Title:	*Deal or No Deal? Remedying Ineffective Assistance of Counsel during Plea Bargaining*
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Abstract: What happens when a defendant receives defective counsel during plea-bargaining, but subsequently receives a fair trial? This Note discusses three different approaches: no remedy, specific performance of the plea bargain, and a retrial. I argue that specific performance of the plea bargain violates various judicial and constitutional principles, while ordering no remedy at all relies on a flawed understanding of the Sixth Amendment. This Note introduces the notion that ineffective assistance of counsel during plea-bargaining is a structural-error in the criminal process, rather than a trial-error. I conclude that the only workable solution is to order a new trial.

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I. INTRODUCTION

A bank is robbed and the police accuse two brothers of the heist. The older brother is arrested for the robbery itself, while his younger brother is arrested for aiding and abetting. They are charged separately, and they each hire their own attorney. Given the mountain of evidence against them, they are both eager to begin plea negotiations, and the state offers both brothers the same deal: 10 years, if they plead guilty to their respective charges.

The younger brother's attorney erroneously advises his client that he faces a maximum sentence of 15 years for aiding and abetting a bank robbery, five more than the plea offer, if he is found guilty at trial. Pursuant to his attorney's advice, the younger brother accepts the offer, pleads guilty, and waives his right to trial, when in fact, 10 years is the maximum sentence the younger brother faced for aiding and abetting the robber. But for the attorney's deficient counsel, the younger brother would have proceeded to trial and risked nothing. Had he been convicted he would have received a sentence no worse than the plea bargain.

The older brother's counsel is also deficient, but in a different way. His attorney misreads the relevant criminal statute and advises his client that 10 years is the maximum sentence that the older brother faces for bank robbery. Therefore, this brother rejects the offer, pleads innocent, and proceeds to trial where he found guilty. In reality the older brother faced a maximum sentence exposure of 25 years for the bank robbery. Pursuant to his conviction, he is given the maximum sentence – more than double the original plea offer. But for the attorney's deficient counsel, the older brother would have accepted the offer of 10 years, pled guilty, and waived his right to trial. Instead, he risked 15 additional years in prison for a slim chance at acquittal.

Both brothers immediately challenge their convictions based on ineffective assistance of counsel, since each attorney committed an inexcusable error when calculating their respective clients' sentence exposures. But what is the remedy for each? The younger brother's remedy is clear: he waived his right to trial because of defective counsel, and so a court would simply vacate his conviction and restore his rights by ordering a new trial.[1] But what about his older brother? Although the older brother also received ineffective assistance of counsel during plea bargaining, he already received a fair trial. Ordering a new trial to replace the fair proceeding that just took place appears both inappropriate and redundant. But then, how else should a court remedy the older brother's ineffective assistance of counsel, if at all?

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

Usually when a defendant receives ineffective assistance of counsel during plea-bargaining, he pleads guilty, waiving his right to trial. There are, however, occasions where a defendant proceeds to trial when in reality his best option would have been to plead guilty pursuant to a plea arrangement.[2] Does a defendant suffer a remedial prejudice if he is denied effective assistance of counsel during plea-bargaining but subsequently receives a fair trial? Courts have answered this question in three ways. The first two find that the defendant does suffer prejudice and therefore deserves a remedy: one orders another trial,[3] while the second

[1] *See* McMann v. Richardson, 397 U.S. 759, 770-71 (1970).
[2] Commonwealth v. Napper, 254 Pa.Super. 54, 60 (1978) (Effective counsel "is most often needed to convince the client to plead guilty in a case where a not guilty plea would be totally destructive.").
[3] *See, e.g.*, Commonwealth v. Napper, 254 Pa.Super. 54 (1978) (vacating the conviction and ordering a new trial).

orders specific performance of the plea bargain.[4] Unlike the first two, the third approach finds no prejudice, orders no remedy, and simply affirms the conviction and sentence.[5] Various courts on the state and federal levels have adopted each path. In 2008 the United States Supreme Court was set to finally decide this question in *Arave v. Hoffman*,[6] before both parties withdrew the case.[7] Given its interest to resolve this nationwide split, the Supreme Court will likely answer this question soon. This piece seeks inform that decision.

Unfortunately, despite the extensive and conflicting case law, along with the Supreme Court's demonstrated interest, academic literature has not kept pace. To close this gap, I begin by discussing the three paths in turn, and the case law associated with each. An aggregate discussion like this will be the first of its kind, and should more fully ground the reader. For instance, by focusing on those jurisdictions that have ordered a new trial, one finds that there are some states that have ordered a new trial without discussion,[8] and there are some that have fully explained their reasoning.[9] Several federal court decisions have played out the same way.[10] But although these cases have applied identical remedies, they have not followed the same line of

[4] *See, e.g.*, Turner v. Tennessee, 858 F.2d 1201, 1208 (6th Cir. 1988) (reinstating plea bargain is the only way to neutralize the constitutional harm).
[5] *See, e.g.*, State v. Taccetta, 975 A.2d 928 (N.J. 2009).
[6] 128 S.Ct. 532 (2008).
[7] After the Court granted certiorari, but before oral argument, defendant filed an unopposed motion to vacate the Ninth Circuit's decision and dismiss the case. Defendant decided to abandon his claim for ineffective assistance during plea-bargaining and no longer sought the relief ordered by the Ninth Circuit. To avoid any possibility of receiving the death penalty, both sides agreed to proceed with the resentencing ordered by the district court. The Court, in a per curiam opinion, granted Hoffman's motion and remanded the case to the Ninth Circuit with the instructions that the district court should dismiss the ineffective assistance of counsel during plea bargaining claim with prejudice. Arave v. Hoffman, 552 U.S. __ (2008) (per curiam).
[8] Dew v. State, 843 N.E.2d 556 (Ind. 2006) (ordering a new trial if state does not reinstate the original plea offer); State v. Williams, 83 S.W.3d 371 (Tex. 2002) (failing to inform defendant of plea bargain offer was defective assistance, warranting a new trial); In the Matter of Cready, 100 Wash.App. 259 (2000) (granting new trial where defense counsel failed to inform defendant he would serve mandatory minimum terms totaling ten years); Larson v. State, 104 Nev. 691 (1988).
[9] People v. Curry, 178 Ill.2d 509 (1997).
[10] Wanatee v. Ault. 259 F.3d 700 (8th Cir. 2001) (granting writ of habeas corpus to defendant who was denied effective assistance of counsel during plea bargaining); United States v. Gordon, 156 F.3d 376 (2d Cir. 1998); Turner v. Tennessee, 858 F.2d 1201 (6th Cir. 1988) (vacating conviction and remanding back to plea negotiations).

argument. The same goes for courts that have ordered specific performance of the plea bargain,[11] and for those that have ordered no remedy at all.[12] I begin by discussing the difficulty of determining prejudice and the "no remedy" approach. In Part III, I outline those decisions that favor specific performance of the plea. Finally, in Part IV-A I examine those decisions that have ordered a retrial.

The conflicting judicial decisions discussed in this review demonstrate that none of these approaches is perfect. Decisions that order no remedy ignore process so long as the "correct result" is achieved. Although specific performance of the plea offer is the most intuitive remedy, it is also the most complex since expired deals are sometimes impossible to resurrect because of changed circumstances. Even if the deal is still available, it is unclear whether a member of the judicial branch can order a member of the executive branch to reoffer a deal without violating the separation of powers. The new trial remedy is redundant, and risks awarding the defendant a windfall chance at acquittal, which would be completely disproportionate to the harm alleged. This Article is unique in that it finally brings these divergent opinions together to compare their strengths and weaknesses. A review like this does not exist in the literature today.

However, this Article does not just describe the ongoing judicial conversation, it also adds to it by offering a new approach. In Parts IV-B and C, I respond to the leading cases that support granting no remedy. This rebuttal is unique in two ways. First, several arguments found in the no-remedy section have never been directly answered, either in judicial opinions or academic articles.[13] Second, I introduce an entirely new argument: the courts that find no

[11] United States v. Blaylock, 20 F.3d 1458, 1468 (9th Cir. 1994).
[12] State v. Taccetta, 195 N.J. 513 (2008); State v. Greuber, 165 P.3d 1185 (Utah 2007).
[13] For example, I respond to an argument found in *State v. Greuber*, that prejudice cannot occur because defendants do not have a right to a plea bargain. 165 P.3d at 1190. This argument misstates the question. The right lost here is

prejudice because the ensuing trial was "fair," obscure the dichotomy between trial-errors and structural errors.[14] This type of error is structural because it defies analysis by traditional harmless error standards and affects "the framework within which the trial proceeds,"[15] or even "whether it proceeds at all."[16]

In many ways, this Article is long overdue: no one has written on this topic for the last seventeen years, no piece reviews the nationwide judicial split in the aggregate, and no publication concludes that only a new trial remedy is appropriate. Moreover, to date no judicial opinion or law review article has explicitly advanced the notion that ineffective assistance of counsel during plea-bargaining is a structural error, rather than a trial error.[17] By doing so, this Article gives attention to a relatively neglected area of the law, while making several unique contributions to the literature on ineffective assistance of counsel.

The last scholarly article to discuss this topic is a student Note from 1992, published in the *California Western Law Review*.[18] The author concludes that defendants do suffer prejudice in these cases, and that the only appropriate remedy is to order specific performance of the plea

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not the right to a plea bargain as such, but rather the right to counsel's assistance in making a decision after a plea bargain has already been put on the table. *See* Part V-A. I also respond to *State v. Taccetta*, which advances a rather powerful argument that since the defendant claimed innocence, he could not have pled guilty pursuant to the plea bargain without committing perjury. 975 A.2d at 935-36. Relying upon existing Supreme Court case law, the Federal Rules of Criminal Procedure, and practical concerns regarding the plea bargain process, I argue that this rule is unworkable and unfair. *See* Part V-B.

[14] United States v. Gonzalez-Lopez, 548 U.S. 140, 150-51 (2006).

[15] Arizona v. Fulminante, 499 U.S. 279, 310 (1991).

[16] United States v. Gonzalez-Lopez, 548 U.S 140, 150 (2006).

[17] Justice Scalia comes close in *United States v. Gonzalez-Lopez*,

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

548 U.S. 140, 150 (2006).

[18] Note, *Ineffective Assistance of Counsel*, 28 Cal. W. L. Rev. 431 (1992).

bargain.[19] Unfortunately, that piece would not help a court resolve this issue today, since it does not discuss federal and state case law since 1992.[20] Second, it concludes that specific performance of the plea bargain is appropriate without addressing other constitutional principles that remedy implicates, such as double jeopardy,[21] the abstention principle,[22] and the separation of powers.[23] Since structural errors must be automatically reversed, and given the logistical hurdles involved in reinstating the original plea, I conclude that the only workable solution is to order a new trial.

A- Overview on the Right to Counsel

When considering claims of ineffective assistance of counsel, state and federal courts must adhere to the standards set forth in *Strickland v. Washington*, which require that defense counsel perform in such a way as will render the trial a reliable adversarial testing process.[24] To succeed on a Sixth Amendment claim of ineffective assistance of counsel, a defendant must satisfy both prongs of the *Strickland* test. First, the defendant must demonstrate that defense counsel's performance was objectively and unreasonably deficient.[25] Second, a defendant must then show that the deficient performance was prejudicial in some way.[26] Attorneys are human and invariably will make mistakes; so the Court in *Strickland* made clear that errors, "even if

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[19] *Id.* at 458.
[20] *See, e.g.*, Wanatee v. Ault. 259 F.3d 700 (8th Cir. 2001); United States v. Gordon, 156 F.3d 376 (2d Cir. 1998); Dew v. State, 843 N.E.2d 556 (Ind. 2006); State v. Williams, 83 S.W.3d 371 (Tex. 2002); In the Matter of Cready, 100 Wash.App. 259 (2000).
[21] *See, e.g.*, *Mahar*, 809 N.E.2d at 1003 (noting that the defendant was acquitted of charged found in the plea arrangement, making it "legally impossible to resurrect and impose the previously rejected plea agreement").
[22] Since most of these cases originate in state court, permitting federal courts to order specific performance could implicate federalism concerns, such as the abstention principle. *See* Moore v. Sims, 442 U.S. 415, 424 (1979); Younger v. Harris, 401 U.S. 37, 49 (1971).
[23] *See* State v. Eckelkamp, 133 S.W.3d 72 (Mo.App. E.D. 2004) (finding court lacked authority to mandate that prosecutor engage in plea negotiations).
[24] 466 U.S. 668, 688 (1984).
[25] *Strickland*, 466 U.S. at 687-88.
[26] *Id*. at 693.

professionally unreasonable," do not warrant setting aside a judgment if the error had no effect on the disposition of the case.[27] Even constitutional deficiencies must be prejudicial in order to constitute ineffective assistance of counsel under the Sixth Amendment.[28] To determine prejudice, a court asks whether there is a reasonable probability that the result of the proceeding would have been different, but for counsel's unprofessional errors; if so, the deficiency is prejudicial.[29] Remedies for the deprivation of the right to counsel "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests."[30]

B- The Right to Counsel during Plea Bargaining

It is rather axiomatic that the Sixth Amendment's right to counsel attaches during every critical stage of the prosecution after adversarial proceedings have begun.[31] Plea-bargaining is one such critical stage, not only because it is "an essential component of the administration of justice,"[32] but also because ninety-five per-cent of convictions end in plea bargains.[33] In 1970, the Supreme Court held that a defendant could challenge a guilty plea based on deficient counsel if that advice was "not within the range of competence" required of criminal defense attorneys.[34] Later, in *Hill v. Lockhart*, a case decided the year after *Strickland*, the Supreme Court directly applied the

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[27] *Id.* at 691-92.
[28] *Id.* at 692.
[29] *Id.* at 694.
[30] United States v. Morrison, 449 U.S. 361, 364 (1981).
[31] Adversarial proceedings begin once the criminal defendant appears before a magistrate judge where he learns of the charges against him, and where his liberty is subject to restriction. Rothgery v. Gillespie County, 128 S.Ct. 2578 (2008).
[32] Santobello v. New York, 404 U.S. 257, 260 (1971). *See also* State v. Simmons, 65 N.C.App. 294, 299 (1983) (noting the same).
[33] Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1136 (2004) ("About ninety-five percent of criminal cases end not with trials, but in plea bargains.").
[34] McMann v. Richardson, 397 U.S. 759, 770-71 (1970). *See also* Julian v. Bartley, 495 F.3d 487, 494-95 (7th Cir. 2007) (discussing *Strickland*'s origins).

Strickland test to legal assistance during plea negotiations.[35] Indeed, this principle has been widely adopted on both the federal and state levels to apply where

(1) defense counsel fails to disclose a plea offer to the defendant,[36]

(2) defendant is erroneously advised to plead guilty,[37] and

(3) defendant is erroneously advised to plead innocent.[38]

Often, the most difficult question is whether the defendant's counsel was ineffective, while the easiest is how to remedy the deficiency. When a defendant, pursuant to his attorney's advice, enters a guilty plea as part of a negotiated deal with the government, he waives his right to trial and the "full panoply" of other constitutional rights that come with it. If the attorney's advice was ineffective, the guilty plea is vacated, the process is reset, and these rights are fully restored.[39] In fact, not a single court or jurisdiction disagrees with this remedy. The answer is not as clear when the defendant is erroneously advised to plead innocent and, in doing so, proceeds to trial where s/he *does* receive the "full panoply" of constitutional protections. The next section discusses the difficulties of determining prejudice if a defendant received a fair trial.

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

[35] 474 U.S. 52, 58 (1985).
[36] *See, e.g.*, United States v. Rodriguez, 929 F.2d 747, 752-753 (1st Cir. 1991); Johnson v. Duckworth, 793 F.2d 898, 902 (7th Cir. 1986); United States ex rel. Caruso v. Zelinsky, 689 F.2d 435, 438 (3d Cir. 1982); State v. Simmons, 65 N.C.App. 294, 300 (1983); People v. Ferguson, 90 Ill.App.3d 416 (1980); Loyd v. State, 258 Ga. 645, 647 (1988); Lyles v. State, 178 Ind.App. 398, 401 (1978); People v. Whitfield, 40 Ill.2d 308, 239 N.E.2d 850 Ill. (1968).
[37] Hill v. Lockhart, 474 U.S. 52, 58 (1985).
[38] Julian v. Bartley, 495 F.3d 487 (7th Cir. 2007); United States v. Day, 969 F.2d 39 (3d Cir. 1992); Toro v. Fairman, 940 F.2d 1065, 1067 (7th Cir. 1991); Lewandowski v. Makel, 949 F.2d 884 (6th Cir. 1991); Turner v. Tennessee, 858 F.2d 1201, 1205 (6th Cir. 1988), *vacated on other grounds*, 492 U.S. 902 (1989); Beckham v. Wainwright, 639 F.2d 262, 265-66 (5th Cir. 1981); People v. Blommaert, 237 Ill.App.3d 811 (1992); Judge v. State of South Carolina, 321 S.C. 554, 558-60 (1996); In re Alvernaz, 2 Cal.4th 924, 934 (1992); Williams v. State, 326 Md. 367 (1992); Larson v. State, 104 Nev. 691 (1988); Commonwealth v. Napper, 254 Pa.Super. 54 (1978).
[39] Hill v. Lockhart, 474 U.S. 52, 58 (1985).

A growing number of courts have held that a defendant who rejects a plea-bargain to go to trial, and is ultimately convicted and sentenced, suffers no prejudice as a result of defective counsel during plea-bargaining.[40] Accordingly, since these jurisdictions find no prejudice, they provide no remedy for the defendant, and simply affirm the conviction and sentence.

A. The Difficulties of Determining Prejudice

The Supreme Court has consistently held that the right to counsel "has been accorded . . . not for its own sake, but for the effect it has on the ability of the accused to receive a fair trial."[41] It is axiomatic that a trial is not unfair, and thus the Sixth Amendment's right to counsel is not implicated, if the defendant is not prejudiced in some way.[42] A prejudicial error deprives the defendant of a substantive or procedural right to which the law entitles him.[43] Since a defendant has no substantive or procedural right to a plea bargain,[44] this argument supposes that as a matter of law, a defendant cannot claim prejudice by ineffective assistance of counsel during plea-bargaining if he ultimately receives a fair trial.[45]

For instance, in the case of *In re Alvernaz*, the California Supreme Court grappled with the difficulty of determining prejudice.[46] First, the court noted that if a defense attorney's simply miscalculates the sentence, this error could not, without more, give rise to a claim of ineffective

[40] State v. Taccetta, 195 N.J. 513 (2008); State v. Greuber, 165 P.3d 1185 (Utah 2007); Bryan v. State, 134 S.W.2d 795 (Mo. App. 2004); State v. Monroe, 757 So.2d 895 (La. App. 2000). *See also* Commonwealth v. Mahar, 809 N.E.2d 989 (Mass. 2004) (Sosman, J., concurring); Garcia v. State, 736 So.2d 89 (Fla. App. 1999) (Gross, J., concurring); Rasmussen v. States, 658 S.W.2d 867 (Ark. 1983) (Adkisson, C.J., dissenting).
[41] Mickens v. Taylor, 535 U.S. 162, 166 (2002), *quoting* United States v. Cronic, 466 U.S. 648, 658 (1984).
[42] *See* Strickland v. Washington, 466 U.S. 668, 694 (1984).
[43] Lockhart v. Fretwell, 506 U.S. 364, 372 (1993).
[44] Mabry v. Johnson, 467 U.S. 504 (1984); State v. Monroe, 757 So.2d 895 (2000).
[45] *See Fretwell*, 506 U.S. at 368-70 (holding that unfairness or unreliability do not result unless counsel's deficiency deprives defendant of a substantive or procedural right to which the law entitles him, not merely that the outcome would have been different).
[46] 830 P.2d 747 (1992).

assistance of counsel.[47] For the *Alvernaz* Court, the defendant has to show that he *would have* accepted the plea bargain to establish prejudice. However, a "self-serving statement" to that effect, after the fact, was insufficient evidence.[48] In this case, the court found that the defendant's "decision to reject the plea offer was motivated primarily by a persistent, strong, and informed hope for exoneration at trial, and that any evaluation of precise sentencing options was secondary in his thinking."[49]

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

[47] *Id*. at 757.
[48] *Id*. *See also* Lloyd v. State, 373 S.E.2d 1, 3 (1988) (holding that the evidence failed to establish that defendant would have accepted the offer had she been properly counseled).
[49] *Alvernaz*, 830 P.2d at 761.
[50] In the matter of McCready, 996 P.2d 658, 662 (Wash.App. 2000) (Brown, J., dissenting).
[51] *Id*. at 757.
[52] *See* Rasmussen v. Arkansas, 658 S.W.2d 867 (Ark. 1983) (refusing to set aside conviction or order new trial since defendant did not allege that she would have accepted plea, or that she would not accept it); People v. Carmichael, 179 P.3d 47 (Col. App. 2007) (construing defendant's statements as self-serving and insufficient to establish prejudice under *Strickland*).

between where the defendant's decision calculus relied upon the counsel's erroneous advice, and where it relied upon a calculated risk to stand trial. Courts struggle to determine what actually caused the defendant to reject the favorable plea arrangement: strategy or deficient counsel.[53]

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

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

Therefore, according to this line of reasoning, before determining prejudice a court should consider first, whether a defendant has shown that he would have accepted the offer, and

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[53] *See, e.g.*, *McCready*, 996 P.2d at 661 (Brown, J., dissenting) (arguing that defendant pursued a strategy of acquittal under a self-defense theory, and rejected a plea offer that would have fixed his sentence at less than any sentence he understood as likely to be imposed if convictd).
[54] Commonwealth v. Mahar, 809 N.E.2d at 999 (Sosman, J., concurring).
[55] *Alvernaz*, 830 P.2d at 758.
[56] People v. Stringham, 206 Cal.App.3d 184, 194 (1988).
[57] 467 U.S. 504 (1984).
[58] *Mabry*, 467 U.S. at 507. *See also* Bryan v. State, 134 S.W.3d 795, 803 (2004) ("The law is clear that negotiations which do not result in a guilty plea, and a resultant embodiment of that plea in the court's judgments, do not implicate any constitutionally-protected rights or liberty interests.").

second, whether the court would have approved the offer.[59] Any past declarations of innocence may make these two hurdles insurmountable, since they undermine the credibility of any hindsight claim that the defendant would have accepted the offer. Additionally, these claims decrease the probability that the court would have accepted a guilty plea, since a defendant cannot plead guilty to a crime he claims he did not commit.[60]

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

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

In *State v. Greuber*, the state charged the defendant with murder and aggravated kidnapping.[62] During the initial stages of the trial preparation the state offered to drop the aggravated kidnapping charges in exchange for a guilty plea to murder.[63] Greuber's defense attorneys advised him to reject the plea offer, mistakenly believing that the only confession on

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[59] *See* People v. Carmichael, 179 P.3d 47, 52 (2007) (requiring both).
[60] State v. Ball, 381 N.J.Super. 545, 554 (2005).
[61] *See e.g.*, State v. Bryan, 134 S.W.3d 795, 803-04 (2004) (rejecting a new trial remedy because "[o]ne fair trial is all the Constitution requires"); State v. Monroe, 757 So.2d 895, 898 (La.App. 2000) ("The only purpose of the new trial in this case would be to allow the defendant to change his plea from not guilty to guilty. But there is no point in doing that when the defendant has already been found guilty.").
[62] 165 P.3d 1185 (Utah 2007).
[63] *Greuber*, 165 P.3d at 1186-87.

the record was a jailhouse informant.[64] But had the attorneys reviewed the evidence, they would have discovered that Greuber himself confessed to the crime on tape, and thus their trial strategy was doomed to fail.[65] After sentencing, the defendant appealed his conviction on the grounds that he would have accepted the plea bargain offer had his attorneys listened to the tape and competently advised him.[66] The Utah Supreme Court denied any relief. First, the court argued that effective assistance of counsel is meant to protect a defendant's right to a fair trial, not a defendant's right to a plea bargain.[67] Unless the challenged conduct had some effect on the trial process itself, it could not have implicated the Sixth Amendment.[68] Having established this requisite, the court then said,

> Thus, while Greuber did possess the right to effective assistance of counsel during the plea process, he could not ultimately have been prejudiced in this case because he received a trial that was fair – the fundamental right that the Sixth Amendment is designed to protect. Nothing in the counsels' pretrial conduct suggests "that the trial cannot be relied on as having produced a just result."[69]

The court pointed out that ineffective assistance of counsel must deprive a defendant of some "substantive or procedural right."[70] But since there is no substantive or procedural right to a plea bargain, the defendant merely lost an opportunity – an opportunity which may present itself to some defendants but not to others.[71]

> When the Supreme Court has applied the Sixth Amendment right to the plea process, it has considered whether an *accepted* guilty

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[64] *Id*. at 1187.
[65] *Id*.
[66] *Id*.
[67] *Greuber*, 165 P.3d at 1188.
[68] *Id*. at 1188-89.
[69] *Id*. at 1189 (quoting *Strickland*, 466 U.S. at 686).
[70] *Fretwell*, 506 U.S. at 373.
[71] *Greuber*, 165 P.3d at 1190.

> plea has prejudiced the defendant, and not how the right applies when a defendant *rejects* a plea and proceeds with a fair trial."[72]

The Utah court also pointed out the difficulty in fashioning a remedy, even if it were to find prejudice. When a defendant is mistakenly led to plead guilty, the remedy is simple: vacate the plea, and give the defendant the trial he never had.[73] But the *Greuber* Court pointed out that after a defendant has received his constitutionally guaranteed fair trial, it is impossible to recreate "the balance of risks and incentives on both sides that existed prior to trial."[74] No remedy could resuscitate the original opportunity to plead guilty. Reinstating the plea would violate the doctrine of separation of powers, while "a new trial does not remedy the lost opportunity to plead."[75] Especially since ordering a new trial may be a "thinly veiled attempt to force the prosecution to reinstate the initial offer."[76] But most disconcerting, if enough time has elapsed, and the evidence and witnesses are no longer available, a new trial may result in a windfall acquittal, a completely disproportionate remedy to the alleged harm.[77]

For the Utah Supreme Court, the difficulty in fashioning a remedy for those defendants that opt for trial, in comparison to those who mistakenly waive their right to trial, illustrated why the two types of defendants should not be treated identically. Ultimately, the decision boiled down to a simple syllogism: although the Sixth Amendment applies during plea bargaining, the

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[72] *Id*. at 1188 (quoting Hill v. Lockhart, 474 U.S. 52, 57-58 (1985)).
[73] *Id*. at 1190.
[74] *Id*. (quoting *Mahar*, 809 N.E.2d at 1001 (Sosman, J., concurring)).
[75] *Id*.
[76] *Id*. (citing *In re Alvernaz*, 830 P.2d 747, 760 (9th Cir. 1992).
[77] *Greuber*, 165 P.3d at 1190-91 (quoting *Mahar*, 809 N.E.2d at 1002-03 (Sosman, J., concurring)). *See also* Boria v. Keane, 99 F.3d 492, 499 (2d Cir. 1996) (no assurance that witness necessary for prosecution would still be available); State v. Bryan, 134 S.W.3d 795, 803-04 (2004) (rejecting a new trial remedy because "[o]ne fair trial is all the Constitution requires"); *Id*. at 804 (granting the defendant a new trial would reward a defendant for rejecting a plea offer to stand trial by "allowing him to escape the consequences of that decision").

guarantee is ultimately grounded in the right to a fair trial; therefore, a defendant can only suffer prejudice if he *accepts* a plea and waives his trial, not if he *rejects* his plea and receives a trial.[78]

In July 2009, the New Jersey Supreme Court became the latest jurisdiction to hold that a defendant cannot demonstrate prejudice for ineffective assistance of counsel during plea-bargaining if he subsequently receives a fair trial.[79] In *State v. Taccetta* the defendant rejected a plea offer he would otherwise have accepted because his attorney misinformed him about the sentencing consequences that would follow if he were found guilty of certain crimes in the indictment.[80] After over a decade of appeals, a unanimous court found that, as a matter of law, the defendant's own proclamations of innocence prevented him from truthfully pleading guilty pursuant to the State's offer, since "[t]he notion that a defendant can enter a plea of guilty, while maintaining his innocence, is foreign to our state jurisprudence."[81] The New Jersey Supreme Court went on to say that a trial court cannot be complicit in a defendant's plan to commit perjury, and an appeals court cannot vacate a jury verdict following a fair trial on the ground that the defendant would have lied under oath to accept a plea arrangement.[82] The law requires that a judge be satisfied from the "lips of the defendant" that he committed the crime before accepting a guilty plea.[83]

For most courts, when determining whether the defendant has demonstrated prejudice, the question has always been whether the defendant *would* have pled guilty. But in *Taccetta* the question was whether the defendant *could* have pled guilty. Ultimately the *Taccetta* decision

[78] *Greuber*. 165 P.d3d at 1189.
[79] State v. Taccetta, 975 A.2d 928 (N.J. 2009).
[80] *Id*. at 929.
[81] *Id*. at 935-936.
[82] *Id*. at 936.
[83] *Id*. at 935 (quoting State v. Slater, 198 N.J. 145, 155 (2009)).

boiled down to a rather unique, albeit intuitive, syllogism: when a defendant claims that he is innocent, he cannot later plead guilty pursuant to a plea arrangement, because doing so would be perjury, and a court cannot accept perjured testimony.

C- Reinstating the Plea Is Often Impossible, and Violates Several Constitutional Principles

Traditionally, specific performance of a plea offer has only been available where the prosecution has abused its discretion,[84] or when the prosecution reneges on an accepted plea agreement.[85] Otherwise, there are difficult logistical issues involved when courts decide to reinstate the plea bargain. For instance, since most of these cases originate in state court, permitting federal courts to order specific performance could implicate federalism concerns, such as the abstention principle, which generally bars federal interference with state criminal proceedings.[86]

Even if a court determined with precision that the defendant would have accepted the offer, and that the trial court would have approved the offer, the notion that the judiciary can order a prosecutor – a member of the executive branch – to re-offer the plea, implicates concerns about the separation of powers. In *Greuber v. State*, the Utah Supreme Court decided that under the separation of powers doctrine, courts do not have the power to require the prosecution to reoffer a plea bargain, especially since it would often entail dismissing charges.[87] Additionally, forcing the prosecution to reoffer a plea bargain that it initially offered to *avoid* the expense and risk of a trial they have already won, would violate the basic fairness principles enshrined in the

[84] Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).
[85] Mabry v. Johnson, 467 U.S. 504, 510 n.11 (1984).
[86] Moore v. Sims, 442 U.S. 415, 424 (1979); Younger v. Harris, 401 U.S. 37, 49 (1971).
[87] Greuber v. State, 165 P.3d 1185, 1190 (2007) ("Under the doctrine of separation of powers, we do not believe courts have the power, in the absence of prosecutorial misconduct, to require the prosecution to dismiss charges, as would often be necessary to enact the earlier rejected plea.").

separation of powers doctrine.[88] Other courts have decided that they could remand the case for retrial, but have no power to require the government to reinstate the rejected plea offer.[89] Even assuming the court vacates the conviction, the prosecution could simply refuse to offer the same deal again, or refuse to engage in plea bargaining negotiations at all.[90]

Forcing the government to re-offer the plea becomes even more difficult when significant time has elapsed. This remedy would fail to take into account the changed circumstances of both parties since the original offer was made, which would interfere with established prosecutorial discretion. After conducting a trial and obtaining a conviction, the prosecutor may now believe that the public's interest is disserved by the original plea offer.[91] A lot can happen between the time the original offer was made and the conclusion of an arduous post-conviction appeals process. The prosecutor "should not be locked into the proposed pretrial disposition, appropriate as it may have been at the time."[92] Not to mention that sentencing decisions are usually made on the trial level; ordering specific performance of a plea bargain, especially one that was not yet approved by the trial judge, would prevent the trial court from exercising its traditional sentencing discretion.[93]

Certain changed conditions may also make the original plea irretrievable under the Constitution's double jeopardy clause, which forbids a defendant from being prosecuted twice

[88] *Greuber*, 165 P.3d at 1190 ("Further, requiring the state to reoffer after trial a plea bargain it may have made originally to avoid the expense and risk of a trial violates separation of powers and basic fairness principles.").
[89] *See* State v. Eckelkamp, 133 S.W.3d 72 (Mo.App. E.D. 2004) (finding court lacked authority to mandate that prosecutor engage in plea negotiations).
[90] Bryan v. State, 134 S.W.3d 795, 804 (Mo.App. S.D. 2004).
[91] *See Alvernaz*, 830 P.2d at 759.
[92] *Id.*
[93] People v. Calloway, 631 P.2d 30 (Cal. 1981) (ordering specific performance is inappropriate because it prevents trial court from exercising sentencing discretion).

for the same crime if he has already been found innocent.[94] For instance, imagine a scenario where the defendant is indicted for both felonious possession of a firearm and also aggravated manslaughter. The initial plea offer stipulates that if the defendant pleads guilty to the firearm offense, the state will drop the manslaughter charge. Instead, the defendant turns down the plea, goes to trial, where he is convicted of aggravated manslaughter, but is found innocent of the firearms charge. The prohibition against double jeopardy would then prevent the defendant from pleading guilty to felonious possession of a firearm, a charge for which he has been declared innocent. The plea, at this point, would be impossible to resurrect.[95] Presumably, this same argument applies to the new trial remedy: the defendant could not be retried on any elements for which he was already found innocent, so a new trial remedy may not include all the charges of the original trial.[96]

The case against any remedy whatsoever is very strong. In the next section I outline a remedial response to this constitutional error: specific performance of the plea bargain.

III. THE CASE FOR REINSTATING THE PLEA

Some courts believe that ordering another trial can never adequately remedy the constitutional deficiency.[97] Instead these courts opt to reinstate the original offer, thereby putting the defendant in the position he was in prior to the Sixth Amendment violation.[98] Since the Supreme Court has held that specific performance of a plea agreement may be a constitutionally permissible remedy

[94] U.S. const., amend. V ("[No person shall] be subject for the same offense to be twice put in jeopardy of life or limb.").
[95] *See, e.g.*, *Mahar*, 809 N.E.2d at 1003 (noting that the defendant was acquitted of charged found in the plea arrangement, making it "legally impossible to resurrect and impose the previously rejected plea agreement").
[96] *Id*.
[97] State v. Kraus, 397 N.W.2d 671, 674 (Iowa 1986). *Accord* United States ex rel. Caruso v. Zelinsky, 689 F.2d 435, 438 (3d Cir. 1982).
[98] United States v. Blaylock, 20 F.3d 1458, 1468 (9th Cir. 1994).

in certain contexts,[99] some lower courts have embraced it to neutralize this particular constitutional deprivation.[100]

The remedy can be applied in one of two ways. On the one hand, courts may order the defendant to accept the offer, and mandate that the trial court resentence the defendant accordingly. On the other hand, the court may simply require the government to re-offer the plea, giving the defendant the chance to reconsider, to make a counter-offer, or in theory, to reject it and receive another trial. If the defendant does reject the plea, the latter scenario functionally becomes a corollary of the "new trial" remedy, with the only difference being that the state has to re-offer the plea before eventually re-trying the case. Even amongst the courts that favor this remedy, there is no consensus about how to apply it. That is, whether the plea should be pushed through by judicial fiat, or whether the defendant should simply be given the opportunity to reconsider it (and possibly re-reject it), but this time with effective assistance of counsel. This section will discuss both applications of this particular remedy.

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

Several state courts have concluded that in these situations a defendant suffers prejudice, but that since the prejudice did not affect the fairness of the trial, the defendant should instead be given a choice: plead guilty in accordance with the plea agreement, or accept the outcome of the trial. In *Williams v. State*, the Maryland Court of Appeals decided that a defendant was prejudiced by ineffective assistance of counsel where his attorney failed to advise him of a possible mandatory

[99] Mabry v. Johnson, 467 U.S. 504, 510 n.11 (1984); Santobello v. New York, 404 U.S. 257, 263 (1971). *See also* State v. Rosario, 391 N.J.Super. 1 (2007) (holding that defendant who plea guilty in New York pursuant to bi-state disposition was entitled to enforcement of New Jersey's prosecutor's plea offer).
[100] *See* Turner v. Tennessee, 858 F.2d 1201, 1208 (6th Cir. 1988).

sentence.[101] However, the court observed, the most the defendant could have done, had he received adequate counsel, would have been to accept the plea offer. Therefore, "[g]iving him that opportunity now will place him in the same position he would have been in but for the incompetence."[102] Accordingly, the court gave the defendant the choice between the original convictions and sentence, or to plead guilty pursuant to the plea arrangement, but refused to order a new trial. At least two other states have followed a similar model.[103] The *Williams* court did not address the separation of powers doctrine when it ordered specific performance of the plea-bargain.

Most of these decisions involve fairly straightforward comparisons between the length of sentence after trial and the proffered sentence in the plea bargain. But in *Hoffman v. Arave* the defendant was charged with first-degree murder, and five weeks before trial the State offered him a rather unique plea bargain: if he were to plead guilty, the State would not pursue the death penalty.[104] Defense counsel advised against accepting the plea based on an inaccurate reading of capital-punishment law,[105] causing the defendant to reject the offer and proceed to trial, where he was convicted and ultimately sentenced to death.[106] On appeal the Ninth Circuit held that the defendant's ineffective assistance of counsel was prejudicial for two reasons: not only was counsel's reasoning flawed, but the defendant's chance of receiving the death penalty was not minimal, which made counsel's mistake all the more "disastrous."[107] After finding prejudice, the

[101] 326 Md. 367, 381 (1991).
[102] *Id*. at 382-83.
[103] *See, e.g.*, Becton v. Hun, 205 W.Va. 139 (1999) (remanding for resentencing in conformance with plea offer); Iowa v. Kraus, 397 N.W.2d 671 (Iowa 1986) (holding that defendant is not entitled to a new trial, but would be allowed opportunity to enter plea pursuant to rejected plea-bargain).
[104] 455 F.3d 926, 929 (9th Cir. 2006).
[105] Defense counsel thought that it was only a matter of time before Idaho's capital punishment scheme would be declared unconstitutional. *Hoffman*, 455 F.3d at 929.
[106] *Id*. at 930-32.
[107] *Id*. at 941-43.

panel decided that the proper remedy would be to reinstate the plea offer with "the same material terms" as the original offer, rather than order a new trial.[108]

The Sixth Circuit has also rejected retrial as an "inappropriate remedy for a defendant who had constitutionally deficient counsel during the plea negotiation process."[109] Like the *Hoffman* decision, the Sixth Circuit gave the prosecution the choice between releasing the defendant or re-offering a plea-bargain.[110] None of these decisions, however, address the *Greuber* decision's observations that specific performance of the plea bargain violates other important constitutional principles, such as the separation of powers.

B- Reinstating the Plea, With the Option for a New Trial

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

Several state courts have adopted this remedy. For instance, in *Dew v. State* the Indiana Court of Appeals reversed a defendant's convictions after finding that his counsel's performance during plea negotiations was prejudicial. To remedy the constitutional deficiency, the court

[108] *Id.* at 942. *See also* United States v. Blaylock, 20 F.3d 1458, 1468 (9th Cir. 1994); *Nunes*, 350 F.3d at 1057.
[109] Magana v. Hofbauer, 263 F.3d 542, 553 (6th Cir. 2001).
[110] *Id.*

ordered the state to either renew its plea offer or retry the entire case, which would reset the proceedings back to the plea-bargaining stage.[111] In a similar case the following year, the Minnesota Supreme Court vacated the defendant's conviction and ordered that he accept the original plea agreement, and be resentenced according to those terms.[112] However, echoing Indiana, the Minnesota court made clear that if the plea arrangement does not go through, either because the trial court rejects it or because "the state, based on valid reasons, objects to specific performance," the defendant would be entitled to a new trial.[113] Florida has followed a similar path.[114] Unfortunately, none of these decisions discussed the logistical and constitutional obstacles to specific performance of the plea bargain.

Although the *Hoffman* decision, which gave the prosecution the choice between reoffering the plea bargain or releasing the defendant, is written as if it were entirely consistent with Ninth Circuit precedent, that circuit had previously decided that the appropriate remedy may be *either* the modification of the judgment so that it is consistent with the terms of the plea bargain, *or* a new trial that resets the plea bargaining process – a choice left open to the prosecution.[115] The Faustian choice presented to the prosecution in *Hoffman*, between offering an expired plea bargain or releasing a defendant who has already been tried and convicted, was a new development in the law.[116]

[111] 843 N.E.2d 556, 571 (Ind. 2006).
[112] Leake v. State, 737 N.W.2d 531, 542 (2007).
[113] *Id*.
[114] *See, e.g.*, Beckham v. Wainwright, 639 F.2d 262 (C.A. Fla.1981) (ordering that defendant either be resentenced according to the plea offer, or be awarded a new trial).
[115] United States v. Blaylock, 20 F.3d 1458 (9th Cir. 1994).
[116] *Id*.

The next section discusses an option that avoids the logistical hurdles of reinstating the plea bargain, while still providing a remedy for ineffective assistance of counsel during plea bargaining: retrial.

IV. TURNING BACK THE CLOCK: ONLY A RETRIAL CAN REMEDY THE CONSTITUTIONAL DEFICIENCY, WHILE SIMULTANEOUSLY BALANCING THE INTERESTS OF BOTH THE DEFENDANT AND THE PROSECUTOR

Remedies for ineffective assistance of counsel "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests."[117] Those competing interests include society's interest in the administration of criminal justice.[118] Ultimately the only appropriate remedy for this type of constitutional error is to vacate the conviction and sentence, and order a new trial. In this section I will first discuss the leading state and federal decisions that order a retrial, and their justifications for doing so. In Part IV-B, I respond to the "no prejudice, no remedy" approach embraced by the *Greuber* and *Taccetta* courts, and demonstrate why the retrial remedy best balances the interest of the prosecution and defendant, while avoiding conflict with other constitutional principles. Finally, in Part IV-C, I introduce the notion that this error is not a trial error, but rather a structural error in the criminal process, which requires an automatic reversal.

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

[117] United States v. Morrison, 449 U.S. 361, 364 (1981).
[118] *Morrison*, 449 U.S. at 364.

In *Commonwealth v. Napper*, one of the first cases of ineffective assistance of counsel during plea-bargaining, the defendant had been indicted on two counts of aggravated robbery.[119] The prosecutor offered up to three years for both charges, but defense counsel did not advise the defendant as to the relative merits of the offer compared to the defendant's chances at acquittal – which were weak – if he proceeded to trial.[120] The defendant followed his attorney's advice and opted for trial. A jury convicted him, and the judge sentenced him to two consecutive terms of five to twenty years.[121] Before concluding that trial counsel was ineffective, the appellate court asked, "whether the action or strategy that counsel decided against or neglected had arguable merit."[122] The court saw the plea offer as a bargain, especially since the indictment risked a sentence of up to forty years – which is what the defendant ultimately received.[123] A central tenet of the Sixth Amendment's right to counsel is that "defense counsel has a duty to communicate to his client, not only the terms of a plea bargain offer, but also . . . the defendant's chances at trial."[124] The court went on to say,

> The decision whether to plead guilty or contest a criminal charge is probably the most important single decision in any criminal case. . . . But counsel may and must give the client the benefit of his professional advice . . . to convince the client that one course or the other is in the client's best interest. Such persuasion is most often needed to convince the client to plead guilty in a case where a not guilty plea would be totally destructive.[125]

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

[119] 254 Pa.Super. 54 (1978).
[120] *Napper*, 254 Pa.Super at 56.
[121] *Id*. at 55.
[122] *Id*. at 56-57.
[123] *Id*. at 57. The court also found significant that the evidence against the defendant was overwhelming. *Id*. at 57-59.
[124] *Id*. at 60.
[125] *Id*. at 60.

latter is especially troublesome in cases like these since the trial court has always imposed a sentence that is much higher than the rejected plea offer. Despite these uncertainties the *Napper* court concluded that the deficiency was prejudicial because the defendant *might* have accepted the offered bargain.[126] As for whether the court would have rejected the offer, "as a practical matter . . . this rarely occurs."[127] Having concluded that the deficiency was prejudicial, the discussion shifted to what remedy would cure this prejudice. The court recognized that any remedy would be imperfect: the court could neither compel the state prosecutor to reinstate the plea bargain offer, nor could it craft its own sentence.[128] Left with no other choice, the court vacated the conviction and ordered a retrial where the defendant would be granted a new opportunity to engage in plea bargain discussions – this time, with competent counsel.[129]

During the 1990s two more states decided that the proper remedy for ineffective assistance of counsel during plea-bargaining is a new trial. In *State v. Lentowski*, the Wisconsin Court of Appeals considered a defendant's claim of ineffective assistance of counsel where his attorney improperly advised him to reject a plea in order to pursue a mistaken defense.[130] The court in *Lentowski* acknowledged that ordering a new trial is an imperfect remedy: returning the parties to the pretrial stage cannot completely recreate the conditions present before the constitutional violation occurred. Nevertheless, the remedy struck an appropriate balance between the interests of the prosecution and the criminal defendant. On the one hand, the

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[126] *Napper*, 254 Pa.Super. at 61. *See also* State v. Hallman, 309 S.E.2d 493 (N.C.App. 1983) ("We, therefore, hold that a failure to inform a client of a plea bargain offer constitutes ineffective assistance of counsel absent extenuating circumstances.").
[127] *Id*.
[128] *Napper*, 254 Pa.Super. at 61 ("Finally, it should be noted that our decision gives appellant only imperfect relief. We cannot compel the Commonwealth to reinstate it plea bargain offer; nor can we dictate what sentence may be imposed if appellant pleads guilty without so advantageous an offer as he had before, or if he goes to trial and is again convicted.").
[129] *Id*.
[130] 212 Wis.2d 849 (1997).

prosecution arguably has increased its bargaining power after having obtained a conviction. On the other hand, the defendant regains the leverage afforded by a prosecutor's desire to avoid another costly and uncertain trial, where the pressure to secure another conviction would be tremendous.[131] While ordering specific performance of the plea arrangement implicates concerns regarding federalism, the separation of powers, and double jeopardy, by ordering a retrial, the decision whether to make the same offer or any offer at all is left to the prosecutor, thereby avoiding conflicts with two of those principles: federalism and the separation of powers.[132] Additionally, since any retrial would necessarily have to exclude those charges for which the defendant was already declared innocent, this remedy would not infringe upon a defendant's protection against double jeopardy. As a result, the *Lentowski* court concluded that only a new trial remedy could balance the interests of the prosecution and defendant, while avoiding conflict with other constitutional principles.

A few months later, in *People v. Curry*, the Illinois Supreme Court decided a similar case.[133] The defendant in *Curry* did not claim that his attorney failed to disclose the State's plea bargain; instead he claimed that he would have accepted the offer and avoided trial had he received effective assistance of counsel.[134] Specifically, the defendant demonstrated that during plea negotiations his attorney did not know that the defendant faced mandatory consecutive sentencing, a fact that would have changed the calculus about whether to risk trial.[135] The court decided that the defense counsel was inadequate by being "entirely unaware" of the maximum

[131] *Lentowski*, 569 N.W.2d at 762.
[132] *Lentowski*, 569 N.W.2d at 762.
[133] 178 Ill.2d 509 (1997).
[134] *Curry*, 687 N.E.2d at 882.
[135] *Id*. at 883.

sentence exposure the defendant faced.[136] The court next considered whether the deficient counsel prejudiced the defendant. The state made two arguments against a finding of prejudice. First, it argued that even if defense counsel's advice was inadequate, the defendant suffered no prejudice because he did not have a substantive or procedural right to the plea bargain he rejected.[137] The court rejected this argument, and instead reframed the issue to be about whether a defendant deserves adequate counsel to consider a plea that has already been offered:

> It is true that a defendant has no constitutional right to be offered the opportunity to plea bargain. However, in this case, the State did engage in plea bargaining with defendant. Thus, what is at issue here is whether, having received a plea offer from the State, defense counsel's deficient performance deprived defendant of his right to be reasonably informed as to the direct consequences of accepting or rejecting that offer.[138]

Second, the state argued that the defendant should also prove that the trial judge would have accepted the plea bargain offer in order to demonstrate prejudice.[139] The court declined to impose this requirement, however, noting that it would be at odds with the realities of the plea bargain process, not to mention unwise to require litigants to speculate about how a particular judge would have acted.[140]

Having established ineffective assistance of counsel and prejudice, the court then shifted its discussion to the proper remedy. The court acknowledged that the defendant was not deprived of a fair trial, so another trial could not truly remedy the situation because the

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[136] *Id*. at 887.
[137] *Id*. at 888.
[138] *Id*. at 888.
[139] The State pointed out that a trial judge is not bound by the terms of a plea bargain agreement, and may in fact issue a different sentence. *Id*. at 889.
[140] *Id*. at 890. *See also* Turner v. Tennessee, 858 F.2d 1201, 1207 (6th Cir. 1988) ("[W]e do not believe that [defendant] was required to demonstrate a reasonable probability that the trial court would have approved the two-year plea arrangement.").

constitutional deprivation occurred during plea-bargaining.[141] But after agreeing that specific performance of the plea agreement would not be a proper remedy, the court concluded that a retrial is the remedy best tailored to the constitutional injury.[142] Many other states have also ordered a new trial to remedy ineffective assistance of counsel during plea-bargaining,[143] often without further discussion.[144]

Several federal court decisions have played out the same way. In 1988 the Sixth Circuit considered an appeal from a habeas petitioner, James Turner, who claimed he received ineffective assistance of counsel in deciding to reject a two-year plea offer and go to trial.[145] The trial resulted in a conviction and a sentence of life imprisonment plus forty years. Both sides agreed that the right to effective assistance of counsel extends to the decision to reject a plea offer and proceed to trial.[146] However, the State argued that Turner had not been prejudiced because he could not show that, but for the incompetent advice, he would have accepted the offer, or that the trial court would have approved the arrangement.[147] The *Turner* court agreed that the defendant had to demonstrate a "reasonable probability" that he would have accepted the offer, but decided that in this case the defendant had done so.[148] But the court rejected the State's argument that a defendant must also demonstrate that the trial court would have approved the arrangement; instead, the court shifted this burden onto the State, to demonstrate

[141] *Curry*, 687 N.E.2d at 890.
[142] The court opinion did not explain why specific performance of the plea bargain is inappropriate. *Id.*
[143] In the Matter of Cready, 100 Wash.App. 259 (2000) (granting new trial where defense counsel failed to inform defendant he would serve mandatory minimum terms totaling ten years); State v. Williams, 83 S.W.3d 371 (Tex. 2002) (failing to inform defendant of plea bargain offer was defective assistance, warranting a new trial); Dew v. State, 843 N.E.2d 556 (Ind. 2006) (ordering a new trial if state does not reinstate the original plea offer).
[144] Larson v. State, 766 P.2d 261 (Nev. 1988); Commonwealth v. Copeland, 381 Pa.Super. 382 (1988) (awarding new trial if defendant proves ineffective assistance of counsel for failing to tell him of a plea offer); State v. Ludwig 124 Wis.2d 600 (1985) (same); Hanzelka v. State, 682 S.W.2d 385 (Tex.App. 1984) (same); State v. Hallman, 309 S.E.2d 493 (N.C.App. 1983).
[145] Turner v. Tennessee, 858 F.2d 1201 (6th Cir. 1988).
[146] *Turner*, 858 F.2d at 1206.
[147] *Id*.
[148] *Id*.

otherwise.[149] Having established prejudice, the court then discussed the proper remedy, ultimately granting the equivalent of a new trial, although the court did not couch the remedy in those terms.

In its remedy discussion, the court began by stating that granting Mr. Turner a new trial could not adequately remedy the deprivation: the rejected plea offer of two years was so unlike the sentence – life imprisonment plus forty years – that there was no chance that one more fair trial could revive the lost chance.[150] Since a prosecutor would never reoffer a two-year bargain after having secured a sixty-year sentence, the court reasoned that ordering a new trial may not be adequate. But the court also acknowledged "on the other hand, [that] requiring specific performance of the original two-year plea arrangement might unnecessarily infringe on the competing interests of the State."[151] The court decided that "the only way to neutralize the constitutional deprivation" would be to allow the defendant "to consider the State's two-year plea offer with effective assistance of counsel."[152] Nevertheless, since the defendant did not have to accept this offer, and since the State could withdraw the offer upon showing the withdrawal was not the product of prosecutorial vindictiveness, this remedy functionally returned the parties to the plea bargaining stage, before trial.[153] Although increasing the probability that both sides would agree to the original two-year plea offer, the court effectively restarted the trial process.

Most recently, in *Julian v. Bartley*, the Seventh Circuit considered a habeas petitioner's claim that he received ineffective assistance of counsel during plea-bargaining.[154] The

[149] *Id.* at 1207.
[150] *Id*. at 1208.
[151] *Id*. at 1208-09.
[152] *Id*. at 1208.
[153] *Id*. at 1209.
[154] 495 F.3d 487 (7th Cir. 2007).

defendant's attorney misinterpreted the Supreme Court's decision in *Apprendi v. New Jersey*,[155] and mistakenly believed that the defendant faced a maximum thirty year sentence. As a result, counsel advised defendant to reject the State's plea offer of twenty-three years, and to proceed to trial. However, contrary to his attorney's advice, the defendant faced a sixty-year sentence by going to trial, and after conviction received a forty-year sentence.[156] The court decided that defense counsel's advice about a thirty-year maximum was "clearly wrong and therefore objectively unreasonable."[157] The court concluded that this error was clearly prejudicial because the defendant believed he was risking seven years by going to trial, when actually he was risking *thirty*-seven years.[158]

The court rejected specific performance of the plea bargain as an inappropriate remedy because the State had no hand in denying the defendant his right to effective assistance of counsel.[159] Moreover, since the defendant never actually accepted the plea bargain, he had no absolute right to the offer now.[160] As a result, the court granted the defendant a new trial.[161]

Several other circuits have agreed that only a new trial adequately solves the contitutional deprivation, while respecting other competing interests.[162]

B. The *Greuber* and *Taccetta* Decisions Rely on a Flawed Understanding of the Sixth Amendment Right to Counsel

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[155] 530 U.S. 466 (2000).
[156] *Bartley*, 495 F.3d at 489-90.
[157] *Id*. at 495.
[158] *Id*. at 499.
[159] *Id*. at 500.
[160] *Id.*
[161] *Id*. Although the court made clear that it did not believe this remedy would be appropriate in all cases, the two conditions the decision cites as reasons to reject specific performance of the plea bargain – that the State had no role in denying the defendant effective assistance of counsel, and that the defendant never actually accepted the offer – apply equally to each case. In no case where a defendant rejects a plea bargain as a result of ineffective assistance of counsel, has the State been responsible for the deprivation.
[162] *See, e.g.*, Wanatee v. Ault. 259 F.3d 700 (8th Cir. 2001) (ordering a new trial for habeas petitioner who was denied effective assistance of counsel during plea bargaining); United States v. Gordon, 156 F.3d 376, 382 (2d Cir. 1998) (affirming district court's order to vacate defendant's convictions and grant him a new trial).

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

In response, I rebut two arguments deeply embedded in both decisions' reasoning. I first show that the right claimed is not the right *to* a plea bargain, but rather the procedural right to have effective assistance of counsel during plea negotiations. Second, I argue that preventing defendants from accepting a plea bargain if they have ever proclaimed innocence is an unworkable rule. In Part IV-C, I introduce the notion that ineffective assistance of counsel during plea-bargaining is a "structural error," rather than a trial error, and must be automatically reversed. Even if the trial was otherwise "fair," a structural flaw is inherently prejudicial because the error transcends the trial itself. The test is not whether the trial alone was fair, but rather whether the defendant was fairly convicted, a question that includes more than just the trial itself.[163]

After showing that a structural flaw will prejudice a defendant, despite any ostensibly "fair" trial s/he may have received, I conclude that the conviction should be vacated and the proceedings reset. By vacating the convictions, but not forcing the prosecution to reoffer the plea, this remedy avoids entanglement with the principles of federalism or the separation of

[163] State v. Lentowski, 569 N.W.2d 758, 761 (Wis.Ct.App. 1997).

powers, while still ensuring an outcome that protects both the defendant's constitutional interests and also public's interest in promoting justice.

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

One key argument, advanced by the *Greuber* court and others, is that defendants do not have a right to a plea-bargain, and therefore prejudice cannot result since the deficient counsel did not deprive the defendant of any substantive or procedural right to which the law entitles him.[164] But this argument misstates the question.

It is true that defendants do not have a constitutional right to a plea bargain, or even the right for the opportunity to negotiate for one.[165] Nevertheless, in cases like these, the prosecution has already engaged in plea bargain negotiations with the defendant. Therefore, the issue is not whether the criminal defendant has a right to engage in these negotiations, but rather once the negotiations start and an offer is made, whether a defendant has the right to be reasonably informed by effective counsel as to the direct consequences of either accepting or rejecting the prosecution's offer.[166] Put differently, the right lost here is not the right to a plea bargain as such, but rather the right to counsel's assistance in making a decision after a plea bargain has already been put on the table. To voluntarily reject a plea bargain, a defendant must understand the risks of proceeding to trial.[167]

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[164] Lockhart v. Fretwell, 506 U.S. 364, 372 (1993).
[165] *Greuber*, 165 P.3d at 1190.
[166] *See* United States v. Day, 969 F.2d 39, 43 (3d Cir. 1992); People v. Curry, 687 N.E.2d 877, 887 (1997).
[167] In the Matter of McCready, 996 P.2d 658, 660 (Wash.App. 2000) ("Stated differently, Mr. McCready's rejection of the plea offer was not voluntary because he did not understand the terms of the proffered plea bargain *and the consequences of rejecting it.*") (emphasis in original). *See also* People v. Correa, 485 N.E.2d 307 (1985) (voluntariness of guilty plea depends upon whether the defendant had effective assistance of counsel).

Although historically the core purpose of the right to counsel was to assure assistance at trial, over time the Court has recognized that this assistance would be less meaningful if it were limited to the formal trial itself.[168] As a result, the Supreme Court has consistently held that the right to effective counsel attaches during all critical stages of the prosecution.[169] In particular, the Court in *Powell v. Alabama* concluded that pretrial arrangements could be "perhaps the most critical period of the proceedings."[170] Since plea-bargaining is an "essential component"[171] of the criminal process, a defendant's counsel has a duty to provide effective assistance during this stage.[172] This ensures that the defendant retains the ultimate authority to make certain fundamental decisions, such as whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.[173] When a defendant is denied effective assistance of counsel during plea bargaining, the right asserted is not the right to a plea bargain, or even the right to a fair trial, but rather the right to be properly informed before deciding his or her own fate.[174] Once attached, this guarantee necessarily extends to the decision whether to accept *or* reject an offer.[175] In this way, the right to counsel protects more than simply a fair trial, for it also "serves

[168] United States v. Ash, 413 U.S. 300, 309-10 (1973). *See also Nunes*, 350 F.3d at 1052-53 (citing *Powell* and *Ash* to apply the Sixth Amendment to plea-bargain negotiations).
[169] *See* Rothgery v. Gillespie County, 128 S.Ct. 2578 (2008); Powell v. Alabama, 287 U.S. 45, 57, (1932); Brewer v. Williams, 430 U.S. 387, 398, 9 (1977). *See also* Hill v. Lockhart, 474 U.S. 52, 57 (1985) (applying the right "to ineffective-assistance claims arising out of the plea process").
[170] *Powell*, 287 U.S. at 57.
[171] Santobello v. New York, 404 U.S. 257, 260 (1971).
[172] *Strickland* 466 U.S. at 688.
[173] *Nunes*, 350 F.3d at 1053, *quoting* Jones v. Barnes, 463 U.S. 745, 751, (1983).
[174] *Id*. ("Here the right that [the defendant] claims he lost was not the right to a fair trial or the right to a plea bargain, but the right to participate in the decision as to, and to decide, his own fate – a right also clearly found in Supreme Court law.").
[175] Nunes v. Mueller, 350 F.3d 1045 (9th Cir. 2003).

to protect the reliability of the entire trial process."[176] Therefore, incompetent advice to reject a plea-bargain offer and proceed to trial constitutes a cognizable Sixth Amendment violation.[177]

Indeed, the flaw in the *Taccetta*/*Greuber* approach becomes clear after one acknowledges that some constitutional protections have purposes other than to promote the reliability of guilty verdicts. Before a court may fashion a remedy (or consider any remedy for that matter) to correct a constitutional violation, it should first assess the fundamental purposes of the right implicated by the error.[178] In this case, the purpose of the right to effective assistance of counsel during plea-bargaining is to ensure that a defendant considers and understands the plea-bargain offer – and the consequences of rejecting or accepting its terms. When this right is violated, returning the defendant to the moment before the violation occurred is the only way to vindicate the right's basic purpose. But since a court cannot order a member of the executive branch to re-offer a plea-bargain, the only available vindication is a new trial. The decisions in *Taccetta* and *Greuber* focus entirely on a reductionist view of the criminal process (a fair trial), while ignoring the essential purposes of this particular right.

2- Disallowing defendants, who at one point or another may have declared their innocence, from later claiming they would have accepted a plea, is an unworkable rule.

Recall that the *Taccetta* court used the defendant's own proclamations of innocence against him, arguing that his plea would never have been approved since the defendant would

[176] *Id*. at 1052. *See also* United States v. Blaylock, 20 F.3d 1458, 1466 (9th Cir. 1994); United States v. Day, 969 F.2d 39, 45 (3d Cir. 1992).
[177] Turner v. Tennessee, 858 F.2d 1201, 1205 (6th Cir. 1988). *Accord* Johnson v. Duckworth, 793 F.2d 898, 900-02 (7th Cir.) (criminal defendant has right to effective assistance of counsel when deciding whether to accept or reject a plea bargain offer), *cert. denied*, 479 U.S. 937 (1986); United States ex rel. Caruso v. Zelinsky, 689 F.2d 435, 438 (3d Cir. 1982) ("[The criminal defendant's] decision to reject a plea bargain offer and plead not guilty is also a vitally important decision and a critical stage at which the right to effective assistance of counsel attaches."); Beckham v. Wainwright, 639 F.2d 262, 267 (5th Cir. 1981) (defendant suffers a Sixth Amendment violation if advice to reject a plea bargain and proceed to trial is incompetent).
[178] Stacy & Dayton, *supra* note XX, at 89-90.

have committed perjury by pleading guilty. Since a trial court cannot accept perjured testimony, the *Taccetta* court concluded that the defendant suffered no prejudice as a result of his lost plea.[179] This rule, however, is inherently flawed. To begin, it is circular: by pleading innocent and presenting a defense, the defendant could not have pled guilty and waived his defense. But beyond that, it also misses the point. The fact that a defendant chooses to defend himself after rejecting a favorable plea offer does not show why he rejected the offer in the first place.[180]

While the *Taccetta* Court holds that a defendant cannot simultaneously maintain his innocence – or, for that matter, ever proclaim it – and plead guilty pursuant to a plea bargain, the Supreme Court thinks otherwise. In fact, in *North Carolina v. Alford*, the Court said the exact opposite, holding that a trial judge may accept a guilty plea from a defendant who maintains his innocence, so long as there is "a strong factual basis" for the plea.[181] While the *Alford* plea was accepted so that the defendant could avoid the risk of the death penalty, *Alford*-pleas for non-capital offenses have also been accepted.[182] Often, when a defendant believes that he is better served by pleading guilty rather than going to trial, there exists some factual basis for that plea. Even then, this is a question that is easily handled by the trial judge during an evidentiary hearing. Federal Rule of Criminal Procedure 11(b)(3) only requires that "[b]efore entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea."[183]

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[179] State v. Taccetta, 975 A.2d 928, 935-36 (N.J. 2009).
[180] *See* Lewandowski v. Makel, 949 F.2d 884, 889 (6th Cir. 1991) (determining prejudice rests on the defendant's motivation for rejecting the plea offer, not the act itself); People v. Curry, 178 Ill.2d 509, 532 (1997) (same).
[181] 400 U.S. 25, 37-38 (1970).
[182] *See, e.g.*, United States v. Cox, 923 F.2d 519, 524-26 (7th Cir.1991); United States v. Gomez-Gomez, 822 F.2d 1008, 1011 (11th Cir.1987), *cert. denied*, 484 U.S. 1028 (1988); United States v. O'Brien, 601 F.2d 1067, 1070 (9th Cir.1979); United States v. Bednarski, 445 F.2d 364, 365-66 (1st Cir.1971).
[183] Fed. R. Crim. P. 11(b)(3). Additionally, the American Bar Association's *Criminal Justice Standards* allow a plea to be withdrawn if it is necessary to correct a "manifest injustice." Standard 14-2.1(b)(i) states, "Withdrawal may be necessary to correct a manifest injustice when the defendant proves, for example, that: (A) e defendant was denied the effective assistance of counsel guaranteed by constitution, statute, or rule.". Am. Bar Ass'n, Criminal Justice

A *Taccetta*-like rule is invariably unworkable because all too often defendants make claims of innocence that are vague, and rarely specific to the legal standards found in each charge. For instance, if a defendant is indicted on murder and aggravated manslaughter, his proclamations of innocence may only refer to the murder charge. But this is hardly surprising, since one may be innocent of murder and guilty of aggravated manslaughter. Not allowing defendants to plea bargain if they have, at some point or another, professed their innocence, would destroy the plea-bargaining process itself.[184]

If this rule is enforced, then only a defendant "who remains mute or, better yet, confesses in open court, will be able to complain of this constitutional violation."[185] But this reasoning forces a defendant to give up one constitutional right (the right to present a defense) to vindicate another (the right to counsel during plea bargaining). Our constitutional rights cannot be held hostage in this fashion.[186] A defendant who professes his innocence should not be firewalled from entering a plea pursuant to a plea bargain, especially if there exists a strong factual basis for guilt.[187]

Ultimately, the internal logic of this rule depends on two assumptions: that the defendant's professions of innocence are true, and that a guilty plea would be false (perjured) testimony. This logic, however, does not survive analytical scrutiny because the trial itself,

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Standards, Pleas of Guilty, Part II: Withdrawal of the Plea, *available at* http://www.abanet.org/crimjust/standards/guiltypleas_blk.html#2.1 [last visited: Apr. 3, 2010].

[184] *See* Mask v. McGinnis, 233 F 3d. 140 (2d Cir. 2000); Cullen v. United States, 194 F. 3d 401 (2d Cir. 1999); Pham v. United States, 317 F. 3d 178 (2d Cir. 2003).
[185] In re Alvernaz, 830 P.2d 747, 765 (9th Cir. 1992) (Mosk, J., dissenting).
[186] *Id*.
[187] North Carolina v. Alford, 400 U.S. 25, 37-38 (1970); United States v. Cox, 923 F.2d 519, 524-26 (7th Cir.1991); United States v. Gomez-Gomez, 822 F.2d 1008, 1011 (11th Cir.1987), *cert. denied*, 484 U.S. 1028 (1988); United States v. O'Brien, 601 F.2d 1067, 1070 (9th Cir.1979); United States v. Bednarski, 445 F.2d 364, 365-66 (1st Cir.1971). *See also* Fed. R. Crim. P. 11(b)(3) (requiring a "factual basis for the plea").

which ended with a conviction, should outweigh the defendant's initial proclamations of innocence. For example, the *Taccetta* court ignores the possibility that the professions of innocence themselves were perjured, rather than the hypothetical plea. The fact that the defendant was convicted at trial lends support to the notion that his unsubstantiated and self-serving claim of innocence *ex ante* was later *disproved* at trial. If anything, given all the information revealed at trial, an appellate judge, *ex post*, should be more confident – not less – that the guilty plea would not be perjured testimony. After a trial and conviction, both assumptions listed above should hardly be taken for granted.

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

This argument, however, is related to the twin burdens many courts impose upon the defendant: (1) demonstrate that s/he would have accepted the offer, but for counsel's advice;[188] and (2) show that the judge would have approved the offer.[189] In the abstract, requiring the defendant to show that he would have accepted the offer is hardly unfair. For instance, the Second Circuit has expressed doubt about whether a defendant's self-serving, post-conviction testimony that he would have accepted the plea offer is sufficient, by itself, to establish a

[188] In re Alvernaz, 830 P.2d 747 (9th Cir. 1992).
[189] People v. Stringham, 206 Cal.App.3d 184, 194 (1988).

"reasonable probability" that the outcome would have been different.[190] The Seventh Circuit also requires other "objective evidence" that the defendant would have accepted the offer.[191] This requirement would reduce the risk of fabricated claims made by a self-serving party after trial.[192]

However, while the burden of proving that the defendant would have accepted the offer is properly placed upon the defendant, the burden of demonstrating that the judge would have accepted the offer is not. There is no statute and no Supreme Court cases that impose such a requirement. Indeed, it appears rather unwise to require a litigant to demonstrate how a particular judge would have acted under past circumstances.[193] Additionally, the burden here should be reversed. Rather than obliging the defendant to prove that the judge would have accepted the offer, it is more appropriate to require the government to demonstrate that the trial court would *not* have approved of the plea arrangement, especially since disapproval is so rare.[194] In this way a prosecution may argue that, although a counsel's ineffective assistance led to the rejection of a favorable plea offer, the defendant nevertheless suffered no prejudice because the trial court would not have approved the deal to begin with.[195] Since courts so rarely reject plea-bargains, after the defendant has demonstrated that he would have accepted the plea, the burden should then shift to the government to prove that the trial court was not prepared to approve the

[190] United States v. Gordon, 156 F.3d 376, 381 (2d Cir. 1998); Boria v. Keane, 99 F.3d 492, 496-97 (2d Cir. 1996).
[191] Toro v. Fairman, 940 F.2d 1065, 1068 (7th Cir. 1991); Dias v. United States, 930 F.2d 832, 835 (11th Cir. 1991).
[192] In re Alvernaz, 830 P.2d 747, 756 (9th Cir. 1992). *See also* Turner v. Tennessee, 858 F.2d 1201, 1206 (6th Cir. 1988) ("The State is correct in maintaining that Turner must establish that there is a reasonable probability that, but for the incompetence of counsel, he would have accepted the two-year offer and pled guilty.").
[193] *See* Turner v. Tennessee, 858 F.2d 1201, 1207 (6th Cir. 1988) ("We know of no case or statute that imposes such a requirement, and we think it unfair and unwise to require a litigant to speculate as to how a particular judge would have acted under particular circumstances."); United States ex rel. Caruso v. Zelinsky, 689 F.2d 435, 438 n.2 (3d Cir. 1982) (finding ineffective assistance of counsel in decision to reject plea offer even though defendant did not rebut possibility that trial court would not have approved the arrangement).
[194] Commonwealth v. Napper, 254 Pa.Super. 54, 61 (1978).
[195] Turner v. Tennessee, 858 F.2d 1201, 1207-08 (6th Cir. 1988).

arrangement.[196] For instance, in *Turner* the court found "much more significant" that the State could point to no evidence that indicated that the trial court would not have approved the plea arrangement.[197] After the defendant established "a reasonable probability" that he would have accepted the State's offer, the burdened shifted to the State to "offer clear and convincing evidence that the trial court would not have approved the plea arrangement."[198] Allocating the burdens in this way would be fairer to both parties.

Some may argue that this arrangement unfairly burdens a prosecution that had no part in the constitutional violation. However, as the Supreme Court said in *Kimmelman v. Morrison*, "[t]he Constitution constrains our ability to allocate as we see fit the cost of ineffective assistance. The Sixth Amendment mandates that the State [or the government] bear the risk of constitutionally deficient assistance of counsel."[199] Therefore, placing too many of these burdens on the defendant impermissibly shifts the risk of ineffective assistance of counsel away from the prosecution.[200]

C- Ineffective assistance of counsel during plea-bargaining is a structural error in the trial process itself, which requires an automatic reversal and retrial.

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

Since the Constitution does not mandate any particular remedy for constitutional violations, courts are instead bound by Federal Rule of Criminal Procedure 52(a) to disregard any error "which does not affect substantial rights."[201] Congress enacted Rule 52(a) in 1919 so

[196] *Turner*, 858 F.2d at 1207 ("We believe that, if the State wishes to suggest that the trial court would not have approved this plea arrangement, the State, and not Turner, bears the burden of persuasion.").
[197] *Turner*, 858 F.2d at 1207.
[198] *Id*.
[199] 477 U.S. 365, 379 (1986).
[200] *See* United States v. Blaylock, 20 F.3d 1458, 1469 (1994).
[201] 28 U.S.C. § 2111. *See also* Chapman v. California, 386 U.S. 18, 22 (1967).

that courts would not have to automatically reverse convictions because of small technical mistakes, which for all intents and purposes, did not affect the proceedings.[202] The Supreme Court applied harmless-error review to constitutional errors for the first time in *Chapman v. California*.[203] Writing for the Court, Justice Hugo Black summed up the purpose of the harmless-error standard: "All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial."[204] The Court went on to clarify that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."[205]

However, the *Chapman* Court acknowledged that some constitutional rights are so fundamental that their infraction can never be harmless.[206] The Court in 1967 listed three of these rights, taking care to emphasize that this list was not exhaustive: the right to counsel, the right to an impartial presiding judge, and the right to be free from a coerced confession.[207] These errors are so intrinsic as to require automatic reversal without regard to their effect on the outcome.[208] The Court has since expanded this "limited class of fundamental constitutional errors that defy analysis by harmless error standards."[209] For instance, the right to self-

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[202] Charles J. Ogletree, Jr., *Arizona v. Fulminante*: The Harm of Applying Harmless Error to Coerced Confessions, 105 Harv. L. Rev. 152, 156-57 (1991).
[203] 386 U.S. 18 (1967).
[204] *Chapman*, 386 U.S. at 21-22.
[205] *Id*. at 22.
[206] *Id.* at 23. *See also* Neder v. United States, 527 U.S. 1, 7 (1999) (recognizing that some errors defy analysis by harmless error standards).
[207] *Chapman*, 286 U.S., at 23. Justice Stewart's concurring opinion cautioned that this list was not exhaustive, and that other errors would also defy harmless error analysis. *Id*. at 42-44 (Stewart, J., concurring). *See also* Ogletree, *supra*, note XX, at 158-59 (discussing the *Chapman* decision).
[208] *Neder*, 527 U.S. at 7.
[209] Neder v. United States, 527 U.S. 1, 7 (1999) (internal citations removed).

representation, when exercised, usually increases the likelihood of an outcome unfavorable to the defendant; therefore, any denial of this right is not amenable to harmless-error analysis.[210]

When appellate courts confront errors in the lower court process, it must first decide whether to treat it as a structural error (which requires an automatic reversal) or a trial error (which might not always require reversal).[211] To determine whether a particular constitutional error is a structural error or a trial error, courts use the test articulated in *Arizona v. Fulminante*.[212] In *Fulminante,* the Arizona Supreme Court had ruled that the defendant's confession had been coerced and that its use against him at trial violated the Fifth and Fourteenth Amendments of the United States.[213] The question before the Supreme Court was whether a lower court could subject the error to harmless-error analysis. To resolve the issue, the *Fulminante* Court first articulated a dichotomy between trial errors and structural errors. A trial error is one which "occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its [effect] was harmless beyond a reasonable doubt."[214] As a result, trial errors are subject to harmless error analysis. In contrast, an error is structural if,

1. It does not occur during the presentation of the case to the jury; or
2. Its effects on the verdict cannot be quantitatively assesses on appeal; or

[210] McKaskle v. Wiggins, 465 U.S. 168, 177, n.8 (1984). *See also* Martinez v. Court of Appeals, 528 U.S. 152, 160 (2000) (the denial of self-representation is not subject to harmless error review because the right is "grounded in part in a respect for individual autonomy.").
[211] *See* Note, The Case Against Automatical Reversal of Structural Errors, 117 YLJ 1180, 1182 (2008) (discussing the difference between trial errors and structural errors).
[212] 499 U.S. 279 (1991).
[213] *Fulminante*, 499. U.S. at 282.
[214] *Fulminante*, 499 U.S. at 308.

3. It affects the framework within which the trial proceeds, or whether it proceeds at all.[215]

If an error meets any one of these standards, it is structural and the verdict must be vacated automatically. Examples of structural errors, which are not subject to harmless-error analysis, include: denial of counsel;[216] admitting a coerced confession;[217] allowing an impartial judge to preside during trial;[218] unlawful exclusion of members of the defendant's race from a grand jury;[219] unlawful denial of the right to self-representation at trial;[220] denying one's right to a public trial;[221] selecting a petit jury in a discriminatory manner;[222] and various jury selection errors in capital cases.[223] The common thread connecting each of these errors is that they affect the framework within which the proceeds, impacting the prosecutorial process from beginning to end, and defying analysis by harmless-error standards.[224]

In *United States v. Gonzalez-Lopez*, the Supreme Court added another error to this list.[225] In *Gonzalez-Lopez* the defendant's counsel of choice was erroneously disqualified when the district court denied his motion for admission pro hac vice. The Supreme Court had to decide whether to treat the erroneous deprivation of a defendant's counsel of choice as a trial error or as a structural error. The government asserted that a Sixth Amendment violation is not "complete" unless the defendant shows that the trial was unfair, which would require a showing of

[215] *Fulminante*, 499, U.S. at 307-310.
[216] Gideon v. Wainwright, 372 U.S. 335 (1963).
[217] Payne v. Arkansas, 356 U.S. 560 (1958).
[218] Tumey v. Ohio, 273 U.S. 510 (1927).
[219] Vasquez v. Hillery, 474 U.S. 254 (1986).
[220] McKaskle v. Wiggins, 465 U.S. 168 (1986).
[221] Waller v. Georgia, 467 U.S. 39 (1984).
[222] Batson v. Kentucky, 476 U.S. 79 (1984).
[223] Gray v. Mississippi, 481 U.S. 648 (1987).
[224] *Fulminante*, 499 U.S. at 310.
[225] 548 U.S. 140 (2006).

prejudice.[226] Writing for the Court, Justice Scalia rejected this argument, stating that it reframes the Sixth Amendment "as a more detailed version of the Due Process Clause – and then proceeds to give no effect to the details."[227] Of course the right is designed to ensure a fair trial, but "it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair."[228] This reasoning "abstracts from the right to its purposes, and then eliminates the right."[229] The effects of wrongfully denying one's chosen counsel are necessarily unquantifiable and intangible, making the inquiry especially speculative.[230]

The *Gonzalez-Lopez* Court reasoned that since the right to select one's counsel of choice is not derived from the Sixth Amendment's purpose of ensuring a fair trial, it is unnecessary to conduct a prejudice inquiry.[231] The Court concluded that this type of error is structural because it does not occur during trial, but before it; because it affects the trial from beginning to end; and because the impacts cannot be quantified. Therefore, erroneously depriving a defendant of his counsel of choice is a "structural error," not subject to harmless error review.[232] When an error is deemed structural, no additional showing of prejudice is required.

2. Applying the *Fulminante* Test to Ineffective Assistance of Counsel during Plea Bargaining

It is evident from a comparison of trial errors and structural errors, that ineffective assistance of counsel during plea-bargaining is a structural error. First, this error defies analysis by harmless-error standards, and affects the framework within which the trial proceeds, or whether it proceeds at all. Second, and more tautologically, this type of error does not occur

[226] *Id*. at 144-45.
[227] *Id*. at 145.
[228] *Id*.
[229] Maryland v. Craig, 497 U.S. 836, 862 (1990).
[230] *Gonzalez-Lopez*, 548 U.S. at 150-51.
[231] *Gonzalez-Lopez*, 548 U.S. at 147-48.
[232] *Id*. at 148.

during trial, and therefore cannot be a trial error. Therefore, applying all three prongs of the *Fulminante* test, ineffective assistance of counsel during plea-bargaining should be considered a structural error, which warrants an automatic reversal.

Similar to the erroneous deprivation of counsel of choice, ineffective assistance of counsel during plea-bargaining has "consequences that are necessarily unquantifiable and indeterminate."[233] It is impossible to know exactly what would have happened had the defendant received effective assistance of counsel: s/he might have accepted the offer; s/he might have made a counter-offer; s/he might have accepted the offer, but the judge might have rejected it and sent the parties back to the negotiating table; the defendant might have turned down the offer at first, gone to trial, but then signaled that s/he would accept the offer sometime during trial. An inquiry into the effects of this error on the criminal process is endlessly speculative because its effect on the outcome is much more difficult to assess than either the complete denial of counsel or even denial of the defendant's first-choice attorney.[234]

Even more than the denial of one's counsel of choice, this error affects "the framework within which the trial proceeds,"[235] or "*whether it proceeds at all*."[236] If the defendant had received effective assistance of counsel while considering the plea bargain offer, s/he would have accepted the deal – meaning the trial would not have occurred in the first place. In this way, the fact that the trial was *conducted* in a fair way misses the point. No matter how "fair" the trial may have been on face, the fact that it never should have occurred means that the framework itself should be questioned, not the machinations *within* that framework. Although *Gonzalez-*

[233] *Gonzalez-Lopez*, 548 U.S. at 150 (*citing* Sullivan v. Louisiana, 508 U.S. 275, 282 (1993)).
[234] *Gonzalez-Lopez*, 548 U.S. at 150-151.
[235] Arizona v. Fulminante, 499 U.S. 279, 310 (1991).
[236] *Gonzalez-Lopez*, 548 U.S. at 150 (emphasis added).

Lopez dealt with a different error altogether, the Court nevertheless acknowledged that errors during plea-bargaining would constitute structural flaws in the criminal process because the harmless-error analysis would be problematic and speculative:

> Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.[237]

Additionally, the Court's recognition of the right to effective assistance of counsel goes beyond the "fair trial" context "to the ability of the adversarial system to produce just results."[238] These results necessarily include a comparison between the length of sentence and an erroneously rejected plea bargain. Focusing only on the fairness of the trial when determining the impact of this error misses the forest for the trees.[239] Ultimately, this error deprives the criminal defendant of basic protections, without which "no criminal punishment may be regarded as fundamentally fair."[240]

Finally, and rather tautologically, trial errors occur during the trial itself, but ineffective assistance of counsel during plea-bargaining necessarily occurs before the trial even begins, pervading the course and conduct of the trial from beginning to end. Since trial error occurs during the presentation of the case to the jury, an appellate court can quantify its impact.[241] For instance, the evidentiary impact of an involuntary confession, introduced to a jury during trial, is

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[237] *Gonzalez-Lopez*, 548 U.S. at 150.
[238] Strickland v. Washington, 466 U.S. 668, 685 (1984).
[239] *See* Mickens v. Taylor, 535 U.S. 162, 166 (2001) ("We have spared the defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding. When that has occurred, the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary."), *citing* United States v. Cronic, 466 U.S. 648, 658-659; Geders v. United States, 425 U.S. 80, 91 (1976); Gideon v. Wainwright, 372 U.S. 335, 344-345 (1963).
[240] *Neder*, 527 U.S. at 8 (citing Rose v. Clark, 478 U.S. 570, 577 (1986)).
[241] *Fulminante*, 499 U.S. at 308-09.

subject to harmless error analysis because it can be quantified in light of other evidence. Thus, wrongfully admitting a coerced confession is not a structural error because it does not "transcend the criminal process," or affect the framework within which the trial proceeds.[242] In contrast, ineffective assistance of counsel during plea-bargaining does not occur during the presentation of the case to the jury. This error is not subject to harmless-error analysis because once the defendant receives erroneous advice to reject the plea bargain offer "the entire conduct of the trial from beginning to end is obviously affected."[243] Analytically, subjecting this error to harmless-error standards is problematic because there is no object upon which the harmless-error scrutiny can operate.[244] Harmless-error attaches to a discrepancy during trial to compare how the trial result would have changed had the error not occurred. For this error, however, the object would be the existence of the trial itself. The basis for harmless-error review is simply absent: it is illogical to assess the error's effect on the verdict when the verdict should never have been rendered.[245] These types of errors, which "infect the entire trial process," must be automatically reversed.[246]

3. The *Taccetta* and *Greuber* Decisions Adopt a Flawed Results-Oriented Approach

To justify denying a defendant any remedy for this type of error, the *Greuber* and *Taccetta* courts rely upon the same argument that the government in *Gonzalez-Lopez* used unsuccessfully before the Supreme Court: namely, that a defendant must show how the pretrial error prejudiced the ensuing trial, which was otherwise fair. Indeed, these two decisions demonstrate how problematic it is to apply harmless-error scrutiny to this type of error: on the

[242] *Fulminante*, 499 U.S. at 311.
[243] *Fulminante*, 499 U.S. at 310.
[244] Sullivan v. Louisiana, 508 U.S. 275, 280 (1993).
[245] *See Sullivan*, 508 U.S. at 279-80.
[246] Brecht v. Abrahamson, 507 U.S. 619, 630 (1993).

one hand, the trial itself was not mechanically unfair as a result of the error; on the other hand, the trial never should have occurred in the first place, since the defendant would have accepted the plea offer, but for the deficient counsel.

Since this error is not amenable to harmless-error review, the *Greuber* and *Taccetta* courts are not applying a harmless-error test, but rather the "right result" test. The underlying theme of both the *Greuber* and *Taccetta* decisions is that ineffective assistance of counsel during plea-bargaining did not render the defendant's trial unfair because the proceedings ended in the "right result": a obviously guilty person was found guilty by a jury and sentenced accordingly. Yet the same could be said of a directed verdict against a defendant with overwhelmingly unfavorable evidence mounted against him – but this error is per se reversible no matter what.[247] Results-oriented decisions like *Greuber* and *Taccetta* ignore the premise of structural-error review, which is that even convictions reflecting the "right result" must be reversed in order to protect a basic right.[248] Indeed, our criminal process protects values other than the acquisition of guilty verdicts.[249] For instance, in *Tumey v. Ohio*, the defendant was tried before a biased judge, but the State argued that this did not matter because the evidence clearly showed that he was guilty.[250] The Court rejected this argument, stating clearly that "[n]o matter what the evidence was against him, the defendant had the right to an impartial judge."[251] Similarly, no matter how obvious the defendant's guilty may be after an ostensibly "fair trial," every criminal defendant has the right to effective assistance of counsel while considering the merits of a plea-bargain.

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[247] *Neder*, 527 U.S. at 34 (Scalia, J., dissenting).
[248] *Neder*, 527 U.S. at 34 (Scalia, J., dissenting). *See also* Carter, *supra* note XX, at 232 (acknowledging some "surface level appeal" to the result oriented-approach, but noting that it undermines the constitutional protections within the criminal process).
[249] Tom Stacy & Kim Dayton, Rethinking Harmless Constitutional Error, 88 Colum. L. Rev. 79, 81 (1988).
[250] 273 U.S. 510 (1927).
[251] *Tumey*, 273 U.S., at 535.

To apply harmless-error scrutiny to this error would diminish the significance of the constitutional violation and shift the emphasis from the fairness of the process to the correctness of the result.[252] This "no harm, no foul" approach both underestimates the significance of the foul (the constitutional error), and ignores the consequences of the harm – so long as the "right result" was achieved.[253] The "no remedy" option effectively denies that a constitutional violation even occurred, for if the court does not remedy the error, for all practical purposes it did not occur.[254] But this approach would abrogate the right to counsel during plea-bargaining, because so long as a defendant is given a fair trial afterwards, any error that occurred beforehand may be "deleted" because the score is reset once the trial begins. This reductionist notion of what a fair trial means is entirely too myopic: if a constitutional error occurs, but the defendant is still given a fair trial, judicial efficiency and finality justify upholding the conviction.[255]

It is clear that the argument against retrial is invariably wrapped in pragmatism: why retry a defendant who is obviously guilty? Trials are expensive, time-consuming, and unpredictable. But our criminal justice system should not ignore basic violations of constitutional rights simply for convenience's sake. William Blackstone cautioned against this very mentality,

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

[252] Linda E. Carter, The Sporting Approach to Harmless Error in Criminal Cases: The Supreme Court's "No Harm, No Foul" Debacle in *Neder v. United States*, 28 Am. J. Crim. L. 229, 230-31 (2001).
[253] Carter, *supra* note XX, at 231-32.
[254] Carter, *supra* note XX, at 242.
[255] Stacy & Dayton, *supra* note XX, at 86.

> [counseled decisions] in questions of the most momentous concern.[256]

Instead of applying harmless-error analysis, courts should first ask whether this type of error is even amenable to harmless-error analysis. But like the violation in *Gonzalez-Lopez*, a Sixth Amendment violation during plea-bargaining is not amenable to harmless-error analysis because it is a structural error in the criminal process.

Yet even if an appellate court were to apply the harmless-error test to this violation, *Chapman v. California* made clear that the category of "harmless" errors is narrow: only those errors which are so "unimportant and insignificant" that they had no impact on the outcome of the proceedings are "harmless."[257] But it stretches credulity to label an error that caused a defendant to reject a favorable plea-bargain and receive a much higher sentence, "unimportant and insignificant." Even under an analytically re-worked harmless-error test, these cases must be reversed because the defendant clearly suffers some error: a higher sentence than s/he normally would have received.

[256] 4 Blackstone, Commentaries *350. *See also Neder*, 527 U.S. at 39-40 (Scalia, J., dissenting) (arguing against a results-oriented approach when analyzing structural errors).
[257] 386 U.S. 18, 22 (1967).

VI. CONCLUSION

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

Like many other structural errors, resetting the adjudicative process by ordering a retrial can actually cure this defect. For instance, the right to represent oneself does not serve the purpose of ensuring a fair trial; rather, it serves to protect a defendant's dignity and independence.[258] If a trial court denies a defendant this right, ordering a retrial to allow him to defend himself – although costly and repetitive – would vindicate the purposes underlying this right. Similarly, if a trial court wrongfully deprives a defendant of her counsel of choice, ordering a retrial so that the defendant's chosen attorney may represent her, cures this error.[259] In both cases, the amount of evidence, or the fact that the trial was otherwise fair, does not negate the fact that the right's purposes were frustrated by the constitutional violations. Similarly, the purpose of the right to effective assistance of counsel during plea-bargaining is to ensure that a criminal defendant understands the consequences of accepting or rejecting a plea-bargain. Resetting the adjudicative process, while providing the defendant with adequate counsel, vindicates this right by returning the defendant to his pre-trial position. But since a

[258] Faretta v. California, 422 U.S. 806, 820-21 (1975).
[259] United States v. Gonzalez-Lopez, 548 U.S. 140 (2006).

court cannot order a member of the executive branch to reoffer the plea bargain, a retrial isn't just the best solution – it's the only solution.

The argument that a defendant who receives a fair trial is not prejudiced by ineffective assistance of counsel is powerful, but ultimately myopic, and too results-oriented. Its proponents focus solely on the fairness of the trial's machinations, and not on the fairness of the framework within which the trial proceeded. This approach erroneously equates "fair process" with "correct result." However, the question is not whether the events during trial were fair – that is, the events between opening argument and closing argument – but whether the defendant was adequately counseled in the decision to go to trial or not. A trial-error necessarily occurs during trial; in contrast, a structural error often occurs before the trial begins, affecting the course of the trial from beginning to end. In this way the flawed process is not unlike a trial before a biased judge or the absence of counsel: in each case the defendant is denied a right that casts the entire process as fundamentally flawed.[260] No matter how "fair" the internal machinations of the ensuing trial may have been, the constitutional deficiency already poisoned the well of the criminal process.

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

[260] Carter, *supra* note XX, at 241.