

No. 10-444

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IN THE  
**Supreme Court of the United States**

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STATE OF MISSOURI,

*Petitioner,*

*v.*

GALIN E. FRYE,

*Respondent.*

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

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**BRIEF FOR RESPONDENT**

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## QUESTIONS PRESENTED

1. Consistent with the holding in *Strickland v. Washington*, 466 U.S. 668 (1984) – which held that to prove prejudice on a claim of ineffective assistance of counsel 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” – has prejudice been shown where defense counsel fails to inform the defendant that he can plead guilty to a misdemeanor with a maximum prison sentence of one year, and as a result of counsel’s failure the defendant pleads guilty to a felony and receives a prison sentence of three years?
2. What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?

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**STATEMENT**

1. On August 14, 2007, respondent Galin Frye was charged with one count of the felony of driving with a revoked license. J.A. 11-12. Michael Coles, a public defender, was appointed to represent him. J.A. 39-40. A preliminary hearing was scheduled for January 4, 2008. J.A. 59.

On November 15, 2007, the State sent Coles a written plea offer by mail. J.A. 40, 50. The offer was received in Coles' office on November 19. J.A. 40. Coles testified that he received and read the offer. J.A. 40. His highlighting and written notations on the letter confirm that he read the offer approximately a week after it was mailed to him. J.A. 40. The offer stated:

My recommendation is a [sic] follows: 3  
and defer, on the felony with 10 days  
"shock" in the Boone County Jail; OR  
90 days to serve on an amended misdemeanor  
in the Boone County Jail.

I am going to subpoena witnesses for  
the preliminary hearing on January 4, 2008.  
I will need to know if Mr. Frye  
will be waiving to preserve the offer by  
noon on December 28, 2007.

J.A. 50, 59-60.

The first paragraph of the offer gave Frye a choice. He could either (1) plead guilty to the felony charge, in which case the prosecutor would recommend a three-year

prison sentence and defer to the court regarding probation but requested that Frye served ten days of “shock” time in jail; or (2) plead guilty to an amended information charging only a misdemeanor, in which case the prosecutor would recommend a sentence of ninety-days in jail. In the second paragraph, the prosecutor clearly explained that the offer would expire at noon on December 28.

Coles did not inform Frye of the offer. J.A. 60. The offer was open for more than a month, from November 15 to December 28, but Coles never made any effort to contact Frye during that period. He did not speak with Frye in person. He did not try to call Frye on the telephone. He did not mail Frye a letter. Frye was not hard to find. He was living in St. Louis, where he attended college. J.A. 38. Coles knew Frye’s mailing address and telephone number. J.A. 38, 44. The offer expired on December 28, but Frye had still never heard about it.

After the offer expired, Coles made no effort to ask the prosecutor to extend the deadline. J.A. 44. He later claimed that this was because on December 30, two days after the deadline, Frye was arrested once again for driving with a revoked license. J.A. 44, 61. “[S]ometimes I could talk them into extending it,” he testified. “But it would have been made more difficult by the fact that . . . he had picked up a new case.” J.A. 44.

In March 2008, Frye entered an “open” guilty plea (i.e., a plea in which the prosecutor does not promise to recommend any particular sentence) to the felony of driving with a revoked license. J.A. 13, 61. He had still never heard about the opportunity to plead guilty to a misdemeanor, under the terms of the plea offer that had

expired back in December. J.A. 27 & n.2. At sentencing the prosecutor adhered to the terms of the expired plea offer, telling the court, “Our recommendation is three and defer. We would request 10 days shock in the Boone County Jail.” J.A. 22. This recommendation was identical to the first of the two options in the expired plea offer. J.A. 61. The court sentenced Frye to three years of imprisonment. J.A. 23, 61. Frye began serving his prison sentence in May 2008. J.A. 25.

2. Frye first learned about the expired plea offer while he was incarcerated, when post-conviction counsel discovered it. J.A. 27 & n.2, 33. Frye moved to vacate his conviction, on the ground that he had been denied the effective assistance of counsel when defense counsel Michael Coles failed to inform him of the plea offer. J.A. 25, 29. He explained that had he been informed of the opportunity to plead guilty to a misdemeanor, he would have done so. J.A. 26, 34.

The court determined that even if Coles was at fault for failing to inform Frye of the plea offer, Frye could not establish ineffective assistance of counsel, because in his motion, Frye had not alleged that he “would have gone to trial but for his counsel’s errors.” J.A. 53. Such an allegation, the court believed, was a requirement in a claim for ineffective assistance of counsel during plea negotiations. J.A. 53-55. Nor was Frye entitled to a remand, the court held, because on remand there would be no way to require the State to renew the plea offer. J.A. 56-57. The court accordingly denied Frye’s motion to vacate his conviction. J.A. 57.

3. The Missouri Court of Appeals reversed. J.A. 58-80. The court applied the two-part standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and determined that Frye had been denied effective assistance of counsel.

Under the first part of the *Strickland* standard, the court found that “Frye’s trial counsel had an absolute duty to keep Frye informed of plea communications.” J.A. 68. Frye had not prevented Coles from carrying out this obligation. J.A. 69. Rather, “[t]he record is void of any evidence of any effort by trial counsel to communicate the Offer to Frye during the Offer window.” J.A. 69. The fault accordingly lay with Coles, not with Frye. J.A. 69-70. Further, the court explained, “[w]e can conceive of no reasonable trial strategy that would justify counsel’s failure to communicate the Offer to Frye.” J.A. 65.

Under the second part of the *Strickland* standard, the Court of Appeals held that the motion court erred as a matter of law in requiring Frye to allege that he would have gone to trial but for counsel’s ineffective assistance. J.A. 70-76. The correct standard of prejudice under *Strickland*, the Court of Appeals noted, required Frye to “show a reasonable probability that, but for counsel’s alleged deficiencies, the result of the proceeding would have been different.” J.A. 70. The court found that Frye had made this showing. “Because of trial counsel’s failure to inform Frye of the Offer,” the court determined, “Frye pled guilty to a felony instead of a misdemeanor and was subject to a maximum sentence of four years instead of one year.” J.A. 78. The court thus concluded that “Frye did sufficiently prove, by a preponderance of the evidence, that he was prejudiced through trial counsel’s failure to

convey the State's offer." J.A. 78. Had Frye pled guilty to a misdemeanor, the Court of Appeals observed, "the trial court would have been bound to accept the guilty plea for the misdemeanor charge." J.A. 77-78. Even if the trial judge had rejected the prosecutor's recommendation of a ninety-day sentence, under Missouri law "[t]he maximum jail sentence that the trial judge could have imposed for the misdemeanor plea was one year imprisonment." J.A. 78. The court thus concluded that Frye had "established prejudice pursuant to Strickland." J.A. 78.

The Court of Appeals then turned to the question of remedy. The court recognized that "the 'appropriate' remediation might be to afford Frye the opportunity to plead guilty to the amended charge of misdemeanor driving while revoked." J.A. 79. In the court's view, however, such a remedy was beyond its authority because "we are not empowered to order the State to reduce the charge against Frye." J.A. 79. Instead, the Court of Appeals reversed the judgment entered on the guilty plea, and remanded the case to the trial court. J.A. 80. The Court of Appeals acknowledged that this remedy "may leave Frye with but two options – proceed to trial or plead guilty to and be resentenced for the same felony charge to which Frye originally entered his 'open' guilty plea." J.A. 79. The court admitted that "this . . . may not seem a satisfactory remedy for Frye." J.A. 79.

## SUMMARY OF ARGUMENT

Missouri and the Solicitor General advance a theory of the Sixth Amendment that has been rejected by all twelve federal Courts of Appeals and by the courts of twenty-five of the twenty-seven States in which the issue has arisen. Under this theory, the only cognizable form of prejudice in cases of ineffective assistance of counsel would be the loss of a fair trial. As the lower courts have almost unanimously recognized, this interpretation of the Sixth Amendment has no basis in constitutional text, in precedent, or in common sense.

*Strickland v. Washington*, 466 U.S. 668 (1984), established the test for claims of ineffective assistance of counsel. The Court applied the *Strickland* standard to the guilty plea in *Hill v. Lockhart*, 474 U.S. 52 (1985), according to the specific circumstances of that particular case then before the Court. Frye's case, while arising out of a guilty plea, presents circumstances that differ from those before the Court in *Hill*, and the *Strickland* standard must be applied in a manner accounting for this particular case. *Hill* did not supplant the *Strickland* standard by establishing a new and absolute rule applicable to every claim of ineffective assistance of counsel following a guilty plea. "Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial." *Strickland*, 466 U.S. at 693. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel." *Id.* at 688-689. Courts must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690.

*See also Roe v. Flores-Ortega*, 528 U.S. 470 (2000) (quoting these last two statements from *Strickland*). In determining prejudice from deficient performance, a court “must consider the totality of the evidence before the court or jury.” *Strickland*, at 696. *Strickland* established the applicable standard. The specific context of particular cases determines how that standard is applied.

The standard of prejudice established in *Strickland*, appropriately and effectively addresses a defense counsel’s deficient performance in failing to communicate a plea offer from the prosecutor to the defendant. Defense counsel has a constitutional obligation to communicate a plea offer. Plea negotiations are a critical stage in the criminal process. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010). A guilty plea entered without knowledge of a prior, and more favorable, plea offer is not entered with full awareness of the alternatives available to the defendant. This lack of awareness undermines the reliability of the plea and renders it fundamentally unfair. A conviction for a felony is a far worse outcome than a conviction for a misdemeanor. Limiting “relief” to standing trial does not remedy the prejudice.

I. *Strickland* established in American jurisprudence the Sixth Amendment’s guarantee to effective assistance of counsel in the defense against criminal charges jeopardizing a citizen’s liberty. “In all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defense.” Constitution of the United States, Sixth Amendment. “[T]he right to counsel is the right to effective assistance of counsel.” *McMann v. Richardson*, 397 U.S. 759 (1970). The Sixth Amendment protects a defendant against an attorney’s

deficiencies which adversely affect the outcome of the criminal case. “When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness [and] that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668 (1984).

Counsel’s performance on Frye’s behalf was clearly deficient. Effective counsel’s representation must meet an objective standard of reasonableness. *Strickland, supra*. “An attorney undoubtedly has a duty to consult with the client regarding important decisions....” *Florida v. Nixon*, 543 U.S. 175, 187 (2004). “A guilty plea, as we recognized in *Boykin v. Alabama*, 395 U.S. 238 (1969), is an event of signal significance in a criminal proceeding.” *Id.* (internal citation omitted). Frye’s counsel failed to communicate to him the State’s offer to amend the charge from a class D felony punishable by up to four years in prison to a misdemeanor with the State’s recommendation of ninety-days in jail.

*Strickland* defined prejudice as “a reasonable probability that, but for counsel’s unprofessional errors, the outcome of the proceedings would have been different.” 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* Unaware of an offer by the State to amend the felony charge to a misdemeanor and recommend a sentence of ninety-days in jail, Frye later entered an “open” plea of guilty to the felony offense and received a sentence of three years in prison. Had counsel informed Frye of the

State's plea offer he would have accepted it. It is not only reasonably likely that he would have accepted the offer to reduce the charge and punishment; it is a certainty that he would have done so. And, had the State amended its charge to allege the reduced crime and made a specific sentencing recommendation to the court, it is reasonably probable that the court would have accepted the agreement and imposed sentence accordingly. Even if not, the misdemeanor plea would have protected Frye against anything more than a one-year sentence. But for counsel's unprofessional error, there is a reasonable likelihood that the outcome of the proceedings would have been different. The requirements of *Strickland* have been met.

*Hill v. Lockhart* held that “the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.” 474 U.S. at 58. Prejudice following a guilty plea “focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process.” *Id.*

The Court found in *Hill* that “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.” 474 U.S. at 59. This holding 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 a trial.” *Id.* Examples of this similarity identified by the Court were failure to investigate, failure to discover potentially exculpatory evidence, or failure to advise a defendant of a potential affirmative defense. *Id.* *Hill* recognized that

under these circumstances, but for counsel's errors, there is a reasonable probability that the defendant would choose to present exculpatory evidence or an affirmative defense through a trial.

Frye's situation is not one of the "many guilty plea cases" addressed by the Court in *Hill*. Frye's case presents a different form of deficient performance and a different prejudice affecting the outcome of the plea process. Had trial counsel performed his responsibilities reasonably, Frye would still not have chosen to go to trial. He would have chosen to accept the plea offer made by the State which would have allowed him to plead guilty before the trial court to a misdemeanor rather than a felony, and his punishment would have been ninety days in jail rather than three years in prison. Counsel's deficient performance clearly resulted in a different outcome of the plea process. Rather than pleading guilty to a misdemeanor with a recommendation from the State for a ninety-day jail sentence, Frye was forced to plead guilty to the original felony charge and throw himself on the mercy of the court regarding sentencing. But for counsel's deficient performance, the outcome of the proceedings, the plea negotiation process, would have been different. This meets the *Strickland* standard for prejudice.

A critical question in reviewing whether a petitioner has demonstrated prejudice resulting from counsel's allegedly deficient performance is whether the decision the petitioner would have made but for the alleged deficiency would have been rational under the circumstances. In the Court's review in *Roe* whether counsel was ineffective in failing to file an appeal on the defendant's behalf, the Court considered whether a rational defendant would want to appeal under the circumstances. 528 U.S. at 480.

In *Padilla*, the Court noted that “to obtain relief on [a claim of ineffective assistance of counsel following a guilty plea] a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.” 130 S. Ct. at 1485. By the same token, under the circumstances of Frye’s case, it would have been an entirely rational decision to accept an offer from the State to reduce the charge from a felony to a misdemeanor with a sentencing recommendation of ninety-days, and a maximum exposure of one year in jail.

The Courts of Appeals which have confronted circumstances like those in Frye have applied *Hill* in a manner consistent with the *Strickland* standard of deficient performance affecting the outcome of the proceeding. These courts have found prejudice, or accepted that prejudice can be found, where, but for counsel’s deficient performance, the defendant *would* have accepted a plea offer and chosen *not* to go to trial. See *Turner v. Tennessee*, 858 F.2d 1201 (6th Cir. 1988) *vacated on other grounds* 492 U.S. 902, *reinstated* 726 F.Supp. 1113 (M.D.Tenn. 1989), *aff’d* 940 F.2d 1000 (6th Cir. 1991), *cert. denied*, 502 U.S. 1050 (1992); *Griffin v. United States*, 330 F.3d 733 (6th Cir. 2003); *Williams v. Jones*, 571 F.3d 1086 (10th Cir. 2009) n.3, *cert. denied* 130 S. Ct. 3385 (2010); *United States v. Carter*, 130 F.3d 1432, 1442 (10th Cir. 1997); *Coulter v. Herring*, 60 F.3d 1499 (11th Cir. 1995). These courts recognize that the circumstances causing the prejudice before the Court in *Hill* are not the only circumstances under which prejudice can occur during the plea negotiation process. The general standard of prejudice established in *Strickland* covers all of the possible circumstances of deficient representation that may arise.

Frye’s “open” guilty plea did not vitiate the harm from counsel’s deficient performance. A guilty plea does not waive a claim that ineffective assistance of counsel rendered the plea unknowing and unintelligent. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). A valid plea must be a “voluntary and intelligent choice among the alternative courses of action open to the defendant.” *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *Hill*, 474 U.S. at 56. Frye was unaware of the alternative courses of action available to him under the State’s plea offer because his attorney failed to inform him of the offer. Constitutional violations are remedied by restoring the victim of the violation to the position they would have been in absent the violation. *Milliken v. Bradley*, 418 U.S. 717, 746 (1974). Every federal Court of Appeal and twenty-five of twenty-seven state courts addressing this issue have rejected the argument that subsequent valid procedures vitiated the harm caused by the constitutional violation of ineffective assistance of counsel because subsequent procedures cannot put the defendant in the position he would have occupied absent the ineffective assistance.

II. The appropriate remedy is to allow Frye to accept the State’s plea offer and plead guilty to the court to a misdemeanor, with a recommendation by the State of ninety days in jail. This is the only remedy which returns Frye to the position he was in prior to the ineffective assistance of counsel. The object of the remedy for ineffective assistance is to “identify and neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel.” *United States v. Morrison*, 449 U.S. 361, 365 (1981). This principle was established in *Strickland*. 466 U.S. at 692.

This remedy does not put Frye in a better position than he would have occupied absent counsel's ineffectiveness, nor does it create a right to a plea bargain. The State was not required to make a plea offer, but it did. A prosecutor has the power to withdraw a plea offer even after it is accepted, but he did not do so here. The prosecutor recommended as a sentence the first of the two options in his original offer after Frye entered an "open" plea of guilty to the felony. This remedy does not give a defendant any new rights.

This remedy will not contravene the separation of powers. When courts exercise their power to remedy constitutional violations, they have authority to order Executive officials perform actions that would exceed the court's power in the absence of the constitutional violation. Had there been no constitutional violation, a court could not compel a prosecutor to extend a plea offer. But where a constitutional violation prevents a defendant from accepting a plea offer the prosecutor has already made, a court may remedy the violation by ordering the prosecutor's office to comply with the terms of its plea offer. *Puckett v. United States*, 129 S. Ct. 1423, 1430 (2009); *Santobello v. New York*, 404 U.S. 257, 263 (1971). The Sixth Amendment mandates that the State bear the risk of constitutionally deficient counsel. *Kimmelman v. Morrison*, 477 U.S. 365, 379 (1986).

This remedy will not displace the discretion of the trial court. The trial court will still have the discretion to reject Frye's guilty plea or to sentence Frye to an authorized sentence greater than that recommended by the prosecutor. Frye would have faced this same discretion had counsel been effective in communicating the plea

offer and had Mr. Frye entered a guilty plea according to that offer.

## ARGUMENT

### **I. Galin Frye Was Denied Effective Assistance Of Counsel When His Lawyer Failed to Inform Him of the State’s Plea Offer.**

The Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel during plea bargain negotiations. *Hill v. Lockhart*, 474 U.S. 52, 57-59 (1985); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480-1481 (2010). The standard is the familiar one set out in *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant establishes ineffective assistance by showing (1) “that counsel’s representation fell below an objective standard of reasonableness,” *Id.* at 688, and (2) “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different,” *id.* at 694. *Premo v. Moore*, 131 S. Ct. 733, 737-738, 739-740 (2011); *Wright v. Van Patten*, 552 U.S. 120, 124 (2008); *Hill*, 474 U.S. at 57-58.

Defense counsel’s failure to inform Frye of the prosecutor’s plea offer unquestionably fell below an objective standard of reasonableness. Had defense counsel acted with reasonable professional competence, Frye would have pleaded guilty to a misdemeanor and received a sentence of as little as ninety days, but certainly no more than one year, in jail. Because of counsel’s deficient performance, however, Frye received a sentence of three years in prison on a felony. But for counsel’s deficient performance, the result of this proceeding would have been different. *Strickland*, 466 U.S. at 694.

The well-established *Strickland* standard of prejudice appropriately and effectively addresses counsel's deficient performance. Plea negotiations are a critical stage in the criminal process. *Padilla*, 130 S. Ct. at 1486. A guilty plea entered without knowledge of a prior, and more favorable, plea offer is not entered with full awareness of the alternatives available to the defendant. This lack of awareness undermines the reliability of the plea and renders it fundamentally unfair. The different outcome changed the result of the proceedings to Frye's disadvantage. Limiting "relief" to standing trial does not remedy the prejudice.

**A. The Right to Effective Assistance of Counsel Ensures the Fairness of All Critical Stages of a Criminal Prosecution, Including Plea Negotiations, Not Just the Fairness of Trial.**

The Sixth Amendment guarantees effective assistance of counsel "[i]n all criminal prosecutions," not just at the trial, but before trial and after trial. "[P]erhaps the most critical period of the proceedings ... [is] the time of ... arraignment until the beginning of ... trial." *Powell v. Alabama*, 287 U.S. 45, 57 (1932). The Court noted that at such time "[t]he critical hand of counsel is needed ...." *Id.* at 54-55. The Court has also guaranteed defendants the right to effective assistance of counsel during the sentencing stage of the criminal proceeding, *Rompilla v. Beard*, 545 U.S. 374, 380 (2005), and in the appellate stage following trial. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The Court noted in *Evitts* that counsel's assistance is necessary because an appeal is "an adversary proceeding that – like a trial – is governed by intricate rules that to a layperson would be hopelessly forbidding." *Id.*

Effective assistance of counsel protects the integrity of criminal *prosecutions*, not just criminal *trials*. In *Kimmelman*, the Court stated, “we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent, *or that it attaches only to matters affecting the determination of actual guilt.*” 477 U.S. at 380 (emphasis added). So, too, the Third Circuit Court of Appeals held, “the Sixth Amendment right to effective assistance of counsel guarantees more than the Fifth Amendment right to a fair trial.” *United States v. Day*, 969 F.2d 39, 45 (3rd Cir. 1992).

Missouri and the Solicitor General rely heavily on the assertion that guilty plea negotiations are not a critical stage of the criminal process. They attempt to distinguish the plea negotiation process from the guilty plea. But the Court has consistently rejected this argument. “[W]e have long recognized that the *negotiation* of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.” *Padilla*, 130 S. Ct. at 1486, *citing McMann v. Richardson*, 397 U.S. 759, 770-771 (1970) (emphasis added). *See also, Burger v. Kemp*, 483 U.S. 776, 803-804 (1987) (noting that “pretrial plea negotiations” are a critical stage of the criminal process). The Court has recognized that the purpose of the Sixth Amendment guarantee of counsel is to assure aid when the accused is confronted with both the intricacies of the law and the advocacy of the public prosecutor. *United States v. Gouveia*, 467 U.S. 180, 189 (1984). This right is extended to critical pre-trial proceedings where the accused is confronted, just as in a trial, by the procedural system, or by an expert adversary in a situation where the results of the confrontation might well settle the accused’s fate. *Id.*

The Court recognizes that effective counsel is necessary to provide fairness to the defendant and reliability to the proceeding because the complex nature of criminal law demands an expertise and experience well beyond the un-trained layperson. These complexities are inherent in the process of negotiating a plea agreement. “Plea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks.” *Premo*, 131 S. Ct. at 741 (emphasis added). A layperson defendant “requires the guiding hand of counsel at *every* step in the proceedings against him.” *Powell v. Alabama*, 287 U.S. at 53 (emphasis added).

While defense counsel represented Frye during the pre-trial process, his failure to communicate the State’s plea offer to Frye is comparable to the absence of counsel during this critical stage. The complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice because “the adversary process itself” has been rendered “presumptively unreliable.” *Roe v. Flores-Ortega*, 528 U.S. at 471; *citing United States v. Cronin*, 466 U.S. 648, 659 (1984).

The plea negotiation process is a critical stage of the criminal proceeding involving a confrontation between an expert public prosecutor and an equally expert defense attorney who must protect the defendant’s rights throughout the process that settles the defendant’s fate in 95 percent of all cases. Without effective assistance of defense counsel, this process breaks down and the validity and reliability of the outcome of the proceeding is called into question.

Missouri and the Solicitor General also make much of the fact that there is no constitutional right to a plea bargain, but that fact has no bearing on this case. Frye is not claiming a constitutional right to plea bargain, nor does granting him relief require the Court to establish such a right. Had the prosecutor not offered a plea bargain, the trial court could not have compelled him to do so. *Mabry v. Johnson*, 467 U.S. 504, 507 (1984); *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977). Once plea negotiations begin, however, the defendant has a constitutional right to effective assistance of counsel during the plea negotiation process. That is the right Frye was denied. Missouri's and the Solicitor General's theory was addressed and rejected in *Williams v. Jones*, 571 F.3d 1086 (10th Cir. 2009). In that case, the defendant wanted to accept the state's plea offer of second degree murder with a ten-year prison sentence from the State, but his attorney, believing his client was innocent, told the defendant that pleading guilty would be perjury and if the defendant wanted to plead guilty counsel would withdraw. *Id.* at 1088. The defendant rejected the plea offer, was convicted of first degree murder at trial, and was sentenced to life in prison without parole. *Id.* The defendant sought to set aside his conviction based on ineffective assistance of counsel. *Id.* The State argued on appeal that plea offers are discretionary and the prosecutor was not required to extend one or to keep it open. *Id.* at 1091. The Court of Appeals noted that the case would be different if the prosecutor had not made a plea offer, citing *Mabry v. Johnson*, and *Weatherford v. Bursey*. *Id.* But that was not the issue:

[W]e are not dealing with the government's discretion to make or withdraw a plea offer. Rather, we are dealing with an offer that

was rejected because of defense counsel's ineffective assistance, with disastrous results for [the defendant]. In the end, this ineffective assistance and the resulting prejudice are attributable to the State.

*Id.* at 1091. The Court of Appeals further noted, "No one contests the rule that plea offers are executory in nature and that, under *Mabry* and *Weatherford*, a prosecutor may, consistent with due process, decline to offer or withdraw an offer. But here, the assistant district attorney made an offer that [the defendant] had a right to accept, as long as it was open, with effective assistance of counsel." *Id.* at 1094. The Court of Appeals cited *Hill* and *Strickland*. *Id.*

Missouri suggests that the plea negotiation process is not "confrontational" because:

Plea offers are often made under circumstances that do not involve the accused in any fashion. For instance, a prosecutor and a defense attorney might run into each other in the hallway of the courthouse or the local restaurant and discuss several offers without ever pausing to allow defense counsel to discuss the various offers with the accused. Such conversations do not subject the defendant to any sort of proceeding or "confrontation" with "prosecutorial forces." There is no danger that the defendant will, because of such a conversation, unwittingly settle his fate or give up the right to trial.

(Petitioner's Brief at 25-26). But that is not what happened in Frye's case. The prosecutor did not "run into" defense

counsel and make an offer in Frye’s case in passing. The prosecutor made a formal offer, in writing on his official stationary, setting out the terms of the offer, and setting an expiration date for the offer. J.A. 50. This is at least as common as a meeting in a hallway or a restaurant, and is more likely in more serious cases. Missouri is wrong to discount the seriousness of plea negotiations in general simply because it can envision less formal contacts. Furthermore, it is because plea offers are made to defense counsel rather than to the defendant personally that effective assistance of counsel is required during the plea negotiation process.

Missouri and the Solicitor General narrow the scope of the Sixth Amendment to protecting a trial only, and not the entire criminal process. This narrow focus has been rejected by all twelve Courts of Appeals<sup>1</sup> and twenty-five of twenty-seven states.<sup>2</sup>

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1. *United States v. Rodriguez-Rodriguez*, 929 F.2d 747, 753 (1st Cir. 1991) n.1; *Pham v. United States*, 317 F.3d 178, 182-85 (2nd Cir. 2003); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 438 (3rd Cir. 1982); *United States v. Brannon*, 48 Fed. Appx. 51, 53 (4th Cir. 2002); *United States v. Herrera*, 412 F.3d 577, 579-82 (5th Cir. 2005); *Turner v. Tennessee*, 858 F.2d at 1205; *Julian v. Bartley*, 495 F.3d 487, 498-500 (7th Cir. 2007); *Engelen v. United States*, 68 F.3d 238, 241 (8th Cir. 1995); *United States v. Blaylock*, 20 F.3d 1458, 1466 (9th Cir. 1994); *Williams v. Jones*, 571 F.3d at 1091; *Coulter v. Herring*, 60 F.3d 1499, 1502-04 (11th Cir. 1995), *cert. denied*, 516 U.S. 1122 (1996); *United States v. Mouling*, 557 F.3d 658, 669 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 795 (2009).

2. *State v. Donald*, 10 P.3d 1193, 1198-99 (Ariz. Ct. App. 2000), *cert. denied*, 534 U.S. 825 (2001); *In re Alvernaz*, 830 P.2d 747, 753-55 (Cal. 1992); *Carmichael v. People*, 206 P.3d 800, 805-09 (Colo. 2009); *Cottle v. State*, 733 So. 2d 963, 967 (Fla. 1999); *Lloyd v. State*, 373 S.E.2d 1, 3 (Ga. 1988); *People v. Curry*, 687 N.E.2d 877, 887-

**B. Failure to Inform the Defendant of a Plea Offer Amounts To Constitutionally Deficient Performance.**

No duty is more basic to the role of defense counsel than that of informing the client of a plea offer made by the prosecutor. “An attorney undoubtedly has a duty to consult with the client regarding important decisions,” including an offer to plead guilty, which “is an event of signal significance in a criminal proceeding.” *Florida v. Nixon*, 543 U.S. 175, 187, (2004) (internal quotation marks omitted). The Court has made it clear that “it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement.” *Libretti v. United States*, 516 U.S. 29, 50 (1995).

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88 (Ill. 1997); *Lyles v. State*, 382 N.E.2d 991, 994 (Ind.App.1978); *State v. Kraus*, 397 N.W.2d 671, 674-76 (Iowa 1986); *Osborne v. Commonwealth*, 992 S.W.2d 860, 863 (Ky. Ct. App. 1998); *Williams v. State*, 605 A.2d 103, 109-10 (1992); *Commonwealth v. Mahar*, 809 N.E.2d 989, 993 (Mass.App. 2004); *People v. McCauley*, 782 N.W.2d 520, 523-24 (Mich.App. 2010) (per curiam), appeal pending, 792 N.W. 331 (Mich. 2011); *Dobbins v. State*, 187 S.W.3d 865, 867 (Mo. banc 2006); *Larson v. State*, 766 P.2d 261, 263 (Nev.1988); *State v. Taccetta*, A.2d 884, 887 (N.J.App. Div. 2002); *State v. Simmons*, 309 S.E.2d 493, 498 (N.C.App. 1983); *Jiminez v. State*, 144 P.3d 903, 907 (Okla. Crim. App. 2006); *Commonwealth v. Napper*, 385 A.2d 521, 524 (Pa. 1978); *Davie v. State*, 675 S.E.2d 416, 418, 420-23 (S.C. 2009); *State v. Garrison*, 40 S.W.3d 426, 431 (Tenn. 2000); *Hanzelka v. State*, 682 S.W.2d 385, 387 (Tex. Ct. App. 1984); *In re Plante*, 762 A.2d 873, 876 (Vt. 2000); *State v. James*, 739 P.2d 1161, 1167 (Wash.App. 1987); *Becton v. Hun*, 516 S.E.2d 762, 768 (W.Va. 1999); *State v. Lentowski*, 569 N.W.2d 758, 761 (Wis. Ct. App. 1997). The only States to the contrary are Louisiana and Utah. *State v. Monroe*, 757 So. 2d 895, 898 (La. Ct. App. 2000); *State v. Greuber*, 165 P.3d 1185, 1188-89 (Utah 2007).

Since defense counsel has a constitutional obligation to consult with a client about a plea offer, and the advantages and disadvantages of accepting a plea offer, counsel has the constitutional obligation to inform the defendant that the prosecutor has made a plea offer. Every federal Court of Appeals to have addressed the issue has held that defense counsel's failure to advise a client of a plea offer amounts to constitutionally deficient performance.<sup>3</sup>

The Court has often used the standards of the American Bar Association as guidelines for determining whether counsel's performance is reasonable. *See, e.g., Rompilla v. Beard*, 545 U.S. at 387; *Wiggins v. Smith*, 539 U.S. 510, 525 (2003); *Padilla*, 130 S. Ct. at 1482. The ABA's Model Rules of Professional Conduct require a lawyer "to promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required by these rules." ABA Model Rule 1.4(a)(1). One such decision is whether to plead guilty. *Id.*, Rule 1.2(a). The Comment to Rule 1.4 makes clear, as the first example of this duty to inform the client, that "a lawyer who receives from opposing counsel . . . a proffered plea bargain in a criminal case must promptly inform the client of its substance." *Id.*, Rule 1.4, Comment 2. The ABA's Standards for Criminal Justice likewise require that

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3. *Rodriguez-Rodriguez*, 929 F.2d at 752; *Pham*, 317 F. 3d at 182; *Caruso* 689 F.2d at 438; *Brannon*, 48 Fed. Appx. at 53; *Arnold v. Thaler*, 630 F.3d 367, 370 (5th Cir. 2011) (per curiam); *Griffin v. United States*, 330 F.3d 733, 737 (6th Cir. 2003); *Johnson v. Duckworth*, 793 F.2d 898, 902 (7th Cir. 1986), *cert. denied*, 479 U.S. 937 (1986); *Blaylock*, 20 F.3d at 1465-66; *United States v. Castro*, 365 Fed. Appx. 966,967 (10th Cir. 2010); *Oliver v. United States*, 292 Fed. Appx. 886, 887 (11th Cir. 2008), *cert. denied*, 129 S. Ct. 2023 (2009); *United States v. Mouling*, 557 F.3d at 669.

“[d]efense counsel should promptly communicate and explain to the accused all significant plea proposals made by the prosecutor.” ABA Criminal Justice Standard 4-6.2(b).

The Court has stated: “States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented ....” *Roe v. Flores-Ortega*, 528 U.S. at 479. Missouri’s Rule 4-1.4 of the rules of professional conduct states: “(a) A lawyer shall: (1) keep the client reasonably informed about the status of the matter; [and] ... (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation.” In *In re Crews*, 159 S.W.3d 355, 359 (Mo. banc 2005), the Missouri Supreme Court held that pursuant to Rule 4-1.4, counsel is required to keep the client informed of significant developments in the case, and “a lawyer who receives from opposing counsel ... a proffered plea bargain in a criminal case *must promptly inform the client of its substance.*” (emphasis added).

Trial counsel failed to meet his professional responsibility to inform Frye of the State’s plea offer. In failing to do so, his performance fell short of the level of competence required by the Sixth Amendment.

**C. Failure to Communicate a Plea Offer Renders a Subsequent Guilty Plea Unknowing, Unintelligent, and Involuntary Because It Leaves the Defendant Unaware of and Unable to Choose Between the Alternatives That Would Have Been Available But for Counsel's Deficient Performance.**

While a guilty plea waives some claims of constitutional error occurring prior to the plea, it does not waive a claim of ineffective assistance of counsel relating to “the voluntary and intelligent character of the guilty plea.” *Tollett v. Henderson*, 411 U.S. at 267. A valid plea must be a “voluntary and intelligent choice among the alternative courses of action open to the defendant.” *North Carolina v. Alford*, 400 U.S. at 31; *Hill*, 474 U.S. at 56.

The Court noted in *Hill* that “the voluntariness of the plea depends on whether counsel’s advice ‘was within the range of competence demanded of attorneys in criminal cases.’” 474 U.S. at 56, quoting *McMann v. Richardson*. Justice Alito noted in his concurring opinion in *Padilla*, that “incompetent advice distorts the defendant’s decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question.” 130 S. Ct. at 1493 (J. Alito, concurring). As demonstrated above, failure to communicate a plea offer falls well short of the competence demanded of defense counsel. Counsel is required to advise the defendant of the consequences of accepting a plea offer and pleading guilty. Any increase in a sentence is prejudicial. *Glover v. United States*, 531 U.S. 198, 203 (2001). Voluntariness requires the defendant’s awareness of the options available to him. Trial counsel’s incompetence in failing to communicate the State’s plea

offer to Frye, and failing to advise him of the possibility of a ninety-day sentence on a misdemeanor conviction, rendered involuntary his subsequent “open” plea to a felony with a range of punishment up to four years, and calls the fairness and integrity of the plea itself into question under *Strickland*, *Hill* and *Padilla*.

The approach of Missouri and the Solicitor General unreasonably limits the options available to a defendant: 1) go to trial, or 2) waive a trial and plead guilty. Fundamentally it is true that criminal cases can have only one of three results: dismissal of the charges by the government; a trial; or a guilty plea. But many avenues lead to those destinations. Under Missouri’s and the Solicitor General’s limited view, the only alternative courses of action open to Frye were to enter an “open” plea of guilty or stand trial. This argument completely ignores that during the critical stage of plea negotiations Frye was offered the options of pleading guilty to a felony with a three year prison term with the possibility of ten days of shock time followed by probation, or pleading guilty to a misdemeanor and serving ninety days in jail. But when Frye entered his guilty plea before the trial court, he was completely unaware that counsel’s ineffective delay had forever foreclosed those options. The only reason these options were not “available” when Frye pleaded guilty was that his attorney failed to communicate those options to him. If counsel had acted as a reasonably competent attorney, those would have been the options among which Frye could have chosen when he pleaded guilty.

Missouri and the Solicitor General argue that Frye’s guilty plea is valid and reliable because at the guilty plea hearing he acknowledged the rights of trial he was

waiving, the consequences of his plea, and the potential range of punishment. If this is the limit of judicial review, every guilty plea will be found knowing, intelligent and voluntary. This is the same record made in every guilty plea. And, yet, not every guilty plea is found to be knowing, intelligent and voluntary. Guilty pleas are set aside because of what is *missing* from the guilty plea transcript. Missing from Frye's plea colloquy is his unawareness, due to counsel's deficient performance, of the initial plea offer of a misdemeanor and ninety-day jail sentence, an offer he would have accepted had he known about it. The Solicitor General goes even further and argues that Frye's guilty plea was knowing, intelligent and voluntary *precisely because* he was unaware, through counsel's constitutionally deficient performance, of the State's plea offer. Missouri and the Solicitor General are attempting to remove necessary protections of effective assistance of counsel guaranteed by the Sixth Amendment from the United States Constitution.

Missouri further argues that Frye's guilty plea is valid and reliable because he is, in fact, guilty. (Petitioner's Brief at 33). This argument was absolutely rejected when the Court stated in *Kimmelman v. Morrison*, "we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent, or that it attaches only to matters affecting the determination of actual guilt." 477 U.S. at 380.

**D. Frye Suffered Prejudice Because Had He Been Informed of the Plea Offer the Outcome Would Have Been Different: He would Have Received a Much Shorter Sentence on a Misdemeanor.**

**1. Prejudice is Found Where Counsel's Constitutionally Deficient Performance Results in a Different Result to the Criminal Proceeding Including the Plea Negotiation Process.**

The second part of the *Strickland* standard requires a showing of prejudice: a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. This measure of prejudice applies to ineffective assistance during plea negotiations, as well as trials. *Padilla*, 130 S. Ct. at 1482; *Hill*, 474 U.S. at 57-59. In *Hill*, the Court stated: “We hold, therefore, that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.” *Id.* at 58. The prejudice requirement focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process.” *Id.* at 59.

But the Court necessarily couched this standard for prejudice in terms of the particular context before it. The Court stated: “[I]n 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.” 474 U.S. at 59. Missouri and the Solicitor General rely heavily on this singular statement without noting its context.

The Court further stated in *Hill* 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.” 474 U.S. at 59. The Court provided examples of that trial-based inquiry: 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. *Id.* The remedy for these errors, if established, is to permit the defendant the opportunity to present favorable or exculpatory evidence, or an affirmative defense, at trial.

By using the term “in many guilty plea cases,” the Court implicitly recognized that in some cases the inquiry is not the same as trial-based ineffective assistance claims. In those cases, a trial will not remedy the different, and adverse, outcome that results from counsel’s constitutionally deficient performance during the plea process.

Reasonable representation by trial counsel in communicating the plea offer would not have provided Frye with exculpatory evidence or a defense at trial. A trial would not have resulted in a misdemeanor conviction. But reasonable performance by trial counsel would have resulted in a different outcome to the plea process – at least two years less incarceration for Frye. Any amount of additional jail time constitutes prejudice under the *Strickland* standard. *Glover, supra* (involving ineffective assistance of counsel during non-capital sentencing).

*Hill* does not stand for the proposition that there is no remedy for the adverse outcome of the plea process

suffered by Frye; it means that the remedy under the facts of this case is simply not a trial. But there must be a remedy. That remedy is to permit Frye to accept the un-communicated offer and present it to the trial court for acceptance as further discussed below.

Several aspects of *Padilla* offer support for this result. Justice Alito stated that “incompetent advice distorts the defendant’s decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question.” 130 S. Ct. 1493 (Alito, J., concurring). Completely failing to advise Frye of the plea offer just as surely distorted his decision-making process and undermined the fairness and integrity of the criminal process. This logic supports the conclusion that trial counsel was constitutionally required to discuss with Frye the options presented in the prosecutor’s plea offer; a felony or misdemeanor conviction, and a three-year sentence or a ninety-day sentence. These options had nothing to do with a trial. But their absence most certainly had an effect on the outcome of the plea process.

In *Premo v. Moore*, after Moore pleaded guilty on advice of counsel, he alleged that trial counsel was ineffective in advising him to plead guilty without first moving to suppress his statements to the police. 131 S. Ct. at 738. The state court held that Moore did not receive ineffective assistance of counsel, without specifying whether it was a lack of deficient performance or lack of prejudice. Suppression of the statement to the police would have been essentially meaningless because Moore had made two other statements that would have been admissible at trial. *Id.* at 740. The Court held that the state court could have determined that it was not

reasonably likely that Moore would have rejected the plea offer that avoided a sentence of death or life without parole, and secured the minimum sentence applicable, and that he would have instead insisted on trial. *Id.* at 744. Citing *Hill*, the Court held that to show prejudice, Moore had to demonstrate a reasonable probability that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial. *Id.* at 733. Justice Ginsburg said the same in her concurrence, noting that appellate counsel acknowledged that Moore never indicated that he would have rejected the plea and insisted on trial. *Id.* at 746.

The Court's analysis in *Premo*, however, was like the analysis for a trial-based challenge, reviewing an issue involving evidence and considering whether a trial would have remedied the alleged prejudice. This was an inquiry typical of what *Hill* noted is undertaken "in many guilty plea cases." But it does not address the circumstances in other cases like *Frye's*. While the Court clearly relied on the general *Hill* statement, it did not eliminate the necessity of resorting to the more general standard of *Strickland* in those cases involving a non-trial inquiry.

Furthermore, the Court's prejudice analysis in *Premo* was driven not only by the particular facts of the case which underscored the weak nature of the claim of prejudice, but also by the procedural posture of the case. The Court was reviewing a grant of federal habeas corpus relief from a state conviction. Under the restrictive federal habeas statute, such relief lies only if the state court's decision denying relief "involves 'an unreasonable application' of 'clearly established Federal law, as determined by the Supreme Court.'" 131 S. Ct.

at 737. This is a highly deferential standard, and when combined with the deference given to counsel under *Strickland*, the deference accorded by the Court to the ruling below was doubled. *Id.* at 740. The question under federal habeas review is whether there is any reasonable argument by which the state court could have found that counsel satisfied the *Strickland* and *Hill* standards. *Id.* at 737.

Many of the federal Courts of Appeals apply *Hill* in a manner appropriate to account for the situation presented in this case. These courts have applied the *Hill* measure of prejudice to allegations that, but for counsel's unprofessional errors, the defendant would have *accepted* the plea offer and *not* gone to trial. *See Turner*, 858 F.2d at 1206-1207; *Griffin v. United States*, 330 F.3d at 737 (the second element of the *Strickland* test in the plea offer context is that there is a reasonable probability the petitioner would have pleaded guilty given competent advice); *Williams v. Jones*, 571 F.3d at 1090 (but for counsel's deficient performance, the defendant would have accepted the plea offer and pled guilty); *United States v. Carter*, 130 F.3d at 1442 (as for the prejudice prong, there must be a reasonable probability that, but for incompetent counsel a defendant would have accepted the plea offer); *Coulter v. Herring*, 60 F.3d at 1504 (the defendant must show that there is a reasonable probability that, but for counsel's errors, he would have pleaded guilty and would not have insisted on going to trial). The courts have recognized that the general expression of prejudice in *Hill* does not apply in the other situations that can arise in the plea negotiation process, such as the present case.

**2. The Missouri Court of Appeals Employed, and Frye Seeks, the Well-Established *Strickland* Test of Deficient Performance Affecting the Outcome of the Proceedings.**

Protecting a defendant's right to effective representation of counsel during the plea negotiation process by requiring counsel to communicate a plea offer does not create a new "results-oriented" test as Missouri argues. Frye did not allege that his trial counsel's performance was deficient because he failed to secure the most advantageous plea possible. He alleged that trial counsel failed to act as a reasonably competent attorney when he failed to communicate the plea offer made by the State. The difference between the sentence offered in the plea bargain – ninety days in jail for a misdemeanor - and the sentence Frye actually received – three years in prison for a felony - is not evidence of counsel's deficient performance; it is evidence of the prejudice Frye suffered as a result of counsel's deficient performance. This is the familiar context-driven *Strickland* test of deficient performance and resulting prejudice. But for counsel's deficient performance, the outcome of the proceedings would have been different. "[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill*, 474 U.S. at 58.

Missouri has set up a straw man to knock down by claiming that Frye and the Missouri Court of Appeals, Western District, have "crafted a test that looks for a 'more favorable' result." (Petitioner's Br. at 29). Missouri then sets out to demonstrate why a "results oriented" test is incorrect. But Missouri's argument is based on a false premise and its argument is irrelevant to this review.

The Missouri Court of Appeals was quite clear that it was applying the analyses for prejudice the Court set out in *Strickland* and *Hill*. The State court began its prejudice analysis by noting: “In *Strickland*, the Supreme Court articulated the standard for prejudice, stating that a defendant must show a reasonable probability that, but for counsel’s alleged deficiencies, the result of the proceeding would have been different.” J.A. 70. The State court noted that *Strickland*’s prejudice prong was interpreted by the Court in *Hill* to mean that in the context of guilty pleas, the defendant must show that but for counsel’s errors he would not have pleaded guilty but would have insisted on going to trial. J.A. 70. The State court noted that the justifications given by the *Hill* Court demonstrated that the *Strickland* inquiry for prejudice necessarily depended on the specific evidence and circumstances surrounding the alleged error. J.A. 71. Under the circumstances surrounding the error alleged by Frye, the State court noted that the *Hill* “template” of insisting on a trial “completely ignores *Strickland*’s looser emphasis on whether a defendant can establish an ‘adverse effect on the defense.’” J.A. 72. The State court concluded that while in many, if not most, cases prejudice will be established by not pleading guilty and insisting on trial, “this is not the only way prejudice can be established.” J.A. 72. The State court found prejudice to Frye according to *Strickland*’s standard that the outcome of the proceeding would be different. J.A. 72.

Missouri, as does the Solicitor General, relies on *Lockhart v. Fretwell*, 506 U.S. 364 (1993) and *Nix v. Whiteside*, 475 U.S. 157 (1986). These cases discuss the search for reliability and truth through the judicial process, but the circumstances in them are so aberrant that they are simply inapplicable to Frye’s case. The

allegation in *Fretwell* was that trial counsel was ineffective in failing to object to certain evidence in aggravation during a capital murder trial. 506 U.S. at 367. At the time of trial, the evidence was inadmissible, but by the time the defendant raised his claim of ineffective assistance of counsel, the case law had changed and the evidence was admissible. Because the sentence was imposed under what was eventually recognized as the correct legal standard, the Court held that the sentence was reliable and the defendant was not prejudiced. *Id.* at 372. The Court noted that had counsel objected, the evidence might have been excluded and the outcome of sentencing might have been different. But since exclusion of the evidence would have been improper as ultimately decided by the courts after trial, the Court held that this “different outcome” would, in fact, have been an unwarranted windfall for the defendant. *Id.* at 369. At the time counsel’s effectiveness was being reviewed, the law did not entitle the defendant to exclusion of the evidence. *Id.* But Frye’s counsel did not misinterpret any existing law; Frye was entitled to be informed of the plea offer extended by the State but counsel failed to inform him of the offer. Frye is not seeking any windfall; he is seeking only what effective assistance of counsel would have achieved for him.

In *Nix*, the defendant wanted to testify falsely, to commit perjury, during his testimony at trial. 475 U.S. at 161. Defense counsel told him that counsel would have to withdraw if he committed perjury. *Id.* Following his conviction, defendant sought to set aside his conviction because his attorney was ineffective in not allowing him to commit perjury. *Id.* at 162. The Court denied defendant’s claim because an attorney does not perform deficiently in refusing to allow his client to commit perjury. *Id.* 166-175.

Counsel's warning that he will withdraw if the defendant commits perjury does not deny the defendant the right to assistance of counsel. *Id.* at 175. The Court also held that the defendant suffered no *Strickland* prejudice because there could be no confidence in a verdict secured through perjured testimony. *Id.* at 998-999. Here, however, Frye had a right to effective assistance of counsel who would advise him of a plea offer extended by the State, and there can be no confidence in a conviction following a guilty plea entered without knowledge of the options the State made available to him. *Padilla*, 130 S. Ct. at 1493 (Alito, J., concurring).

In *Williams v. Taylor*, 529 U.S. 362 (2000), the Court explained the reasons for its holdings in *Fretwell* and *Nix*. The Court noted that it did not modify or supplant the *Strickland* standard in *Fretwell*. *Id.* at 391. The *Strickland* standard provides sufficient guidance for resolving virtually all claims of ineffective assistance of counsel, but in some circumstances, fundamental fairness may affect the analysis. *Id.* Such situations exist where an incorrect interpretation of the law will provide a windfall to the defendant, *Fretwell*, or where false testimony might persuade a jury to acquit a defendant, *Nix*. *Id.* These were results the defendants were not entitled to under the law. The Court made clear that *Fretwell* and *Nix* do not justify a departure from a straightforward application of *Strickland* when the ineffectiveness of counsel *does* deprive the defendant of a substantive or procedural right to which the law entitles him. *Id.* at 393.

The Court again addressed this issue in *Glover*, *supra*. In *Glover*, counsel's unreasonable failure to argue in favor of grouping offenses resulted in an increase in

the defendant's sentence of six to twenty-one months. 531 U.S. at 201. The District Court found this increase insufficiently significant to amount to *Strickland* prejudice. *Id.* at 202. The Court disagreed, holding that the District Court misinterpreted *Fretwell* to mean that only an increase in punishment that rendered the outcome of sentencing unreliable or fundamentally unfair amounted to *Strickland* prejudice. *Id.* at 202-203. The Court noted that it had expressly held in *Williams* that *Fretwell* did not supplant the *Strickland* standard which held that a defendant demonstrates prejudice by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 203. The Court reiterated its holding in *Williams* that "in the vast majority of cases ... [t]he determinative question – whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different – remains unchanged." *Id.*

Frye was entitled to effective counsel who would advise him of the State's plea offer. He was entitled to awareness of the alternatives available to him before he decided whether to accept a plea offer and plead guilty. A straightforward application of the *Strickland* test applies because, but for counsel's deficient performance, the outcome of Frye's proceeding would have been different. Frye does not seek to modify or supplant the *Strickland* test.

**II. The Appropriate Remedy is to Allow Frye to Plead Guilty to the Original Offer Because That is the Only Remedy That Will Restore Him to the Position He Would Have Occupied Had Counsel Not Been Ineffective.**

The ordinary remedy for constitutional violations is to restore the victim of the violation to the position he would have occupied had the violation not occurred. The constitutional violation suffered by Frye was the loss of the opportunity to accept the State's original offer - the State's offer to plead guilty to a misdemeanor with a recommended sentence from the State of ninety-days in jail. The only way to restore Frye to the position he would have occupied had counsel advised him of the plea offer is to allow him to plead guilty under the terms of the plea offer.

Frye's "open" guilty plea to a felony with up to four years in prison could not "remedy" or "cure" the prejudice he suffered from counsel's constitutionally deficient performance. The guilty plea was not constitutionally adequate because it was not knowingly, intelligently and voluntarily entered. Counsel's deficient performance left Frye unaware of the full range of options offered to him by the State. And the resulting sentence of three years in prison cannot cure the prejudice suffered from the loss of the opportunity to obtain a ninety-day sentence for the offense.

Permitting Frye to plead guilty to a misdemeanor with the recommendation of a ninety-day jail sentence will not provide him a windfall he is not entitled to, it does not violate the separation of powers doctrine, it does not

deprive the trial court of its discretion, it does not interfere with finality in criminal proceedings, and it will not lead to “sandbagging” by defense attorneys.

**A. The Standard Remedy for Ineffective Assistance, As With All Constitutional Violations, is to Place the Defendant in the Position He Would Have Occupied in the Absence of the Violation.**

The remedy for a constitutional violation “must closely fit the constitutional violation.” *United States v. Virginia*, 518 U.S. 515, 547 (1996). Constitutional remedies are “necessarily designed, as all remedies are, to restore the victims of [constitutional violations] to the position they would have occupied in the absence of such conduct.” *Milliken v. Bradley*, 418 U.S. 717, 746 (1974).

Remedies for deprivation of effective assistance of counsel are no different. “Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation.” *United States v. Morrison*, 449 U.S. at 364. “Our approach has thus been to identify and neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel.” *Id.* at 365. As the Court has observed, “[t]he adequacy of any remedy is determined solely by its ability to mitigate the constitutional error.” *Rushen v. Spain*, 464 U.S. 114, 119-120 (1983). An appropriate remedy returns the defendant to the point before the constitutional violation in order to put him in the position he would have occupied but for the error.

Where ineffective assistance of counsel takes place at trial, the appropriate remedy is to remand for a new trial because that is the remedy that “neutralize[s] the taint,” *Morrison*, 449 U.S. at 365, and restores the defendant to the position he would have occupied had counsel been effective. *See, e.g., Kimmelman*, 477 U.S. at 372-373.

Where ineffective assistance occurs at some stage other than trial, the Court has always ordered a remedy tailored to cure the violation. Where defense counsel is ineffective at sentencing, the appropriate remedy is to remand for a new sentencing hearing. *Rompilla v. Beard*, 545 U.S. at 393. Where defense counsel is ineffective on appeal, the appropriate remedy is to remand for a new appeal. *Evitts v. Lucey*, 469 U.S. at 390-39. Where counsel’s ineffectiveness is a failure to file a timely notice of appeal, the appropriate remedy is to give the defendant a new opportunity to appeal. *Roe v. Flores-Ortega*, 528 U.S. at 484. Where counsel’s ineffectiveness consists of a failure to file a timely petition for writ of certiorari, the appropriate remedy is to give the defendant a new opportunity to file a petition. *Wilkins v. United States*, 441 U.S. 468, 470 (1979).

The only remedy appropriate to cure counsel’s ineffectiveness in failing to communicate the State’s plea offer to Frye is to permit Frye to accept the original offer. Anything less does not “mitigate the constitutional error.” *Rushen v. Spain*, *supra*. Many of the state courts have reached the same conclusion. *See, e.g., Satterlee v. Wolfenbarger*, 453 F.3d 362, 371 (6th Cir. 2006) n.7, *cert. denied*, 549 U.S. 1281 (2007); *Nunes v. Mueller*, 350 F.3d 1045, 1056-57 (9th Cir. 2003); *Blaylock*, 20 F.3d at 1468-69; *United States v. Wilson*, 719 F. Supp. 2d 1260, 1275

(D. Or. 2010); *Leatherman v. Palmer*, 583 F. Supp. 2d 849, 871-72 (W.D. Mich. 2008), *aff'd*, 387 Fed. Appx. 533 (6th Cir. 2010); *Shiwlochan v. Portuondo*, 345 F. Supp. 2d 242, 264-65 (E.D.N.Y. 2004), *aff'd*, 150 Fed. Appx. 58 (2d Cir. 2005); *Alvernaz v. Ratelle*, 831 F. Supp. 790, 797-99 (S.D. Cal. 1993); *Ebron v. Commissioner of Correction*, 992 A.2d 1200, 1214-19 (Conn.App. 2010), appeal pending, 297 Conn. 915, 995 A.2d 954 (2010); *Jiminez v. State*, 144 P.3d at 905, 907; *Ex Parte Lemke*, 13 S.W.3d 791, 797-98 (Tex. Ct. Crim. App. 2000); *State v. Donald*, 10 P.3d 1193, 1202-05 (Ariz. Ct. App. 2000), *cert. denied*, 534 U.S. 825 42 (2001); *Becton v. Hun*, 205 W. Va. 139, 516 S.E.2d 762, 768 (1999); *Williams v. State*, 605 A.2d 103, 110-11 (Md. 1992); *State v. Kraus*, 397 N.W.2d 671, 676 (Iowa 1986).

**B. Constitutionally Adequate Procedures Following Prejudice Suffered By a Defendant From Counsel’s Deficient Performance During Plea Bargaining Negotiations Cannot Cure the Resulting Prejudice.**

If Frye’s guilty plea following the constitutional violation is viewed as a “remedy” or “cure” for the violation, it completely fails to meet the purpose of such a remedy recognized by the Court. *United States v. Virginia, supra.*; *Milliken v. Bradley, supra.*; *United States v. Morrison, supra.*; *Rushen v. Spain, supra.*; *Kimmelman v. Morrison, supra.*; *Rompilla v. Beard, supra.*; *Evitts v. Lucey, supra.*; *Roe v. Flores-Ortega, supra.*; *Wilkins v. United States, supra.* Frye’s guilty plea resulting in a three year prison sentence in no way cured or remedied the prejudice he suffered from the constitutional violation that deprived him of a ninety-day jail sentence. The guilty plea to a felony – and resulting three-year prison sentence

– did not put Frye in the position he would have occupied prior to the Sixth Amendment violation – a guilty plea to a misdemeanor with a ninety-day jail sentence.

The Courts of Appeals of the Third, Sixth, Eighth, Ninth and Tenth circuits have expressly addressed, and rejected, the argument that valid, subsequent proceedings can remedy the prejudice caused by counsel’s deficient performance during plea negotiations. In *Caruso*, the Third Circuit Court of Appeals held that failure to communicate a plea offer deprives the defendant of the opportunity to present the plea offer to the trial court for acceptance in violation of the Sixth Amendment. 689 F.2d at 438. The State argued that because the defendant received a fair trial after the violation, he was entitled to no other relief. *Id.* The Third Circuit called that argument “untenable,” and held “[a] subsequent fair trial does not remedy [the deprivation of the opportunity to plead guilty].” *Id.* That conclusion was re-iterated by the Third Circuit ten years later in *United States v. Day*, 969 F.2d 39, 44 (3rd Cir. 1992). In *Turner*, the Sixth Circuit recognized that the only way to remedy the loss of the opportunity to present a favorable plea offer to the trial court was to provide the defendant the opportunity to do so. 858 F.2d at 1207-1208. It noted that “[o]ne more fair trial, or even a series of them, would not necessarily revive the lost chance.” *Id.* at 1208. The Sixth Circuit noted that this Court has indicated that specific performance of a plea agreement is constitutionally permissible. *Id.*, citing *Mabry v. Johnson* and *Santobello v. New York*. The Eighth Circuit held in *Engelen v. United States*, while addressing the issue of prejudice resulting from deficiencies during plea negotiations, “that a defendant, after rejecting the proposed plea bargain and receiving a fair trial, may still

show prejudice if the plea bargain agreement would have resulted in a lesser sentence.” 68 F.3d at 241. The Ninth Circuit stated in *Blaylock*, “we emphasize that although [defendant] has received a fair trial, he is not precluded from showing prejudice.” 20 F.3d 1465. In *Williams v. Jones*, the Tenth Circuit held the defendant established deficient performance and prejudice in counsel’s erroneous advice to reject a plea offer, and “[t]he fact that [defendant] subsequently received a fair trial (with a much greater sentence) simply does not vitiate the prejudice from the constitutional violation.” 571 F.3d at 1091.

The remainder of the Circuit Courts have found prejudice, or accepted that it could be possible to establish prejudice, from ineffective assistance of counsel during the plea negotiation process, without addressing the validity of subsequent proceedings, and without finding any bar to relief from valid, subsequent proceedings. *See e.g.*, *Rodriguez-Rodriquez*, 929 F.2d 747 (1st Cir. 1991); *Pham*, 317 F.3d 178 (2nd Cir. 2003); *United States v. Brannon*, 48 Fed.Appx. 51 (4th Cir. 2002); *United States v. Herrera*, 412 F.3d 577 (5th Cir. 2005); *Julian v. Bartley*, 495 F.3d 487 (7th Cir. 2007); *Coulter v. Herring*, 60 F.3d 1499 (11th Cir. 1995); and *United States v. Mouling*, 557 F.3d 658 (D.C. Cir. 2009).

The appropriateness of a remedy depends on the specific facts of the particular case. In *Santobello*, the Court remanded the case, stating, “[t]he ultimate relief to which petitioner is entitled we leave to the discretion of the state court, which is in a better position to decide whether the circumstances of the case require only specific performance of the agreement on the plea ... or whether, in the view of the state court, the circumstances

require granting the relief sought by petitioner, i.e., the opportunity to withdraw his plea of guilty.” 404 U.S. at 263. Justice Douglas noted that the decision of the appropriate remedy was dependent upon the particular circumstances of the case because, “[o]ne alternative may do justice in one case, and the other in a different case.” *Id.* at 267. (J. Douglas, concurring). What is appropriate in this case might not be appropriate in every case of ineffective assistance of counsel during plea negotiations. Indeed, there have been cases in which the government urged precisely the remedy Frye urges here. In *United States v. Gordon*, 156 F.3d 376 (2nd Cir. 1998), for example, the defendant demonstrated that his counsel had been ineffective in advising him to decline a plea offer. The United States took the position that the appropriate remedy was a remand for resentencing according to the forgone plea offer. *Id.* at 381. The Court of Appeals held, however, that while a remand for resentencing would have been within the discretion of the District Court, the District Court did not abuse its discretion in deciding instead to vacate the defendant’s conviction and grant a new trial. *Id.* at 381-382.

The appropriate remedy in this case is thus not a one-size-fits-all remedy for all cases of ineffective assistance. As Judge Becker of the Third Circuit Court of Appeals noted in *Day*, “a second opportunity to accept a plea agreement ought not be automatic, but it does not follow that the relief of ‘specific performance’ of a plea bargain is *never* appropriate.” 969 F.2d at 47. Judge Winter of the Second Circuit Court of appeals noted in *United States v. Carmichael*, 216 F.3d 224, 227 (2nd Cir. 2000), specific performance will sometimes be the most appropriate remedy, but “we do not mean to suggest ... that a

defendant is necessarily entitled to specific performance of a previously spurned plea offer” in all cases of ineffective assistance. In other cases, there may be different remedies that will be better tailored to restoring the defendant to the position he would have occupied had counsel been effective. In this case, however, a remand to allow Frye to accept the State’s plea offer and plead guilty according to its terms is the only remedy that will achieve that end.

**C. The Standard Remedy Will Not Give Frye a Windfall, Contravene the Separation of Powers, Displace the Trial Court’s Discretion, Cause A Loss of Finality, or Lead to “Sandbagging” by Defense Counsel.**

Missouri warns of disastrous consequences if the remedy for the prejudice suffered by Frye is to permit him to accept the offer made by the State and plead guilty before the trial court according to that agreement. None of these consequences are legitimate concerns.

The Court noted in *Fretwell* that “[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel’s error may grant a defendant a windfall to which the law does not entitle him.” 506 U.S. at 369. But as the Court recognized, counsel’s error in failing to object to certain evidence would have provided the defendant a right to something to which he was not entitled because the particular evidence was ultimately found to be admissible. Justice O’Connor wrote separately in concurrence “only to point out that today’s decision will, in the vast majority of cases, have no effect on the prejudice inquiry under *Strickland v. Washington*. The determinative question – whether there is ‘a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,' remains unchanged." 506 U.S. at 373 (internal citations omitted). Here, Frye was entitled to have the State's plea offer made known to him. He was entitled to accept that offer and plead guilty according to its terms to the trial court. He was entitled to a misdemeanor conviction with a ninety-day jail sentence if the plea was accepted by the court. The *Strickland* test for prejudice remains the same. Frye receives a remedy for the prejudice he suffered, not a windfall to which he is not entitled.

Missouri mischaracterizes this remedy as an entitlement to the benefits of the plea offer which would interfere with the authority of a trial court. This is not correct. The trial court retains the authority to reject the plea offer. In this sense, returning Frye to the trial court to accept the offer and enter a plea accordingly does not deprive the trial court of its discretion. But this, too, is the position Frye would have been in but for trial counsel's unprofessional error. The trial court was not required to accept Frye's guilty plea, either according to the original offer made by the State or the "open" plea Frye ultimately entered. However, there is certainly a reasonable probability that the trial court would have accepted Frye's plea to the original offer if the State amended the charge to a misdemeanor and made a recommendation of ninety-days in jail. Missouri has offered nothing to suggest that would not have been the outcome of the plea process had counsel informed Frye of the plea offer. Frye does not have to prove that the outcome would have been different; he is only required to demonstrate a reasonable probability that the outcome would have been different. That is a probability less than

a preponderance, but enough to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

This remedy does not contravene the separation of powers. See *State v. Donald*, 10 P.3d at 1203-1205. Plea bargaining is a function of the executive branch. The trial court could not have compelled the State to engage in plea negotiations or make a plea offer to Frye. *Weatherford*, 429 U.S. at 561; *Mabry*, 467 U.S. at 507. But the State did make a plea offer to Frye. The State was bound by that offer during the terms of the offer.

Where a constitutional violation prevents the defendant from accepting a plea offer made by the prosecutor, a court has authority to remedy that violation by ordering the defendant to be given the opportunity to accept the offer. 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. *Puckett*, 129 S. Ct. at 1430; *Santobello*, 404 U.S. at 263. In *Santobello*, the Court characterized this as "specific performance," and held that while it is not the only remedy, it is a remedy within the power of a court. *Id.*

The logic underlying *Santobello*, *Puckett*, *Mabry*, and *Weatherford* suggests that even if a court would unduly encroach on the prosecutor's authority by ordering the prosecutor to plea bargain or make a plea offer, there is no encroachment where the court orders the prosecutor, as a remedy for a constitutional violation, to abide by an offer already tendered. It must be noted that after the plea offer was not accepted because Frye was unaware of it, the prosecutor's recommendation at the "open" plea was the first option it had offered to Frye in its initial plea offer. J.A. 22, 50.

The remedy fashioned by the Ninth Circuit Court of Appeals in *Nunes v. Mueller*, took into account the discretion of the prosecutor and the issue of ordering specific performance. 350 F.3d at 1056-1057. The Ninth Circuit held that the ineffective assistance of counsel justified dismissal of the charges, and therefore directed the lower court to issue an order dismissing the charges unless the prosecutor extended the original plea offer within a certain period of time. *Id.* In this manner, the court was not interfering with the discretion of the prosecutor, but remedied the harm suffered by the defendant. The Tenth Circuit Court of Appeals noted in *Williams v. Jones*, that “[i]n the end, no remedy may restore completely the parties’ original positions,” but that the remedy adopted must come the closest to the original positions without being constrained by state law. 571 F.3d at 1093. The Court has noted, “... the Constitution constrains our ability to allocate as we see fit the costs of ineffective assistance. The Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel.” *Kimmelman*, 477 U.S. at 379. Allowing Frye to accept the plea offer freely extended by the prosecutor, and not specifically withdrawn, returns the parties, as closely as possible, to their original positions before counsel’s deficient performance. If the prosecutor chooses not to extend the original offer, it may have to suffer dismissal of the charges as a remedy for the Sixth Amendment violation.

Granting relief to Frye will not adversely affect the finality of convictions nor open the “floodgates” to additional post-conviction litigation. The Court confronted, and rejected, similar arguments in *Hill* and *Padilla*. This concern is satisfied by the “high bar” of prejudice imposed by *Strickland*. *Hill*, 474 U.S. at 58; *Padilla*, 130 S. Ct. at

1484-1485. The Court stated in *Padilla* that “[t]here is no reason to doubt that lower courts – now quite experienced in applying *Strickland* – can effectively and efficiently use its framework to separate specious claims from those with substantial merit.” 130 S. Ct. at 1485. This is even more true under the circumstances of this appeal. While it certainly occurs, the complete failure to communicate a plea offer is an infrequent occurrence. While infrequent, the Sixth Amendment violation involved cries out for relief. Protection of this constitutional guarantee is worthy of an avenue to correct a Sixth Amendment violation.

Missouri’s warning of dire consequences if the Court recognizes prejudice in this case is belied by the fact that the Missouri Court that granted relief to Frye merely employed the well-settled *Strickland* prejudice test to this claim of ineffective assistance of counsel during plea negotiations. We have for twenty-seven years been in the middle of whatever “flood” would come from doing so.

Missouri warns that relief to Frye will lead to defense attorneys “sandbagging;” intentionally *not* communicating a plea offer to a defendant in order to “bank” a better outcome for the defendant if the trial turns out poorly. This fear is unfounded because it assumes that criminal defense attorneys, as a group, will intentionally behave unethically. Those individuals who do can be dealt with individually. But refusing to consider Frye’s claim for that reason is not justified.

In *Kimmelman*, the Court demonstrated its respect for defense attorneys when it noted, “We have no reason to believe that defense attorneys will ‘sandbag’ – that is, consciously default or poorly litigate their client’s Fourth

Amendment claims in state court in the hope of gaining a more favorable review of these claims in Sixth Amendment federal habeas proceedings. First, it is virtually inconceivable that an attorney would deliberately invite the judgment that his performance was constitutionally deficient in order to win a federal collateral review for his client.” 477 U.S. at 382, n.7. In a case more specific to ineffective assistance during the plea negotiation process, the Third Circuit Court of Appeals noted in *Day* that the lower court was concerned about the potential for “sandbagging” by failing to fully discuss a plea offer in order to “ensure, that if convicted, his client can obtain the benefit of such bargain without incurring the obligations invariably associated therewith.” 969 F.2d at 46, n.9. The Circuit Court agreed that reviewing courts needed to be wary of such a claim, but stated, “[n]onetheless, we do not think that such concerns justify refusing to consider this sort of claim altogether.” *Id.* The Circuit Court showed respect for criminal defense attorneys when it stated, “[m]ost defense lawyers, like most lawyers in other branches of the profession, serve their clients and the judicial system with integrity.” *Id.* Deliberate ineffective assistance is unethical, risking disciplinary action, malpractice suits, and a loss of business. *Id.*

Restoring Frye to the position he would have occupied but for counsel’s deficient performance comports with the Court’s Sixth Amendment precedent. Doing so will not create new rights or a new legal test; nor will it interfere with the orderly administration of justice. Allowing Frye to accept the un-communicated offer will remedy the Sixth Amendment prejudice he suffered, consistent with the standard the Court established in *Strickland v. Washington*.

**CONCLUSION**

The judgment of the Missouri Court of Appeals, Western District, should be affirmed, insofar as it deemed Galin Frye's guilty plea withdrawn, but it should be modified to allow Frye to accept the State's plea offer of an amendment to a misdemeanor with a recommendation for a ninety-day jail sentence and to plead guilty before the trial court according to those terms of the agreement.

Respectfully submitted,

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