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The Fairness of a Fair Trial: Not Guilty Pleas and the Right to Effective Assistance of Counsel

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THE FAIRNESS OF A FAIR TRIAL: NOT GUILTY PLEAS AND THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Abstract: The pervasiveness of plea bargaining in our modern justice system has led too many courts to conclude that the Sixth Amendment right to effective assistance of counsel applies to not guilty pleas. This Note argues that, although the United States Supreme Court has never directly addressed this issue, its decisions inform a Sixth Amendment analysis and indicate that the right to effective assistance of counsel is limited to providing the defendant a fair trial. The Court has suggested that a critical stage at which this right attaches must, in contrast to a not guilty plea, affect the fairness of a defendant's trial. It has further indicated that a defendant who receives a fair trial after pleading not guilty cannot establish the constitutional prejudice required to demonstrate ineffective assistance. Finally, the past seventy years of Supreme Court Sixth Amendment jurisprudence supports the conclusion that the gravamen of an ineffective assistance of counsel claim is an assertion that the defendant was denied a fair trial.

Introduction

A defendant is indicted for armed home invasion, armed assault with intent to rob, and assault by means of a dangerous weapon after entering a home and threatening its occupants with a machete.[1] His lawyer incorrectly advises him that he cannot be convicted under the first indictment unless the Commonwealth demonstrates that the persons inside the home did not consent to his entry.[2] The defendant, based on this misinformation, rejects the Commonwealth's proposal to dismiss the armed home invasion charge in exchange for a guilty plea to the other indictments.[3] He is subsequently convicted of all of the above charges at a fair trial.[4] On appeal, the defendant alleges ineffective assistance of counsel.[5]

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[1] Commonwealth v. Mahar, 809 N.E.2d 989, 991 (Mass. 2004).
[2] *See id.* at 992.
[3] *See id.* at 991.
[4] *See id.*
[5] *See id.* at 992.

In 2004, this claim was addressed by the Supreme Judicial Court of Massachusetts in *Commonwealth v. Mahar*.[6] The majority concluded that a defendant is constitutionally entitled to effective counsel during plea negotiations because the decision to accept or reject a plea offer is a critical stage in a criminal proceeding.[7] It further noted that a subsequent fair trial does not remedy the constitutional harm that occurred during the plea bargaining process.[8] The concurring opinion, in contrast, contended that a defendant convicted at a fair trial cannot have been constitutionally prejudiced because a fair trial is all that the Sixth Amendment guarantees.[9] It explained that an ineffective assistance of counsel claim focuses on whether the result of the trial was rendered unreliable by counsel's performance.[10] The opinion therefore concluded that there was nothing fundamentally unfair in imposing the sentence.[11] These opinions illustrate the competing positions on the proper scope of the right to effective assistance of counsel provided by the Sixth Amendment of the U.S. Constitution.[12] Although addressed by numerous jurisdictions, this question remains unresolved.[13]

This Note examines the application of the Sixth Amendment right to effective assistance of counsel to not guilty pleas.[14] It argues that this right should be limited to protecting the defendant's right to a fair trial.[15] Part I analyzes the relevant Sixth Amendment jurisprudence of the U.S. Supreme Court.[16] This provides insight into the proper scope

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[6] *See id.* at 992–96.

[7] *Mahar*, 809 N.E.2d at 992.

[8] *Id.* at 993.

[9] *See id.* at 997–98 (Sosman, J., concurring).

[10] *Id.* at 997. Justice Sosman observed that "[w]hen poor advice or misinformation has caused a defendant to forgo a very favorable plea opportunity, that may strike us as regrettable or unfortunate . . . but it is not the equivalent of an ill-advised waiving of constitutional rights . . . ." *Id.*

[11] *See id.* at 997–98.

[12] *See id.* at 992–96 (majority opinion); *id.* at 997–99 (Sosman, J., concurring). The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

[13] *See, e.g.*, United States v. Gordon, 156 F.3d 376, 379–80 (2d Cir. 1998) (holding that the right to effective assistance of counsel applies to not guilty pleas); State v. Monroe, 757 So. 2d 895, 898 (La. Ct. App. 2000) (concluding that the right to effective assistance of counsel does not apply when a defendant pleads not guilty because the defendant has no vested interest in the enforcement of a plea bargaining contract); State v. Greuber, 165 P.3d 1185, 1188 (Utah 2007) (ruling that a defendant who received a fair trial was not constitutionally prejudiced and cannot succeed on an ineffective assistance claim).

[14] *See infra* notes 24–300 and accompanying text.

[15] *See infra* notes 24–300 and accompanying text.

[16] *See infra* notes 24–130 and accompanying text.

of the right to effective assistance of counsel.[17] Part II explains that the U.S. courts of appeals have unanimously concluded that the right to effective assistance of counsel attaches to not guilty pleas.[18] Part III highlights how the state courts have divided over the proper scope of the right to effective assistance of counsel.[19] Some have determined that the right should be applied to this context.[20] Other courts, in contrast, have held that the scope of the right is limited to providing the defendant a fair trial.[21] Finally, Part IV argues that the gravamen of an ineffective assistance claim is the assertion that the defendant was deprived of the right to a fair trial.[22] This Part concludes that this limitation on the right to effective assistance is supported by the U.S. Supreme Court's Sixth Amendment jurisprudence.[23]

I. The Narrow Interpretation of the Right to Effective Assistance of Counsel

The U.S Supreme Court has never directly addressed the application of the right to effective assistance of counsel to not guilty pleas.[24] The Court's decisions, however, inform an analysis of the Sixth Amendment right to effective assistance of counsel.[25] In 1967, in *United States v. Wade*, the U.S. Supreme Court extended the right to effective assistance of counsel to all "critical stages" of a criminal proceeding.[26] A critical stage was defined as any stage of a criminal proceeding where counsel's absence could derogate from the defendant's right to a fair trial.[27] Similarly, in 1984, the U.S Supreme Court in *Strickland v. Washington* fashioned the standard for demonstrating ineffective assistance of counsel.[28] The Court indicated that the right to effective assistance was tied to as-

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[17] *See infra* notes 24–130 and accompanying text.

[18] *See infra* notes 131–169 and accompanying text.

[19] *See infra* notes 170–210 and accompanying text.

[20] *See, e.g.*, *In re* Alvernaz, 830 P.2d 747, 752–54 (Cal. 1992); Cottle v. State, 733 So. 2d 963, 965–67 (Fla. 1999); People v. Curry, 687 N.E.2d 877, 887–88 (Ill. 1997).

[21] *See, e.g.*, *Monroe*, 757 So. 2d at 898; *State v. Bryan*, 134 S.W.3d 795, 802 (Mo. Ct. App. 2004); *Greuber*, 165 P.3d at 1188–89.

[22] *See infra* notes 211–300 and accompanying text.

[23] *See infra* notes 211–300 and accompanying text.

[24] *See* Arave v. Hoffman, 128 S. Ct. 749, 750 (2008), *vacating as moot* 455 F.3d 926 (9th Cir. 2007).

[25] *See, e.g.*, United States v. Gonzalez-Lopez, 548 U.S. 140, 147 (2006); Strickland v. Washington, 466 U.S. 668, 684–94 (1984); United States v. Wade, 388 U.S. 218, 226 (1967).

[26] 388 U.S. at 224.

[27] *Id.* at 226.

[28] 466 U.S. at 687.

suring the defendant a fair trial.[29] Finally, the past seventy years of the Supreme Court's ineffective assistance jurisprudence implies that a fair trial is all that the Sixth Amendment guarantees.[30]

A. *Critical Stage Analysis*

In 1967, the U.S. Supreme Court in *Wade* articulated the critical stage standard.[31] The defendant in the case was indicted for conspiring to rob, and subsequently robbing, a bank.[32] Two of the bank's employees observed a post-indictment lineup that was conducted in the absence of counsel.[33] Both employees successfully identified the defendant, and he was convicted at trial.[34] The Court observed that no organized police forces existed when the Bill of Rights was adopted.[35] It explained that modern law enforcement machinery, in contrast, involved critical confrontations of the accused at pretrial proceedings.[36] Recognizing that these engagements had the power to render the trial itself meaningless, the Court interpreted the Sixth Amendment right to effective assistance of counsel to apply to all critical stages of a criminal proceeding.[37]

In explaining what constituted a critical stage, the Court held that a defendant could not be made to stand alone against the State at any stage of the prosecution where counsel's absence could derogate from the defendant's right to a fair trial.[38] The Court concluded that the defendant was entitled to counsel during the pretrial lineup because the serious potential for prejudice, which could not be demonstrated at trial, made this confrontation a critical stage in a criminal proceeding.[39]

The Court conceded, however, that the analyses of an accused's fingerprints, blood samples, clothing, and hair did not implicate the critical stage standard.[40] It reasoned that the defendant, following these preparatory steps, retained the opportunity to meaningfully confront the government's case through cross-examination of the government's

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[29] *Id.* at 684–94.

[30] *See, e.g.*, Kimmelman v. Morrison, 477 U.S. 365, 382 (1986); Nix v. Whiteside, 475 U.S. 157, 175 (1986); United States v. Cronic, 466 U.S. 648, 658 (1984).

[31] 388 U.S. at 224.

[32] *Id.* at 220.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 224.

[36] *Id.*

[37] *Wade*, 388 U.S. at 224.

[38] *Id.* at 226.

[39] *See id.* at 236–37.

[40] *Id.* at 227–28.

expert witnesses and the presentation of the defendant's own experts.[41] The Court noted that there was little danger that counsel's absence during these stages would derogate from the defendant's right to a fair trial.[42] It therefore determined that these analyses were not critical stages.[43]

In 1973, the U.S. Supreme Court adopted this position again in *United States v. Ash*.[44] The defendant was indicted for five counts related to the robbery of a bank.[45] Prior to trial, the prosecutor presented five color photographs to the four witnesses who had previously identified a black-and-white photograph of the defendant.[46] Three of these witnesses, in the absence of counsel, again made successful identifications.[47] The defendant contended that he was deprived of the right to counsel at a critical stage of the criminal proceeding.[48] The Court noted that the core purpose of the right to effective assistance of counsel is to provide assistance at trial.[49] It explained that a confrontation ceased to be critical when accurate reconstruction at trial was possible.[50] The Court, therefore, concluded that a photographic identification was not a critical stage because any injustice permitted in counsel's absence was remedied by the opportunity to later review the photographs.[51]

B. *The* Strickland *Test*

In 1984, the U.S. Supreme Court in *Strickland* outlined the standard for overturning criminal convictions arising from ineffective assistance of counsel.[52] The respondent, during a ten-day period, committed three murders and engaged in torture, kidnapping, assault, attempted extortion, and theft.[53] He was sentenced to death for each of the three counts

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[41] *Id.*
[42] *Id.* at 228.
[43] *Wade*, 388 U.S. at 228.
[44] *See* 413 U.S. 300, 309 (1973).
[45] *Id.* at 302–03.
[46] *Id.* at 303.
[47] *Id.*
[48] *Id.*
[49] *Id.* at 309.
[50] *Ash*, 413 U.S. at 316.
[51] *See id.* at 317–19.
[52] *See* 466 U.S. at 687.
[53] *Id.* at 671–72.

of murder and received prison sentences for his additional crimes.[54] The respondent asserted that counsel was ineffective in six respects.[55]

The Supreme Court, in addressing these claims, explained that a defendant who alleged ineffective assistance of counsel must first demonstrate that counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment.[56] This requirement is met when counsel's representation falls below an objective standard of reasonableness.[57] The second prong of the *Strickland* test requires that the defendant establish that the deficient performance prejudiced the defense.[58] The Court stated that it was insufficient for the defendant to show that counsel's mistakes had some conceivable effect on the outcome of the proceeding.[59] It explained that this requirement is met only when it is demonstrated that the defendant was deprived of a fair trial whose outcome is reliable.[60] The Court held that a court examining an ineffective assistance claim need not address both the deficient performance and prejudice components of this inquiry.[61] Specifically, it observed that a court should, if it is easier, dispose of a claim for lack of prejudice without addressing counsel's performance.[62]

In announcing the *Strickland* test, the Court reasoned that the right to counsel existed to protect the fundamental right to a fair trial.[63] It noted that access to an attorney with sufficient skill and knowledge to ensure a fair trial is necessary for the defendant to meet the case of the prosecution.[64] The Court explained that it was for this reason that the right to counsel has been recognized as the right to effective assistance of counsel.[65] It stated, however, that the underlying purpose of the effective assistance guarantee was not to improve legal representation,

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[54] *Id.* at 675.

[55] *See id.* The respondent contended that counsel was ineffective because "he failed to move for a continuance to prepare for sentencing, to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner's reports or cross-examine the medical experts." *Id.*

[56] *Id.* at 687.

[57] *Id.* at 688.

[58] *Strickland*, 466 U.S. at 687.

[59] *Id.* at 693.

[60] *Id.* at 687. The Court noted that a trial was reliable when reliance on its outcome could be justified. *Id.* at 691–92.

[61] *See id.* at 697.

[62] *Id.*

[63] *Id.* at 684.

[64] *Strickland*, 466 U.S. at 685.

[65] *Id.* at 686.

but to ensure that criminal defendants received a fair trial.[66] The Court concluded that the "benchmark for judging any claim of ineffectiveness" is whether counsel's conduct so undermined the adversarial process that the trial cannot be relied on as having produced a just result.[67]

The following year, in *Hill v. Lockhart,* the U.S. Supreme Court addressed the application of the *Strickland* test to ineffective assistance of counsel in plea bargaining.[68] The petitioner pleaded guilty to first-degree murder and property theft.[69] The trial court accepted the plea and sentenced him to concurrent sentences of thirty-five years for the murder and ten years for the theft.[70] The petitioner later alleged that he would not have pled guilty had counsel correctly stated that half of the sentence had to be served before parole would be considered.[71] The Court held that the *Strickland* test for ineffective assistance of counsel applied to challenges to guilty pleas.[72] It noted that although the first prong of the *Strickland* test mandated the standard examination of attorney competence, the determination of prejudice was, in this context, based on whether the defendant demonstrated a reasonable probability that, but for counsel's mistakes, a guilty plea would not have been entered.[73]

The U.S. Supreme Court has not, since the advent of *Strickland,* had the opportunity to determine if a defendant who pled not guilty can successfully bring an ineffective assistance of counsel claim.[74] In 2007, the Court granted a writ of certiorari in *Arave v. Hoffman.*[75] The Court requested that the parties brief an issue that was not presented in the petition.[76] The parties were asked, "What, if any, remedy should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial?"[77] The Court was prevented from considering this matter,

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[66] *See id.* at 689.

[67] *Id.* at 686.

[68] *See* Hill v. Lockhart, 474 U.S. 52, 57 (1985).

[69] *Id.* at 53.

[70] *Id.* at 54.

[71] *Id.* at 55.

[72] *Id.* at 58.

[73] *Id.* at 58–59.

[74] *See Arave*, 128 S. Ct. at 750.

[75] *See* 455 F.2d 926 (9th Cir. 2007), *cert. granted*, 128 S. Ct. 532 (2007) (No. 92-212).

[76] *See Arave*, 128 S. Ct. at 532–33.

[77] *Id.* The petitioner argued that this case provided the Supreme Court with the opportunity to address an important question of constitutional law. Petitioner's Reply Brief at 6, *Arave*, 128 S. Ct. 749 (No. 07-110). He stated that "the Court has never addressed the question of effective assistance associated with recommending a plea offer be rejected, and

however, when the parties agreed to dismiss the case so that the petitioner could proceed with resentencing.[78]

C. *Historic Scope of the Right to Effective Assistance of Counsel*

The U.S. Supreme Court has developed seventy years of ineffective assistance jurisprudence.[79] These decisions suggest that the Sixth Amendment affords a defendant no protection beyond the right to a fair trial.[80]

In 1932, the U.S. Supreme Court in *Powell v. Alabama* considered whether due process concerns compelled it to overturn the defendants' rape convictions.[81] The defendants were not provided sufficient time following their arraignments to secure counsel.[82] Additionally, although this was a capital case, no counsel was designated until the morning of the trial.[83] The Court concluded that a defendant's right to be heard would mean little if it did not encompass the right to be heard by counsel.[84] It noted that without counsel, defendants could be tried on improper charges and convicted on inadmissible evidence.[85]

The Court displayed the same focus in *Johnson v. Zerbst* in 1938.[86] The petitioners were charged with passing and possessing counterfeit currency.[87] They brought a federal habeas corpus claim after being tried, sentenced, and convicted without counsel.[88] The Court explained that the purpose of the right to assistance of counsel is to protect the defendant from a conviction arising from his ignorance of his constitutional rights.[89] It observed that the right embodied an understanding of the obvious truth that the lay defendant, when brought before a tribu-

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has not addressed the issue of effective assistance of counsel in any context of plea offers since *Hill*." *Id.*

[78] *Arave*, 128 S. Ct. at 750.

[79] *See, e.g.*, *Kimmelman*, 477 U.S. at 382; *Nix*, 475 U.S. at 175; *Cronic*, 466 U.S. at 658.

[80] *See, e.g.*, Lockhart v. Fretwell, 506 U.S. 364, 369 (1993); Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Powell v. Alabama, 287 U.S. 45, 69 (1932).

[81] *See* 287 U.S. at 49, 67 (1932).

[82] *Id.* at 53.

[83] *Id.* at 56.

[84] *Id.* at 68–69.

[85] *Id.* at 69. The Supreme Court stated that "[i]t was the duty of the court having their cases in charge to see that they were denied no necessary incident of a *fair trial*." *Id.* at 52 (emphasis added).

[86] 304 U.S. 458, 462–63 (1938).

[87] *Id.* at 459–60.

[88] *Id.* at 460.

[89] *Id.* at 465.

nal, lacked the legal skills needed to combat experienced counsel.[90] The Court therefore reversed the petitioners' convictions.[91]

In 1963, in the seminal case of *Gideon v. Wainwright*, the U.S. Supreme Court held that the Sixth Amendment guarantee to effective assistance of counsel was made obligatory on the states by the Fourteenth Amendment.[92] The petitioner was charged with breaking and entering with the intent to commit a misdemeanor.[93] The trial court denied his request for appointed counsel, and he was subsequently convicted at trial.[94] The Supreme Court observed that common sense dictated that a person haled into court would not be guaranteed a fair trial in the absence of counsel.[95] It stated that, in this country, the right to effective assistance of counsel was deemed fundamental to assuring the defendant a fair trial.[96] The Court therefore ruled that the right to effective counsel applied to the states.[97]

Similarly, in *United States v. Cronic* in 1984, the Court considered the application of the right to effective assistance of counsel when counsel was provided twenty-five days to prepare for a complex mail-fraud trial.[98] The Court reasoned that the right to effective assistance of counsel existed to protect the right of the accused to demand that the prosecution's case survive the crucible of meaningful adversarial confrontation.[99] It explained that when the reliability of the trial process is not challenged, a defendant's right to effective counsel is generally not implicated.[100] The Court stated 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.*"[101] It concluded

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[90] *Id.* at 462–63.

[91] *Id.* at 469. The Court employed the same reasoning, with the opposite outcome, in *Avery v. Alabama* in 1940. 308 U.S. 444, 453 (1940). Counsel was appointed for the defendant three days before his trial for murder. *See id.* at 447. The trial court rejected the motion for continuance made on the ground that there had not been sufficient time to prepare a defense. *See id.* at 447–48. The Court determined that the trial judge conducted a fair trial that safeguarded the defendant's rights. *Id.* at 453. Thus, it held that there was no constitutional violation. *See id.*

[92] *See* 372 U.S. at 342.

[93] *Id.* at 336.

[94] *Id.* at 337.

[95] *Id.* at 344.

[96] *Id.*

[97] *Id.* at 342.

[98] *See* 466 U.S. at 649, 658.

[99] *See id.* at 656.

[100] *Id.* at 658.

[101] *Id.* (emphasis added).

that the right to effective counsel did not attach because no specific breakdown of the adversarial process at trial was indicated.[102]

The Court again addressed the scope of this right in *Nix v. Whiteside* in 1986.[103] The petitioner was charged with murder.[104] He subsequently informed counsel that he planned to testify, falsely, that the victim had been holding a gun.[105] This proposed testimony was never offered, however, because counsel stated that he would inform the court of the lie and withdraw from representation.[106] The petitioner asserted that his right to effective assistance of counsel was violated when he was prevented from committing perjury.[107] The Court noted that, pursuant to its holding in *Strickland,* the benchmark of an ineffective assistance of counsel claim is the fairness of the adversary proceeding.[108] It concluded that the petitioner failed to establish constitutional prejudice because the confidence in the reliability of his trial was not diminished when he was prohibited from offering false testimony.[109]

The Court underscored this position later in 1986 in *Kimmelman v. Morrison.*[110] The respondent was convicted of rape after counsel, under the misapprehension that the State was obligated to fully inform him of its case, conducted no discovery.[111] In addressing this issue, the Court distinguished claims brought under the Fourth Amendment from those brought under the Sixth Amendment.[112] Specifically, it observed that the Fourth Amendment is not a trial right.[113] The Court reasoned that the essence of the right to effective assistance of counsel, in contrast, is that counsel's errors upset the adversarial balance between the defense and the prosecution.[114] This imbalance, it explained, yielded an unfair trial with a suspect verdict.[115] The Court concluded that only

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[102] *See id.* at 658, 666.

[103] *See* 475 U.S. at 175.

[104] *Id.* at 160.

[105] *See id.* at 161.

[106] *Id.*

[107] *See id.* at 162.

[108] *Id.* at 175; *see Strickland*, 466 U.S. at 686 (1984).

[109] *See Nix*, 475 U.S. at 175. Justice Blackmun stated that the "touchstone of a claim of prejudice" is the allegation that counsel affected the fairness and reliability of the defendant's trial. *Id.* at 184 (Blackmun, J., concurring).

[110] 477 U.S. at 374–75, 382.

[111] *Id.* at 368–69.

[112] *See id.* at 374–75.

[113] *Id.* at 374.

[114] *Id.*

[115] *Id.*

defendants who demonstrate that their counsel's ineffectiveness deprived them of fair trials are entitled to retrials.[116]

The Court addressed this issue again in *Lockhart v. Fretwell* in 1993.[117] The defendant was convicted of capital felony murder.[118] He contended that counsel was ineffective because he failed to object to a sentence based on an aggravating factor that duplicated an element of his murder conviction.[119] The Court noted that a defendant, pursuant to *Strickland,* is required to demonstrate that counsel's errors made the trial's outcome unreliable or fundamentally unfair.[120] It explained that an outcome-determination analysis that asked only if the outcome would have been different was therefore incorrect.[121] The Court held that the proceedings were not unreliable because the defendant, in receiving a fair trial, was not deprived of any procedural or substantive rights.[122] It thus ruled that the right to effective assistance of counsel was inapplicable.[123]

Finally, the Court addressed the scope of the right to effective assistance of counsel in *United States v. Gonzalez-Lopez* in 2006.[124] The defendant was charged with conspiracy to distribute marijuana.[125] The trial court repeatedly denied the defendant's chosen lawyer's motions for admission on the ground that, in a previous case, the lawyer had improperly communicated with a represented party.[126] The defendant, represented by a different lawyer, was subsequently convicted at trial.[127] The Court noted that, unlike the right to select counsel, the right to effective counsel derived from the Sixth Amendment's objective of providing the defendant a fair trial.[128] The Court stated that the limits of

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[116] *Kimmelman*, 477 U.S. at 382. Justice Powell expressed the view that "the right to effective assistance of counsel is personal to the defendant, and is explicitly tied to the defendant's right to a fundamentally fair trial . . . ." *Id.* at 392–93 (Powell, J., concurring).

[117] *See* 506 U.S. at 366.

[118] *Id.*

[119] *See id.* at 367.

[120] *Id.* at 369.

[121] *Id.* at 369–70. The Supreme Court reasoned, "To set aside a conviction or sentence solely because the outcome would have been different but for counsel's errors *may grant the defendant a windfall to which the law does not entitle him.*" *Id.* (emphasis added).

[122] *See id.* at 372.

[123] *See Lockhart*, 506 U.S. at 366. *See generally* Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. Rev. 1069 (2009) (discussing the legal standards for asserting a claim of ineffective assistance of counsel at sentencing).

[124] *See* 548 U.S. at 147.

[125] *Id.* at 142.

[126] *Id.* at 143.

[127] *See id.*

[128] *See id.* at 147.

the right to effective assistance derived from this same purpose.[129] It therefore ruled that the scope of the right to effective assistance of counsel was limited to protecting the defendant's right to a fair trial.[130]

II. Federal Courts' Broad Interpretation of the Right to Effective Assistance of Counsel

The U.S. courts of appeals that have squarely addressed this issue have held that the right to effective assistance of counsel does attach to not guilty pleas.[131] These courts have concluded that the right to effective counsel is implicated by the decision to plead not guilty because it is a critical stage in a criminal proceeding.[132] They have also held that the injuries inflicted by counsel satisfy the prejudice prong of the test for ineffective assistance outlined by the U.S. Supreme Court in *Strickland v. Washington* in 1984.[133] The most illustrative cases are described below.[134]

A. *The Cases Extending the Right to Effective Assistance of Counsel to Not Guilty Pleas*

In 1982, the U.S. Court of Appeals for the Third Circuit rejected the contention in *United States ex. rel. Caruso v. Zelinsky* that because the defendant received a fair trial, he was not entitled to a habeas remedy

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[129] *Id.*

[130] *See Gonzalez-Lopez*, 548 U.S. at 147.

[131] *See, e.g.*, United States v. Day, 969 F.2d 39, 44–45 (3d Cir. 1992); 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). Every circuit of the U.S. courts of appeals of general jurisdiction has, if only in dicta, addressed the application of the right to effective assistance of counsel to not guilty pleas. *See, e.g.*, United States v. Carter, 130 F.3d 1432, 1442 (10th Cir. 1997) (ruling that a defendant who pled not guilty can establish constitutional prejudice by demonstrating that counsel's performance fell below an objective standard of reasonableness and that there was a reasonable probability that the defendant would have accepted the plea offer); Coulter v. Herring, 60 F.3d 1499, 1503–04 (11th Cir. 1995) (holding that the decision of the U.S. Supreme Court to apply the right to effective assistance to guilty pleas also extends to not guilty pleas (citing Hill v. Lockhart, 474 U.S. 52, 58 (1985))); United States v. Rodriguez Rodriguez, 929 F.2d 747, 753 & n.1 (1st Cir. 1991) (explaining, in dictum, that "the fact that a defendant, after rejecting a guilty plea, still receives all the constitutional protections of trial does not preclude an attack on Sixth Amendment grounds").

[132] *See, e.g.*, Nunes v. Mueller, 350 F.3d 1045, 1052–53 (9th Cir. 2003); United States v. Gordon, 156 F.3d 376, 379–80 (2d Cir. 1998); *Zelinsky*, 689 F.2d at 438.

[133] *See* Strickland v. Washington, 466 U.S. 668, 687 (1984); *see also, e.g.*, *Gordon*, 156 F.3d at 379–80; Turner v. Tennessee, 858 F.2d 1201, 1206 (6th Cir. 1988); *Duckworth*, 793 F.2d at 902.

[134] *See infra* notes 135–159 and accompanying text.

for ineffective assistance of counsel.[135] In deeming this argument "untenable," the court first observed that the decision to reject a plea offer and plead not guilty is a critical stage of the criminal process at which the right to effective counsel attaches.[136] It then explained that the failure by defense counsel to communicate a plea offer prejudiced the defendant by depriving him of the opportunity to plead guilty in exchange for a lesser sentence.[137] The court held that a subsequent fair trial did not remedy this deprivation.[138]

In 2003, the U.S. Court of Appeals for the Ninth Circuit addressed this issue in *Nunes v. Mueller*.[139] The respondent had sought federal habeas corpus relief following his conviction for second-degree murder.[140] His claim alleged that, but for counsel's failure to fully communicate the terms of the government's plea offer, he would have pled guilty.[141] The petitioner argued that the constitutional injury inflicted by ineffective counsel during plea bargaining was limited to situations where the defendant pled guilty and surrendered the right to a fair trial.[142] The court noted, however, that it had long been understood that criminal defendants are entitled to effective counsel during all critical stages of the criminal process.[143] The Ninth Circuit reasoned that this included plea bargain negotiations because the time between the arraignment and the beginning of trial is one of the most critical periods of a criminal pro-

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[135] *See* 689 F.2d at 438.

[136] *See id.*

[137] *Id.*

[138] *Id.* The U.S. Court of Appeals for the Third Circuit, recognizing that this ruling predated the holding of the U.S. Supreme Court in *Strickland*, reaffirmed its decision in 1992 in *United States v. Day*. *See Day*, 969 F.2d at 44–45. The defendant alleged that trial counsel neglected to explain that he could be classified as a career offender. *Day*, 969 F.2d at 42. Defendant further argued that he would have accepted the government's plea offer had counsel informed him of his actual sentencing exposure. *Id.* The district court found that the second prong of the *Strickland* test was not satisfied because a defendant who receives a fair trial cannot suffer prejudice. *Id.* at 44. The Third Circuit conceded that the argument for limiting the scope of the right to effective assistance of counsel to providing the defendant a fair trial was forceful, but cited *Zelinksy* in rejecting it. *Id.* The court also referred to the prejudice standard articulated in *Strickland* when noting that the defendant was required to demonstrate a "'reasonable probability that, but for counsel's unprofessional errors, the results would have been different.'" *Id.* at 42 (quoting *Strickland*, 466 U.S. at 694). It concluded that the Sixth Amendment right to effective counsel included more than the Fifth Amendment right to a fair trial. *Id.* at 45.

[139] *See* 350 F.3d at 1052–53.

[140] *See id.* at 1050.

[141] *See id.*

[142] *See id.* at 1052.

[143] *Id.* at 1052–53.

ceeding.[144] The court, therefore, concluded that it was counsel's duty to fully convey the plea offer, and that the respondent was constitutionally harmed when deprived of the right to participate in the plea decision.[145]

Additionally, the U.S. Court of Appeals for the Seventh Circuit in *Johnson v. Duckworth*, in 1986, considered counsel's failure to permit the defendant to make the final decision regarding the disposition of a plea offer.[146] The petitioner argued that the decision to reject a plea offer was the flip side of the decision to plead guilty.[147] In his view it followed, *a fortiori,* that his rights were violated when counsel rejected a plea offer without prior consultation.[148] The court, however, rejected this unrefined analysis.[149] It noted that there is a vast difference between accepting and rejecting a plea agreement because while rejection results in the defendant receiving a fair trial, a defendant who accepts a plea offer waives this right.[150] Despite this conclusion, the Seventh Circuit held that to establish prejudice, a "'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"[151] The court therefore followed the reasoning of the Third Circuit in *Zelinsky*.[152] It held that counsel's failure to involve the defendant in the decision-making process during plea bargain negotiations constituted a violation of the Sixth Amendment.[153]

Finally, the U.S. Court of Appeals for the Second Circuit in *United States v. Gordon* in 1998 considered the application of the right to effec-

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[144] *See id.*

[145] *See Nunes*, 350 F.3d at 1053.

[146] 793 F.2d at 899.

[147] *Id.* at 900.

[148] *Id.*

[149] *See id.* 900–01.

[150] *Id.* at 900.

[151] *Id.* (quoting *Strickland*, 466 U.S. at 694).

[152] *See Duckworth*, 793 F.2d at 901; *see also Zelinsky*, 689 F.2d at 438

[153] *Duckworth*, 793 F.2d at 902. Similarly, in 1988, the U.S. Court of Appeals for the Sixth Circuit in *Turner v. Tennessee* held that the right to effective assistance of counsel applied to not guilty pleas. *See* 858 F.2d at 1205. The petitioner brought a federal habeas corpus petition on the ground that he received ineffective assistance when counsel advised him to reject a proposed plea bargain. *See id.* at 1203. The court stated that to establish prejudice, a "'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 1206 (quoting *Strickland*, 466 U.S. at 694). Applying this definition, the court reasoned that although neither the Supreme Court nor the Sixth Circuit had ever ruled on this point, the decision "to reject a plea offer" fell within the ambit of the Sixth Amendment. *See id.* at 1205.

tive assistance of counsel to not guilty pleas.[154] The defendant argued that counsel persuaded him to reject a plea offer by informing him that, if he proceeded to trial, the maximum sentence that could be imposed was ten years.[155] The court observed that the defendant's right to effective counsel attaches at all critical stages in the proceedings.[156] It stated that plea negotiations are included because the decision to contest a criminal charge can be the most important decision in a criminal case.[157] The Second Circuit then determined that the defendant's reliance on counsel's advice affected his decision to stand trial.[158] The court, therefore, held that counsel's conduct satisfied the prejudice standard articulated in *Strickland* that there be a reasonable probability that, but for counsel's unprofessional conduct, the outcome of the proceeding would have been different.[159]

B. *The Policy Argument for Extending the Right to Effective Assistance of Counsel to Not Guilty Pleas*

The implicit policy concern underlying courts' decisions to apply the right to effective assistance of counsel to not guilty pleas is that plea bargaining is an essential component of the administration of justice.[160] The potential application of the right to effective assistance of counsel to not guilty pleas has risen to prominence because of the prevalence of plea bargaining in our modern justice system.[161] Many commentators argue that plea negotiations are one of the most important features of

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[154] *See* 156 F.3d at 380.

[155] *See id.* at 377.

[156] *Id.* at 379.

[157] *See id.* at 380.

[158] *See id.*

[159] *See id.* at 379–81.

[160] *See* Santobello v. New York, 404 U.S. 257, 260 (1971). The Court stated:

> The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

Id.

[161] *See* Tara Harrison, *The Pendulum of Justice: Analyzing the Indigent Defendant's Right to the Effective Assistance of Counsel When Pleading Not Guilty at the Plea Bargaining Stage*, 2006 UTAH L. REV. 1185, 1194–95; Todd R. Falzone, Note, *Ineffective Assistance of Counsel: A Plea Bargain Lost*, 28 CAL. W. L. REV. 431, 452 (1992); Stephen G. Valdes, Note, *Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations*, 153 U. PA. L. REV. 1709, 1732–33 (2005).

criminal law.[162] This contention is based on findings that although plea bargaining was practically nonexistent when the Sixth Amendment was drafted, judges are now presented with plea agreements in over ninety percent of the cases before them.[163] For example, in 2002, ninety-five percent of felony convictions in state courts and ninety-six percent of felony convictions in the federal system were obtained through guilty pleas.[164] Some critics have asserted that because most statistical analyses only include the cases in which the defendant actually pled guilty, it is probable that a plea bargain is offered in almost every criminal case.[165]

To explain the pervasiveness of plea bargaining, commentators point to crowded court dockets, pretrial detention practices, the poor quality of public defenders, financial incentives, incompetent judges, and better trained prosecutors and police.[166] They have concluded, in short, that plea bargaining has proven useful because it allows large quantities of cases to be quickly resolved.[167] Critics argue that given this context, it is vital that the right to effective assistance of counsel be extended to not guilty pleas.[168] This conclusion is based on the view that the plea bargaining process is only fair when both sides have adequate knowledge and experience.[169]

III. A Patchwork of Decisions: Division in the State Courts

The state courts are divided over the application of the Sixth Amendment right to effective assistance of counsel to not guilty pleas.[170] The courts that invoke the right stand in opposition to those that conclude that the right is limited to providing the defendant a fair

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[162] *See* Valdes, *supra* note 161, at 1732.

[163] *See* Harrison, *supra* note 161, at 1194.

[164] *Id.*

[165] Falzone, *supra* note 161, at 452.

[166] Harrison, *supra* note 161, at 1194–95.

[167] *Id.* at 1195.

[168] *Id.* at 1207–08.

[169] *See id.* at 1206.

[170] *See, e.g.*, People v. Curry, 687 N.E.2d 877, 882 (Ill. 1997) (holding that the right to effective assistance attaches to not guilty pleas); State v. Monroe, 757 So. 2d 895, 898 (La. Ct. App. 2000) (concluding that the right to effective assistance of counsel was not implicated because a defendant who pleads not guilty has no vested interest in the enforcement of a plea bargaining contract); State v. Bryan, 134 S.W.3d 795, 802 (Mo. Ct. App. 2004) (ruling that the right to effective assistance does not attach to not guilty pleas because the trial process is not impacted).

trial.[171] The cases discussed below further develop the substantive arguments behind both positions.[172]

A. *Applying the Right to Effective Assistance of Counsel*

The seminal state case supporting the application of the right to effective assistance of counsel to not guilty pleas was decided by the Supreme Court of California in 1992 in *In re Alvernaz*.[173] The court rejected the appellate court's conclusion that because the defendant received a fair trial, he could not be constitutionally prejudiced.[174] It first noted that plea bargaining is an integral component of our justice system that has been deemed a critical stage in the criminal process.[175] From this conclusion, the court held that both alternatives available to a defendant, pleading guilty and pleading not guilty, required the same attorney-client interaction and invoked the same professional obligations.[176] It therefore determined that the application of the right to effective assistance of counsel to guilty pleas encompassed the decision to reject a plea.[177]

The court also reasoned that the position that a fair trial remedies ineffective assistance of counsel during plea bargaining disregarded the defendant's specific constitutional injury.[178] It explained that the defendant's argument did not relate to his defense at trial, but to the ineffec-

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[171] *See, e.g.*, *In re* Alvernaz, 830 P.2d 747, 749 (Cal. 1992) ("[W]e conclude . . . that when a defendant demonstrates that ineffective representation . . . caused him or her to proceed to trial . . . the defendant has been deprived of the effective assistance of counsel . . . ."); State v. Greuber, 165 P.3d 1185, 1189 (Utah 2007) ("Greuber . . . 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.").

[172] *See infra* notes 173–210 and accompanying text.

[173] *See* 830 P.2d 747. It should be noted that on issues of federal law, the decisions of the U.S. courts of appeals are not binding authority in the states in which they reside. *See* People v. Leonard, 157 P.3d 973, 1008 (Cal. 2007) (concluding that a decision of the U.S. Court of Appeals for the Ninth Circuit was not binding on the Supreme Court of California).

[174] *See Alvernaz*, 830 P.2d at 749, 752.

[175] *See id.* at 752–53. Many state cases cite the U.S. Supreme Court's decision in *Hill v. Lockhart* in 1985 as dispositive of the question of whether the right to effective assistance of counsel extends to not guilty pleas. *See* Hill v. Lockhart, 474 U.S. 52, 57 (1985); *see also, e.g.*, Cottle v. State, 733 So. 2d 963, 965 (Fla. 1999). *Hill*, properly interpreted, stands only for the proposition that the decision *to plead guilty* is a critical stage in a criminal proceeding. *See* 474 U.S. at 58.

[176] *Alvernaz*, 830 P.2d at 753–54.

[177] *See id.* at 754.

[178] *Id.*

tive counsel that prevented him from avoiding trial in the first place.[179] The court further concluded that were it to adopt the ruling of the appellate court, it would not only deprive the defendant a remedy for his specific constitutional injury, but also gravely undermine the plea bargaining process.[180] Specifically, it stated that only providing constitutional protection to guilty pleas would engender skewed, asymmetrical results.[181] For these reasons, the court overruled the conclusion of the appellate court.[182]

In 1997, the Illinois Supreme Court addressed this same issue in *People v. Curry*.[183] The defendant asserted that counsel mistakenly advised him that he would face a maximum penalty of four-year concurrent sentences at trial.[184] The court observed that it is well established that the right to effective assistance of counsel attaches to not guilty pleas.[185] It rejected the State's argument that the defendant could not demonstrate prejudice because he had no constitutional right to be offered the opportunity to plea bargain.[186] The court conceded that there is no such constitutional right, but noted that the State opted to engage in plea bargain negotiations.[187] It reasoned that having received a plea offer, the defendant was only required to show a reasonable

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[179] *Id.*

[180] *Id.*

[181] *Id.* The Supreme Court of California explained that "'[l]ike the character in the short story, criminal defendants facing this choice under asymmetrical constitutional protection may begin to see one alternative as the lady and the other as the tiger.'" *Id.* (quoting Turner v. Tennessee, 664 F. Supp. 1113, 1120 (M.D. Tenn. 1987).

[182] *See Alvernaz*, 830 P.2d at749.

[183] *See* 687 N.E.2d at 882.

[184] *Id.* at 881.

[185] *Id.* at 882. The Illinois Supreme Court, in noting that the application of the right to effective assistance of counsel was "well established," cited numerous federal and state court decisions. *See id.*; *see also, e.g.*, Toro v. Fairman, 940 F.2d 1065, 1067 (7th Cir. 1991); Beckham v. Wainwright, 639 F.2d 262, 265–67 (5th Cir. 1981); Larson v. State, 766 P.2d 261, 263 (Nev. 1988). The less-cited holdings, however, largely restate the reasoning used by the courts discussed in this Note that have extended the right to effective assistance to not guilty pleas. *Toro*, for example, relies on the conclusions of the Seventh Circuit in *Johnson v. Duckworth* and the Third Circuit in *United States ex. rel. Caruso v. Zelinsky*. *See Toro*, 940 F.2d at 1067; Johnson v. Duckworth, 793 F.2d 898, 900–02 (7th Cir. 1986); United States *ex. rel.* Caruso v. Zelinsky, 689 F.2d 435, 438 (3d Cir. 1982). The salient point is that no arguments emerge from these cases that are not already addressed in this Note. *See, e.g.*, *Larson*, 766 P.2d at 263 (applying the *Strickland* test in holding that counsel provided ineffective assistance when it successfully urged the defendant to plead not guilty).

[186] *Curry*, 687 N.E.2d at 887–88.

[187] *Id.* at 888.

probability that, but for counsel's advice regarding potential sentencing, the result of the proceeding would have been different.[188]

The Florida Supreme Court reached the same conclusion in *Cottle v. State* in 1999.[189] The defendant contended that counsel failed to inform him that a plea offer had been extended.[190] The court observed that the analysis outlined by the U.S. Supreme Court in *Strickland v. Washington* in 1984 extended to the plea bargaining process because it is a critical stage in criminal adjudication.[191] It noted that to establish prejudice under *Strickland,* it is customarily required to show that counsel's errors were sufficiently serious to deprive the defendant of a fair trial.[192] The court, however, gave short shrift to the notion that ineffective assistance of counsel during plea bargaining was remedied by a subsequent fair trial.[193] It held, instead, that when counsel failed to notify a defendant of a plea offer, the defendant was only required to demonstrate a reasonable probability that the offer would have been accepted.[194]

B. *Limiting the Right to Effective Assistance of Counsel*

Recent decisions in several states have limited the scope of the right to effective assistance of counsel to protecting the defendant's right to a fair trial.[195] In 2000, the Louisiana Court of Appeal ruled in *State v. Monroe* that a defendant preserved all of his legal safeguards when he pled not guilty after counsel misrepresented the maximum sentence that could be imposed at trial.[196] In explaining that only guilty pleas implicate the Constitution, the court compared the plea bargaining process to a contract.[197] It observed that plea agreements are constitutional contracts.[198] Although a party to the contract has a vested interest in its enforcement, a party who rejects the contract through a not guilty plea has no such vested interest.[199] The court concluded that unlike a defendant

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[188] *Id.* at 887–88.
[189] *See* 733 So. 2d at 967.
[190] *See id.* at 964.
[191] *Id.* at 965; *see* Strickland v. Washington, 466 U.S. 668, 687 (1984).
[192] *Cottle*, 733 So. 2d at 966–67.
[193] *See id.* at 967.
[194] *Id.*
[195] *See Monroe*, 757 So. 2d at 898; *Bryan*, 134 S.W.3d at 802; *Greuber*, 165 P.3d at 1188.
[196] *See* 757 So. 2d at 897–98.
[197] *See id.* at 898.
[198] *Id.*
[199] *Id.*

who pled guilty, the defendant here preserved all of his constitutional rights, including his chance of being found not guilty.[200]

In 2004, the Missouri Court of Appeals adopted the same position in *State v. Bryan*.[201] The defendant claimed that during the plea bargaining process, counsel failed to advise him that he did not have an adequate defense to kidnapping and sodomy charges.[202] The court found this error constitutionally insignificant because the reliability of the final judgment entered against the defendant was unaffected.[203] It noted that "[o]ne fair trial is all the Constitution requires."[204] The court concluded that the Sixth Amendment guarantee to effective assistance of counsel does not attach unless counsel's conduct impacts the trial process.[205]

In 2007, the Utah Supreme Court addressed the application of the right to effective assistance of counsel to not guilty pleas in *State v. Greuber*.[206] The defendant claimed that counsel was constitutionally ineffective because it failed to listen to recordings indicating that the defense's planned impeachment strategy was contrary to the evidence.[207] The court, however, reasoned that the right to effective assistance of counsel is not recognized for its own sake, but for the effect that counsel has on the defendant's ability to receive a fair trial.[208] The court, therefore, determined that because he received a fair trial, the defendant was precluded from demonstrating the constitutional prejudice necessary to satisfy the *Strickland* test.[209] In justifying this decision, the court explained that a fair trial is the fundamental right that the Sixth Amendment is intended to protect.[210]

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[200] *Id.*
[201] *See* 134 S.W.3d at 802.
[202] *Id.* at 801.
[203] *See id.* at 802–03.
[204] *Id.* at 803–04.
[205] *See id.* at 802.
[206] *See* 165 P.3d at 1188.
[207] *Id.* at 1187.
[208] *Id.* at 1188–89.
[209] *See id.* at 1189.
[210] *Id.*

IV. The Case for a Narrow Interpretation of the Right to Effective Assistance of Counsel

It is evident that two reasonable interpretations of the proper scope of the right to effective assistance of counsel exist.[211] Equally clear, however, is the need for a standard to be in accord with the implied position of the U.S. Supreme Court.[212] The Court's decisions inform a Sixth Amendment analysis and suggest that the right to effective assistance is limited to providing the defendant a fair trial.[213] The Court has indicated that a critical stage at which the right to effective assistance attaches must, unlike a not guilty plea, affect the fairness of the defendant's trial.[214] The U.S. Supreme Court's analysis in *Strickland v. Washington* in 1984, moreover, suggests that a defendant who receives a fair trial after entering a not guilty plea cannot establish the constitutional prejudice needed to succeed on a claim of ineffective assistance.[215] Finally, the Supreme Court has developed seventy years of Sixth Amendment jurisprudence.[216] These decisions support the conclusion that the gravamen of an ineffective assistance of counsel claim is the assertion that the defendant was deprived of a fair trial.[217]

A. *The Critical Stage Analysis: Limited to Fair Trials*

Most courts that have applied the right to effective assistance of counsel to not guilty pleas have explicitly observed that the plea-bargaining process is a critical stage at which the defendant is entitled to effective counsel.[218] This conclusion is based on the 1967 holding of the U.S. Supreme Court in *United States v. Wade*, which extended the right to effective assistance of counsel to all critical stages of a criminal

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[211] *See, e.g.*, United States v. Gordon, 156 F.3d 376, 379–80 (2d Cir. 1998); State v. Monroe, 757 So. 2d 895, 898 (La. Ct. App. 2000); State v. Greuber, 165 P.3d 1185, 1188 (Utah 2007).

[212] *See e.g.*, United States v. Gonzalez-Lopez, 548 U.S. 140, 147 (2006); Strickland v. Washington, 466 U.S. 668, 684–94 (1984); Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[213] *See, e.g.*, Kimmelman v. Morrison, 477 U.S. 365, 374 (1986) ("The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.").

[214] *See* United States v. Wade, 388 U.S. 218, 226 (1967).

[215] *See* 466 U.S. at 684–94.

[216] *See, e.g.*, *Kimmelman*, 477 U.S. at 382; Nix v. Whiteside, 475 U.S. 157, 175 (1986); United States v. Cronic, 466 U.S. 648, 658 (1984).

[217] *See, e.g.*, *Gideon*, 372 U.S. at 344 ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.").

[218] *See, e.g.*, Nunes v. Mueller, 350 F.3d 1045, 1052–53 (9th Cir. 2003); United States *ex. rel.* Caruso v. Zelinksy, 689 F.2d 435, 438 (3d Cir. 1982); *In re* Alvernaz, 830 P.2d 747, 753 (Cal. 1992).

proceeding.[219] The Court, however, has never ruled that the decision to plead not guilty constitutes a critical stage.[220]

In *Wade,* the Court expressly outlined the limits of what could be considered a critical stage.[221] The Court stated that the analyses of fingerprints, blood samples, hair, and clothing were not critical stages because there was "minimal risk" that counsel's absence could derogate from the defendant's right to a fair trial.[222] Similarly, in *United States v. Ash* in 1973, the Court concluded that the right to effective assistance of counsel did not attach during a post-indictment photographic display.[223] It reasoned that this was not a critical stage because accurate reconstruction at trial remedied any potential defects.[224]

It follows that the decision to plead not guilty does not constitute a critical stage.[225] The confrontations in *Wade* and *Ash* that were not considered critical stages were unlikely to affect a defendant's subsequent trial.[226] The decision to plead not guilty, similarly, cannot derogate from the defendant's right to a fair trial.[227] This decision actually has the contrary effect of assuring that a defendant, instead of pleading guilty, proceeds forward to a fair trial.[228] It therefore provides an even more compelling reason not to be considered a critical stage.[229]

The U.S. Court of Appeals for the Third Circuit overlooked this point in 1982 in *United States ex. rel Caruso v. Zelinsky.*[230] In concluding that the decision to reject a plea offer and plead not guilty constituted a critical stage, the court ignored the fact that this action did not deprive the defendant of a fair trial.[231] The U.S. Court of Appeals for the Ninth Circuit reasoned in *Nunes v. Mueller* in 2003 that the decision to plead

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[219] *See* 388 U.S. at 224.

[220] *See* Iowa v. Tovar, 541 U.S. 77, 81 (2004). The Court concluded only that "[t]he *entry of a guilty plea*, whether to a misdemeanor or a felony charge, ranks as a 'critical stage' at which the right to counsel adheres." *Id.* (emphasis added).

[221] *See* 388 U.S. at 227–28.

[222] *Id.*

[223] *See* 413 U.S. 300, 321 (1973).

[224] *See id.* at 319.

[225] *See id.*

[226] *Id.*; *Wade*, 388 U.S. at 227–28.

[227] *See Ash*, 413 U.S. at 319; *Wade*, 388 U.S. at 227–28.

[228] *See* Garcia v. State, 736 So. 2d 89, 91 (Fla. Dist. Ct. App. 1999) (Gross, J., concurring specially) ("[A] defendant whose guilt is determined after a fair trial conducted with all the guarantees of the Constitution, has not suffered a deprivation, even where his lawyer's conduct prevented him from negotiating or accepting a better deal. . . . [H]is guilt has been established in the manner envisioned by the drafters of the Constitution.").

[229] *See Ash*, 413 U.S. at 319; *Wade*, 388 U.S. at 227–28.

[230] *See* 689 F.2d at 438.

[231] *See id.*

not guilty was a critical stage because the time between a defendant's arraignment and the start of trial can be the most important period of a criminal proceeding.[232] The court failed to recognize *why* this period was considered so decisive.[233] This part of a criminal proceeding is deemed crucial because much of what transpires can derogate from the defendant's right to a fair trial.[234] The entry of a not guilty plea, however, has no effect on the fairness of a defendant's subsequent trial.[235]

Finally, the U.S. Court of Appeals for the Second Circuit in *United States v. Gordon* in 1998 determined that the entry of a not guilty plea was a critical stage because the decision to plead guilty or challenge a criminal charge was the most important decision of a criminal proceeding.[236] The court failed to recognize that guilty and not guilty pleas have distinct ramifications.[237] The decision to enter a guilty plea is the most important decision of a criminal case because the defendant sacrifices his constitutional right to a fair trial.[238] The decision to plead not guilty, in contrast, preserves this right and is therefore less significant.[239]

B. *A Fair Trial Precludes a Finding of Constitutional Prejudice*

The courts that have determined that the right to effective assistance of counsel attaches to not guilty pleas almost universally have

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[232] 350 F.3d at 1052–53. The court further held that the U.S. Supreme Court in *Hill v. Lockhart* "applied that right (and the corresponding *Strickland* analysis) 'to ineffective-assistance claims arising out of plea process.'" *Id.* at 1052 (quoting Hill v. Lockhart, 474 U.S. 52, 57 (1985)). The Ninth Circuit misinterpreted *Hill*, however, because that case only applied the critical stage analysis to ineffective assistance claims arising from *guilty pleas. See Hill*, 474 U.S. at 58.

[233] *See Nunes*, 350 F.3d at 1052–53.

[234] *See id.*

[235] *See id.*

[236] *See* 156 F.3d at 379–80.

[237] *See id.*

[238] *See, e.g.*, Johnson v. Duckworth, 793 F.2d 898, 900 (7th Cir. 1986) (holding that a defendant who pleads guilty waives constitutional protections like the right to trial by jury).

[239] *See id.* ("The rejection of a plea agreement . . . will result in the defendant going to trial with all of the concomitant constitutional safeguards that are part and parcel of our judicial process."). Other courts, in determining that the decision to plead not guilty constitutes a critical stage, have also discounted the fact that this decision cannot derogate from a defendant's right to a fair trial. *See Alvernaz*, 830 P.3d at 753; Cottle v. State, 733 So. 2d 963, 965 (Fla. 1999). In *Cottle v. State*, the Florida Supreme Court held that the plea process is "a critical stage in criminal adjudication, which warrants the same constitutional guarantee of effective assistance as trial proceedings." 733 So. 2d at 965. In 1992, the Supreme Court of California in *In re Alvernaz* ruled that "[t]he pleading-and plea bargaining-stage of a criminal proceeding is a critical stage in the criminal process at which a defendant is entitled to the effective assistance of counsel guaranteed by the federal and California Constitutions." 830 P.3d at 753.

cited a single passage from the holding of the U.S. Supreme Court in *Strickland v. Washington* in 1984.[240] The passage states that to establish constitutional prejudice, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[241] This statement, however, cannot be read in isolation.[242]

The Court began its analysis by observing that the Sixth Amendment exists to protect the fundamental right to a fair trial.[243] It then outlined the standard for overturning criminal convictions based on ineffective assistance of counsel.[244] The Court explained that to establish constitutional prejudice, the second prong of the *Strickland* test, the defendant must do more than demonstrate that counsel's errors had some conceivable effect on the outcome of the proceeding.[245] It noted that this standard is met only when it is shown that the defendant was deprived of a fair trial where the outcome is reliable.[246] The Court concluded that the "benchmark" for judging ineffective assistance claims is whether counsel's conduct so undermined the adversarial process that the trial cannot be relied upon as producing a just result.[247]

In sum, the Court's statements in *Strickland* indicate that the right to effective assistance of counsel is tied to providing the defendant a fair trial.[248] Counsel's mistakes, when followed by a fair trial, are not constitutionally significant.[249] It therefore holds that the decision to plead not guilty, which assures that a defendant *will proceed to a fair trial*, cannot satisfy *Strickland's* prejudice prong.[250]

Many courts have overlooked this limitation.[251] In 1998, the U.S. Court of Appeals for the Second Circuit held in *United States v. Gordon* that *Strickland's* standard for constitutional prejudice was satisfied because there was a reasonable probability that, but for counsel's conduct,

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[240] *See* 466 U.S. at 694; *see also, e.g.*, United States v. Day, 969 F.2d 39, 42 (3d Cir. 1992); *Duckworth*, 793 F.2d at 900; People v. Curry, 687 N.E.2d 877, 887 (Ill. 1997).

[241] *Strickland*, 466 U.S. at 694.

[242] *See id.* at 684–94.

[243] *Id.* at 684.

[244] *See id.* at 687.

[245] *Id.* at 693.

[246] *See id.* at 687.

[247] *Strickland*, 466 U.S. at 686.

[248] *See id.* at 684–94.

[249] *See id.*

[250] *See id.*

[251] *See, e.g.*, *Gordon*, 156 F.3d at 379–81; *Day*, 969 F.2d at 42, 44–45; *Curry*, 687 N.E.2d at 887–88.

the result of the proceeding would have been different.[252] It reached this conclusion despite the fact that the defendant's fair trial was, pursuant to the clear thrust of *Strickland,* all that the Sixth Amendment guaranteed.[253]

The Illinois Supreme Court adopted the same position in *People v. Curry* in 1997.[254] The court observed that although there is no constitutional right to plea bargain, the State decided to engage in plea bargain negotiations.[255] It concluded that the defendant, having received a plea offer, had to demonstrate only a reasonable probability that, but for counsel's advice regarding potential sentencing, the result of the proceeding would have been different.[256] The court thus ignored the defendant's fair trial and improperly expanded the scope of the right to effective assistance beyond the parameters established by *Strickland*.[257]

C. *U.S. Supreme Court's Sixth Amendment Jurisprudence*

The courts that have concluded that the right to effective assistance of counsel attaches to not guilty pleas also have discounted seventy years of U.S. Supreme Court jurisprudence that provides insight into the scope of the Sixth Amendment.[258] The Court's seminal holdings suggest that the right to effective assistance of counsel is limited to providing the defendant a fair trial.[259]

In 1984, the Court explained in *United States v. Cronic* that the right to effective assistance exists to protect the right of the accused to demand that the prosecution's case survive the crucible of meaningful adversarial confrontation.[260] The Court stated that the right to effective

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[252] *See* 156 F.3d at 379–81.

[253] *See Strickland*, 466 U.S. at 684–94; *Gordon*, 156 F.3d at 379–81.

[254] *See* 687 N.E.2d at 887–88.

[255] *Id.* at 888.

[256] *Id.* at 887–88. Numerous courts have dispensed with *Strickland's* decision to limit the right to effective assistance of counsel to providing the defendant a fair trial by citing the same passage. *See, e.g.*, Turner v. Tennessee, 858 F.2d 1201, 1206 (6th Cir. 1988); *Duckworth*, 793 F.2d at 900; *Cottle*, 733 So. 2d at 966–67. In *Cottle*, the Florida Supreme Court conceded that to establish prejudice, it is customarily required under *Strickland*, to show that counsel's mistakes deprived the defendant of a fair trial. 733 So. 2d at 966–67. The court concluded, however, that "[w]here the defendant was not notified of a plea offer, courts have held that the claimant must prove," to a reasonable probability, that the defendant would have accepted the offer instead of proceeding to trial. *Id.* at 967.

[257] *See Curry*, 687 N.E.2d at 887–88.

[258] *See, e.g.*, Lockhart v. Fretwell, 506 U.S. 364, 369–72 (1993); *Gideon*, 372 U.S. at 344; Powell v. Alabama, 287 U.S. 45, 68–69 (1932).

[259] *See, e.g.*, *Kimmelman*, 477 U.S. at 382; *Nix*, 475 U.S. at 175; *Cronic*, 466 U.S. at 658.

[260] 466 U.S. at 656.

assistance of counsel is not recognized for its own sake, but because of its impact on a defendant's ability to receive a fair trial.[261] Similarly, the Court reasoned in *Nix v. Whiteside* in 1986 that the "benchmark" of an ineffective assistance of counsel claim is the fairness of the adversary proceeding.[262] Finally, the Court delineated the scope of the right to effective assistance of counsel in *United States v. Gonzalez-Lopez* in 2006.[263] It noted that, in contrast to the right to select counsel, the right to effective counsel was limited to guaranteeing the defendant a fair trial.[264] In sum, the Supreme Court's indications through its Sixth Amendment analysis easily refute the reasoning of the courts that applied the right to effective assistance to not guilty pleas.[265]

In 1992, the Supreme Court of California in *In re Alvernaz* concluded that the right to effective assistance attached to not guilty pleas.[266] It reasoned that the decision to plead guilty and the decision to plead not guilty involved the same attorney-client interaction and the same professional obligations of counsel.[267] The court failed to understand, however, that both decisions did not involve the same *consequences*.[268] It neglected to address the fact that, unlike a defendant who pleads guilty, a defendant who pleads not guilty retains the right to a fair trial.[269]

The court also observed that the position that a fair trial remedied counsel's ineffective assistance disregarded the defendant's specific constitutional injury.[270] It explained that the defendant, due to counsel's errors, was deprived of the opportunity to avoid trial.[271] The court did not grasp that the defendant, in enjoying a fair trial, received the limits of the protection afforded by the Sixth Amendment.[272] Lastly, the Supreme Court of California stated that limiting the scope of the right to effective assistance of counsel to providing the defendant a fair trial would gravely undermine the plea bargaining process.[273] The court noted that accepting or rejecting a plea offer presented a binary

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[261] *Id.* at 658.
[262] *See* 475 U.S. at 175.
[263] *See* 548 U.S. at 147.
[264] *Id.*
[265] *See, e.g.*, *Kimmelman*, 477 U.S. at 382; *Nix*, 475 U.S. at 175; *Cronic*, 466 U.S. at 658.
[266] 830 P.2d. at 753.
[267] *Id.* at 753–54.
[268] *See id.*
[269] *See id.*
[270] *Id.* at 754.
[271] *Id.*
[272] *See Alvernaz*, 830 P.2d at 754.
[273] *Id.*

choice.[274] It reasoned that providing constitutional protection when a defendant pled guilty, but refusing this protection when a defendant pled not guilty could produce a skewing of results.[275] The court did not comprehend that this asymmetry should exist.[276] Only when a guilty plea is entered does the defendant sacrifice the right to a fair trial that the Sixth Amendment protects.[277]

In 1982, the U.S. Court of Appeals for the Third Circuit in *United States ex. rel. Caruso v. Zelinsky* held that the defendant was constitutionally prejudiced by counsel's failure to communicate a plea offer.[278] The court explained that the defendant was prejudiced because he was deprived of the opportunity to plead guilty to a lesser sentence.[279] It observed that this deprivation was not remedied by his subsequent fair trial.[280] This conclusion was unsound, however, because it ignored the U.S. Supreme Court's position that a fair trial is all that the Sixth Amendment guarantees.[281]

In 1986, the U.S. Court of Appeals for the Seventh Circuit addressed this issue in *Johnson v. Duckworth*.[282] The court noted that there is a "significant difference" between the consequences of the decision to reject a plea offer and the decision to plead guilty.[283] It held, however, that the defendant had the right to be informed of a plea offer and to contribute to the decision to accept or reject it.[284] In reaching this conclusion, the Seventh Circuit discounted the suggestions of the U.S. Supreme Court.[285] The court failed to adequately account for the "significant difference" between a guilty plea and a not guilty plea.[286] Specifically, the court was not persuaded by the point that the decision to plead guilty implicates the right to effective assistance of counsel because the defendant is deprived of a fair trial.[287] It failed to recognize

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[274] *Id.*

[275] *Id.*

[276] *See id.*

[277] *See id.*

[278] *See* 689 F.2d at 438.

[279] *Id.*

[280] *Id.*

[281] *See Strickland*, 466 U.S. at 684; *Zelinsky*, 689 F.2d at 438.

[282] *See* 793 F.2d at 900–02.

[283] *Id.* at 901; *see Commonwealth v. Mahar*, 809 N.E.2d 989, 998 (Mass. 2004) (Sosman, J., concurring) ("Of course, a defendant who goes to trial is not the equivalent of a defendant who has pleaded guilty, and equating the two . . . is misguided.").

[284] *See Duckworth*, 793 F.2d at 902.

[285] *See Strickland*, 466 U.S. at 686; *Duckworth*, 793 F.2d at 902.

[286] *See Duckworth*, 793 F.2d at 901.

[287] *See id.* at 900–02.

that a not guilty plea, in contrast, preserves the defendant's right to a fair trial.[288]

D. *The Correct Interpretation of the Right to Effective Assistance of Counsel*

The proper scope of the right to effective assistance of counsel is delineated by the decisions of courts that have limited the right to providing the defendant a fair trial.[289] These courts have recognized that because a fair trial is all that the Sixth Amendment guarantees, it follows, *ipso facto,* that a defendant convicted at a fair trial cannot demonstrate ineffective assistance.[290] This limitation was best articulated by the Louisiana Court of Appeal in *State v. Monroe* in 2000.[291] In explaining that only guilty pleas implicate the Constitution, the court observed that plea agreements are akin to constitutional contracts.[292] Although a party to the contract has a vested interest in its enforcement, a party who rejects the contract in a not guilty plea has no such vested interest.[293] The court concluded that a defendant who entered a not guilty plea preserved all of his constitutional rights.[294]

This position does not discount the policy concerns that the courts applying a broad interpretation of the right to effective assistance of counsel implicitly attempted to address.[295] Congress and state legislatures are not precluded from extending the right to effective assistance of counsel to not guilty pleas.[296] One commentator notes that a similar approach was successfully adopted in the context of post-conviction

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[288] *See id.*

[289] *See Monroe*, 757 So. 2d at 898; State v. Bryan, 134 S.W.3d 795, 802 (Mo. Ct. App. 2004); *Greuber*, 165 P.3d at 1188–89.

[290] *See Monroe*, 757 So. 2d at 898; *Bryan*, 134 S.W.3d at 802–03; *Greuber*, 165 P.3d at 1188–89. One commentator explains that:

> In the case of a plea, the concern is that the relinquishment of constitutional rights (i.e. the right to a trial; the right to confront and cross-examine one's accusers; and the right to remain silent) be voluntary, knowing and intelligent. Effective assistance of counsel is required to assist the defendant in that endeavor. In the case of a defendant who complains of ineffective assistance where he did not accept the plea, those constitutional rights were not waived, but rather, were asserted.

Steve Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. Rev. 841, 863 (1998).

[291] *See* 757 So. 2d at 898.

[292] *Id.*

[293] *Id.*

[294] *Id.*

[295] *See, e.g.*, *Day*, 969 F.2d at 44–45; *Duckworth*, 793 F.2d at 902; *Zelinsky*, 689 F.2d at 438.

[296] *See* Harrison, *supra* note 161, at 1207.

proceedings.[297] The crucial point is that this right is not protected by the Sixth Amendment.[298] The U.S. Supreme Court has explained that it will only expand the right to effective assistance of counsel to contexts that present the danger that the right was originally designed to protect.[299] This danger—the deprivation of a fair trial—is not present when a defendant pleads not guilty.[300]

Conclusion

The pervasiveness of plea bargaining in our modern justice system has made the proper scope of the Sixth Amendment right to effective assistance of counsel an important issue. In concluding that the right applies to not guilty pleas, too many courts that have addressed this question have overlooked the implied position of the U.S. Supreme Court. The Court has never directly addressed the application of the right to effective assistance of counsel to not guilty pleas. The Court's Sixth Amendment jurisprudence, however, indicates that a defendant does not have the right to effective counsel when entering a not guilty plea because this is not a critical stage in a criminal proceeding. Assuming *arguendo* that a defendant who pleads not guilty is entitled to effective counsel, the Supreme Court's holdings suggest that a subsequent fair trial precludes a finding of the constitutional prejudice needed to meet the *Strickland* test for overturning criminal convictions arising from ineffective assistance of counsel. When confronting this issue, future courts should limit the application of the right to effective assistance of counsel to providing the defendant a fair trial.

Leigh Tinmouth

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[297] *See id.*

[298] *See Monroe*, 757 So. 2d at 898; *Bryan*, 134 S.W.3d at 802; *Greuber*, 165 P.3d at 1188–89.

[299] *See Ash*, 413 U.S. at 311.

[300] *See, e.g.*, *Mahar*, 809 N.E.2d at 997–98 (Sosman, J., concurring) ("[I]f the defendant has, after rejecting the opportunity offered in a plea bargain, been convicted at a fair trial, we are assured that there is nothing 'unreliable' about that result and nothing 'fundamentally unfair' in imposing a lawful sentence based on that conviction." (quoting *Lockhart*, 506 U.S. at 372)).