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Ineffective Assistance of Counsel in Plea Bargain Negotiations

I. INTRODUCTION

Criminal defendants have a constitutional right to counsel. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[1] The Supreme Court has interpreted the Sixth Amendment Right to Counsel Clause to mean that criminal defendants have the right to "*effective* assistance of counsel."[2] In *Strickland v. Washington*,[3] the Court held that the assistance provided to a criminal defendant is ineffective if (1) the counsel's performance was "deficient" and (2) the deficient performance "prejudiced" the defense so as to deprive the defendant of a fair trial.[4] If counsel's assistance to a criminal defendant is ineffective, then the defendant's conviction may be reversed or his sentence may be set aside.[5] The Court later extended this right to effective assistance of counsel to state court defendants in *Gideon v. Wainwright*.[6]

In *Williams v. Jones*,[7] the U.S. Court of Appeals for the Tenth Circuit considered a unique question: whether a defendant's murder conviction should be reversed or his sentence set aside where his counsel's assistance in plea bargain negotiations was deficient, notwithstanding his conviction following a fair trial. On appeal, the Tenth Circuit held that the defendant established both "deficient performance and prejudice."[8] Accordingly, the court remanded the

1. U.S. CONST. amend. VI.

2. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (emphasis added).

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

4. *Id.* at 687.

5. *Id.*

6. 372 U.S. 335, 342 (1963) (holding that the right to the assistance of counsel is "fundamental and essential to a fair trial" and is thus "made obligatory upon the States by the Fourteenth Amendment" (quotations omitted)).

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

8. *Id.* at 1091.

case so the district court could determine the proper remedy for the constitutional violation.[9]

The question presented in *Williams* has national significance and has vexed state and federal courts alike. Some courts presented with evidence of deficient counsel during plea bargain negotiations have found a constitutional violation; those courts, however, have struggled to define the proper remedy for the constitutional violation.[10] Other courts simply have denied that a constitutional violation occurred where counsel's performance was deficient during plea bargaining, so long as the defendant was afforded a subsequent fair trial.[11] The Tenth Circuit in *Williams* grappled at length with the nature of the constitutional violation implicated by deficient attorney performance during plea negotiations. In the end, a divided panel held that a constitutional violation occurred. In remanding the case, however, the court was unable to set any meaningful guidelines for the lower court to utilize to determine a proper remedy.

In 2006, the Supreme Court granted certiorari in *Hoffman v. Arave*,[12] a case similar to *Williams*, and asked the parties to brief the following 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?"[13] Before deciding the case, however, the Supreme Court

9. *Id.* at 1093.

10. *See, e.g.*, Williams v. Jones, No. CIV-03-201-RAW, 2006 WL 2662795, at *12 (E.D. Okla. Sept. 14, 2006) (affirming state court's lowering of sentence for first-degree murder from life imprisonment *without* the possibility of parole to life imprisonment *with* the possibility of parole), *rev'd*, 571 F.3d at 1093 (10th Cir. 2009) (remanding the case with vague "instructions to the district court to entertain briefing and impose a remedy that comes as close as possible to remedying the constitutional violation"); Julian v. Bartley, 495 F.3d 487, 500 (7th Cir. 2007) (a court has discretion over whether to order a new trial or impose the terms of the original plea offer); Hoffman v. Arave, 455 F.3d 926, 942–43 (9th Cir. 2006) (proper remedy is reinstatement of plea offer), *vacated in part*, 552 U.S. 117 (2008); Satterlee v. Wolfenbarger, 453 F.3d 362, 370–71 n.7 (6th Cir. 2006) (defendant should be given an opportunity to accept reinstated plea offer); *see also* United States v. Gordon, 156 F.3d 376, 381–82 (2d Cir. 1998) (per curiam) (grant of new trial was an appropriate remedy); Jiminez v. Oklahoma, 144 P.3d 903, 907 (Okla. Crim. App. 2006) (sentence modified to conform to term in plea agreement).

11. *See, e.g.*, Utah v. Greuber, 165 P.3d 1185, 1191 (Utah 2007) (holding that a subsequent fair trial vitiates any Sixth Amendment violation).

12. 455 F.3d 926 (9th Cir. 2006), *cert. granted*, 552 U.S. 1008 (2007), *vacated as moot*, 552 U.S. 117 (2008).

13. Arave v. Hoffman, 552 U.S. 1008, 1008 (2007) (granting Petitioner's writ of certiorari).

dismissed it as moot on unrelated grounds (the defendant voluntarily asked that the ineffective assistance of counsel portion of his case be dismissed).[14] Given the disagreement and uncertainty in the courts (and on the Tenth Circuit panel), the Supreme Court may conclude that *Williams* merits its review.

Part II of this Note discusses the facts and procedural history of the *Williams* case, the defendant's conviction for first-degree murder and his sentence to life in prison without parole, and his subsequent petitions for relief due to his attorney's deficient performance during plea negotiations. Part III considers the Supreme Court's interpretation of the Constitution's Right to Counsel Clause. It argues that the Supreme Court decisions interpreting the Right to Counsel Clause reveal that the clause, and the Sixth Amendment as a whole, operates to provide fair trials for criminal defendants. Part IV analyzes the Tenth Circuit's decision in *Williams v. Jones*, as well as the dissenting opinion of Judge Neil M. Gorsuch. Specifically, it describes the panel majority's lack of appreciation for the underlying purpose of the Counsel Clause—to ensure a fair trial. Part V provides brief conclusions to the analysis made in this Note.

II. FACTS AND PROCEDURAL HISTORY

In the early morning hours of June 9, 1997, Michael Joe Williams entered the trailer home of Larry Durrett in Okmulgee, Oklahoma, fired five shots at Durrett, and killed him.[15] After a trial, an Oklahoma jury convicted Williams of first-degree murder and sentenced him to life in prison without the possibility of parole.[16] Although the jury determined beyond a reasonable doubt that Williams had committed first-degree murder, it is undisputed (even by Williams) that Williams's counsel provided effective assistance during trial.[17]

It also is undisputed, however, that the performance of Williams's counsel during plea negotiations was deficient.[18] Before

14. Arave v. Hoffman, 552 U.S. 117, 118 (2008) ("Because [Respondent's] claim for ineffective assistance of counsel during pretrial plea bargaining is moot, we vacate the judgment of the Court of Appeals to the extent that it addressed that claim.").

15. Williams v. Jones, No. CIV-03-201-RAW, 2006 WL 2662795, at *1, *4 (E.D. Okla. Sept. 14, 2006).

16. Williams v. Jones, 571 F.3d 1086, 1088 (10th Cir. 2009) (per curiam).

17. *See id.* at 1091 ("Mr. Williams subsequently received a fair trial . . . .").

18. *Id.*

trial, state prosecutors offered Williams a ten-year sentence in exchange for pleading guilty to second-degree murder.[19] Williams wanted to accept the offer, but his counsel insisted that Williams proceed to trial. Williams's attorney believed so strongly that Williams should reject the plea offer and proceed to trial that he threatened to withdraw from the case if Williams accepted the plea offer.[20] He even counseled Williams that a guilty plea would be tantamount to perjury.[21] Williams followed the advice of his attorney, declined to accept the plea offer, and the case proceeded to trial. Ultimately, Williams was convicted of first-degree murder and sentenced to life in prison without the possibility of parole.[22]

Williams appealed his conviction and sentence directly to the Oklahoma Court of Criminal Appeals ("OCCA"), arguing that he received ineffective assistance of counsel during plea negotiations. The OCCA immediately remanded the case to the state trial court for a determination whether Williams received ineffective assistance of counsel during plea negotiations. The state trial court concluded that the performance of Williams's attorney during plea negotiations was deficient, satisfying the first prong of the *Strickland* test.[23] Yet the trial court also determined that Williams suffered no prejudice. As a result, the trial court concluded that the *Strickland* test was not satisfied and that Williams's conviction and sentence should not be disturbed.[24]

Williams appealed the state court's ruling. On appeal, the OCCA agreed that Williams's attorney's performance during plea negotiations was deficient.[25] The OCCA held, however, that by following the (deficient) advice of his attorney, Williams and his defense were prejudiced "because he lost the opportunity to pursue the plea offer with trial counsel."[26] Accordingly, the OCCA determined that Williams had received ineffective assistance of counsel in violation of the Sixth Amendment. To remedy this constitutional violation, the OCCA modified Williams's sentence to

19. *Id*. at 1088.
20. *Id*.
21. *Id*. at 1091.
22. *Id*. at 1088.
23. *Id*.
24. *Id*.
25. *Id*.
26. *Id*.

life imprisonment *with* the possibility of parole[27]—the lowest possible punishment for first-degree murder under Oklahoma law.[28]

Williams then filed a petition for a writ of habeas corpus in U.S. District Court for the Eastern District of Oklahoma, contending that the OCCA's modification of his sentence did not adequately remedy the constitutional violation because it did not restore him to the position he would have been in had he accepted the plea offer. The court denied Williams's petition on the ground that the modified sentence fell within the statutory sentencing range for first-degree murder in Oklahoma, and thus was inherently constitutional.[29] Williams appealed the district court's decision to the Tenth Circuit.

III. THE CONSTITUTIONAL RIGHT TO COUNSEL

The Sixth Amendment's Right to Counsel Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[30] The Supreme Court has interpreted this clause in numerous cases to provide robust protection to criminal defendants.

A. Early Twentieth Century—The Supreme Court Gives Life to the Right to Counsel Clause

In its early cases exploring a criminal defendant's right to counsel, the Supreme Court established that a criminal defendant's "defence" extends from arraignment to sentencing, that courts are without jurisdiction even to entertain a case when the defendant is not represented by counsel (unless he has waived that right), and that federal and state governments are obliged to pay for appointed counsel if the defendant cannot do so himself.

In *Johnson v. Zerbst*,[31] the Supreme Court held that representation by counsel is a prerequisite for a federal criminal trial—absent a criminal defendant's "competent" and "intelligent" waiver of the right to counsel, a federal trial court lacks jurisdiction

27. *Id.*

28. *See* OKLA. STAT. tit. 21, § 701.9 (2002); *see also* OKLA. STAT. tit. 22, § 1066 (2003).

29. Williams v. Jones, No. CIV-03-201-RAW, 2006 WL 2662795, at *12 (E.D. Okla. Sept. 14, 2006).

30. U.S. CONST. amend. VI.

31. 304 U.S. 458 (1938), *overruled on other grounds by* Edwards v. Arizona, 451 U.S. 477 (1981).

to try the case.[32] Since the Sixth Amendment confers on criminal defendants the right to counsel, federal courts must comply with this constitutional mandate or they are without jurisdiction to entertain the case and, potentially, deprive the accused of his life or liberty. Conversely, when the right to counsel is knowingly waived, the assistance of counsel is no longer a necessary element of the court's jurisdiction.[33]

Zerbst firmly established the Sixth Amendment right to counsel in all federal criminal trials. But for many years the right to counsel in state prosecutions was determined exclusively by state law. In 1932, the famous "Scottsboro Case" raised the question of whether a state's failure to appoint counsel to indigent defendants in a capital case could deprive the defendants of their rights to due process under the Fourteenth Amendment. In *Powell v. Alabama*,[34] the Court defined the scope of a criminal defendant's "defence." In that case, the Court held that the Fourteenth Amendment's Due Process Clause requires that criminal defendants—typically defendants that are more vulnerable to injustice—receive assistance of counsel from the time of arraignment all the way through trial.[35] According to the *Powell* Court, criminal defendants are "as much entitled to . . . aid [before trial] as at the trial itself."[36]

In *Powell*, nine African-American men known as the "Scottsboro Boys" were accused of raping two young white women.[37] All but one of the defendants were convicted and sentenced to death by all-white juries in a series of one-day trials in Alabama state court.[38] The Supreme Court reversed the convictions. In relevant part, the Court held that the Scottsboro Boys (1) "were not given a fair, impartial, and deliberate trial"; (2) "were denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial"; and (3) were unfairly tried by juries comprised entirely of non–African Americans.[39] In reversing the convictions, the Court

32. *Id*. at 465.

33. *Id*. at 467–68.

34. 287 U.S. 45 (1932).

35. *Id*. at 57.

36. *Id*. at 57 (citing People *ex rel.* Burgess v. Riseley, 13 Abb. N. Cas. 186 (1883); Batchelor v. Indiana, 125 N.E. 773 (Ind. 1920)).

37. *Id*. at 49.

38. *Id*. at 49–50.

39. *Id*. at 50.

held that the defendants "did not have the aid of counsel in any real sense" from the time of their arraignment until the beginning of trial, "although they were as much entitled to such aid during that period as at the trial itself."[40] The Court noted that the defendants possessed several characteristics—"ignorance and illiteracy"; "youth"; "circumstances of public hostility"; subjection to "imprisonment and . . . close surveillance . . . by the military forces"; inability to communicate easily with friends and families, who were all in other states; and, above all, being in "deadly peril of their lives"—all of which led inevitably to the conclusion that, in denying the defendants access to counsel from the time of arraignment all the way through trial, the state had inflicted "a clear denial of due process."[41]

Although the *Powell* Court determined Alabama violated the Scottsboro Boys' due process rights by failing to appoint counsel, the Court did not require counsel in *all* state prosecutions. Ten years later, in fact, in *Betts v. Brady*[42] the Court held explicitly that the Due Process Clause of the Fourteenth Amendment did not incorporate the specific guarantees of the Sixth Amendment, and, therefore, did not create an automatic right to counsel.[43] Instead, the Court endorsed a case-by-case inquiry into the fundamental fairness of a given proceeding, in light of the totality of the facts in that case.[44] In *Betts*, the defendant's conviction for robbery was affirmed even though the judge refused to appoint counsel upon request.[45] The Court considered the circumstances of the case and concluded as follows:

> [T]he accused was not helpless, but was a man forty-three years old, of ordinary intelligence, and ability to take care of his own interests on the trial of that narrow issue [alibi defense]. He had once before been in a criminal court, pleaded guilty to larceny and served a sentence and was not wholly unfamiliar with criminal procedure. It is quite clear that in Maryland, if the situation had been otherwise and it had appeared that the petitioner was, for any

40. *Id*. at 57.

41. *Id*. at 71.

42. 316 U.S. 455 (1942), *overruled by* Gideon v. Wainwright, 372 U.S. 335, 339 (1963).

43. *Id*. at 461–62.

44. *Id*. at 471–72.

45. *Id*. at 472–73.

> reason, at a serious disadvantage by reason of the lack of counsel, a refusal to appoint would have resulted in the reversal of a judgment of conviction.[46]

After several Supreme Court cases weakened *Betts*'s central holding that states are not required by the Sixth Amendment to appoint effective counsel in all criminal trials,[47] the Supreme Court overruled *Betts* in *Gideon v. Wainwright*,[48] holding that the Sixth Amendment's Right to Counsel Clause is "made obligatory upon the states by the Fourteenth Amendment."[49] As such, the Court held, indigent defendants in criminal prosecutions in a state court have the right to have counsel appointed for them and paid for by the state.[50] In *Wainwright*, the state court refused to appoint counsel because, by state custom, only defendants in capital cases were entitled to counsel appointed and paid for by the state.[51] On appeal, the defendant challenged his conviction and sentence on the ground that the trial court's refusal to appoint counsel effectively denied him his Sixth Amendment right to counsel.[52] Having previously construed the Sixth Amendment to require federal courts to provide counsel for defendants unable to employ counsel unless the right was competently and intelligently waived, the Court held that the Fourteenth Amendment imposed the same standard on the states: the Sixth Amendment's guarantee of counsel is one of the "fundamental and essential"[53] fair-trial rights "made obligatory upon the states by the Fourteenth Amendment."[54]

Thus, after *Wainwright*, the Court had firmly established that the Sixth Amendment, through the Due Process Clause of the Fourteenth Amendment, (1) requires that criminal defendants be provided with the assistance of counsel before trial in state and federal court, from arraignment all the way through to trial; (2) strips trial courts of jurisdiction unless the criminal defendant has had

46. *Id*.

47. *See generally* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE INVESTIGATIVE: CASES AND COMMENTARY 846–47 (8th ed. 2007).

48. 372 U.S. 335 (1963).

49. *Id*. at 340 (quoting Betts v. Brady, 316 U.S. 455, 465 (1942)).

50. *Id*.

51. *Id*. at 337.

52. *Id*. at 339.

53. *Id*. at 344.

54. *Id*. at 342.

the assistance of counsel from the time of arraignment all the way through the trial; and (3) if the criminal defendant is unable to afford an attorney, requires the state to provide one for him.

B. Strickland v. Washington *and "Effective" Assistance of Counsel*

In the above-recited cases the Supreme Court recognized that the Sixth Amendment right to counsel protects the fundamental right to a fair trial. In *McMann v. Richardson*,[55] the Supreme Court held that the right to counsel means the right to *effective* counsel.[56] The *McMann* Court, however, declined to provide a standard for determining whether a lawyer's efforts constitute effective assistance, preferring to leave that determination "to the good sense and discretion of the trial courts . . . ."[57] But the *McMann* Court did admonish that "if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts."[58]

In *Strickland v. Washington*,[59] the Supreme Court established the standard by which courts are to evaluate a convicted defendant's claim that his counsel's assistance was so defective as to require the reversal of his conviction or the setting aside of his sentence. "First, the defendant must show that counsel's performance was deficient."[60] This is the deficiency prong of *Strickland*. "Second, the defendant must show that the deficient performance prejudiced the defense."[61] This is the prejudice prong.

To establish deficiency, the defendant must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and show that it was objectively unreasonable.[62] Prejudice is normally established by showing that

55. 397 U.S. 759 (1970).

56. *Id.* at 771 n.14 (citing Reece v. Georgia, 350 U.S. 85, 90 (1955); Glasser v. United States, 315 U.S. 60, 69–70 (1942); Avery v. Alabama, 308 U.S. 444, 446 (1940); Powell v. Alabama, 287 U.S. 45, 57 (1932)).

57. *Id.* at 771.

58. *Id.*

59. 466 U.S. 668 (1984).

60. *Id.* at 687.

61. *Id.*

62. *Id.* at 689.

"there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[63] "A reasonable probability is a probability sufficient to undermine confidence in the outcome."[64]

IV. ANALYSIS

There is a reasonable probability that *Williams v. Jones* will eventually find its way to the U.S. Supreme Court, given that the Supreme Court already has granted certiorari in a similar case posing the same constitutional question (although that case was dismissed as moot on unrelated grounds).[65] Certiorari is merited in this case because the panel majority failed to grasp the underlying purpose of the Right to Counsel Clause—to provide for a fair trial with a just outcome. Although Williams received a harsher sentence than he would have received had he accepted the prosecutor's plea offer because he followed the (deficient) advice of counsel, that does not mean that the outcome was unjust or unfair. To the contrary, Williams was afforded all that the Constitution requires—he was given a fair trial by an impartial jury with effective assistance from his trial counsel. The Sixth Amendment was not violated.

A. The Tenth Circuit's Decision

In a split decision, a three-judge panel of the U.S. Court of Appeals for the Tenth Circuit held that Williams received ineffective assistance of counsel during plea bargain negotiations, in violation of the Sixth and Fourteenth Amendments.[66] Specifically, the court held that Williams satisfied *Strickland*'s two-prong test because he showed deficient performance by his attorney at the plea bargain stage of the proceedings, and because he showed that his attorney's deficient performance prejudiced him in the sense that but for the attorney's errors, Williams would have been able to secure a more lenient sentence.[67]

63. *Id.* at 694.

64. *Id.*

65. *See supra* notes 12–14 and accompanying text.

66. Williams v. Jones, 571 F.3d 1086, 1093 (10th Cir. 2009) (per curiam).

67. *Id.* at 1091.

The deficient performance, according to the court, was Williams's counsel's advice concerning the plea agreement—i.e., that Williams would be committing perjury by accepting the plea offer—and his threat to withdraw from representing Williams if Williams accepted the plea agreement.[68] In fact, all agreed that Williams's attorney's performance was deficient at the plea bargain stage of the proceedings. Even dissenting Judge Gorsuch acknowledged that Williams's attorney acted in a deficient, albeit good faith, manner.[69]

The Tenth Circuit also held that due to his attorney's deficiency, Williams suffered prejudice, thus satisfying the second *Strickland* prong. According to the court, "the prejudice Mr. Williams identified was that, had he been adequately counseled, there is a reasonable probability that he would have accepted the plea offer and limited his exposure to ten years."[70] The court thus squarely focused the prejudice inquiry on the prejudice to the outcome of the case for the particular defendant, not on the prejudice to the fairness of the actual trial eventually given to the defendant: "The fact that Mr. Williams subsequently received a fair trial (with a much greater sentence) simply does not vitiate the prejudice from the constitutional violation."[71] The court, without support, credited the OCCA's conclusion that it is reasonably probable that Williams would have accepted the prosecution's plea offer "but for defense counsel's ineffective assistance."[72] "Accordingly," the court stated, "we are not dealing with the government's discretion to make or withdraw a plea offer. Rather, we are dealing with an offer that was rejected because of defense counsel's ineffective assistance, with disastrous results for Mr. Williams."[73] Ultimately, Williams's attorney's deficient performance led directly to a higher sentence, prejudicing the outcome for Williams.

The court touched only lightly on the "purpose" of *Strickland*—to "protect[] the right to a fair trial"[74]—stating cursorily that fair

68. *Id.*

69. *Id.* at 1096 (Gorsuch, J., dissenting) ("Nor do I question the OCCA's conclusion that Mr. Williams's counsel performed deficiently in the plea negotiation process.").

70. *Id.* at 1091 (majority opinion).

71. *Id.*

72. *Id.*

73. *Id.*

74. *See id.* at 1092 (citing United States v. Gonzalez-Lopez, 548 U.S. 140, 147 (2006)).

trial considerations did not sway its conclusion. Instead, the court simply declined to adopt an approach "which would hold that a subsequent fair trial vitiates any Sixth Amendment violation."[75]

In contrast to the majority approach, dissenting Judge Neil M. Gorsuch focused primarily on the purpose of the Counsel Clause—"to ensure a fair trial."[76] By all accounts—including Williams's—Williams received a fair trial. Thus, because "the due process clauses of the Constitution's Fifth and Fourteenth Amendments do not encompass a right to receive or accept plea offers," no constitutional violation occurred, even though, by professional standards, Williams's attorney acted in a professionally deficient manner.[77] "As the Supreme Court has repeatedly held, plea bargains are matters of executive discretion, not judicially enforceable entitlement; due process guarantees a fair trial, not a good bargain."[78] After analyzing the two prongs of the *Strickland* test, Judge Gorsuch concluded that Williams was not prejudiced because he received a fair trial; Williams's counsel's deficient performance at the plea bargain stage was unrelated to that proceeding.

B. The Majority in Williams *Failed to Fully Analyze the Purpose Underlying the Right to Counsel Clause and* Strickland

Any analysis of the Sixth Amendment right to effective assistance of counsel must begin with, and satisfy fully, *Strickland*. *Strickland*'s two-prong test is now very familiar, and the Tenth Circuit in *Williams* went to great lengths to squeeze the facts of *Williams* into the two prongs. The court failed, however, adequately to take into account the purpose underlying the Supreme Court's holding in *Strickland*, and ultimately, the purpose underlying the Constitution's Right to Counsel Clause.

> In giving meaning to the requirement [that a criminal defendant receive the effective assistance of counsel] we must take its purpose—to ensure a fair trial—as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial

75. *Id*. (citing Utah v. Greuber, 165 P.3d 1185 (Utah 2007)).

76. *Id*. at 1094 (Gorsuch, J., dissenting).

77. *Id*.

78. *Id*.

> process that the trial cannot be relied on as having produced a just result.[79]

The hallmark, then, of any analysis of the Right to Counsel Clause and any application of *Strickland*'s two-prong test, is whether (1) the defendant received a fair trial (2) that produced a just result. Misunderstanding the underlying purpose of *Strickland*'s test and the Right to Counsel Clause generally, the Tenth Circuit simply held that Williams was deprived of the best possible outcome and therefore had been deprived of his constitutional right to the effective assistance of counsel.[80]

As discussed above,[81] the Supreme Court has recognized that the Sixth Amendment exists, and is needed, in order to protect the fundamental right to a fair trial. "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment,"[82] including guaranteeing that the accused receives "a speedy and public trial"; that the trial be conducted before "an impartial jury" comprised of persons previously selected from the defendant's state and district; that the defendant "be informed of the nature and cause of the accusation"; that the defendant be "confronted with the witnesses against him"; that the defendant be able to obtain witnesses by compulsion; and that the defendant "have the Assistance of Counsel for his defence."[83]

That the right to counsel plays a crucial role in the adversarial system is well established by Supreme Court precedent.[84] According to the *Strickland* Court, this is because "counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are *entitled*."[85] Nowhere in the Constitution is a criminal defendant given entitlement to a plea bargain. Rather, plea bargains represent merely a prosecutorial grace, a means to better manage the crushing workflow of the criminal justice system.

79. Strickland v. Washington, 466 U.S. 668, 686 (1984).

80. *Williams*, 571 F.3d at 1088.

81. *See supra* Part III.

82. *Strickland*, 466 U.S. at 684–85.

83. U.S. CONST. amend. VI.

84. *See supra* Part III.

85. *Strickland*, 466 U.S. at 685 (emphasis added) (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 275–76 (1942)).

The Founders included the guarantee of the assistance of counsel in the Bill of Rights "because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce *just* results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is *fair*."[86] Given counsel's central role in assuring a fair trial that results in a just outcome under the law, the Court has recognized the right not only to the assistance of counsel, but "'the right to counsel is the right to the *effective* assistance of counsel.'"[87]

C. In Light of the "Fair Trial" and "Just Results" Purposes Underlying the Right to Counsel Clause, Strickland*'s Two Prongs Are Not Satisfied in* Williams

As noted above, *Strickland*'s two prongs must be analyzed in light of the underlying purposes of the Right to Counsel Clause. While it is undisputed that Williams's attorney performed deficiently during plea bargain negotiations, such action did not prejudice Williams's ability to obtain a fair trial. Thus, *Strickland* is not met, and Williams's conviction should stand.

Under the first component in *Strickland*, a defendant must show that counsel's performance was deficient. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[88] Admittedly, Williams's attorney acted unreasonably in concluding that Williams was innocent and insisting that Williams reject the plea offer. Criminal defense attorneys obviously cannot take a client's professed innocence at face value, especially in the absence of corroborating evidence. Moreover, Williams's attorney acted egregiously when he persuaded Williams by telling him that he would be perjuring himself by pleading guilty. Surely Williams's attorney could have examined the evidence, as the jury did, and concluded that a plea to second-degree murder might be the best choice for Williams.

But satisfying *Strickland*'s first prong alone is insufficient to establish ineffective assistance of counsel under the Sixth

86. *Id.* at 687 (emphasis added).

87. *Id.* at 686 (emphasis added) (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)).

88. *Id.* at 687.

Amendment. In addition to deficient performance by counsel, a criminal defendant also must show that the deficient performance prejudiced the defense. "This requires showing that counsel's errors were so serious as to deprive the defendant of a *fair* trial, a trial whose result is *reliable*."[89] In no way did Williams's attorney prejudice the actual, fair trial that occurred. In no way did the attorney's performance produce a less reliable result. As the Court stated in *Strickland*, "[u]nless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable."[90]

In reality, the majority in *Williams* conflated an unfortunate outcome for Williams with a constitutionally prejudiced outcome. Our society exacts certain punishments for certain crimes. After a fair trial where he was represented by able counsel, Williams was convicted of first-degree murder and sentenced to life in prison. That result was not unjust; it was not unfair. Williams should not be constitutionally entitled to a do-over because he, on bad advice, chose not to take advantage of an opportunity he was not entitled to.

D. The Practical Problems Arising From Williams

The Tenth Circuit's decision in *Williams* is untenable as a practical matter. The en banc dissenters in *Arave v. Hoffman*, the Ninth Circuit case for which the Supreme Court earlier granted certiorari to decide the issue faced by the *Williams* court, understood the practical problems posed by allowing a criminal defendant to decline a plea offer, take his case to trial and lose fairly, only to return to the courts seeking the original plea offer. *Arave* involved the rejection of a plea bargain that would have imposed life in prison instead of the death penalty upon a criminal defendant where the defendant heeded allegedly faulty advice by defense counsel. The *Arave* en banc dissenters[91] argued that the original panel's conclusion, that defense counsel's recommendation was based upon incomplete research and "that his client risk[ed] much in exchange for very little,"[92]

89. *Id.* (emphases added).

90. *Id.*

91. Seven Ninth Circuit judges dissented en banc. *See* Hoffman v. Arave, 481 F.3d 686 (9th Cir. 2007) (en banc).

92. Hoffman v. Arave, 455 F.3d 926, 940 (9th Cir. 2006).

> open[s] this court up to a cavalcade of challenges. Every defendant whose attorney reasonably predicted a likely sentence which turned out to be wrong, or who erroneously predicted the direction of the court's constitutional holdings, has a claim of deficient performance. And yet, how often does an attorney give advice that does not in some way predict future court action?[93]

As Judge Gorsuch concisely explained it: "So long as a defendant can claim his lawyer mishandled a plea offer, he can take his chances at a fair trial and, if dissatisfied with the result, still demand and receive the benefit of the foregone plea."[94] Given that Williams received a fair trial and that his attorney competently conducted the trial, Williams should not be given the choice, after the fact, to opt back into the plea agreement—an offer that was originally given by the grace of the prosecutor, not as a constitutional right.

V. CONCLUSION

The Tenth Circuit's opinion in *Williams v. Jones* was wrongly decided because the majority failed to take into account the purpose underlying the Right to Counsel Clause. The bedrock right to the effective assistance of counsel does not exist to provide the best outcome for a criminal defendant. Rather, it is meant to ensure a *fair trial* that produces *just results*. Williams cannot say that his trial was unfair, or that the resulting verdict was unjust, merely because he failed to take advantage of a plea offer that in retrospect was too lenient—an offer to which Williams does not possess a constitutional right. Due to overwhelming evidence, Williams was convicted of first-degree murder. The law requires that he be punished accordingly, and that punishment should be allowed to stand.

Paul J. Sampson[*]

93. *Hoffman*, 481 F.3d at 688.

94. Williams v. Jones, 571 F.3d 1086, 1094 (10th Cir. 2009) (Gorsuch, J., dissenting).

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