a remedy that gets as close as possible to redressing the injury, but more importantly, is "adequate to keep government within the bounds of law."[224]

In a Sixth Amendment claim of ineffective assistance of counsel at plea bargaining, the *Strickland* test requires the petitioner to show that his counsel was deficient during the plea process and that he was prejudiced as a result of counsel's deficient performance.[225] If a petitioner is successful in his claim of ineffective assistance of counsel at plea bargaining, his constitutional injury must be adequately redressed. As discussed in Section III.B, the nature of the plea process produces an overcharging dynamic, which in turn has the potential to render a fundamentally unfair result for the petitioner and prejudice him even if his trial was procedurally fair.[226] Thus, the goal is to put the petitioner in the same position he was in prior to suffering prejudice. Under *Hill v. Lockhart*, a petitioner asserting a Sixth Amendment claim challenging a guilty plea is prejudiced if he can show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[227] In this context, reinstatement of the original plea offer would be the remedy that would be as close as possible to redressing the injury and is nonetheless "adequate to keep government within the bounds of law."[228] Reinstatement of the original plea is not only the most judicious means of redressing a petitioner's injury, but it is

219. *Id.* at 47.
220. Williams v. Jones (*Williams II*), 571 F.3d 1086, 1093 (10th Cir. 2009).
221. *See* Jeffries, *supra* note 11; *see also supra* notes 26–31 and accompanying text.
222. Gewirtz, *supra* note 11, at 587.
223. *See* Marbury v. Madison, 5 U.S. 137, 147 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.").
224. *See* Jeffries, *supra* note 11, at 88 (quoting Fallon, Jr. & Meltzer, *supra* note 13, at 1736).
225. Strickland v. Washington, 466 U.S. 668, 687 (1984).
226. *See supra* Part III.B.
227. Hill v. Lockhart, 474 U.S. 52, 59 (1985).
228. *See* Jeffries, *supra* note 11, at 88 (quoting Fallon, Jr. & Meltzer, *supra* note 13, at 1736).

also the most efficient; a plea agreement is expedient in so far as it saves time as well as the cost of another trial.

An attempt to remedy the constitutional injury by ordering a new trial would be fruitless because the petitioner would likely still face multiple and overlapping charges, and he would therefore still suffer prejudice.[229] In addition, a modified sentence would also be inadequate to remedy a petitioner's Sixth Amendment injury. A modified sentence attempts to mitigate the harm done to the petitioner by rendering a remedy that is somewhere between maintaining the status quo and reinstating the original plea offer, but it is arbitrarily chosen because it is not redressing the actual injury.[230] Where the constitutional violation occurred during the pre-trial plea process, the modified sentencing approach merely reduces the sentence resulting from a post-trial conviction. Thus:

> Where . . . a defendant receives a greater sentence than one contained in a plea offer that he would have accepted if not for the ineffective assistance of counsel, the properly tailored remedy is to give the defendant the opportunity to accept the offer, because simply retrying the petitioner without making the plea offer would not remedy the constitutional violation that led to the issuance of the writ.[231]

## CONCLUSION

The Tenth Circuit in *Williams II* sought to downplay that its decision to deny a rehearing en banc did not implicate or exacerbate a circuit split.[232] However, not only is there a circuit split,[233] there is also conflict among state courts on the issue of whether a fair trial negates the possibility of prejudice under a Sixth Amendment claim of ineffective assistance of counsel at plea bargaining.[234] There can be little doubt that these splits in authority contributed to the Supreme Court's recent grant of *certiorari* in *Arave v. Hoffman* to specifically resolve this question.[235]

---

229. *See supra* Part III.B. If a new trial were granted, the court would not enjoin the prosecution from bringing the same charges brought in the first trial; all that could be guaranteed to the petitioner at the end of the day would be a new trial on the same charges. *See, e.g.*, Williams v. Jones (*Williams II*), 571 F.3d 1086, 1110 (2009) (Gorsuch, J., dissenting). Thus, at the second trial, the petitioner would still be facing increased charges without an opportunity to engage in a plea bargain.

230. In modifying William's sentence from life without parole to life with parole, the OCCA only considered the scope and limitations of sentencing granted by state law given a guilty verdict to first-degree murder. *See Williams II*, 571 F.3d at 1088. This was an arbitrary modification because the OCCA simply selected a statutory sentence without considering that William's constitutional injury occurred during the plea process, prior to conviction.

231. Satterlee v. Wolfenbarger, 453 F.3d 362, 370 (6th Cir. 2006); *see* Turner v. Tennessee, 858 F.2d 1201, 1208 (6th Cir. 1988) ("[T]he only way to neutralize the constitutional deprivation suffered . . . would seem to be to provide [the petitioner] with an opportunity to consider the State's two-year plea offer with the effective assistance of counsel."), *vacated*, 492 U.S. 902 (1989); *see also* Nunes v. Mueller, 350 F.3d 1045, 1057 (9th Cir. 2003).

232. *See* Williams v. Jones (*Williams III*), 583 F.3d 1254, 1258 n.3 (10th Cir. 2009) (Gorsuch, J., dissenting).

233. *See* United States v. Springs, 988 F.2d 746, 749 (7th Cir. 1993).

234. *See* State v. Greuber, 165 P.3d 1185, 1190 (Utah 2007).

235. Arave v. Hoffman, 552 U.S. 1008, 1008 (2007).

The Supreme Court's grant of certiorari is clear evidence that the Court is aware of the indeterminate authority and absence of clearly established federal law directing state and federal courts in an analysis of a Sixth Amendment claim of ineffective assistance of counsel at plea bargaining. Unfortunately, the petitioner in *Arave* abandoned his appeal, which leaves us with questions unanswered.[236]

The law is unclear. There is an analytical void between the Sixth Amendment right to effective assistance of counsel at plea bargaining and the appropriate remedy. This void is neither theoretical nor constitutional; it is practical. If a defendant rejects a pre-trial plea due to deficient counsel and is subsequently convicted of multiple and overlapping charges at trial, that defendant suffers prejudice and satisfies his Sixth Amendment claim. A thorough and comprehensive analysis of a Sixth Amendment claim challenging a pre-trial plea requires a recognition of plea bargaining as it *actually* functions in the criminal system—reflecting the dominating presence of plea negotiations as well as the practice of overcharging—in order to safeguard a defendant's constitutional rights and fashion an appropriate remedy. The Tenth Circuit in *Williams II* should have accounted for this reality; failure to do so weakened the majority's opinion, rendered an incomplete decision, and entrenched unsettled case law.

*Ana Maria Gutiérrez*[*]

236. *See* Arave v. Hoffman, 552 U.S. 117, 118–19 (2008) (vacating as moot because petitioner abandoned the ineffective assistance of counsel claim).

* J.D. Candidate 2011, University of Denver Sturm College of Law. I would like to thank Professor Rebecca Aviel for her valuable insight and guidance in developing this Comment. I would also like to extend a sincere thank you to the *Denver University Law Review* Board of Editors and staff for their assistance and revisions. And to my family for their unqualified love and support.