

No. 10-209

IN THE
SUPREME COURT OF THE UNITED STATES

BLAINE LAFLER,
Petitioner,

vs.

ANTHONY COOPER.
Respondent.

BRIEF OF WAYNE COUNTY, MICHIGAN
AS AMICUS CURIAE IN SUPPORT OF
PETITIONER

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Question Presented

I.

What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?

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Interest of the Amicus

Amicus is the County of Wayne, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. The Wayne County Prosecuting Attorney, charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within his jurisdiction, has an interest in the outcome of the current litigation, as it may well affect the execution of her constitutional and statutory duties. Indeed, the case currently before the Court arises from a conviction in Wayne County, and another Wayne County case presenting this issue is pending argument before the Michigan Supreme Court (*People v McCauley*, Michigan Supreme Court No. 140422), that court directing the parties to address “whether a defendant can raise a challenge to the effective assistance of his attorney during the plea bargaining process where the defendant rejected the plea offer and subsequently received a fair trial, and, if so, what remedies should be available to the defendant.”

As the legal representative of a unit of state government, Supreme Court Rule 37 permits *Amicus* to file a supporting brief without permission of the parties.

No party or counsel connected with a party contributed any funds towards this brief nor contributed in any way to its writing.

Summary of the Argument

Defendant has a right under the Sixth Amendment through the Fourteenth Amendment to the “... Assistance of Counsel *for his defence.*” The right is provided to afford the defendant a fair trial, one where he or she may meet the prosecution’s evidence.

A defendant who has received a fair trial has received that which the constitution guarantees. A part of that fair trial is a right to effective assistance of counsel during that trial and all proceedings designed to ensure *its* fairness. And the *giving up* of the right protected by the constitution—a fair trial—on the advice of counsel requires that the performance of counsel be constitutionally adequate. But there is no right to any level of performance during plea negotiations, as there is no right to a plea, or to negotiations at all.

Further, after a fair trial a defendant cannot show prejudice, having received that which the constitution guarantees. Moreover, it is not possible to put the parties back in the pre-trial posture, for any offer made by the prosecution was premised on avoiding the expense and uncertainty of trial, and that trial has occurred. The prosecution also cannot be forced to “re-offer” any plea concession and hold to it (not withdraw it), as a court has no such power. The only possible “remedy” would be a fair trial, and that has occurred. The matter should thus be at an end in these circumstances.

Argument

I.

The Sixth Amendment right to the effective assistance of counsel is meant to ensure a fair trial. Having received a fair trial, the respondent cannot carry his burden of establishing that counsel was constitutionally ineffective.

A. The Right Protected By the Right to Counsel Is The Right to a Fair Trial

The right to counsel is not a “freestanding” right. One does not simply have a “right to counsel”; rather, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel *for his defence*.” The Sixth Amendment was a change from the common law, for the common-law rule had—somewhat oddly—denied the right to those charged with felonies while recognizing it for misdemeanor cases:

‘Originally, in England, a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions which the accused himself might suggest. At the same time parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel. . . .

(It) appears that in at least twelve of the thirteen colonies the rule of the English common law, in the respect now under consideration, had been

definitely rejected and the right to counsel fully recognized in all criminal prosecutions, save that in one or two instances the right was limited to capital offenses or to the more serious crimes . . .’ *Powell v. Alabama*, 287 U.S. 45, 60, 64-65, 53 S.Ct. 55, 61, 77 L.Ed. 158.’

The Sixth Amendment thus extended the right to counsel beyond its common-law dimensions.¹

And what was the purpose of so extending the right to counsel? What is counsel’s function?

- the “provision was inserted in the Constitution because the assistance of counsel was recognized as essential to any fair trial of a case against a prisoner.”²
- We accept *Betts v. Brady*'s assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is ‘fundamental and essential to a fair trial’ is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of

1. *Argersinger v. Hamlin*, 407 U.S. 25, 30, 92 S.Ct. 2006, 2009 (1972).

2. *Powell v. Alabama*, 287 U.S. 45, 70, 53 S.Ct. 55, 64 (1932).

counsel is not one of these fundamental rights.³

- ...the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.⁴
- ...this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.⁵
- To establish a violation of the Sixth Amendment under *Strickland*, a defendant must show that “counsel's performance was deficient,” and that “the deficient performance prejudiced the defense” in that “counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”⁶
- ...the defendant must show that the deficient performance prejudiced his defense. This requires showing that counsel's errors were

3. *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 795 (1963).

4. *United States v. Wade*, 388 U.S. 218, 226, 87 S.Ct. 1926, 1932 (1967).

5. *Strickland v. Washington*, 466 U.S. 668, 684, 104 S.Ct. 2052, 2063 (1984).

6. *Strickland*, 466 U.S., at 687, 104 S.Ct., at 2064.

so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.⁷

- We have further recognized that the purpose of providing assistance of counsel “is simply to ensure that criminal defendants receive a fair trial,” . . .and that in evaluating Sixth Amendment claims, “the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such.”⁸
- Our decisions have emphasized that the Sixth Amendment right to counsel exists “in order to protect the fundamental right to a fair trial.”...Thus, “the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.”⁹
- Under our decisions, a criminal defendant alleging prejudice must show “that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” ... Thus, an analysis focusing solely on mere outcome determination, without attention to whether the result of

7. *Strickland* at 687, 104 S.Ct. 2052.

8. *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 1697 (1988).

9. *Lockhart v. Fretwell*, 506 U.S. 364, 368-369, 113 S.Ct. 838, 842 (1993).

the proceeding was fundamentally unfair or unreliable, is defective.¹⁰

- ...we have consistently declined to impose mechanical rules on counsel—even when those rules might lead to better representation—not simply out of deference to counsel's strategic choices, but because “the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, ... [but rather] simply to ensure that criminal defendants receive a fair trial.”¹¹

The right protected by due process, and by the Sixth Amendment guarantee of counsel in criminal prosecutions, then, is the right to a fair trial—a proceeding whose result can be said to be reliable.

B. The Right to a Fair Trial Encompasses As Well the Decision to Waive That Right, A Decision to be Made With the Effective Assistance of Counsel, But No More

This brings the matter to *Hill v Lockhart*,¹² and it is that case which is critical, for so many cases rely on it to reach a result contrary to that urged by amicus here. In so doing, they have misread the case, and engaged in a logical fallacy. If, as the this Court has said, “the purpose of the

10. *Lockhart*, 506 U.S. at 369.

11. *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 1037 (2000).

12. See *Hill v Lockhart*, 474 US 52, 59, 106 S Ct 366, 370, 88 LEd2d 203 (1985).

effective assistance guarantee of the Sixth Amendment is . . . simply to ensure that criminal defendants receive a fair trial,” then an accused who *gives up* that constitutionally-protected right (and thus has not had a trial at all) on advice of counsel must receive advice “within an objective standard of reasonableness,” that advice being reviewed with great deference. And so this Court found in *Lockhart* that where counsel’s performance is so deficient as to justify a finding that there is a reasonable probability that but for that deficient performance the accused would not have *given up* his or her right to a fair trial by pleading guilty, that *plea* may be set aside, so that the constitutionally-protected fair trial may be *had*. This makes perfect sense, and is fully consistent with *Powell*, *Strickland*, and their progeny.

But the doctrine on which the Court of Appeals based its findings—and its direction as to “remedy”—is premised on a widespread misapplication of *Lockhart*.¹³

13. Among the many cases citing *Lockhart* for the proposition that there is a right to relief after a fair trial if counsel performed “ineffectively” during plea negotiations are the the Court of Appeals holding in the present case; *Williams v Jones*, 5712 F3d 1086 (CA 10, 2009), rehearing en banc denied 583 F3d 1254 (CA 10, 2009); *Julian v Bartley*, 495 F3d 487 (CA 7, 2007); *United States v Herrera*, 412 F3d 577 (CA 5, 2005); *Commonwealth v Mahar*, 809 NE2d 989 (Mass, 2004); *Nunes v Mueller*, 350 F3d 1045 (CA 9, 2003); *Magana v Hofbauer*, 263 F3d 542 (CA 6, 2001); *State v McDonald*, 10 P3d 1193 (Az App, 2001); *Coulter v Herring*, 60 F3d 1499 (CA 11, 1995); *Engelen*, 68 F3d 238 (CA 8, 1995); *United States v Day*, 969 F2d 39 (CA 3, 1992).

**(1) The logical error in applying
Lockhart to convictions had
after a fair trial**

Lockhart is viewed in many cases as simply stating a rule the logical equivalent of which is the rule stated by the Court of Appeals in this case. Indeed, many cases “quote” from *Lockhart*, but move the “not,” again, as though the propositions are logically equivalent. The statement of the rule of *Lockhart* is that defendant must prove both that his counsel's performance was deficient and that “*there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.*” Cases dealing with the present situation, where defendant went to trial rather than pleading guilty, actually employ a rearranged version of this test, saying that defendant prevails if he or she proves both that counsel's performance was deficient and that “there is a reasonable probability that, but for counsel's errors, he would . . . [the “not” being removed from the *Lockhart* rule with the substitution of elipsis dots] have pleaded guilty and would [not] [the “not” from *Lockhart* being relocated here, accompanied by brackets] have insisted on going to trial.”¹⁴ This re-worded rule is stated as though it necessarily follows from

14. See e.g. *Smith v. Singletary*, 170 F.3d 1051, 1053 (CA 11, 1999) (“To prevail on an ineffective-assistance-of-counsel claim, a habeas corpus petitioner must show that: (1) his lawyer's performance was deficient, and (2) ‘a reasonable probability that, but for counsel's errors, he would ... have pleaded guilty and would [not] have insisted on going to trial.’”

Lockhart, being but its “converse,”¹⁵ so that no more justification for setting aside the conviction had at a fair trial is required. But this is a logical error. The latter proposition is not the converse of the first. The converse of the proposition “All defendants who pled guilty because of counsel’s errors are entitled to a fair trial” is “All defendants who have a fair trial are entitled to plead because of counsel’s errors.”¹⁶ And the converse of an

15. See e.g. *Williams v. Jones*, 583 F.3d at 1255(“This case merely presents the converse of *Hill*....); *Cleveland v. State*, 674 S.E.2d 289, 291 (Ga.,2009); *State v. Donald*. 10 P.3d 1193, 1199 (Ariz.App. Div. 1,2000); *In re Alvernaz*, 830 P.2d 747, 753 (Cal.,1992).

16.Using syllogistic terms, *Lockhart* proceeds as follows:

All [defendants who pled guilty
because of counsel’s errors](subject)
are entitled to be [defendants who
receive a fair trial](predicate).
Defendant [pled guilty because of his
counsel’s errors].
Defendant is [entitled to a fair trial]

Cases such as *Williams v Jones* reason:

All [defendants who pled guilty
because of counsel’s errors](subject)
are entitled to be [defendants who
receive a fair trial](predicate)[the
holding of *Lockhart*]
Defendant [had a trial because of his
counsel’s errors].
Defendant is [entitled to a plea]

This is a non sequitur. Further, the converse of All S is P is All P is S (conversion is the exchange of the subject and predicate terms), and in the case of a categorical-affirmative proposition (an “A” proposition) is generally untrue. For example, the

affirmative categorical proposition is not generally true in any event.¹⁷ That one who *waives* the constitutionally-guaranteed right to a fair trial because of poor advice amounting to ineffective assistance is entitled to have that plea set aside and have a trial simply says nothing at all about whether one who *has* a fair trial is entitled to set aside the result of that trial because his attorney performed “deficiently” during the non-constitutionally guaranteed plea negotiations. Some justification beyond a mere citation to *Lockhart* is required.

(2) There is no right to a negotiated plea, and thus no right to a performance standard with regard to plea negotiations

That one is entitled to the advice of competent counsel when *waiving* the right to a fair trial (and those rights attendant to it) does not mean that one has the right to the advice of competent counsel in *not* waiving—that is, asserting—the right to fair trial, other than that the performance *at* that trial must be effective as understood in *Strickland*. Again, cases misread or “overread” *Hill v Lockhart*. Cases often cite that decision for the proposition that “Defendants have a constitutional right to effective assistance of counsel during plea negotiations. *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S.Ct. 366, 88 L.Ed.2d 203

converse of “All dogs are animals” is “All animals are dogs.” See Irving Copi, *Introduction to Logic* (3rd Ed., 1968), p. 135.

17. Irving Copi, *Introduction to Logic* (3rd Ed., 1968), p. 135.

(1985),”¹⁸ or it is said that *Hill v Lockhart* holds the *Strickland* test “applicable in the context of plea bargains.”¹⁹ But that is not what the this Court said; it has not said vaguely that the effective assistance right applies in the “context of guilty pleas” disconnected from the entry of a guilty plea, which waives the right to a fair trial. The defendant in *Hill v Lockhart* waived his right to a trial by pleading guilty, and argued that he had been ineffectively advised by counsel. This Court said not that the defendant had a right to effective assistance during plea negotiations, but that “Where, as here, a defendant is represented by counsel during the *plea process and enters his plea upon the advice of counsel*, the voluntariness of the plea depends on whether counsel's advice ‘was within the range of competence demanded of attorneys in criminal cases.’... a defendant who *pleads guilty upon the advice of counsel* may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.”²⁰

18. See e.g. *Humphress v. United States*, 398 F.3d 855, 858 (CA6, 2005)“Defendants have a constitutional right to effective assistance of counsel during plea negotiations. *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).”

19. See Note, “Opportunity Lost?—the Ineffective Assistance Doctrine's Applicability to Foregone Plea Bargains,” 42 *Suffolk U. L. Rev.* 709, 727 (2009).

20. *Hill v. Lockhart*, 474 U.S. at 56, 106 S.Ct. at 369 (emphasis supplied). And the Court concluded “We hold, therefore, that the two-part *Strickland v.*

That a defendant who “pleads guilty on the advice of counsel”—who gives up that constitutionally-guaranteed right and its attendant constitutional rights—is entitled to advice that is “within the range of competence demanded of attorneys in criminal cases” is unremarkable. But this says nothing about whether a defendant is entitled to any performance standard of counsel in the *assertion* of the right to trial, and, given that a negotiated plea is *not* a constitutional right, the situations are hardly analogous. Indeed, one who is entitled to a particular procedure under the constitution is *not* entitled to its opposite; there are no cases finding a requirement of advice “within the range of competence demanded of attorneys in criminal cases” in the assertion of the right to jury trial, for example.²¹ And the law is clear that a defendant

Washington test applies to challenges to guilty pleas based on ineffective assistance of counsel.”
Hill v. Lockhart, 474 U.S. at 58, 106 S.Ct. at 370.

21. The only exception is when the “opposite” of the right is also a constitutional right. In Illinois the defendant has a constitutional right to both a bench trial and to a jury trial, so that the assertion of the one is a waiver of the other, and for that reason in Illinois it is possible to have ineffective assistance in the decision to have a jury trial. See *People v. McCarter*, 897 N.E.2d 265, 286(Ill.App. 1 Dist., 2008) (“Under the Illinois constitution, an accused has the right to waive trial by jury. . . .when defendant claims that counsel's error caused him to waive his right to a jury trial, prejudice under *Strickland* occurs when “there exists a reasonable likelihood that the defendant would not have waived his jury right in the absence of the alleged error”).

has “ no “right” to negotiate a plea. This Court itself has said not only that “there is no constitutional right to plea bargain,” but also that “*It is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty.*”²²

Because the constitutional right which is protected is the right to a fair trial, “critical stages of the proceedings” for application of the Sixth Amendment, and the performance standard under *Strickland*, are those where “the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial”; on the other hand, no “standard of performance” applies (as counsel is not required) where “there is minimal risk that [defendant’s] counsel's absence . . . might derogate from [the] right to a fair trial.”²³ *Strickland* recognized that counsel is crucial to our adversarial system precisely because “access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.”²⁴ And again, included is the *waiver* of the right to a fair trial through the entry of a guilty plea; as *Hill v Lockhart* held, the “two-part *Strickland v.*

22. *Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S.Ct. 837, 846, 51 L Ed 2d 30 (1977) (emphasis supplied).

23. *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 1933, 18 L Ed 2d 1149 (1967).

24. *Strickland*, 466 US 6 at 685, 104 SCt at 2063 quoting *Adams v United States ex rel McCann*, 317 US 269, 275-276, 63 SCt 236, 240, 87 Led 268 (1942);

Washington test applies to challenges to guilty pleas based on ineffective assistance of counsel.”²⁵

Where counsel’s performance both before and during trial was adequate under *Strickland* to provide that ample opportunity to meet the prosecution’s case, the inquiry should be at an end, the defendant having received that assistance the Constitution affords to ensure the trial was a fair adversarial search for the truth involved in the matter. In other words, a defendant who has received a fair trial has received all that to which he has a constitutional “right.”

C. A Defendant Who Received a Fair Trial Cannot Show Prejudice As Described in *Strickland*

This Court in *Strickland* focused upon counsel’s performance only to determine that an accused’s right to trial was adequately protected, not to assess whether counsel acted to maximize any potential benefit to him. Judge Easterbrook in *United States v Springs*²⁶ powerfully described the narrow range of the inquiry.

- Not every adverse consequence of counsel’s choices is “prejudice” for constitutional purposes. “[A]n analysis focusing solely on mere outcome

25. And thus it is that a defendant uninformed or misinformed about the deportation consequences of his plea may void that plea on grounds of ineffective assistance of counsel. *Padilla v. Kentucky*, __US__, 130 S.Ct. 1473, 1485 (2010).

26. *United States v Springs*, 988 F2d 746, 749 (CA 7, 1993).

determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective.” *Lockhart v Fretwell*, 506 US 364, ----, 113 SCt 838, 842, 122 LEd2d 180 (1993)...*The guarantee of counsel in the sixth amendment is designed to promote fair trials leading to accurate determinations of guilt or innocence. The Constitution does not ensure that lawyers will be good negotiators, locking in the best plea bargains available....*

- The “prejudice” component of ineffective assistance “focuses on the question whether counsel’s deficient performance renders the result of the [proceeding] unreliable or fundamentally unfair.... *Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him.*” *Fretwell*, 506 US at ----, 113 SCt at 844. Prosecutors need not offer discounts and may withdraw their offers on whim.

Precisely so. As Judge Easterbrook has pointed out, this Court itself that has said that “Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him.” Counsel here did not

“deprive the defendant of any substantive or procedural right to which the law entitles him.”²⁷

Representative of those cases finding prejudice upon a showing by the defendant that “there is a reasonable probability that, but for counsel's errors, he would . . . have pleaded guilty and would [not] have insisted on going to trial” are *Williams v Jones*,²⁸ *Magana v Hofbauer*,²⁹ and the present case.³⁰ As is typical, the panel in *Williams v Jones* relied on *Lockhart* as supposedly establishing that an ineffective assistance claim will lie even after a fair trial. As to prejudice, the panel in conclusory fashion stated that “The fact that Mr. Williams subsequently received a fair trial (with a much greater sentence) simply does not vitiate the prejudice from the constitutional violation.”³¹ Though recognizing that this Court has said that the right to effective assistance serves the purpose of protecting the right to a fair trial, the panel pointed also to language that counsel

27. And any argument that one is denied the right to effective assistance by receiving ineffective assistance is circular and invalid; *Fretwell* is discussing the prejudice component, and says that *prejudice* does not exist unless counsel's performance denies the defendant some substantive or procedural right.

28. *Williams v Jones*, 571 F3d 1086 (CA 10, 2009), rehearing en banc denied 583 F3d 1254 (2009).

29. *Magana v Hofbauer*, 263 F3d 542 (CA 6, 2001).

30. *Cooper v Lafler*, 2010 WL 1851348 (CA 6, 2010)(unpublished).

31. *Jones*, at 1091.

“can be ineffective where ‘his mistakes have harmed the defense.’ ...Surely the plea process is part of the defense.”³² When rehearing en banc was denied, several judges replied to the dissent, taking the view, the fallacy of which was discussed previously, that “This case merely presents the converse of *Hill*...”³³

In *Magana* defendant’s counsel mistakenly advised him the most he would receive after a trial conviction was two concurrent sentences, when the sentences were in fact by statute consecutive. Defendant testified that if he had known that, he would have taken the government’s plea offer, and so his trial conviction should be set aside. Relying on *Hill v Lockhart*, the panel agreed. As a “remedy,” the panel ordered that the district court issue a conditional writ mandating that the state either offer the defendant the original plea offer, or, if the state could rebut an unexplained “presumption of vindictiveness,” it could offer a less favorable plea. Retrial was apparently not permitted by the order (“If the state can meet its burden [of rebutting the presumption of vindictiveness], then the parties are free to negotiate a new plea. If the state cannot overcome the presumption and it refuses to reinstate its original offer, then the writ must be granted”).³⁴ The panel in the present case also relied on *Hill v Lockhart*, and gave the back of its hand to the

32. *Jones*, at 1092. Judge Gorsuch dissented; that dissent, and his dissent from the denial of rehearing en banc, will be discussed later.

33. *Williams v Jones (Denying Rehearing En Banc)*, 583 F3d at 1255.

34. *Magana*, at 553.

Warden's argument that there was no prejudice because the defendant received a fair trial, a view it characterized as "myopic."³⁵ As a remedy, the district court had ordered the state to either reinstate the original plea offer or release the defendant, relief which the court of appeals upheld: "Allowing petitioner an opportunity to assess and accept the plea deal, with the competent assistance of counsel, remedies this wrong....A new trial does not."³⁶ After all, said the panel—myopically—"[T]he district court did nothing more than hold the state to a deal the state had previously offered"³⁷—an offer that, as Judge Easterbrook noted in *Springs*, the state could withdraw "on a whim" even after its acceptance by the defendant but before either the plea was taken or some detrimental reliance by performance (such as testifying against a codefendant) had occurred, and which was premised, at least in part, on *saving* the state and the witnesses from the time and expense of a trial, a trial which has now occurred, and was successfully prosecuted by the state. From where comes the authority of the court to "hold" the State to the plea offer, particularly on this state of facts?

The opposite view is perhaps best expressed by Judge Gorsuch's dissent in *Williams v Jones* to both the panel decision and the decision denying rehearing en banc, and in the opinion of the Utah Supreme Court in *State v Greuber*.³⁸ In addition to

35. *Cooper*, at 10.

36. *Cooper*, at 10.

37. *Cooper*, at 10.

38. *State v Greuber*, 165 P3d 1185, 1189 (Utah, 2007).

observing that “no decision from the United States Supreme Court has ever held (or even hinted) that a lawyer’s bad advice to reject a plea officer gives rise to a violation of the Sixth Amendment, or any other provision of federal law,”³⁹ Judge Gorsuch dissenting from the denial of rehearing en banc in *Williams v Jones*, Judge Gorsuch argued that under *Strickland* the defendant must show that his lawyer’s bad advice or deficient performance “prejudice[d] the defendant by infringing some legal *entitlement* due him.”⁴⁰ In his dissent to the panel decision, Judge Gorsuch made the further point that this Court itself has said that the “right ‘to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.’”⁴¹ “Constitutional scrutiny,” then, “is applied only to the procedure that deprives the defendant of his liberty, and ...executory plea bargains do not.”⁴² Moreover, added Judge Gorsuch, it is not possible to restore the parties to the position they had been in by way of remedy, for even if the defendant had accepted a plea offer, “the prosecutor would have been free to withdraw it on a whim. . . . So ordering specific performance of plea agreement would not restore [defendant] to his original position; it would confer on him something he never had to begin with: a *legal entitlement*, as opposed to a *chance*...” to achieve a lesser conviction and sentence,

39. *Jones*, 583 F3d at 1258 (Gorsuch, J. dissenting).

40. 583 F3d at 1259 (emphasis in the original).

41. *Williams v Jones*, 571 F3d at 1099, quoting *United States v Cronin*, 466 US 648, 104 S Ct 2039, 80 L Ed 2d 657 (1984).

42. 571 F3d at 1101.

transforming the plea bargaining process from “an act of executive discretion to one of judicially enforceable right.”⁴³ Precisely so.

In much the same vein is the Utah decision of *State v Grueber*, the Utah Supreme Court finding that once the offer has not been taken, and the defendant has received “his constitutionally guaranteed fair trial, it is impossible to resuscitate the original opportunity,” for the “balance of risks and incentives on both sides that existed prior to trial”⁴⁴ cannot be recreated, and the attempt to do so engaged in here itself violates constitutional principles of separation of powers.⁴⁵

The Court of Appeals has ordered relief that places respondent in his pretrial position, but with a benefit. Where before trial the prosecutor could have withdrawn the plea offer, as Judge Easterbrook has noted, at whim, now the prosecutor is *compelled* by the judiciary to make that executive act, or rebut some showing of vindictiveness⁴⁶ to allow an offer in excess of that originally made (which again, before trial the

43. 571 F3d at 1110.

44. *Id* at 1190.

45. Similarly, see *Bryan v State*, 134 SW3d 795 (Mo.Ct.App. 2004); *Commonwealth v Mahar*, 809 NE2d 989 (2004)(concurring opinion), and *State v Monroe*, 757 So.2d 895 (La.Ct.App.2000).

46. It is not explained why such a presumption arises; in any event, the fact that the State successfully prosecuted the case at trial to conviction would be ground enough to rebut any “presumption.”

prosecutor could have withdrawn at whim), and if that showing is made and the new offer rejected, rather than the conviction being reinstated, as a fair trial was had, it appears a new trial is mandated! This all violates principles of separation of powers. Returning to the pretrial posture—erasing history—is not possible, for that “position” included a position *occupied by the State*—a pretrial posture, where the State was willing to exchange the expense and uncertainty of a trial for a certain conviction, albeit on lesser charges. That ship has sailed, and cannot be recalled. As the Utah Supreme Court pointedly observed in *State v Greuber*,⁴⁷ once the offer has not been taken, and the defendant has received “his constitutionally guaranteed fair trial, it is impossible to resuscitate the original opportunity,” for the “balance of risks and incentives on both sides that existed prior to trial”⁴⁸ cannot be recreated. Moreover,

some courts have required the prosecution to give the defendant the same offer he had before trial, even though the defendant has since been convicted at a fair trial. . . . 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. . . . Further, requiring the state to reoffer after trial a plea bargain it may have made originally to avoid the

47. *State v Greuber*, 165 P3d 1185, 1189 (Utah, 2007).

48. *Id* at 1190

expense and risk of a trial violates separation of powers and basic fairness principles. . . .

In recognition of these difficulties, other courts have instead granted the defendant a new trial. . . . [but] a new trial cannot restore the defendant's "opportunity to plead guilty to lesser charges with lesser sentences." . . . In addition, ordering a new trial may sometimes constitute a thinly veiled attempt to force the prosecution to reinstate the initial offer. . . . *Further, there is no guarantee that the delicate balance of witness availability and evidence will be the same after the first trial as it was at the time of the initial plea offer.* . . . if witnesses and evidence are not available, it is possible that a new trial will result in an acquittal, "a 'remedy' out of all proportion to the damage allegedly done by the ineffective assistance in connection with the earlier plea offer."
. . .

The unavailability of a rational remedy for ineffective assistance of counsel in the rejection of plea offers illustrates the flaws inherent in treating identically defendants who have received fair trials and those who have forgone trials and pled guilty.⁴⁹

49. *State v. Greuber*, 165 P.3d at 1190 -1191 (emphasis supplied).

D. Conclusion

This Court should find that no “effective assistance” inquiry regarding plea negotiations is pertinent after a conviction resulting from a fair trial. An accused has no right to a negotiated plea; in fact a substantial number of defendants never receive offers from the prosecutor. Executive branch prosecuting authorities are not required to make any concessions in order to obtain a guilty plea, and even if they do so, and the defendant accepts the terms, that offer may be withdrawn until such time as the plea has been accepted by the court, or detrimental reliance of a concrete sort—such as the giving of testimony against an accomplice—has occurred.⁵⁰ The decision to charge and the choice of charges are executive decisions, with which the judiciary may not interfere nor superintend. Review of these decisions is not, for example, for abuse of discretion, but only for abuse of power; that is, as to whether the prosecuting authority has exercised its power unconstitutionally by engaging in selective prosecution based on invidious discrimination.⁵¹ And in cases of federal habeas corpus principles of comity are also presented. Foregoing the constitutionally-guaranteed fair trial by admitting guilt and *having* the constitutionally-guaranteed

50. See *Mabry v Johnson*, 467 US 504, 104 SCt 2543, 81 LEd2d 437 (1984).

51. See eg *United States v Palmer*, 3 F3d 300, 305 (CA 9, 1993) (“separation of powers concerns prohibit us from reviewing a prosecutor’s charging decisions absent a prima facie showing that it rested on an impermissible basis, such as gender, race or denial of a constitutional right.” Also *People ex rel Leonard v Papp*, 386 Mich 672, 684 (1972).

fair trial are far different things, as the Utah Supreme Court understood in *Greuber* and Judge Easterbrook in *Springs*.⁵²

The respondent received a fair trial, whatever the performance of his counsel during plea negotiations, and that performance was not deficient. And to vacate his convictions and sentence and require that the State offer a plea it no longer wishes to violate separation of powers principles as well as principles of comity. The Court of Appeals should be reversed.

52. The 10th Circuit has reached the same erroneous conclusion as the Sixth Circuit in *Williams v Jones*, 571 F3d 1086 (CA 10, 2009), over a dissent, rehearing en banc denied *Williams v Jones*, 583 F3d 1254 (CA 10, 2009), over the dissent of four judges. And see, rejecting claims of ineffective assistance in this context, *Bryan v State*, 134 SW2d 795 (Mo.Ct. App, 2004); *State v Monroe*, 757 So.2d 895 (La.Ct.App 2000).

Relief

The People request this Honorable Court
reverse the Court of Appeals.

Respectfully submitted,

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