

No. 10-444

In The
Supreme Court Of The United States

—◆—
STATE OF MISSOURI,
Petitioner,

v.

GALIN E. FRYE,
Respondent.

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

—◆—
**BRIEF OF AMICI CURIAE CONNECTICUT
AND 28 OTHER STATES IN SUPPORT OF
PETITIONER**
—◆—

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QUESTIONS PRESENTED

- I. Contrary to the holding in Hill v. Lockhart, 474 U.S. 52 (1985) – which held that a defendant must allege that, but for counsel’s error, the defendant would have gone to trial – can a defendant who validly pleads guilty successfully assert a claim of ineffective assistance of counsel by alleging instead that, but for counsel’s error in failing to communicate a plea offer, he would have pleaded guilty with more favorable terms?

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

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INTEREST OF THE *AMICI*

The *amici* states have a compelling interest in the finality of convictions emanating from their courts, and defending these presumptively valid judgments against post-conviction claims of ineffective assistance. They also have an interest in the finality of convictions resulting from pleas of guilty. They therefore have a strong interest in the proper application of the law governing claims that guilty plea convictions should be overturned due to ineffective assistance of counsel. Thus, the *amici* states have a substantial interest in this Court’s determination of whether the states must provide relief to, and a remedy for, a criminal defendant who has validly pleaded guilty, though ignorant of a “more favorable” plea bargain about which his attorney never informed him.¹

SUMMARY OF THE ARGUMENT

In this case, the Missouri Court of Appeals for the Western District (“The Missouri Court”) ruled that a criminal defendant, convicted after entering a guilty plea, is entitled to relief when he later discovers that his attorney failed to convey to him an earlier, more favorable, plea offer made at the State’s discretion.²

¹ Rule 37(4) permits the Attorneys General to file amicus curiae briefs without permission of the parties. In Connecticut, the Chief State’s Attorney serves as the equivalent of the Attorney General for criminal matters. Conn. Const. Amd. XXIII; Conn. Gen. Stat. § 51-278(c).

²Throughout this brief, “plea offer” refers to an offer by the State to recommend to the trial court pre-trial disposition under certain

The Missouri Court remanded the case to the trial court with direction that the defendant should be given the opportunity to insist upon going to trial, or to plead guilty, should the State convey to him another plea offer.³

This case implicates two areas of jurisprudence. First, it involves the question of whether – and under what circumstances – the defendant’s guilty plea can be withdrawn after conviction. A body of law focusing precisely on this question balances the State’s interest in finality of convictions and conservation of resources with a defendant’s interest in making a well-informed decision to plead guilty and forfeit rights. The scenario presented, therefore, involves the subsidiary question of whether a decision to plead guilty is sufficiently informed if a defendant is unaware of an earlier plea offer involving “more favorable” terms.

Second, this case involves the question of whether a criminal defendant’s attorney renders constitutionally ineffective assistance of counsel when he fails to convey a plea offer to the defendant, and the defendant therefore forfeits the opportunity to accept the State’s discretionary offer and ask the trial court to enter his

terms, which, having not been accepted by and embodied in the judgment of the court, in no way constitutes a fully executed, binding plea agreement pursuant to Santobello v. New York, 404 U.S. 257 (1971).

³In effect, the Missouri Court’s order has the potential to accomplish nothing. It does not require the State to extend the terms of the earlier plea offer, a requirement that would have separation of powers consequences.

plea accordingly. This Court's ineffective assistance cases similarly seek to balance the State's interests with the defendant's.

Notwithstanding that both areas of the law involve a similar balancing of interests, they do not necessarily encompass the same objectives. In ineffective assistance cases, the objective is to ensure that a conviction rests upon the machinery of an adversarial process that produced just results. With respect to pleas of guilty, the objective is to ensure that a defendant's conviction, resting upon his admission and his waiver of rights (including his right to trial), is valid as a voluntary act. This Court recognized the distinction between these objectives in United States v. Ruiz, 536 U.S. 622 (2002). There, the Court rejected a claim from a defendant, who pleaded guilty, that she was entitled to receive the terms of an *earlier* plea offer which she rejected because it required her to waive her right to receive exculpatory materials pursuant to Brady v. Maryland, 373 U.S. 83 (1963). The Court reasoned that "the need for [the exculpatory information] is more closely related to the *fairness* of a trial than to the *voluntariness* of the plea." Ruiz, *supra*, at 633 (emphasis in original). The defendant's plea was, therefore, deemed voluntary and she was bound by its terms.

Standing at the intersection of these somewhat incongruous objectives is this Court's decision in Hill v. Lockhart, 474 U.S. 52 (1985). There, the Court addressed a claim that a defendant pleaded guilty based upon his attorney's erroneous advice regarding his eligibility for parole. Hill, like Ruiz, recognized that

claims of ineffective assistance of counsel generally relate more to the fairness of trial than to the guilty plea that resulted in conviction. Generally, therefore, a defendant is bound by the terms of his plea except to the extent that counsel error caused the defendant to forfeit rights he otherwise would have exercised.

Thus, the Court modified the test for ineffectiveness set forth in Strickland v. Washington, 466 U.S. 668 (1984), and applied it to a situation where a defendant sought to disavow his guilty plea on account of attorney error. The Court, reiterating the need, acknowledged in Strickland, to balance the State's and the defendant's competing interests, held that under such circumstances, a defendant's plea can be found involuntary, but only if he could show that his attorney's advice surrounding the plea constituted deficient performance and that, otherwise, the defendant would not have waived his trial rights.

Notwithstanding that this respondent's conviction rests upon his guilty plea, the Missouri Court did not apply the test for attorney ineffectiveness as modified by Hill. Perhaps recognizing that the Hill standard simply would not give to the defendant a chance at the terms of the lost plea offer, the court instead purported to apply the unmodified test for ineffectiveness announced in Strickland, which addressed claims of ineffective assistance *at trial*. That test requires a defendant to show that, as a result of attorney error, the adversarial process by which he was convicted produced an unreliable judgment. The result is awkward, because the defendant was not convicted

through adversarial testing of the State's evidence against him. He was convicted by his guilty plea.

Taking this approach, the Missouri Court presumed that the "process" of conviction is deemed unreliable by an attorney's failure to convey a plea offer. It also treated this case as though the complaint before it related solely to the fairness of trial, and entirely purged its analysis of any consideration that it may have related, as well or instead, to the voluntariness of the plea. As a further consequence, therefore, the Missouri Court failed properly to balance the State's and the defendant's interests consistent with this Court's precedents in both areas of the law.

Some courts in similar situations invoke Hill, but assume that it set forth a symmetrical mandate. In other words, they read Hill to warrant relief where attorney error causes the loss of the opportunity to accept a plea offer. They reason that the foregone plea situation merely presents the converse of that addressed in Hill. This "what-goes-up-must-also-come-down" approach ignores that the Hill test specifically contemplates the balancing of interests and objectives when a defendant seeks to *revoke* the plea into which he entered rather than to recapture one he forfeited.

It makes little difference whether, as here, the Hill test is abandoned altogether in a guilty plea case, or whether it is read to permit the recapture of a plea deal lost due to attorney error. In either situation, the approach impermissibly burdens the State in contravention of this Court's precedents. It requires the State to correct an attorney's ethical failing, without

regard to whether the attorney's mistake either caused a defendant to forego the protections of the adversarial process altogether, or caused a breakdown in the adversarial process because it impeded the State's obligation to provide a fair and reliable process for adjudication. Because the attorney's failure to inform a defendant of a plea offer does neither of these things, relief is not warranted.

ARGUMENT

I. INTRODUCTION

In claims of ineffective assistance of counsel regarding pretrial events, the Court “scrutinize[s] any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant’s basic right to a fair trial.” United States v. Wade, 388 U.S. 218, 227 (1967). Plea negotiations do not necessarily constitute a single confrontation. “The State to some degree encourages pleas of guilty at every important step in the criminal process.” Brady v. United States, 397 U.S. 742, 750 (1970). Where, as in the matter now before the Court, there have been multiple opportunities for a defendant to resolve his case before going to trial, each event must be scrutinized to determine whether a deprivation of counsel’s assistance occurred at that event.

Hence, this case arises not because there is a complaint regarding a single pre-trial event – “plea negotiations.” Rather, the complaint here focuses on two separate pre-trial events. First, the defendant’s attorney failed to convey a plea offer. This event could

not logically have impacted the fairness of a later trial. Wade, therefore, suggests that the counsel guarantee is not implicated. Second, the defendant later pleaded guilty. A guilty plea is valid without regard to considerations of trial “fairness.” Instead, a guilty plea is valid as long as it was entered voluntarily and intelligently. Thus, it is clear that errors that might otherwise impact upon one’s right to test the Government’s evidence at trial (i.e., “the adversarial process”) do not govern the determination of whether a guilty plea is valid.

[A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case. . . . A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established.

Menna v. New York, 423 U.S. 61, 63 n.2 (1975).

Here, the respondent does not claim that he is factually *not guilty*, or even that it would have been better for him to test the State’s evidence at trial. The claimed “constitutional violation” – that his attorney rendered ineffective assistance by failing to communicate an antecedent plea offer – is not “logically inconsistent” with the establishment of his guilt. Indeed, the respondent merely wants to restructure his

guilt through the earlier plea offer – a more favorable one for him, to be sure. This Court’s precedents suggest that he may not do so.

II. CONVICTION BY VALID PLEA OF GUILTY FULLY SATISFIES THE DEMANDS OF THE ADVERSARIAL PROCESS

The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.

Strickland v. Washington, 466 U.S. at 685. Accordingly, in Strickland, this Court set forth the elements of the test for determining whether attorney error affected the adversarial process such that it produced something less than a “just result.” Absent some *effect of attorney error on the judgment*, the Court explained, setting aside the judgment is not warranted. Id. at 691-92.

When a defendant pleads guilty, however, it is not the mechanisms of the “adversarial process” that produce the judgment. It is true that the strength of the case of his adversary – the prosecutor – and the fear of a greater sentence after trial may have influenced the defendant to plead guilty. In other words, some pleas of guilty may arise because the defendant has contemplated and is persuaded by what the adversarial process holds for his fate; but it is not the adversarial process itself that results in conviction. This Court has also recognized that people may, at times, plead guilty simply because they are conscience-bound to do so,

regardless of whether the adversarial process, if employed, is even likely to result in conviction. Brady v. United States, 397 U.S. at 750. “All these pleas of guilty are valid in spite of the State’s responsibility for some of the factors motivating the pleas.” Id.

Thus, the judgment in a guilty plea case does not emanate directly from the workings of the adversarial process, although its elements may bear on a defendant’s motivation to plead guilty. Instead, the judgment stems from the defendant’s confession, in open court, that he has committed the crime for which he has been charged. United States v. Broce, 488 U.S. 563, 569-70 (1989). A plea of guilty and the attendant conviction “comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilty and a lawful sentence.” Id. at 569. In other words, when a defendant has pleaded guilty, his admission has supplanted the adversarial process in its quest to produce a “just result.” See Boykin v. Alabama, 395 U.S. 238, 242-43 n.4 (1969) (guilty plea is a “stipulation that no proof by the prosecution need be advanced”). The plea itself is the “just result” that is the end of the adversarial process, except to the extent that the plea – *not the adversarial machinery* – is invalid.

III. A DEFENDANT’S IGNORANCE OF THE EXISTENCE OF ANOTHER PLEA OFFER DOES NOT RENDER HIS LATER GUILTY PLEA AND CONVICTION INVALID

Resolution of criminal cases by plea, obviating as it does the State’s burden to prove each and every

element of charged crimes, was not always looked upon with favor. The Court has referred to it as a “previously clandestine practice,” the open acknowledgment of which was an evolution. Bordenkircher v. Hayes, 434 U.S. 357, 362 (1978). The chief concern, of course, is that, in pleading guilty and halting the adversarial process, the defendant waives critical rights that the adversarial process promises to him. Most notably, the conviction is entered without a trial. Therefore, not the least of the rights waived by the defendant in pleading guilty are the rights to be tried by a jury, and to confront the witnesses against him, as well as his right not to be a witness against himself. Brady, *supra*, 397 U.S. at 748.

Still, the Court has recognized plea disposition, though perhaps less than ideal, to be a legitimate means of adjudication because it is *mutually beneficial* to the defendant, the State, and the Judiciary. Corbitt v. New Jersey, 439 U.S. 212, 222 & n. 12 (1978); Blackledge v. Allison, 431 U.S. 63, 71 (1977). The defendant avoids extended pretrial incarceration and the anxieties and uncertainties attendant to trial, and he gains swifter disposition of his case and the chance to acknowledge his guilt. Further, he begins rehabilitative measures sooner. Judges and prosecutors conserve scarce and important resources, and the public is protected from the risks posed by criminals who may be guilty but nonetheless at liberty pending completion of criminal proceedings. Blackledge, *supra*, at 71.

The Court’s approach in guilty plea cases thus exhibits a careful balancing to give weight to both the State’s interest in the finality of convictions emanating

from guilty pleas and the defendant's right to test the State's evidence through the adversarial process. As the Court has noted, the chief virtues that flow from plea disposition – speed, economy and finality – can be secured “only if dispositions by guilty plea are accorded a great measure of finality.” *Id.* In short, the value of plea bargaining is “eroded if a guilty plea is too easily set aside.” Premo v. Moore, 131 S.Ct. 733, 741 (2011). A defendant may not, therefore, attack the validity of his guilty plea “merely because [he] made what turned out, in retrospect, to be a poor deal.” Bradshaw v. Stumpf, 545 U.S. 175, 186 (2005).

Accordingly, because a plea of guilty and resulting conviction “comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilty and a lawful sentence,” when a defendant seeks to reopen the proceeding and disavow his plea and underlying waiver of rights, the inquiry is ordinarily limited to whether his actions were voluntary and counseled. Broce, *supra*, 488 U.S. at 569.

A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats, misrepresentations, [or other improprieties such as bribes].

Brady, 397 U.S. at 755 (quote and cite omitted). Thus, if both voluntary and counseled, the plea of guilty and concomitant waiver of rights is not amenable to collateral attack on the resulting conviction. Broce, 488

U.S. at 569. Moreover, to the extent it is claimed that a plea of guilty is involuntary and inadequately counseled because of a deprivation of constitutional rights, the claim is only viable if the plea of guilty was dependent upon the deprivation – i.e., the deprivation *caused* the defendant to enter his plea.

[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

Tollett v. Henderson, 411 U.S. 258, 267 (1973). These limitations balance the State's interests in maintaining convictions by guilty plea with a defendant's interests in making an informed and voluntary decision to relinquish his rights, regardless of his motivations for doing so.

These principles are not altered merely because the claim is that a plea was involuntary and inadequately counseled due to attorney error. A guilty plea may be rendered invalid as a result of ineffective assistance of counsel. Bradshaw v. Stumpf, 545 U.S. at 186. But, nonetheless, it must be shown that the plea of guilty and waiver of rights were dependent upon the attorney's error, and that the error caused the plea to be

involuntary and unintelligent. Hill v. Lockhart, 474 U.S. 52 (1985).

Where, as in the case at bar, the defendant enters a plea of guilty unaware that there existed the earlier *potential* for more favorable disposition, it is illogical to conclude that his ignorance of the earlier plea offer *caused* him to accept the latter. An affirmative weight, such as inducement by threat or misrepresentation, has not been placed upon the defendant through his ignorance of the earlier offer, constraining his ability to make a free choice. In other words, the defendant's ignorance of the earlier offer is not an encumbrance on the requisite voluntariness and awareness regarding the nature and effect of the plea deal into which he did enter.

The voluntariness of a plea can be determined only by considering all of the relevant circumstances surrounding it. Brady, supra, 397 U.S. at 749. But, these "circumstances" relate to the decision to enter into the guilty plea, not matters extraneous to the decision. Events that have no logical connection to the decision to plead guilty cannot render the guilty plea invalid; rather, there must be a nexus between the claimed constitutional violation and the decision. Parker v. North Carolina, 397 U.S. 790, 796 (1970) (citation omitted) (connection between alleged error and plea of guilty one month later had "become so attenuated as to dissipate the taint.").⁴

⁴ It is not altogether different in the situation where a claimed constitutional violation precedes a fair trial. In Frisbie v. Collins, 342 U.S. 519 (1952), a defendant had been forcibly abducted from

More than 100 years ago, this Court reasoned that a conviction by plea is valid if a defendant is “fully advised of the truth, force, and effect of his plea of guilty.” Hallinger v. Davis, 146 U.S. 314, 324 (1892). More recently, the Court affirmed that a defendant’s plea of guilty is valid if he is informed of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments to which he is exposed upon the entry of a guilty plea. Iowa v. Tovar, 541 U.S. 77, 80 (2004). The substance of the plea offer itself is not a valid consideration in determining whether a plea was entered voluntarily. Bordenkircher, *supra*, 434 U.S. at 362. Indeed, a plea is not coerced even if a defendant feels pressured into admitting guilt in order to obtain a more lenient sentence. McKune v. Lile, 536 U.S. 24, 42 (2002); *see also*, Brady, *supra*, at 754 (plea not compelled even though law promised a lesser sentence if defendant forfeited trial right).

Thus, for example, in Brady, the Court rejected the claim that a defendant’s fear of the death penalty in the event of conviction after a jury trial coerced him into pleading guilty. That was so even though, in the interim, the death penalty provision of the statute under which the defendant had been convicted was found to be unconstitutional. In Ruiz, the Court rejected the claim that the dispositive plea was in some way tainted by the fact that the earlier plea had been rejected because the defendant sought disclosure of impeachment information. Similarly, the Government’s

one state and brought to another for trial. The Court upheld his conviction because the trial itself was fair.

breach of a plea agreement did not *retroactively* cause the defendant's plea to be involuntary in Puckett v. United States, 129 S.Ct. 1423, 1430 (2009).

In Tollett, the defendant's guilty plea foreclosed independent inquiry into a claim of discrimination in the selection of the grand jury, Tollett, 411 U.S. at 266, even though this Court has clearly stated that such discrimination is so inherently evil as to undermine the entire adversarial process without regard to whether it had an actual effect on the judgment. Rose v. Mitchell, 443 U.S. 545 (1979). That is because, when a defendant seeks to withdraw a guilty plea, the focus is not on the integrity of the conviction (i.e., "the adversarial process"), but whether he should be given an opportunity to withdraw his plea, valid when entered, and be given another chance to test the State's evidence (i.e., because his plea was involuntary). McMann v. Richardson, 397 U.S. 759 (1970). In each of these cases, it was claimed that some error of constitutional magnitude – indeed, error that may very well have been found unconstitutional on direct review, but nonetheless abstract from the decision to plead guilty – caused the plea to be involuntary. The Court, however, did not retreat from the longstanding recognition that a guilty plea must stand if a defendant is aware of its "truth, force, and effect." This case demands the same result; the respondent's plea of guilty must stand, notwithstanding his attorney's error in failing to convey the earlier, attenuated, plea offer.

To be sure, this respondent *may not* have entered into the dispositive plea if he was aware of the earlier plea offer, if he had accepted it, and if the trial court

imposed its terms. Thus, his ignorance of the earlier offer may have been a “but for” cause of his decision to later plead guilty. *Id.* Nonetheless, it does not follow that he was coerced into later pleading guilty. In Brady, the Court noted:

[E]ven if we assume that Brady would not have pleaded guilty except for the death penalty provision of [the statute under which he was convicted], this assumption merely identifies the penalty provision as a “but for” cause of his plea. That the statute caused the plea in this sense does not necessarily prove that the plea was coerced and invalid as an involuntary act.

Brady, *supra*, 397 U.S. at 750.

Similarly, in Hutto v. Ross, 429 U.S. 28 (1976), a defendant entered a plea agreement and, although not required by that agreement, waived his right against self-incrimination and confessed to the crime. He later withdrew from the agreement and demanded a jury trial, claiming that the confession should be suppressed because, “but for” the earlier plea agreement, he would not have confessed. This Court reasoned that “causation in that sense has never been the test of voluntariness.” *Id.* at 30. Because the confession was not “extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of any improper influence,” the confession was deemed valid. *Id.* Similarly, here, the fact that the respondent was ignorant of the earlier plea offer is not akin to the type of “coercion” contemplated

in Hutto; it simply did not *compel* the later, dispositive, plea.

Nor does the fact that the respondent was ignorant of the earlier plea offer mean that he was “uncounseled” with respect to the “truth, force, and effect” of the dispositive plea.

The law ordinarily considers a waiver knowing, intelligent, and sufficiently informed if the defendant fully understands the nature of the rights and how it would likely apply *in general* in the circumstances – even though the defendant may not know the *specific detailed* consequences of invoking it.

Tovar, *supra*, 541 U.S. at 92 (quote and citation omitted, emphasis in original). Thus, in Brady, the Court held that the defendant’s plea was intelligently made because he was aware of the nature of the charge against him, and there was no indication that he was not in control of his mental faculties. Brady, *supra*, 397 U.S. at 756. Moreover, a plea of guilty is no less “counseled” merely because a defendant is unaware of all relevant circumstances.

[T]his Court has found that the Constitution, in respect to a defendant’s awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various

constitutional rights, despite various forms of misapprehension under which a defendant might labor.

Ruiz, supra, 536 U.S. at 630-31 (and listing examples).

The same is true with claims that an attorney's deficient performance precluded full awareness of the circumstances. In Broce, for example, it was claimed the defendant's pleas of guilty violated Double Jeopardy, a defense about which counsel did not render advice. This Court rejected the claim, noting that waiver of the right to trial "derives not from any inquiry into a defendant's subjective understanding of the range of potential defenses, but from the admissions necessarily made upon entry of a voluntary plea of guilty." Broce, supra, 488 U.S. at 573-74. In fact, the requirement that a guilty plea be "counseled" is "not a requirement that all advice by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." McMann, supra, 397 U.S. at 770.

Thus, an attorney's mistaken belief that an allegedly coerced confession is nonetheless admissible at trial may cause him to fail to object to its admission. This may change the course of a trial and have a prejudicial impact on its outcome (i.e., it may affect the "adversarial process"). However, an attorney's mistaken belief that a confession is inadmissible at trial cannot serve as a predicate to the claim that a plea was unintelligent. Parker v. North Carolina, supra, 397 U.S. at 797-98. In McMann, the Court confronted a trilogy of cases where it was claimed that pleas of guilty were motivated by prior coerced confessions – the effects

of which coercion trial counsel failed to ameliorate through adequate advice. Consistent with the Brady view that guilty pleas must stand if a defendant is aware of the general *consequences*, the Court rejected the Second Circuit's determination that a plea is involuntary if it is the consequence of an involuntary confession. McCann, *supra* at 765. According to the Court, the circumstances of the coerced confessions did not have "abiding impact" or "taint the plea," notwithstanding counsel's errors:

[The defendant's] later petition for collateral relief asserting that a coerced confession induced his plea is at most a claim that the admissibility of his confession was mistakenly assessed and that since he was erroneously advised, . . . his plea was an unintelligent and voidable act. *The Constitution, however, does not render pleas of guilty so vulnerable.*

McMann 397 U.S. at 769 (emphasis added). The defendant who pleads guilty, the Court went on to say, "assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts." *Id.* at 774. Moreover, even when a defendant lacks a "full appreciation of all the *consequences* flowing from his waiver," it does not mean that he lacked the necessary information to "satisf[y] the constitutional minimum." Tovar, 541 U.S. at 92.

There is no indication that this respondent had anything less than a full appreciation of the

consequences of entering his dispositive plea. This respondent's complaint is that "but for" his attorney's failure to inform him of the earlier plea offer, he would not have entered the later one. As in McMann, the impact upon this respondent's guilty plea of his attorney's "error" – the failure to inform him of the earlier plea offer – on his later decision to plead guilty was inconsequential. The lapse did not have "abiding impact" on his later decision, nor did it "taint the plea" such that the respondent could not have understood the nature of the charges against him and the consequences of pleading guilty.

At bottom, whether the guilty plea and accompanying waivers that resulted in this respondent's conviction are invalid because he was unaware of the earlier plea offer is governed by this Court's decision in Moran v. Burbine, 475 U.S. 412 (1986). Moran arose in the Fifth Amendment context, but the Court later recognized its applicability to Sixth Amendment controversies. Patterson v. Illinois, 487 U.S. 285, 296-97 (1988). In Moran, a defendant was arrested, executed a series of waivers, and, after interrogation by police, confessed to a crime, all while entirely unaware that the police had rebuffed his attorney's efforts to contact him. The defendant later claimed that the failure of the police to inform him of his attorney's attempts to reach him deprived him of information essential to his ability to knowingly waive his Fifth Amendment rights. This Court held that the defendant's waiver of rights was nevertheless valid. The Court reasoned that:

Events occurring outside the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right.

Moran, 475 U.S. at 422. As the Court explained, “the same defendant, armed with the same information” upon which his waiver decision was based, would be said to have made a valid waiver had a lawyer not attempted to contact him at all. Id.

Nothing in any of our waiver decisions or in our understanding of the essential components of a valid waiver requires so incongruous a result. No doubt the additional information would have been useful to respondent; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him *calibrate his self interest* in deciding whether to [waive his rights].

Id. (emphasis added).

Similarly, like the theoretical defendant mentioned by the Moran Court, this respondent would not be heard to complain that his dispositive plea was invalid if the earlier plea offer had never been extended by the State. Further, while many may argue that an attorney, unlike the police, *is* required to help a defendant “calibrate his self interest,” that is not the

constitutional role of an attorney. The *constitutional* entitlement to an attorney's assistance is to play the role necessary to ensure that the adversarial system produces just results. Strickland, 466 U.S. at 685; see also, Id., at 689 (goal of Sixth Amendment right to effective assistance not to "improve the quality of legal representation"); Morris v. Slappy, 461 U.S. 1, 13, (1983) (constitution does not guarantee "meaningful relationship" with defense counsel). As the Moran Court continued:

Granting that the "deliberate or reckless" withholding of information is objectionable as a matter of ethics, such conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand *the nature of his rights and the consequences of abandoning them*.

Moran, supra, 475 U.S. at 423-24 (emphasis added).

Like the waivers in Moran, this respondent's waiver of rights attendant to his guilty plea were not rendered invalid because of something entirely unknown to him – the State's discretionary extension of the earlier plea offer. Thus, his attorney's failure to communicate the earlier plea offer, while "objectionable as a matter of ethics," does not implicate the Constitution.

IV. THE FAILURE OF COUNSEL TO INFORM A DEFENDANT OF A STATE'S DISCRETIONARY PLEA OFFER, THOUGH "PROFESSIONALLY OBJECTIONABLE," DOES NOT CONSTITUTE A "BREAKDOWN IN THE ADVERSARIAL PROCESS"

When a defendant enters a plea of guilty unaware, because of his attorney's error (or, perhaps, negligence), of an earlier plea offer encompassing more favorable terms, there is no impact upon the adversarial process. See Ruiz, supra, 536 U.S. at 634 (*Thomas, J.*, concurring) (concerns regarding fairness of trial are "not implicated at the plea stage"). Accordingly, the Constitution is not implicated.

There is little dispute that an attorney's failure to convey a plea offer is ethically objectionable. See, e.g., Lawyer Disciplinary Board v. Turgeon, 210 W.Va. 181 (2000); In re Longacre, 155 Wash.2d 723 (2005). Some jurisdictions recognize a tort sounding in malpractice for failure to convey a plea offer. E.g., Krahn v. Kinney, 43 Ohio St.3d 103 (1989); Falkner v. Foshaug, 108 Wash. App. 113 (2001). At times, the cause of action is recognized without regard to whether a conviction has been overturned because counsel was found *constitutionally* ineffective. Krahn, supra. Other courts, recognizing that such a cause of action might result in a "flood of nuisance litigation" from "criminals who may be guilty, [but] . . . could have gotten a better deal," require a showing of actual innocence. Foshaug, supra, at 123-24 (internal quote omitted).

The question raised by this and similar cases, though, is whether the failure to convey the offer (or to mistakenly appraise an offer) rises to a *constitutional* violation. A “breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel.” Nix v. Whiteside, 475 U.S. 157, 165 (1986). Instead, “In evaluating Sixth Amendment claims, the appropriate inquiry *focuses on the adversarial process*, not on the accused’s relationship with his lawyer as such.” Wheat v. United States, 486 U.S. 153, 159 (1988) (emphasis added, internal quote omitted). Thus, while the adversarial process is not implicated at the plea bargaining stage (except, of course, insofar as the *entry* of a guilty plea truncates the process and must, therefore, be a voluntary and informed act), the Sixth Amendment right to the effective assistance of counsel focuses *entirely* on the adversarial process.

Strickland makes it more than clear that in order for there to be a violation of the right to the effective assistance of counsel, there must be a *breakdown in the adversarial process*.

In every case the court should be concerned with whether . . . the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Strickland, 466 U.S. at 696; see also, Id. at 685 (fair trial “is one in which evidence subject to adversarial testing is presented to an impartial tribunal for

resolution . . .” and the Sixth Amendment envisions “counsel’s playing a role that is critical to the ability of the adversarial system to produce just results”); at 686 (“The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”); at 687 (unless defendant shows both deficient performance and prejudice, “it cannot be said that the conviction . . . resulted from a breakdown in the adversarial process that renders the result unreliable.”).

In some cases, a breakdown in the adversarial process is presumed. Strickland, 466 U.S. at 692. In these cases, the likelihood of prejudice is so great that an examination into the actual effect to a particular case is not worth the cost. Id. Moreover, the State is justifiably accountable for the impairments involved because they are easy to identify and the prosecution is directly responsible for them. Id. In claims of ineffective assistance, however, actual prejudice must be proved. Id. at 693. Whether presumed or actual, there *must* be a breakdown in the adversarial process before it can be said that there has been ineffective assistance of counsel.

This focus on the adversarial process is critical in the analysis of whether there has been a violation of the right to the effective assistance of counsel, because “[i]neffective assistance claims that lack necessary foundation may bring instability to the very [adversarial] process the inquiry seeks to protect.” Premo v. Moore, 131 S.Ct. 733, 741-42 (2011).

Strickland allows a defendant to escape rules of waiver and forfeiture, and a disrespect for the latitude it requires could have grave consequences to the utility that plea bargaining brings to the criminal justice system. Id. Thus, in analyzing whether a plea of guilty, with its attendant waivers, could be revoked as invalid due to attorney error, this Court recognized that the critical focus is on the error's effect, if any, on the adversarial process and the judgement that results. Hill v. Lockhart. 474 U.S. 52, 57 (1985).

Consistent with its guilty plea jurisprudence, the Court in Hill balanced the interests of the State with those of the defendant. The Hill Court expressly noted the limitations imposed upon plea revocation – i.e., that a plea is only rendered invalid if it is involuntary and uncounseled. Id. at 56. The Court explicitly held Strickland applicable in guilty plea cases for the very same policy reasons: “The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of conviction or sentence.” Hill, 474 U.S. at 57, quoting Strickland, 466 U.S. at 693. In addition, the Hill Court recognized that imposing Strickland's prejudice requirement, albeit in modified form, when a defendant seeks to revoke his guilty plea serves the State's interest in finality of convictions. Hill, supra, at 58.

The Court very recently reiterated these concerns. “Prosecutors must have assurance that a plea will not be undone years later because of infidelity to . . . the teachings of Strickland.” Premo, 131 S.Ct. at 742. As it did in Ruiz, the Court again distinguished between the objectives in ineffective assistance cases (a fair trial

through the adversarial process) and guilty plea cases (voluntariness). The Court further noted that the question in guilty plea cases is not whether a defendant entered a plea because he was sure he would be convicted, but whether he established beyond reasonable probability that he would *not have entered* his plea but for counsel's error. Premo, supra, at 744. Thus, there can be no doubt that this Court's extension of Strickland to guilty plea cases in Hill was engineered to give consideration to the same concerns attendant to claims that a guilty plea was involuntarily *entered*. See also, Roe v. Flores-Ortega, 528 U.S. 470, 485 (2000) (emphasis in original) ("the decision whether to plead guilty (i.e., *waive trial*), rested with the defendant and, [therefore], counsel's advice in Hill might have caused the defendant to forfeit a judicial proceeding to which he was otherwise entitled."). In other words, like Strickland, Hill is concerned with whether there is a breakdown in the adversarial process because a defendant unwittingly and involuntarily forfeited the protections to which that very process entitles him.

Nonetheless, courts routinely reason that the Hill test is symmetrical. Hill requires a defendant to show that but for counsel's advice, he *would not have* accepted plea disposition and waived important constitutional rights. Courts reason that Hill must also mean that ineffective assistance exists if a defendant can show that but for counsel error, he *would have* pursued the *potential* for plea disposition. E.g., Williams v. Jones, 583 F.3d 1254, 1255 (10th Cir. 2009) ("This case merely presents the converse of Hill"); Coulter v. Herring, 60 F.3d 1499, 1504 n. 7 (11th Cir. 1995) ("we believe that Hill also applies when a

defendant decided to accept a plea offer”); Commonwealth v. Mahar, 442 Mass. 11, 14 (2004) (citing Hill, and stating that the right to counsel “plainly includes counsel’s effective assistance in connection with the defendant’s decision to accept or reject a plea bargain offer”). These courts overlook that Strickland’s focus is on the adversarial process. In other words, these decisions do not respect “the teachings of Strickland” and, thus, have brought instability to the adversarial process. See Premo, 131 S.Ct. at 741-42. Cases involving forfeited opportunities to plead guilty and avoid trial *are indeed* converse to Hill. But, they are *completely* converse. As opposed to Hill, they do not implicate the adversarial process at all.

Here, unlike these other courts, the Missouri Court did not employ Hill in a symmetrical fashion. Instead, the Court defaulted to what it perceived to be Strickland’s “looser emphasis on whether a defendant can establish ‘an adverse effect on the defense.’” Similarly, in its recent decision holding that ineffective assistance of counsel can be shown in the foregone plea context, the Tenth Circuit reasoned that “[s]urely, the plea process is part of the defense.” Williams v. Jones, 571 F.3d 1086, 1092 (10th Cir. 2009). Whatever the approach, these decisions ignore that the goal of the Sixth Amendment right to effective assistance of counsel, pursuant to both Strickland *and* Hill, is to protect the adversarial process, and they exhibit a fundamental misconception of what is meant by “the defense” in Sixth Amendment jurisprudence.

The Sixth Amendment guarantees to a criminal defendant the assistance of counsel “for his defence.”

This guarantee is meant to ensure fairness in the adversarial process. United States v. Morrison, 449 U.S. 361, 364 (1981). “Defence” does not mean “defense in relation to other objectives that may be important to the accused.” Rothgery v. Gillespie County, 554 U.S. 191, 216 (2008) (*Alito, J., Scalia, J., and Roberts, CJ.* concurring); see also, Faretta v. California, 422 U.S. 806, 818 (1975) (emphasis added) (“the [Sixth] Amendment constitutionalizes the right in an adversary criminal trial to *make a defense as we know it.*”). The “adversarial process” is one in which the prosecution’s case is subjected to “the crucible of meaningful adversarial testing.” United States v. Cronin, 466 U.S. 648, 656 (1984). It’s goal is to achieve a reliable judgment *on the merits* of a criminal case, by permitting the parties to “contest all issues before a court of law” in pursuit of the “two-fold aim” of the criminal justice system that “guilt shall not escape or innocence suffer.” United States v. Nixon, 418 U.S. 683, 709 (1974), (quoting Berger v. United States, 295 U.S. 78, 88 (1935)); see United States v. Ash, 413 U.S. 300, 307-15 (1973); Herring v. New York, 422 U.S. 853, 862 (1975) (“The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.”). Ultimately, the adversarial system is relied upon to “advance the public interest in truth and fairness,” Polk County v. Dodson, 454 U.S. 312, 318 (1981), and guard the truth-seeking function of a trial. Perry v. Leeke, 488 U.S. 272, 282 (1989).

Within this adversarial system, the defense is guaranteed the “opportunity to participate fully and

fairly in the adversary factfinding process.” Herring v. New York, 422 U.S. at 858. In addition, the adversarial process also preserves the defendant’s right to test the State’s evidence through cross-examination. Nix v. Williams, 467 U.S. 431, 446 (1984). Thus, in order to grant to a defendant these opportunities to fully participate in the factfinding process and test the evidence against him, the adversarial system guarantees to him the assistance of counsel “at pretrial confrontations *where the subsequent trial cannot cure* an otherwise one-sided confrontation between prosecuting authorities and the uncounseled defendant.” Id. at 447.

None of these hallmarks of the adversary process are at risk when a defense attorney fails to convey to his client an offer to dispose of his case through plea disposition. The event is entirely non-confrontational and non-adversarial. There is no potential for a State-created impediment unless one accepts as realistic the notion that a prosecutor would offer a discretionary plea and then impede its conveyance to the defendant. Even in that odd scenario, the prosecutor would not be impeding the delivery of anything to which the defendant is entitled. In fact, once the prosecutor has extended the offer to defense counsel, he need have no further involvement. Moreover, communications between the attorney and the defendant are privileged, and the State can neither be responsible for nor prevent an attorney’s failure to convey the offer. Further, the offer itself is unrelated to any meaningful testing of the State’s case against the defendant. It is not part of the “contest” related to the merits of the case and the factfinding, truth-seeking function of the adversarial

process. Indeed, plea negotiations are wholly unconcerned with those functions. Menna v. New York, 423 U.S. 61, 63 n.2. It is precisely for this reason that pleas of guilty are valid regardless of the strength of the State's evidence against a defendant or whether a conviction could even be had at trial, so long as they are voluntary and intelligent. Brady, 397 U.S. at 750.⁵

Nothing about the plea negotiation process implicates the adversarial process through which criminal cases are adjudicated, until a defendant enters a guilty plea and waives the protections that the process affords him. For this reason, this Court has stated that a plea bargain, by itself, is “without constitutional significance” until it is “embodied in the judgment of a court.” Mabry v. Johnson, 467 U.S. 504, 507-08 (1984), unrelated dictum disavowed, Puckett, supra, at 1430 n. 1. The failure of an attorney to convey a plea offer has absolutely no effect on the judgment, and, therefore, has no constitutional significance. Accordingly, the error, though “professionally unreasonable,” does not warrant setting aside the judgment. Strickland, 466 U.S. at 691.

⁵ An exception, of course, is the situation where the Constitution forbids the charges from being filed in the first place, such as where the very statute under which a defendant is charged is wholly unconstitutional. See Menna, 423 U.S. at 62.

V. **SETTING ASIDE A JUDGMENT FOR ERROR THAT DOES NOT IMPACT THE ADVERSARIAL SYSTEM AND, THEREFORE, HAS NO EFFECT ON THE JUDGMENT, IS DETRIMENTAL TO THE CRIMINAL JUSTICE SYSTEM AND THE PUBLIC**

In explaining why the Court could not view as categorically non-cognizable on federal habeas review Sixth Amendment claims of ineffective assistance regarding the failure of an attorney to move to suppress evidence procured in violation of the Fourth Amendment, even though the Fourth Amendment claim is itself not cognizable, the Court stated that:

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 v. Morrison, 477 U.S. 365, 379 (1986). Some have read Kimmelman to mean that Strickland warrants a remedy in the situation where an attorney fails to convey, or incorrectly conveys, a plea offer, even absent an effect on the judgment. Williams v. Jones, 571 F.3d 1086, 1091-92 (10th Cir. 2009); see also, Ebron, 120 Conn. App. 560, 588 (1010); Riggs v. Fairman, 399 F.3d 1179, 1189 (9th Cir. 2005) (*Bea J.*, dissenting) (citing Kimmelman). In fact, Kimmelman never reached the Strickland question. Kimmelman, supra, 477 U.S. at 391 (concurring opinion) (“the Court . . .

employs unnecessarily broad language that may suggest that we have considered and resolved the broader Strickland issue in this case. . . .[We] write separately because that suggestion is mistaken. . . .”).

To be sure, Kimmelman did not reverse Strickland’s recognition that the State is not responsible for and cannot prevent all attorney error. In fact, the State is responsible only for attorney error that impedes the State’s obligation to foster an adversarial process that leads to a just result – a reliable judgment.

The constitutional mandate is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standards of due process of law. Unless a defendant charged with a serious offense has counsel able *to invoke the procedural and substantive safeguards* that distinguish our system of justice, a serious risk of injustice infects the trial itself. *When a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty.*

Evitts v. Lucey, 469 U.S. 387, 396 (1985) (emphasis added) (quote and cite omitted).

Because an attorney’s failure to inform his client of a plea offer is an error that does not affect the judgment, any “remedy” for the error requires the state to go beyond its constitutional mandate. It does nothing

to legitimize the adversarial process – the *factfinding* process by which the prosecution’s evidence is tested to ensure a reliable determination of guilt. Indeed, whether the crime fits the facts and whether the punishment fits the crime become irrelevant inquiries. For that reason the Court has recognized that:

Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.

Delaware v. Van Arsdell, 475 U.S. 673, 681 (1986)(citing and quoting R. Traynor, *The Riddle of Harmless Error* 50 (1970)).

Accordingly, the Court has judiciously reversed convictions in the absence of error upon the judgment. The Court does so only when the State is directly responsible, and the law and public policy warrant reversal. For example, in Rose v. Mitchell, 443 U.S. 545 (1979), the Court set aside a conviction and quashed the indictment because of racial discrimination in the selection of grand jurors, even though the constitution of the petit jury and the determination of guilt were without flaw. In doing so, the Court reasoned that racial discrimination itself is unconstitutional, and was the “primary evil” underlying the Civil War and the later enactment of the Fourteenth Amendment. In addition, for a variety of public policy reasons, the harm, the Court reasoned, is to society as a whole.

Similarly, the “exclusionary rule” requires illegally seized evidence to be excluded at trial – even

though it may be reliable and even though exclusion may be fatal to the prosecution. In those cases, it is said that “the criminal is to go free [not because the conviction is unreliable, but] because the constable blundered.” Mapp v. Ohio, 367 U.S. 643, 659 (1961) (citation omitted). Nonetheless, like the Constitution’s proscription against racial discrimination that was operative in Rose, “[t]he criminal goes free, if he must, but it is the law that sets him free.” Id. That law is the very Fourth Amendment right to be free from unreasonable searches and seizures that is granted to *all* citizens, including criminal defendants. Schneckloth v. Bustamonte, 412 U.S. 218, 267 (1973). In these contexts, where the government itself breaks the law, “it breeds contempt for the law.” Mapp, supra.

However, where an attorney fails to convey to a criminal defendant a plea offer extended at the State’s discretion, there is no consequence to society as a whole. Moreover, the State has not broken any underlying law. Unlike the prophylactic “exclusionary rule,” there is no government conduct to deter – indeed, no government actor accountable to the people through the political process is involved.

Accordingly, to hold the people responsible, notwithstanding that they have delivered the constitutional mandate of providing a mechanism through which the adversarial process can reach a “just result,” threatens to “breed contempt for the law” in this context. The criminal is able to avoid the penalty that a sound adversarial process has determined to be most effective because it is commensurate with his conduct. See Bordenkircher v. Hayes, 434 U.S. 357, 364-65

(1978) (re-indictment on more serious charges after breakdown in plea negotiations is not a due process violation where later conviction and sentence are commensurate with criminal conduct). It is this situation that “bestirs the public to ridicule” the judicial process.

Neither the law nor public policy support reversal of convictions for this attorney’s particular error for which the State is not responsible and which has no effect on the judgment.

VI. CONCLUSION

The decision of the Missouri Court should be reversed.

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