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SIXTH AMENDMENT — INEFFECTIVE ASSISTANCE OF COUNSEL  
— TENTH CIRCUIT HOLDS THAT A DEFENDANT IS PREJUDICED  
WHEN HIS LAWYER’S DEFICIENT PERFORMANCE LEADS HIM  
TO FOREGO A PLEA BARGAIN AND FACE A FAIR TRIAL. —  
*Williams v. Jones*, 571 F.3d 1086 (10th Cir. 2009) (per curiam).

At the heart of America’s conception of its criminal justice system sits the right to a fair trial. Part of this right is a right to effective assistance of counsel.<sup>1</sup> But the overwhelming majority of defendants never see trial; guilty pleas structure their experience of criminal adjudication.<sup>2</sup> In *Hill v. Lockhart*,<sup>3</sup> the Supreme Court clarified that effective assistance protects these defendants’ trial rights too: if a reasonable probability exists that a defendant who pled guilty would have insisted on trial but for his lawyer’s deficient performance, he is entitled to reversal.<sup>4</sup> Recently, in *Williams v. Jones*,<sup>5</sup> the Tenth Circuit addressed the opposite situation. It asked whether a defendant suffers prejudice when a lawyer’s deficient performance leads him to face a fair trial rather than accept a plea bargain with a shorter sentence.<sup>6</sup> In finding prejudice,<sup>7</sup> the Tenth Circuit reached the right result, but its cursory analysis failed to explain sufficiently which interests effective assistance protects in plea bargaining, leaving unrebutted the dissent’s powerful argument that fair trials, as the “gold standard” of adjudication, vitiate concerns about fairness and reliability during plea bargaining.<sup>8</sup> The best explanation for *Williams* requires recognizing the right *Williams* lost through his attorney’s deficient performance: the right to make autonomous choices. Given the longer sentences that modern criminal adjudication imposes on defendants who choose trial and lose, effective assistance is necessary to ensure that this choice, like the choice to accept a plea bargain, is voluntary and intelligent.

In 1997, a gunman killed Larry Durrett in his home.<sup>9</sup> Michael Williams, charged with the crime, wanted to accept the prosecution’s offer

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<sup>1</sup> See *Strickland v. Washington*, 466 U.S. 668, 686, 689 (1984).

<sup>2</sup> See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NO. NCJ 225711, FEDERAL JUSTICE STATISTICS 2006 — STATISTICAL TABLES 25 tbl.4.2 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2006/fjso6st.pdf>; TRACEY KYCKELHAHN & THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NO. NCJ 221152, BULLETIN: FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004, at 3 (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluco4.pdf>.

<sup>3</sup> 474 U.S. 52 (1985).

<sup>4</sup> *Id.* at 58–59.

<sup>5</sup> 571 F.3d 1086 (10th Cir. 2009) (per curiam).

<sup>6</sup> See *id.* at 1088.

<sup>7</sup> See *id.* at 1091.

<sup>8</sup> *Id.* at 1102 (Gorsuch, J., dissenting).

<sup>9</sup> *Williams v. Jones*, 583 F.3d 1254, 1257 n.2 (10th Cir. 2009) (Gorsuch, J., dissenting from denial of rehearing en banc).

of a ten-year sentence in return for a guilty plea to second-degree murder.<sup>10</sup> His attorney, apparently crediting his earlier denials, threatened to withdraw if he took it.<sup>11</sup> Williams was convicted of first-degree murder and sentenced to life without parole.<sup>12</sup> On direct appeal, the Oklahoma Court of Criminal Appeals (OCCA) held that both deficient performance and prejudice — the two elements required to show ineffective assistance under *Strickland v. Washington*<sup>13</sup> — were present.<sup>14</sup> It modified his sentence to life with the possibility of parole, the state's lowest punishment for first-degree murder, because it found that state law permitted no greater remedy.<sup>15</sup> The federal district court denied habeas relief.<sup>16</sup> The Tenth Circuit granted a certificate of appealability limited to the remedy's adequacy.<sup>17</sup>

The circuit court reversed and remanded.<sup>18</sup> In a per curiam opinion joined by Judges Kelly and McConnell,<sup>19</sup> the court focused on the underlying substantive issue — how *Strickland*'s prejudice prong applies to rejected pleas — rather than on the remedy per se, reasoning that the remedy's adequacy depended on the underlying right.<sup>20</sup> The court found that Williams's lawyer performed deficiently by advising Williams that he would perjure himself by accepting the plea, and by threatening to withdraw.<sup>21</sup> The court then identified prejudice in the fact that “had [Williams] been adequately counseled, there is a reasonable probability that he would have accepted the plea offer and limited his exposure to ten years.”<sup>22</sup> The court rejected two contrary arguments. First, it held that a later fair trial does not “vitiating the prejudice from the constitutional violation,”<sup>23</sup> relying principally on federal courts' consensus on the point and treating it as an unremarkable application of *Hill*'s standard for accepted plea bargains.<sup>24</sup> Second, the court rejected the suggestion that Williams could not show prejudice

<sup>10</sup> *Williams*, 571 F.3d at 1088.

<sup>11</sup> *See id.*; *id.* at 1096 (Gorsuch, J., dissenting).

<sup>12</sup> *Id.* at 1088 (per curiam).

<sup>13</sup> 466 U.S. 668, 687 (1984).

<sup>14</sup> *See Williams*, 571 F.3d at 1088.

<sup>15</sup> *Id.* at 1088, 1090.

<sup>16</sup> *Williams v. Jones*, No. CIV-03-201-RAW, 2006 WL 2662795, at \*12 (E.D. Okla. Sept. 14, 2006).

<sup>17</sup> *Williams*, 571 F.3d at 1095.

<sup>18</sup> *Id.* at 1094.

<sup>19</sup> *Id.* at 1088.

<sup>20</sup> *See id.* at 1090–92.

<sup>21</sup> *Id.* at 1091.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *See id.* at 1090 n.3 (identifying ten circuits); *id.* at 1093. Although the court treated *United States v. Carter*, 130 F.3d 1432 (10th Cir. 1997), as settling the prejudice question in the Tenth Circuit, *Williams*, 571 F.3d at 1090 n.3, the sparse discussion in *Carter* was dictum because the court found no deficient performance. *See Carter*, 130 F.3d at 1441–42.

because the state could have withdrawn the offer and Williams thus lacked a legal entitlement. The court reasoned that Williams had a right to accept the offer as long as it was open and that he “was entitled to the effective assistance of counsel during plea negotiations, including the decision whether to accept or reject the plea offer.”<sup>25</sup> Finally, the court dismissed the suggestion that state law governed the remedy, concluding that “any correction for a federal constitutional violation must be consistent with federal law.”<sup>26</sup> It remanded for briefing on an appropriate remedy.<sup>27</sup>

In a lengthy dissent,<sup>28</sup> Judge Gorsuch argued that “due process guarantees a fair trial, not a good bargain,” and complained that the majority allowed Williams both to benefit from the offer and to test the prosecution’s case at trial.<sup>29</sup> In his view, the majority conflated *Strickland*’s deficient performance and prejudice prongs by holding essentially that “the lawyer’s bad advice (deficient performance) deprives the client of a right to good advice (prejudice).”<sup>30</sup> He saw *Hill* as applying only to mistaken decisions to plead guilty, reasoning that in such cases the defendant waives the “right to test the government’s evidence at trial”;<sup>31</sup> a rejected plea, by contrast, “is a waiver of nothing; it is an invocation of the constitutional right to a trial, and it is effective whether or not it is made knowingly and voluntarily.”<sup>32</sup> Judge Gorsuch argued that the Constitution is implicated “only [by] the procedure that deprives the defendant of his liberty.”<sup>33</sup> Because a fair trial imprisoned Williams, the lost plea was irrelevant.<sup>34</sup>

For Judge Gorsuch, this interpretation protected both reliability and fairness: “A fair trial’s outcome is as reliable an outcome as we can hope to achieve. And because the plea bargain is a matter of prosecutorial grace, not a matter of legal entitlement, a defendant who loses the chance for a deal cannot be said to have been treated unfairly.”<sup>35</sup> Judge Gorsuch criticized the federal circuits reaching the opposite re-

<sup>25</sup> *Williams*, 571 F.3d at 1094.

<sup>26</sup> *Id.* at 1092.

<sup>27</sup> *Id.* at 1093. Though recognizing that “no remedy may restore completely the parties’ original positions,” *id.*, because Williams was able to test the government’s evidence at trial, *id.* at 1092, the court noted the “obvious merit of reinstating the plea offer were it possible — it would address the prejudice Mr. Williams suffered.” *Id.* Oklahoma’s request for rehearing en banc was denied. *Williams v. Jones*, 583 F.3d 1254 (10th Cir. 2009).

<sup>28</sup> *Williams*, 571 F.3d at 1094–1110 (Gorsuch, J., dissenting).

<sup>29</sup> *Id.* at 1094.

<sup>30</sup> *Id.* at 1097.

<sup>31</sup> *Id.* at 1098.

<sup>32</sup> *Id.* (emphasis omitted).

<sup>33</sup> *Id.* at 1101 (citing *Mabry v. Johnson*, 467 U.S. 504 (1984); *Weatherford v. Bursey*, 429 U.S. 545 (1977)).

<sup>34</sup> *See id.*

<sup>35</sup> *Id.*

sult as either failing to offer adequate reasons or similarly conflating performance and prejudice;<sup>36</sup> he preferred the analysis in several state cases<sup>37</sup> and an abrogated Seventh Circuit decision<sup>38</sup> and pointed out that the Supreme Court had granted certiorari, later vacated as moot, on the issue.<sup>39</sup> Finally, Judge Gorsuch noted that the majority had left the remedy question unresolved. He argued that the difficulty in fashioning a remedy reflected the absence of any substantive right: because the prosecutor could have withdrawn the offer, requiring specific performance would put Williams in a better position than before the lawyer's deficient performance and would either require "assum[ing] control of [Oklahoma's] executive prerogatives"<sup>40</sup> or leave the state free to revoke the offer immediately.<sup>41</sup>

*Williams* is both easy and hard to explain — easy because the lawyer made a mistake that hurt his client, hard because the majority neither answered the dissent's argument that the trial is the "gold standard"<sup>42</sup> of fairness and reliability, nor identified a legal entitlement that the defendant lost. And to the dissent's objections, another can be added: additional punishment is not always prejudicial under Supreme Court precedent. Courts and commentators often interpret *Hill* as suggesting that defendants cannot prevail merely by claiming that they accepted a worse deal because of their lawyers' deficient performance,<sup>43</sup> though courts are not unanimous.<sup>44</sup> Ultimately, however, *Williams* is correct under technical *Strickland* reasoning, but it becomes normatively compelling only if one recognizes that effective assistance protects defendants' right to make autonomous choices.

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<sup>36</sup> *Id.* at 1097, 1107 & n.7.

<sup>37</sup> *Id.* at 1108 (citing *State v. Monroe*, 757 So. 2d 895 (La. Ct. App. 2000); *Commonwealth v. Mahar*, 809 N.E.2d 989, 996 (Mass. 2004) (Sosman, J., concurring); *Bryan v. State*, 134 S.W.3d 795 (Mo. Ct. App. 2004); *State v. Greuber*, 165 P.3d 1185 (Utah 2007)).

<sup>38</sup> *Id.* at 1107–08 (citing *United States v. Springs*, 988 F.2d 746 (7th Cir. 1993) (Easterbrook, J.)). The Seventh Circuit no longer follows *Springs*. See *Julian v. Bartley*, 495 F.3d 487, 497–500 (7th Cir. 2007).

<sup>39</sup> *Williams*, 571 F.3d at 1108 (Gorsuch, J., dissenting); see *Hoffman v. Arave*, 455 F.3d 926 (9th Cir. 2006), *cert. granted*, 128 S. Ct. 532 (2007), *vacated as moot*, 128 S. Ct. 749 (2008).

<sup>40</sup> *Williams*, 571 F.3d at 1110 (Gorsuch, J., dissenting).

<sup>41</sup> *Id.* at 1108–10.

<sup>42</sup> *Id.* at 1102.

<sup>43</sup> See *Bethel v. United States*, 458 F.3d 711, 720 (7th Cir. 2006) (adopting this reading); see also *United States v. Nesgoda*, 559 F.3d 867, 870 (8th Cir. 2009); *Short v. United States*, 471 F.3d 686, 696 (6th Cir. 2006); *United States v. Landsaw*, 206 F. App'x 773, 777 & n.3 (10th Cir. 2006); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2542 (2004); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1958 (1992).

<sup>44</sup> See *United States v. Howard*, 381 F.3d 873, 882 (9th Cir. 2004). The Ninth Circuit's justification for granting relief for "worse deal" claims in light of *Hill* appears to be the assumption that a competent lawyer would have threatened to go to trial rather than plead guilty to the higher charge, which would have provoked a better offer. See *Moore v. Czerniak*, 534 F.3d 1128, 1150 n.26 (9th Cir. 2008).

Doctrinally, the first step to understanding *Williams* is recognizing that the *Strickland* analysis in this case focuses on the plea process rather than the trial. *Strickland* defined prejudice as “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>45</sup> *Hill* made clear that plea bargaining is a separate *Strickland* “proceeding”: it asked whether “counsel’s constitutionally ineffective performance affected the outcome of the plea process.”<sup>46</sup> Bad lawyering affected the process here: Williams pled not guilty to the original charge instead of guilty to a lesser charge. This focus on the plea process makes the later trial irrelevant.<sup>47</sup>

This analysis does not depend on whether Williams had a legal entitlement to the bargain. In *United States v. Gonzalez-Lopez*,<sup>48</sup> the Supreme Court declared that counsel can be ineffective if “his mistakes have harmed the defense.”<sup>49</sup> To be sure, the Supreme Court has been less than pellucid on the interests that ineffectiveness doctrine protects, and the prevalence of sweeping language cutting in opposite directions allowed the *Williams* majority and dissent to talk past one another.<sup>50</sup> Even so, the decisive point against Judge Gorsuch’s argument is that, if it prevailed, defendants would lack an enforceable right to counsel during plea negotiations in cases that go to trial, despite consensus that plea bargaining is a “critical stage” to which the right to counsel applies.<sup>51</sup> Moreover, in the cases most strongly supporting Judge Gor-

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<sup>45</sup> *Williams v. Taylor*, 529 U.S. 362, 391 (2000) (emphasis added) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

<sup>46</sup> *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (emphasis added).

<sup>47</sup> The dissent’s contrary conclusion that only the outcome of the trial is relevant relies on the statement in *Mabry v. Johnson*, 467 U.S. 504 (1984), that “[a] plea bargain standing alone is without constitutional significance[, and] . . . until embodied in the judgment of a court, does not deprive an accused of liberty . . . . It is the ensuing guilty plea that implicates the Constitution.” *Williams*, 571 F.3d at 1100 (Gorsuch, J., dissenting) (quoting *Mabry*, 467 U.S. at 507–08). The question the Court faced in *Mabry*, however, was whether an accepted plea agreement bound a prosecutor who sought to withdraw the offer before trial. *Mabry*, 467 U.S. at 505–06. To say that the government’s bargaining does not implicate the Constitution before the defendant loses his liberty is one matter. But to suggest that a defense lawyer’s behavior is similarly invisible to the Constitution would carve a large hole out of the Court’s categorical statement that “all ‘defendants facing felony charges are entitled to the effective assistance of competent counsel,’” *Hill*, 474 U.S. at 57 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)), and would undermine the adversarial system.

<sup>48</sup> 548 U.S. 140 (2006).

<sup>49</sup> *Id.* at 147 (emphasis added).

<sup>50</sup> Compare *id.*, with *Taylor*, 529 U.S. at 393 n.17 (“[Prejudice] 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.” (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993))). The majority emphasized *Gonzalez-Lopez*; the dissent, *Taylor*. Compare *Williams*, 571 F.3d at 1092, with *id.* at 1103 (Gorsuch, J., dissenting).

<sup>51</sup> *Williams*, 571 F.3d at 1090; see *id.* at 1090–91; *id.* at 1096 (Gorsuch, J., dissenting).

such's requirement for a legal entitlement,<sup>52</sup> the defendant claimed prejudice based on the lawyer's failure to obtain something that the law forbade — not, as here, on the lawyer's interference with a lawful choice. In *Lockhart v. Fretwell*,<sup>53</sup> the petitioner sought relief based on his lawyer's failure to make an objection available under then-current circuit precedent, which the circuit overturned in the interim. Had the objection been made and sustained, the defendant would have benefited from a legal error.<sup>54</sup> In *Nix v. Whiteside*,<sup>55</sup> the Court found no prejudice when a lawyer refused to help him perjure himself.<sup>56</sup>

More fundamentally, Williams did lose an entitlement, and one that the Supreme Court has identified as foundational: his right to make the critical choices for his defense. The Court has protected this autonomy right in other aspects of the defense, such as choice of counsel,<sup>57</sup> the right to self-representation,<sup>58</sup> and the right to appeal.<sup>59</sup>

Given modern realities, the decision to reject a plea bargain merits similar protection. Current doctrine recognizes that *completed* plea bargains implicate defendants' autonomy. In *Brady v. United States*,<sup>60</sup> the Supreme Court first sanctioned plea bargaining's basic trade — certain punishment in return for a lesser sentence.<sup>61</sup> For such bargains to be valid, however, the Court required that the defendant's admissions be “not only . . . voluntary but . . . knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”<sup>62</sup> The Court emphasized that “an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney.”<sup>63</sup>

*Brady*'s requirements, of course, apply formally only to accepted pleas, as Judge Gorsuch correctly noted.<sup>64</sup> However, if plea bargaining

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<sup>52</sup> See *id.* at 1104 (Gorsuch, J., dissenting) (citing *Lockhart*, 506 U.S. 364; *Nix v. Whiteside*, 475 U.S. 157 (1986)).

<sup>53</sup> 506 U.S. 364.

<sup>54</sup> *Id.* at 367–68, 371.

<sup>55</sup> 475 U.S. 157.

<sup>56</sup> *Id.* at 176.

<sup>57</sup> *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144–48 (2006).

<sup>58</sup> *Faretta v. California*, 422 U.S. 806, 820 (1975) (“To thrust counsel upon the accused, against his considered wish, thus violates the logic of the [Sixth] Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists.” (footnote omitted)).

<sup>59</sup> *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (“[T]he failure to file [a notice of appeal] reflects inattention to the defendant's wishes.”).

<sup>60</sup> 397 U.S. 742 (1970).

<sup>61</sup> *Id.* at 751–52.

<sup>62</sup> *Id.* at 748.

<sup>63</sup> *Id.* at 748 n.6.

<sup>64</sup> See *Williams*, 571 F.3d at 1098 (Gorsuch, J., dissenting) (“[A] not-guilty plea is a waiver of nothing; it is an *invocation* of the constitutional right to a trial, and it is effective whether or not it is made knowingly and voluntarily.”).

is justifiable partly as an exercise of defendants' autonomy to enter into free exchanges with prosecutors,<sup>65</sup> it makes little sense to protect this autonomy only when exercised in one direction. Given how plea bargaining has reshaped criminal adjudication, there is strong justification for treating voluntariness and intelligence as requirements attaching to the *choice* between trial and plea.

Since *Brady's* endorsement, plea bargains have come to dominate criminal adjudication,<sup>66</sup> and they have reshaped the system. Modern criminal adjudication compels defendants to choose between certain punishment through plea or a longer sentence after potential conviction at trial, with the system likely built partly to encourage pleas. If legislatures and prosecutors believe that five years is the "right" sentence for a charge, the most efficient approach may be for legislatures to authorize fifteen years and for prosecutors to offer five years for guilty pleas.<sup>67</sup> The sheer quantitative differences in punishment are daunting: A study using Pennsylvania data found that defendants accused of violent crimes who faced jury trials were 2.7 times more likely to be imprisoned<sup>68</sup> and received 57% longer sentences than those who pled guilty.<sup>69</sup> Other studies have also shown striking differences.<sup>70</sup> In the face of how criminal adjudication actually works, Judge Gorsuch's rhetorically powerful insistence on the trial as the "gold standard"<sup>71</sup> of fairness and reliability acquires an air of unreality. If the trial is the gold standard, it carries a correspondingly hefty price tag.

Given this price, ineffective assistance doctrine is necessary to protect autonomous choice for defendants who reject plea bargains, as

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<sup>65</sup> See *Brady*, 397 U.S. at 752 ("[B]oth the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law. . . . It is this mutuality of advantage that perhaps explains the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty . . ."); see also John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 490 n.231 (2001); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1978 (1992); Scott & Stuntz, *supra* note 43, at 1913.

<sup>66</sup> See Stephanos Bibas, Essay, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 912 n.1 (2006).

<sup>67</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 552 (2001).

<sup>68</sup> Jeffery T. Ulmer & Mindy S. Bradley, *Variation in Trial Penalties Among Serious Violent Offenses*, 44 CRIMINOLOGY 631, 650 (2006).

<sup>69</sup> *Id.* at 652.

<sup>70</sup> See Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 973-75 (2005) (finding "consistent support," *id.* at 975, for a trial penalty, including a 350% difference in heroin distribution sentences in one state); Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67, 89-90 (2005) (finding that, among sentences resulting in prison terms in forty large counties nationwide, those after jury trials averaged 44.5 months longer than those after pleas).

<sup>71</sup> *Williams*, 571 F.3d at 1102 (Gorsuch, J., dissenting).

well as for those who accept them. In *Williams*, “the lawyer, rather than the client, effectively decided whether or not to accept [the plea]”<sup>72</sup> by threatening to withdraw if *Williams* accepted it. In this way, the deficient performance that *Williams* alleged is typical in its extremity: almost all such claims involve lawyers who give incorrect information<sup>73</sup> or fail to communicate an offer at all.<sup>74</sup>

In the end, the *Williams* result gains normative weight only if one recognizes that effective assistance protects defendants’ autonomous choice to plead guilty or not guilty. Federal courts’ consensus on the *Williams* result<sup>75</sup> suggests that they, too, sense the important interest at stake. But recognizing autonomous choice explicitly — in effect, extending *Brady*’s requirements to rejected pleas — has implications beyond placing the *Williams* result on stronger theoretical footing. If the denial of autonomous choice constitutes prejudice, it is not clear why the deficient performance prong should be satisfied only by such gross incompetence or active denials of choice as the one in *Williams*. Facing a criminal justice system designed to encourage pleas and punish decisions to go to trial, defendants confront several obstacles to sound choices. One is informational: defendants will likely know neither the “going rate” for pleas nor the probable post-trial sentence. Another is psychological: cognitive biases such as undue optimism and excessive discounting of future losses from imprisonment render defendants more likely to insist on trial than rational choice would suggest.<sup>76</sup> Repeat offenders and young men, two of the largest groups in the criminal justice system, are likely to be less risk averse with respect to imprisonment, exacerbating these biases.<sup>77</sup> These obstacles suggest that defendants will make predictably bad decisions with momentous consequences. Good lawyering can help: experienced lawyers know the going rates, and their advice can counteract cognitive biases.<sup>78</sup> But although *Williams*’s prejudice holding ensures that lawyers cannot actively interfere with defendants’ choices, it stops far short of ensuring legal advice that can surmount those systemic obstacles and help defendants make more fully autonomous choices.

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<sup>72</sup> *Id.* at 1096.

<sup>73</sup> *See, e.g.*, *United States v. Gordon*, 156 F.3d 376 (2d Cir. 1998) (miscalculating sentencing exposure).

<sup>74</sup> *See, e.g.*, *Teague v. Scott*, 60 F.3d 1167, 1170 & n.13 (5th Cir. 1995).

<sup>75</sup> *Williams*, 571 F.3d at 1090 n.3 (identifying ten circuits).

<sup>76</sup> *See Bibas, supra* note 43, at 2496–2519; William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2553 n.5 (2004).

<sup>77</sup> *See Bibas, supra* note 43, at 2529.

<sup>78</sup> *See id.* at 2519–27.