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No. 10-444

IN THE
Supreme Court of the United States

MISSOURI,
Petitioner,

v.

GALIN E. FRYE,
Respondent.

ON WRIT OF CERTIORARI TO THE
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

REPLY BRIEF

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ARGUMENT

I. The Court should reject Mr. Frye's invitation to depart from the standard established in *Hill v. Lockhart*.

Mr. Frye argues that the standard established in *Hill v. Lockhart*, 474 U.S. 52 (1985), should not apply to his claim because requiring the defendant to prove he "would have insisted on going to trial" is a requirement that should be imposed only when defense counsel has committed a "trial-based" error, *e.g.*, "where counsel's alleged error is failing to investigate, or failing to discover exculpatory evidence, or failing to advise the defendant of an affirmative defense." *See* Resp.Br. 9, 28. He supports this claim by asserting that the standard adopted in *Hill* "followed from the Court's recognition that '[i]n many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through trial.'" Resp.Br. 9.

But Mr. Frye reads *Hill* backwards. In fact, the Court's discussion of what would happen "[i]n many guilty plea cases" followed its determination of the appropriate standard. *Hill*, 474 U.S. at 59. And the standard that the Court adopted followed from the Court's recognition that "[t]he longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" *Id*. at 56. Thus, while the Court discussed how its newly-adopted standard would be applied in the future in "many cases," it did not suggest that in other guilty-plea cases the *Hill* standard could be ignored.

To the contrary, the very facts of *Hill* refute such a notion. Hill alleged that his plea was "involuntary" because "his attorney supplied him with information about parole eligibility that was erroneous." 474 U.S. at 56. This was not a "trial-based" error; yet, the Court applied its newly-adopted standard and held that Hill was required to prove that, but for counsel's alleged error, he would have insisted on going to trial. *Id*. at 60. Thus, while the standard in *Hill* applies to the sorts of so-called "trial-based" errors that will occur in "many cases," it also by its own terms applies to other types of cases, *e.g.*, where counsel has coerced a guilty plea or rendered it unknowing or unintelligent by failing to explain the consequences of the plea. *See Padilla v. Kentucky*, 130 S.Ct. 1473, 1486-87 (2010) (holding that counsel should have advised defendant about deportation consequences that would follow a guilty plea).

Mr. Frye and his *amici* assert that under *Hill* prejudice can be tied to any unfavorable "outcome of the plea process." Resp.Br. 9; NACDL Br. 6; Const. Proj.Br. 12-13; CACL Br. 2, 14-15. But their reliance on one isolated phrase of the Court's opinion is misplaced. For, while the Court observed that the prejudice requirement "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process," *id*. at 59, the Court left no doubt about its meaning. In the immediately following sentence, the Court explained: "*In other words*, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id*. (emphasis added).

Despite the Court's clear statement of the governing standard, Mr. Frye asserts that tying prejudice to

the "loss of a fair trial" lacks a basis in the Constitution, the Court's precedents, and common sense. Resp.Br. 6. He asserts that the "lower courts have almost unanimously recognized" that the right is not limited to ensuring a fair trial, and, as an example, Mr. Frye cites *United States v. Day*, 969 F.2d 39, 45 (3rd Cir. 1992), for the proposition that "the Sixth Amendment right to effective assistance of counsel guarantees more than the Fifth Amendment right to a fair trial." Resp.Br. 16.

But by requiring the accused to prove that he would have insisted on exercising his right to trial, the Court in *Hill* reaffirmed that the right to the effective assistance of counsel is inexorably tied to protecting the defendant's right to trial. Indeed, the Court has repeatedly recognized 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." *Strickland v. Washington*, 466 U.S. 648, 658 (1984). And, contrary to the opinion in *Day*, the Court has expressly stated that the right to the effective assistance of counsel does not guarantee more than a fair trial: "Having derived the right to effective representation from the purpose of ensuring a fair trial, we have, logically enough, also derived the limits of that right from that same purpose." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006).

Cases like *Day* fail to abide by this limitation and often find support in precedent that is either inapposite or too old to accurately reflect more recent precedents. In *Day*, for instance, the Third Circuit relied primarily upon *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435 (3rd Cir. 1982)—a case decided two years before *Strickland*. With regard to prejudice specifically, the court in *Day* cited *Caruso*

for the proposition that when counsel fails to communicate a plea offer and a defendant is unable to plead pursuant to the offer, "[a] subsequent fair trial does not remedy this deprivation." *Day*, 969 F.3d at 44. But the only support *Caruso* offered for this critical conclusion was a "*cf.*" citation to *Rose v. Mitchell*, 443 U.S. 545, 557 (1979)—a case where the Court indicated that racial discrimination during grand jury proceedings could not be cured by a subsequent fair trial. Applying *Rose v. Mitchell* to the issue was inapt, and *Day* was decided without the benefit of the Court's opinion in *Gonzalez-Lopez*.

Mr. Frye asserts that a "narrow focus [on the fairness of trial] has been rejected by all twelve Courts of Appeals and twenty-five of twenty-seven states." Resp.Br. 20; *see also* Const.Proj.Br. 14; CACL Br. 21-23. But no collection of lower courts can overrule this Court's precedents, and no collection of opinions can create a constitutional right where none exists. Even when the lower courts are largely unanimous on a given issue, the Court has not refrained from reaching a contrary result. *See Bloate v. United States*, 130 S.Ct. 1345, 1351 (2010) (rejecting majority view in 8-2 federal circuit split); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N. A.*, 511 U.S. 164, 169 (1994) (noting that "numerous" federal courts had taken a contrary view); *id*. at 192 (Stevens, J., dissenting) (observing "all 11 Courts of Appeals to have considered the question" had adopted the position rejected by this Court).

Moreover, while many cases state Mr. Frye's position, the lower courts have not uniformly rejected the State's argument. In most of the federal court decisions that Mr. Frye cites, the government did not even argue against the court's reformulation of the prejudice analysis. *See, e.g.*, *Turner v. Tennessee*, 858

F.2d 1201, 1205 (6th Cir. 1988) ("the State does not challenge the proposition that incompetent advice to reject a plea offer can constitute a Sixth Amendment deprivation"). Of the federal cases included in Mr. Frye's footnote 1, only two offered any significant analysis: *Caruso* (which, as discussed above, was not consistent with the Court's more recent precedents), and *Williams v. Jones*, 571 F.3d 1086 (10th Cir. 2009). In *Williams v. Jones*, the court was not unanimous; one judge vigorously dissented on the basis that a lost plea offer could not constitute prejudice, as there was no right to a plea offer. *See id.* at 1097-1108 (Gorsuch, J., dissenting). Finally, not every circuit has unanimously rejected the State's argument: one has expressly agreed with the State's argument. *See United States v. Springs*, 988 F.2d 746, 748-49 (7th Cir. 1993).

In the end, much of Mr. Frye's argument boils down to a claim that he should be able to show *Strickland* prejudice by demonstrating that, but for counsel's error, he probably would have received a shorter sentence. In Mr. Frye's view, the longer sentence he received is inherently prejudicial or unfair. Resp.Br. 24 ("Any increase in a sentence is prejudicial."). *See* NACLD Br. 6-7; Const.Proj.Br. 15; CACL Br. 4-5.[1]

But in a criminal case, in terms of the sentence, there are many possible "fair" results. Given the subjective views and divergent interests of the parties,

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[1] As an alternative, Mr. Frye asserts in passing that he is entitled to a "presumption of prejudice" because counsel's failing to communicate the offer "is comparable to the absence of counsel[.]" Resp.Br. 17. But Mr. Frye is confusing the complete deprivation of counsel with what were merely counsel's ineffectual efforts to contact Mr. Frye.

and given the interests of society (and victims), and given the many ways that a case can evolve over time, no particular sentence or outcome can be reasonably identified as *the* "fair" result. On the other hand, determining whether a trial or a plea hearing was "fair" is something that can be done with a reasonable degree of certainty. Thus, the Court has appropriately concluded that to show prejudice from counsel's alleged errors in a criminal case, a defendant must show the deprivation of some procedural or substantive right. *See Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

Mr. Frye dismisses *Fretwell* as "aberrant" because in that case it was alleged that counsel failed to take advantage of existing case law that was, as it turned out later, wrongly decided. Resp.Br. 33-34. Mr. Frye argues that in *Fretwell*, the law did not "entitle" the defendant to the benefit counsel could have obtained for him. Resp.Br. 34. Of course, Mr. Frye also was not "entitled" to a plea offer (*see* Part III, below); but even if it is assumed, *arguendo*, that counsel's error in this case is not analogous to the error in *Fretwell*, the material aspect of *Fretwell* was its reliance on constitutional principles to reject the notion that the probability of a more favorable outcome, alone, is sufficient to support a claim of *Strickland* prejudice.

It is true that the Court has made plain that *Fretwell* did not create a new test for prejudice. *See Williams v. Taylor*, 529 U.S. 362, 393 (2000). But this merely solidifies the conclusion that *Strickland* was primarily concerned with ensuring the fairness of trial (as opposed to ensuring the best possible result for the defendant). Thus, in *Glover v. United States*, 531 U.S. 198, 202-03 (2001), it was not proper to require anything more than *Strickland*'s analysis, as the alleged error deprived the defendant of a fair

sentencing hearing (*i.e.*, the requisite substantive or procedural right) and a probable lesser sentence.

After a guilty plea, under *Hill*, and consistent with *Fretwell*, the relevant question is not whether the accused received a shorter or longer sentence, but whether the accused was deprived of going to trial altogether, for there is no right—constitutional, statutory, or otherwise—to a plea bargain. *See Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000) ("Like the decision whether to appeal, the decision whether to plead guilty (*i.e.*, waive trial) rested with the defendant and, like this case, counsel's advice in *Hill* might have caused the defendant to forfeit a judicial proceeding *to which he was otherwise entitled*.") (emphasis added).[2]

II. The validity of Mr. Frye's guilty plea was not undermined by counsel's failing to convey the State's plea offer.

Apparently wary of ignoring *Hill* altogether, Mr. Frye's argument hovers between a rejection of the *Hill* standard and an attempt to fit within *Hill*'s admonition that "a defendant who pleads guilty upon

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[2] The CACL argues that a defendant who is deprived of information relevant to a potential guilty plea "has been deprived of his right to exercise authority over fundamental decisions in his defense." CACL Br. 20. And, citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983), the CACL argues that the decision to plead guilty "is a substantive right to which the law entitles him[.]" CACL Br. 20. But this is merely another way of asserting, incorrectly (*see* Part III, below), that Mr. Frye had a right to plead guilty to a particular plea offer. While *Jones v. Barnes* certainly stands for the proposition that only the defendant can make the *decision* to plead guilty, it does not follow that the defendant actually has any *right* to plead guilty. *See Santobello v. New York*, 404 U.S. 257, 262 (1971) ("There is, of course, no absolute right to have a guilty plea accepted.").

the advice of counsel 'may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*[*v. Richardson*, 397 U.S. 759 (1970)].'" *Hill*, 474 U.S. at 56-57. *See* Resp.Br. 10, 24, 27-28. And, citing *North Carolina v. Alford*, Mr. Frye observes that "A valid plea must be a 'voluntary and intelligent choice among the alternative courses of action open to the defendant.'" Resp.Br. 24. *See North Carolina v. Alford*, 400 U.S. 25, 31 (1970) (citing *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *Machibroda v. United States*, 368 U.S. 487, 493 (1962); and *Kercheval v. United States*, 274 U.S. 220, 223 (1927)).

But Mr. Frye is wrong in asserting (Resp.Br. 25) that the "alternative courses of action" should include potential courses of action beyond the two alternative courses implicated by a guilty plea—the alternatives of proceeding to trial or accepting the plea that was actually entered. *Alford* itself reflects that the validity of a guilty plea is evaluated by comparing the alternatives of proceeding to trial or accepting the plea at issue. As the Court explained, when the guilty plea whose validity is at issue is (as in *Alford*) a guilty plea to second-degree murder, the "choice among the alternative courses of action open to the defendant," *Alford*, 400 U.S. at 31, is a "choice between a trial for first-degree murder [without the plea], on the one hand, and a plea of guilty second-degree murder, on the other." *Id*. at 37.

That understanding is confirmed by the three decisions that *Alford* cited to illustrate the standard for determining the validity of a plea. Two focused on the requirement that the defendant understand the consequences of the guilty plea. *See Kercheval*, 274 U.S. at 223; *Machibroda*, 368 U.S. at 493. The third,

Boykin v. Alabama, made clear that the validity of a guilty plea is determined by comparing the alternatives of entering a plea and proceeding to trial. *Boykin* explained that "a plea of guilty . . . is a conviction" based on the defendant's own " 'stipulation that no proof by the prosecution need be advanced' " at trial. 395 U.S. at 242 & n. 4 (citation omitted). Accordingly, the Court reasoned, a guilty plea constitutes a waiver of "[s]everal federal constitutional rights"—the privilege against self-incrimination, the "right to trial by jury" and the "right to confront one's accusers"—that the defendant must have knowingly and intelligently relinquished for his guilty-plea-based " 'waiver to be valid.' " *Id.* at 243 & n.5 (citations omitted). *Boykin* thus requires that courts ensure that defendants have knowingly and intelligently chosen between the alternative courses of (1) proceeding to a trial where the defendant would have enjoyed constitutional trial rights and (2) accepting the guilty plea that would waive those rights.

The Court maintained that standard in *Hill* when it cited the "longstanding test for determining the validity of a guilty plea" and explained that a defendant could "'only attack the voluntary and intelligent character of [his] guilty plea' " by proving ineffective assistance of counsel in "the plea process." *Id.* at 56-57 (citation omitted). And, as stated above, *Hill* then made plain that the relevant measure in examining the "outcome of the plea process" is whether "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59. *Hill*'s test, thus, reflects the choice among the two alternative courses of action open to the defendant at the time he enters his guilty plea. It is the entry of that plea that waives the defendant's trial rights, and, as a

result, under *Hill*, that plea cannot later be challenged unless the defendant can show that he would have "insisted on going to trial." *Id*.

Even if it were appropriate to consider what other "alternatives" might have been available under the State's offer, Mr. Frye is forced to speculate when he asserts that, but for counsel's error, the State's offer would have been available to him at the time he pleaded guilty. The State was not bound to hold open the plea offer for any amount of time, and there is no reasonable probability that Mr. Frye would have been able to accept the offer and immediately plead guilty.

The record shows that on November 9, 2007—before the State made its offer—Mr. Frye sought a continuance of his case until January 4, 2008. J.A. 2. It was six days later, on November 15, 2007, that the State made its plea offer. Thus, it is reasonably probable that if Mr. Frye had been inclined to accept the offer, that the parties would have simply agreed to hold the plea hearing on the next court date of January 4, 2008. (Mr. Frye had requested the January date so that he would not have to deal with his criminal case until "past the exam season," J.A. 46; it makes little sense to suggest that he would have immediately pleaded guilty and gone to jail instead of taking exams.) If Mr. Frye did not plead guilty until January 4, 2008, by that time, Mr. Frye had been arrested yet again for driving while revoked. *See* J.A. 43, 45-48. That was the sort of event that would (or at least reasonably could) have prompted the prosecutor to terminate the plea offer. *See* J.A. 45.

III. Mr. Frye's claim that he had a "right" to accept the State's plea offer is inconsistent with *Mabry v. Johnson* and *Weatherford v. Bursey*.

Mr. Frye does not ask the Court to overrule any part of its prior decisions in *Mabry v. Johnson*, 467 U.S. 504 (1984), and *Weatherford v. Bursey*, 429 U.S. 545 (1977); in fact, he cites these cases favorably. He asserts: "Frye is not claiming a constitutional right to plea bargain . . . . Had the prosecutor not offered a plea bargain, the trial court could not have compelled him to do so." Resp.Br. 18. He acknowledges: "The trial court could not have compelled the State to engage in plea negotiations or make a plea offer to Frye." Resp.Br. 46.

But while he cites to *Mabry* and *Weatherford*, Mr. Frye then makes claims that are fundamentally at odds with them. He asserts that because "the State did make a plea offer to Frye," "The State was bound by that offer during the terms of the offer." Resp.Br. 46. He argues that "[h]e was entitled to accept that offer and plead guilty according to its terms to the trial court." Resp.Br. 45. Quoting *Williams v. Jones*, 571 F.3d at 1091, he asserts that the prosecutor "made an offer that [the defendant] had a right to accept, as long as it was open, with effective assistance of counsel." Resp.Br. 18-19.

Both *Mabry* and *Weatherford* make plain that a defendant has no right to plead guilty to a particular offer, that a defendant has no right to plea bargaining, and that a prosecutor is not "bound" by an offer during the terms of the offer. The facts of *Mabry* aptly illustrate these principles. There, the state made an offer of a twenty-one-year sentence to be served concurrently with other sentences the accused

was already serving. *Mabry*, 467 U.S. at 506. The day after the state made its offer, the defendant accepted the offer, but the prosecutor "told counsel that a mistake had been made and withdrew the offer." *Id.* The prosecutor then offered the same twenty-one-year sentence, but with the sentence to run consecutively to the defendant's other sentences. *Id.* The defendant rejected the second offer and trial commenced. *Id.* On the second day of trial, the trial ended in a mistrial. *Id.* The defendant then pleaded guilty according to the terms of the state's second offer involving consecutive time, but the defendant argued that he was entitled to the terms of the first offer that he had accepted. *Id.*

The United States Court of Appeals for the Eighth Circuit agreed and "concluded that 'fairness' precluded the prosecution's withdrawal of a plea proposal once accepted by respondent." *Id.* But this Court disagreed and held that the defendant could not enforce the plea offer that he had tried to accept because "A plea bargain standing alone is without constitutional significance[.]" *Id.* at 507. The Court observed that a plea offer "is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest." *Id.* The same is true in Mr. Frye's case. The State made a plea offer, but the State was not bound by the terms of that offer—even during the allotted time for accepting the offer. A mere offer of prosecutorial grace did not give Mr. Frye any "right" to take advantage of the offer. *See Santobello v. New York*, 404 U.S. 257, 262 (1971) ("There is, of course, no absolute right to have a guilty plea accepted.").

The facts in *Weatherford* also illustrate these principles. There, a "co-defendant" in the defendant's

criminal case was actually an undercover officer. 429 U.S. at 547. Before trial, the undercover officer met with the defendant and the defendant's attorney, and, eventually, the state disclosed the undercover officer's identity and the undercover officer testified at the defendant's trial. *Id*. at 548-549.

In a § 1983 action, the defendant claimed that the state's actions had deprived him of the effective assistance of counsel and due process. The United States Court of Appeals for the Fourth Circuit found that the defendant had been denied due process by the state's concealment of the undercover officer's identity until the day of trial. *Id*. at 550. The Fourth Circuit observed that the state's actions had "lulled [the defendant] into a false sense of security and interfered with his preparations for trial." *Id*. The court of appeals also "suggested that [the undercover officer's] continued duplicity lost [the defendant] the opportunity to plea bargain." *Id*. at 560.

This Court rejected those claims, and with regard to the latter, the Court observed that "there is no constitutional right to plea bargain." *Id*. at 560. Moreover, because the defendant had been given a fair trial, the Court observed that it would be "a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty." *Id*. In Mr. Frye's case, similarly, there was no right to the plea offer, and it cannot be said that a subsequent plea that met constitutional standards infringed Mr. Frye's rights.

IV. Mr. Frye's remedy of specific performance will place defendants in a better position than they would have been in if counsel had communicated the offer.

In Mr. Frye's view, the only result that cures the alleged constitutional violation of losing a plea offer is to order "a remand to allow Frye to accept the State's plea offer and plead guilty according to its terms[.]" Resp.Br. 44. He asserts that he is entitled to that particular result (and not merely the chance to plead guilty again or go to trial) because he proved that there was a "reasonable probability" that he would have obtained that result if counsel had timely communicated the offer. Resp.Br. 45.

There are two fundamental problems with this argument. First, because there was never any agreement between the parties, and because the trial court never accepted the terms of the agreement, there is no agreement to specifically perform. Citing cases like *Puckett v. United States*, 129 S.Ct. 1423, 1430 (2009), and *Santobello v. New York*, 404 U.S. 257, Mr. Frye and his *amici* argue that "The Court has held that a trial court may remedy a constitutional violation by ordering a prosecutor's office to comply with the terms of its own plea offer." Resp.Br. 46; *see* NACDL Br. 10-13; Const.Proj.Br. 27.

But in both *Puckett* and *Santobello*, the parties agreed upon the terms of the respective plea agreements, the defendants actually pleaded guilty in reliance on those terms, and the guilty pleas were accepted by the trial court. *See Puckett*, 129 S.Ct. at 1426-27; *Santobello*, 404 U.S. at 257-60. Accordingly, the Court observed that "plea bargains are essentially contracts" and indicated that one remedy for the government's breach included "specific perform-

ance of the contract." *Puckett*, 129 S.Ct. at 1430. In Mr. Frye's case, of course, the lost plea offer was never agreed to by the parties, and it was never accepted by the trial court. It remained "a mere executory agreement[.]" *Mabry*, 467 U.S. at 507. To suggest that the State should now be bound by those terms (particularly when the position of the parties has materially altered since the time of the offer) is inconsistent with the Court's precedents.

The second problem with Mr. Frye's remedy is that it places him in a better position than he would have been in if counsel had told him about the offer. Mr. Frye is essentially arguing that he should be allowed to plead guilty to the State's offer without allowing the State to exercise its prerogative to withdraw the offer prior to acceptance by the trial court. *See* Resp.Br. 37, 44. But if counsel had timely communicated it, the State could have withdrawn the offer at any time—for example, when Mr. Frye was again arrested for driving while revoked.

Accordingly, even if it is assumed that losing a plea offer is a deprivation that requires a remedy, Mr. Frye should be permitted at most to attempt to negotiate a new plea offer. In other words, ineffective assistance during plea negotiations should only result in another round of plea negotiations, as allowing Mr. Frye to "lock in" the terms of the State's first offer grants Mr. Frye far more negotiating power than he would have otherwise had.

V. Mr. Frye's proposed rule will undermine the widespread and beneficial practice of plea bargaining.

Mr. Frye asserts that "[n]o duty is more basic to the role of defense counsel than that of informing the

client of a plea offer made by the prosecutor." Resp.Br. 21. He cites the American Bar Association's Model Rule 1.4 and the Missouri Supreme Court's Rule 4-1.4, and he points out that these rules of professional conduct require defense attorneys to promptly inform their clients of plea offers and to explain such offers to their clients. Resp.Br. 22-23. The petitioner agrees that, as a practice, prompt communication with the defendant is critical.

Under the Court's precedents, *e.g.*, *Mabry*, it is vitally important that defense attorneys promptly inform their clients of favorable plea offers, as the prosecutor is not bound to hold open any offer for any length of time. In other words, because offers are ephemeral and without constitutional significance, prompt communication is critical, as it increases the likelihood of the defendant's being able to effectuate a favorable outcome by pleading guilty and having the plea agreement embodied in a judgment.

In its opening brief, the State voiced its concern that, if specific performance of an uncommunicated plea offer is deemed the appropriate remedy, "then any offer can be pocketed by defense counsel and held in reserve" to act as a cap on the defendant's criminal liability. Pet.Br. 36. Mr. Frye and his *amici* claim that it is insulting, disrespectful or outrageous to suggest that defense attorneys would ever resort to the unethical practice of withholding a plea offer. Resp.Br. 48; NACDL Br. 3, 19-20; ABA Br. 23. Quoting from the Court's opinion in *Kimmelman v. Morrison*, 477 U.S. 365 (1986), Mr. Frye states that "it is virtually inconceivable that an attorney would deliberately invite the judgment that his performance was constitutionally deficient in order to win a . . . collateral review for his client." Resp.Br. 48-49.

But the State is not suggesting that defense attorneys are a shady class of attorneys who will simply ignore or willfully violate their ethical duties in an attempt to "game" the system. To the contrary, in pointing out that defense attorneys could act in a manner that serves to minimize the loss of liberty for their clients, the State is pointing out that Mr. Frye's rule will bring two ethical principles into conflict.

The preamble to Missouri's Rules of Professional Conduct states: "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." MO. SUP. CT. RULE 4, Preamble ¶ [2]. Usually, the ethical obligations to zealously seek the best possible result and to promptly convey plea offers go hand in hand. But if counsel's silence about an offer will transform the offer into an irrevocable offer, the two ethical obligations begin to conflict. This ethical conflict will sharpen in cases where the criminal charges are more serious and the state makes a favorable offer in the early stages of the case. In short, defense attorneys will in some cases be confronted with the real possibility that withholding a plea offer might be the best means of obtaining the best possible result.

In *Kimmelman* the alleged danger was that defense counsel would "sandbag" by refraining from litigating Fourth Amendment claims, so as to later obtain a new trial for the defendant in federal habeas proceedings. 477 U.S. 382 n. 7. The Court deemed this a negligible danger, for it seemed unlikely that many defense attorneys would give up the chance for acquittal (at a trial where evidence would be suppressed) in exchange for the possibility of obtaining a new trial at some later date. *See id*. But, here, under Mr. Frye's proposed rule, defense counsel's preference for zealously seeking the best possible

outcome will not merely procure a new trial; rather, it will procure the immediate benefit of a reduced sentence and, in some cases, reduced charges. And the defendant will be assured of this benefit even *after* "rolling the dice" at trial in hopes of gaining an acquittal, or after entering an "open" plea in hopes of gaining merciful treatment from the trial court.

Additionally, unlike the dubious, future benefit that might have come from the sort of sandbagging feared in *Kimmelman*, the benefit under Mr. Frye's rule can be realized even before trial. For, once a prosecutor makes any plea offer, defense counsel's silence about the offer will transform the offer into a maximum cap on the defendant's criminal liability. Thus, as trial approaches, if the case takes a turn for the worse, or if the state's subsequent offers are not acceptably favorable, defense counsel need only "come clean" with the defendant and divulge the first plea offer and make its terms immediately available to the defendant (who, like Mr. Frye, will have suffered the same "prejudice" of not being able to previously accept the plea offer that he would have accepted if the defendant had known about it).

In other words, because ethical duties under the rules can conflict, the question of whether counsel's performance was "constitutionally deficient" should not be slavishly tied to one particular rule. The preamble to Missouri's Rules of Professional Conduct acknowledges the possibility of ethical conflicts; it states: "In the nature of law practice, . . . conflicting responsibilities are encountered." MO. SUP. CT. RULE 4, Preamble ¶ [9]. To resolve such conflicts, lawyers in Missouri are advised to consider various principles, including "the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law[.]" *Id*.

Mr. Frye essentially argues that counsel's duty to communicate a plea offer is the only permissible course of action under the Constitution. But as the Court made plain in *Strickland*, the rules of professional conduct, while instructive, do not create constitutional rights, and they do not dictate what is required of counsel: "Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, *but they are only guides*." 466 U.S. at 688 (emphasis added). "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 688-689. In fact, "Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Id.*

In short, in the State's view, the problem is not that defense attorneys will willfully abandon their ethical duties, but that defense attorneys will be forced to choose between conflicting obligations. And in some cases, the great benefit that can inure to a criminal defendant who temporarily "loses" a plea offer may be sufficient to convince counsel that silence about an offer is the better choice.

Lastly, the difficulties inherent in Mr. Frye's rule are not limited to instances where defense counsel makes a tactical decision to hold back a plea offer. Even if it is assumed that defense attorneys will, as a practice, always convey plea offers, prosecutors will know that mistakes do happen. Thus, because prosecutors will also know that the State will bear the burden of such mistakes the willingness to plea bargain in the most serious cases will undoubtedly

wane. Plea bargaining will lose its fluidity, it will become much more formal, and it could evolve to the point where the trial court will have to be involved in plea negotiations to ensure that all of the prosecutors' offers have been fully and adequately communicated to defendants.[3] This would place a heavy and unnecessary burden on the criminal justice system.

In short, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation," *Strickland*, 466 U.S. at 689; but if the Court wants to invigorate the professional rules cited by Mr. Frye and the ABA, and if the Court wants to encourage counsel to promptly convey plea offers and provide good advice about such offers, the Court should reject Mr. Frye's proposed remedy and leave the burden of communicating offers on defense counsel.

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[3] In fact, Mr. Frye's *amici* point out that this is already taking place in Arizona, NACDL Br. 20; CACL Br. 25; ABA Br. 24 n. 23, and the CACL urges the Court to encourage states to make all plea offers a matter of record in court. CACL Br. 23-28; *see also* ABA Br. 24.

CONCLUSION

The Court should reverse the judgment of the Missouri Court of Appeals.

Respectfully submitted,

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