No. 10-444

IN THE

Supreme Court of the United States

MISSOURI,
Petitioner,

v.

GALIN EDWARD FRYE,
Respondent.

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

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Contrary to the holding in *Hill v. Lockhart*, 474 U.S. 52 (1985)—which held that to prove prejudice a defendant must allege that, but for counsel's error, the defendant would not have pleaded guilty and would have gone to trial—can a defendant who validly pleads guilty successfully assert a claim of ineffective assistance of counsel by alleging that, but for counsel's error in failing to communicate a plea offer, he would not have pleaded guilty when he did, but would have pleaded guilty sooner with more favorable terms?

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?

PARTIES TO THE PROCEEDING

Petitioner, State of Missouri, was the respondent below; the respondent, Galin Edward Frye, was the appellant.

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The Missouri Court of Appeals' opinion, entered on March 23, 2010, is reported at *Frye v. State*, 311 S.W.3d 350 (Mo. Ct. App. 2010), and is reprinted in the Joint Appendix ("J.A.") at pp. 58-80.

The post-conviction motion court's judgment, entered November 18, 2008, is included in the Joint Appendix at pp. 52-57.

JURISDICTION

The Supreme Court of Missouri denied transfer on June 29, 2010. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Constitution of the United States, Amendment XIV:

> ... No state shall . . . deprive any person of life, liberty or property without due process of law . . . .

STATEMENT OF THE CASE

On August 14, 2007, the State filed a complaint charging Mr. Frye with driving while his license was revoked, in violation of § 302.321, Mo. Rev. Stat. 2000. J.A. 1, 11-12. Because Mr. Frye had three prior convictions for driving while revoked, his offense was elevated to a class D felony. J.A. 11-12.

The court set the case for preliminary hearing on November 9, 2007, but the court granted Mr. Frye's request for a continuance and reset the hearing for January 4, 2008. J.A. 2. Shortly thereafter, on November 15, 2007, the prosecutor sent a letter to Mr. Frye's attorney, extending a plea offer. J.A. 50. The offer outlined two options. J.A. 50. The first option stated that the prosecutor would recommend a three-year sentence and defer to the trial court on the question of probation, with the condition that Mr. Frye serve 10 days "shock" incarceration in the county jail. J.A. 50. The second option stated that the prosecutor would amend the charge to a misdemeanor, and that Mr. Frye would serve 90 days in the county jail. J.A. 50.

The prosecutor's letter stated that Mr. Frye had to accept the offer "by noon on December 28, 2007." J.A. 50. (The prosecutor intended to subpoena witnesses for the preliminary hearing on January 4, 2008. J.A. 50.) After receiving the letter, Mr. Frye's attorney did not communicate the State's offer to Mr. Frye. J.A. 33-34, 40-41, 47.[1]

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[1] Counsel testified at the post-conviction hearing that he was "not sure" if he told Mr. Frye about the offer. J.A. 41. He testified that he did not think he saw Mr. Frye until after the offer expired. J.A. 41. The contents of counsel's trial file tended to confirm that counsel had no contact with Mr. Frye after receiving the offer and before the offer's expiration. J.A. 41-45.

Before the preliminary hearing, around December 30, 2007, Mr. Frye was charged in another county with misdemeanor driving while revoked. J.A. 43, 45-47. The prosecutor handling Mr. Frye's case had a practice of terminating any plea offers "if a new case was charged." J.A. 45.[2]

On January 4, 2008, Mr. Frye waived preliminary hearing, and the case was bound over for trial. J.A. 2. On January 7, 2008, the State filed an information charging Mr. Frye with the class D felony of driving while revoked. J.A. 3.

On February 25, 2008, Mr. Frye appeared for arraignment and entered a plea of not guilty. J.A. 5. But less than a week later, on March 3, 2008, Mr. Frye withdrew his previous plea and pleaded guilty. J.A. 5-6. Mr. Frye entered an "open" plea, meaning that he had no plea agreement with the State, and that the judge could impose any sentence within the authorized range of punishment. J.A. 13, 15-16.

At the guilty-plea hearing, Mr. Frye stated that he understood various trial rights that he was giving up by pleading guilty. J.A. 14-15. After assuring the court that he understood the consequences of his plea, Mr. Frye testified that he had decided to plead guilty understanding that the court would be able to impose the full range of punishment. J.A. 16. Mr. Frye stated that he understood that he could be sentenced "up to four years," and that the court could "require [him to] do the time" J.A. 16. Mr. Frye also

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[2] According to on-line records, the new charge was also enhanced to a class D felony, and, on January 9, 2009, Mr. Frye pleaded guilty to that offense. The court in that case sentenced Mr. Frye to three years to be served concurrently with the sentence ordered in this case. *See State v. Galin Edward Frye*, No. 0811-CR02644-01.

stated that he understood that, if he received probation, he would have to spend two days in the county jail. J.A. 16-17. Mr. Frye also assured the court that no promises or threats had been made to induce his plea. J.A 17. Mr. Frye then admitted his guilt of the charged offense and that he had been convicted of driving while revoked on three prior occasions. J.A. 18-19. The court ordered a sentencing assessment report (SAR). J.A. 20-21.

At sentencing, on May 5, 2008, the prosecutor recommended a three-year sentence, deferring to the court on probation, but requesting ten days of "shock" incarceration if the court were to grant probation. J.A. 21-22. Mr. Frye's counsel requested that the court order ten days of "shock" incarceration in the county jail and place Mr. Frye on probation. J.A. 22. Counsel also requested, "no matter what happens," that the court stay execution of Mr. Frye's sentence so that Mr. Frye could complete some final exams at school. J.A. 22. Having received and considered the SAR, the court did not grant probation, and it imposed a three-year sentence; but the court stayed execution until two days after Mr. Frye's exams. J.A. 23.[3]

After delivery to the Department of Corrections, Mr. Frye filed a post-conviction motion alleging that counsel was ineffective for failing to tell Mr. Frye about the State's November 15, 2007, plea offer. J.A.

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[3] The SAR was not made part of the record on appeal, but, pursuant to MO. SUP. CT. RULE 29.07(a)(2) the SAR would have included "any prior criminal record of the defendant and such information . . . as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant." At the post-conviction evidentiary hearing, Mr. Frye acknowledged that he has four prior felony convictions, and several prior misdemeanor convictions. J.A. 34-35.

25-26. The court held an evidentiary hearing and denied the motion, concluding, *inter alia*, that Mr. Frye had failed to show prejudice, in that Mr. Frye had failed to allege or prove that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial. J.A. 30, 52-57.

In finding no prejudice, the court relied on the test established in *Hill v Lockhart*, 474 U.S. 52, 59 (1985), which held that, after a guilty plea, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *See* J.A. 53-56. Consistent with this test, the motion court concluded, "Because [Mr. Frye] has failed to claim, either at the evidentiary hearing or in his motion, that he would have gone to trial but for his trial counsel's actions . . . this Court finds that [Mr. Frye] is entitled to no relief." J.A. 57.

Mr. Frye appealed, and the State argued that Mr. Frye had failed to show prejudice as required by *Hill*. *See* J.A. 70. The Missouri Court of Appeals rejected that argument and concluded that the post-conviction motion court had clearly erred in applying *Hill*'s test for prejudice to Mr. Frye's claim. J.A. 76. The court of appeals declined to apply *Hill*:

> We conclude that though prejudice may, and often will, be established by a defendant's showing that 'but for' counsel's ineffective assistance, the defendant would not have pled guilty and would have insisted on going to trial, this is not the only way prejudice can be established.

J.A. 72. Relying on *Strickland v. Washington*, 466 U.S. 668 (1984), the court then held that Mr. Frye

could show prejudice if he could show that but for counsel's error, there was a reasonable probability that "the result of the proceeding would have been different"—i.e., a reasonable probability that, but for counsel's error, he would have accepted the state's earlier (and better) plea offer. J.A. 72-76.

The court then observed that the offer was better because, under the terms of the offer, the State would have reduced the charge and the sentencing court would have been limited to imposing up to one year of imprisonment (instead of up to four years for the felony). J.A. 77-78.[4] But, although the court's prejudice analysis was premised upon its conclusion that Mr. Frye lost a favorable agreement, the court ultimately recognized that it could not order specific performance of the lost plea offer. J.A. 79. The court observed, "we are not empowered to order the State to reduce the charge against Frye." J.A. 79. Thus, the court vacated Mr. Frye's guilty plea and remanded the case so that Mr. Frye could "proceed to trial or plead guilty to and be resentenced for the same felony driving while revoked charge to which Frye originally entered his 'open' guilty plea." J.A. 79.

[4] In reaching this conclusion, the court included a misstatement of Missouri law; the court stated: "had Frye been advised of the Offer, and had he accepted the Offer, the trial court would have been bound to accept the guilty plea for the misdemeanor charge." J.A. 77-78. In fact, the trial court would not have been bound to accept the guilty plea, *see* MO. SUP. CT. RULE 24.02(d)4; rather, if the trial court had accepted the plea, it would have been bound to sentence Mr. Frye within the misdemeanor range of punishment.

SUMMARY OF THE ARGUMENT

1. The Sixth Amendment to the United States Constitution guarantees counsel to the accused in criminal prosecutions. This guarantee is more than a guarantee of having counsel present only at the trial itself. In light of the various tools that are employed by the prosecution during a criminal prosecution, the counsel guarantee has been extended to pre-trial events to protect the unaided layperson at critical confrontations with the prosecution.

2. To give meaning to the Constitution's promise of having the assistance of counsel for a defense, the Court has held that the right to counsel is the right to the *effective* assistance of counsel. But, that said, the right to effective assistance is not provided for its own sake, but because it aids the accused in receiving a fair trial. Accordingly, the Court has held that the right to the effective assistance of counsel is limited to ensuring a fair trial.

In *Strickland*, the Court established the test for evaluating whether counsel's alleged errors deprived the accused of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687-688, 694 (1984). Relying on the framework established in *Strickland*, the Court also established a test for evaluating whether counsel was ineffective during guilty-plea proceedings. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985). But, in *Hill*, instead of examining whether counsel's errors affected the reliability of the factfinder's verdict, the Court held 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." *Id*. at 58.

While stated differently, the two tests found in *Strickland* and *Hill* aim to protect the same right: the right to a fair trial. The *Strickland* test protects that right by ensuring that the factfinder's ability to determine guilt or innocence was not fettered by the mistakes of counsel and was, instead, governed by correct standards and reliable evidence. The *Hill* test, on the other hand, protects the right by ensuring that the accused is not unfairly deprived of the right altogether.

3. Here, Mr. Frye alleges that he was prejudiced not because he was deprived of his right to a fair trial, but because counsel failed to tell him about a favorable plea offer that he would have accepted if counsel had told him about it. But the loss of a favorable plea bargain—even if the outcome would have been better than what the accused received—is not the sort of "prejudice" that *Strickland* and *Hill* sought to guard against. The accused has no right to a plea bargain, and a plea bargain standing alone has no constitutional significance.

While the entry of a guilty plea is certainly a critical confrontation with the prosecution, the plea negotiations that precede a plea are only critical in the general sense of the word, and only insofar as they prompt or inform a waiver of the accused's right to a fair trial. In other words, when a plea offer is rejected, or when negotiations are unsuccessful, the accused's right to a fair trial is not infringed in any way, and what follows thereafter should be judged according to the terms of *Strickland* and *Hill*.

Accordingly, here, where the State made a plea offer, but that offer was not communicated to Mr. Frye, there was no confrontation between Mr. Frye and the prosecutorial forces of the State. The State

obtained no advantage over Mr. Frye as a result of the plea offer, and Mr. Frye lost no constitutional right. Mr. Frye may have lost a potential benefit, *i.e.*, the favorable terms of the plea offer, but he was not deprived of any substantive or procedural right.

4. In arguing that he was prejudiced by the loss of the plea offer, Mr. Frye is urging the adoption of a purely result-oriented test for prejudice—*i.e.*, if there is a reasonable probability that the result of the criminal case would have been more favorable to the accused then Mr. Frye was prejudiced. But the Court has held that a prejudice analysis that focuses only on the outcome is defective. If counsel's error does not deprive the accused of any substantive or procedural right, then it cannot be said that the proceeding was unreliable or unfair. In other words, the loss of a more favorable outcome is not always a legitimate means of proving prejudice.

A result-oriented test in this case would also place an unfair burden on the state and present practical problems. Ordinarily, the State bears the burden of counsel's errors because, if a conviction is obtained in a proceeding in which the accused is deprived of the effective assistance of counsel, the State has unconstitutionally deprived the accused of his liberty. Here, though, Mr. Frye does not assert that his conviction was the result of an unfair guilty-plea proceeding.

If the State is compelled to bear the burden of errors that occur during failed plea negotiations, there will be an incentive for counsel to allow or create failures in plea negotiations. For, once counsel has a favorable plea offer in hand, the offer will act as an "insurance policy" against worse results at trial. There will be no risk in gambling for an acquit-

tal at trial, because if the trial turns out worse than the lost plea offer, the accused will be able to obtain post-conviction relief and seek another outcome. This will lead to waste of judicial resources, and it could cause prosecutors to refrain from even engaging in plea negotiations.

5. Even if a lost plea offer constitutes "prejudice" under *Strickland* and *Hill*, Mr. Frye is not entitled to any further remedy because his conviction was obtained through a constitutionally adequate guilty-plea proceeding. If the accused receives ineffective assistance of counsel at trial, the remedy is to order a new trial—not to order an acquittal. Similarly, here, the appropriate remedy was not to order specific performance of the lost plea offer, but to accord Mr. Frye a fair trial or guilty plea. And inasmuch as Mr. Frye validly waived his right to trial and pleaded guilty, no further remedy is appropriate.

Moreover, because Mr. Frye's guilty plea was a break in the chain of events that preceded it, he cannot raise independent constitutional claims that occurred prior to the plea. Mr. Frye's claim of ineffective assistance of counsel is independent from his guilty plea because the alleged error did not affect the knowing, intelligent, and voluntary nature of his plea. In short, Mr. Frye "was fully aware of the likely consequences when he pleaded guilty; it is not unfair to expect him to live with those consequences now." *Mabry v Johnson*, 467 U.S. 504, 511 (1984).

ARGUMENT

I. The Sixth Amendment seeks to ensure a fair trial by guaranteeing the right to counsel at trial and during "critical confrontations" with the State's prosecutorial forces.

One aim of the Sixth Amendment is to guarantee fairness to the accused at trial. As the Court stated in *Strickland v. Washington*, 466 U.S. 668, 684-685 (1984), "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause[.]"

Similarly, the Court has stated that "'the 'core purpose' of the counsel guarantee is to assure aid at trial, '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, 188-189 (1984). The "right to counsel exists to protect the accused during trial-type confrontations with the prosecutor." *Id*. at 190.

To provide the requisite protection, the Court has held that the right to counsel is not limited to having counsel present "only at the trial itself." *See Kirby v. Illinois*, 406 U.S. 682, 688 (1972). Rather, the Sixth Amendment's aim is "protecting the unaided layman at critical confrontations with his adversary[.]" *Gouveia*, 467 U.S. at 189. Extending the Sixth Amendment's right to counsel to "critical confrontations" that precede trial has been deemed necessary because the fairness of trial is often dependent on pre-trial events.

The right to counsel attaches, then, when adversary proceedings have been initiated against

the accused. *Kirby*, 406 U.S. at 688. Focusing on that moment, the Court recognized that "perhaps 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). Thus, in *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961), the Court held that "in Alabama [arraignment] is a critical stage in a criminal proceeding," for "[w]hat happens there may affect the whole trial." The Court pointed out that, under Alabama law, certain defenses otherwise available at trial could be "irretrievably lost, if not then and there asserted." *Id*. The Court observed that at such proceedings, "[t]he guiding hand of counsel is needed . . . 'lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which they in fact and in law committed.' " *Id*. at 54-55.

A few years after *Powell*, in *Massiah v. United States*, 377 U.S. 201, 204-206 (1964), the Court held that a surreptitious, post-indictment interrogation of the accused by a government agent was a confrontation where counsel's aid was critical because it resulted in evidence "used against [the defendant] at his trial." The Court explained:

> A Constitution which guarantees a defendant the aid of counsel at . . . trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less . . . might deny a defendant "effective representation by counsel at the only stage when legal aid and advice would help him."

Id. at 204 (quoting *Spano v. New York*, 360 U.S. 315, 326 (1959) (Douglas, J., concurring)).

In *United States v. Wade*, 388 U.S. 218, 219-220, 236-237 (1967), the Court held that a "post-indictment lineup conducted for identification purposes" was also a critical confrontation. The Court observed that "today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *Id*. at 224. The Court continued: "It is central to that principle [of having a fair opportunity to present a defense at trial] that in addition to counsel's presence at trial,[] the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *Id*. at 226 (footnote omitted). Accordingly, the Court concluded that "we scrutinize 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 as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." *Id*. at 227.

In short, "critical confrontations" include pre-trial proceedings where " 'the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both,' . . . in a situation where the results of the confrontation 'might well settle the accused's fate and reduce the trial itself to a mere formality.' " *Gouveia*, 467 U.S. at 189. "It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the

intricacies of substantive and procedural criminal law." *Id*.

All these critical-confrontation cases involved the *absence* of counsel during what were held, or alleged, to be stages of a prosecution that were critical because of their effect on any future trial. They did not directly address claims of ineffective assistance of counsel. Thus, while they address the broader question of when counsel must be *provided* to the accused, they do not address the separate, more specific question of what constitutes the *effective* assistance of counsel during such stages of trial. Nevertheless, these cases provide a framework for determining whether a given pre-trial event is a "critical confrontation," and they affirm the general principle that prejudice must be gauged by examining whether counsel's presence or absence (or—as the case may be in gauging counsel's effectiveness—counsel's action or inaction) "might derogate from the accused's right to a fair trial." *Wade*, 388 U.S. at 226.

II. The Sixth Amendment right to the *effective* assistance of counsel is limited to preserving the right to a fair trial.

As a natural corollary to the overarching purpose of the Sixth Amendment, it has long been recognized that "the right to counsel is the right to the *effective* assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970) (emphasis added). But, while the right to counsel plays an important role in criminal prosecutions, "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *United States v. Cronic*, 466 U.S. 648, 658 (1984). In other words, the

right to the effective assistance of counsel is bounded, or limited, by the right to a fair trial: "Having derived the right to effective representation from the purpose of ensuring a fair trial, we have, logically enough, also derived the limits of that right from that same purpose." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006).

In *Strickland v. Washington*, 466 U.S. at 668, the Court established the now-familiar two-part test for determining whether the accused in a criminal case has been deprived of the right to the effective assistance of counsel. First, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id*. at 687-688. Second, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. In discussing the application of the second part of this test—the test for "prejudice"—the Court explained, "When a defendant challenges a conviction [obtained after a trial], the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id*. at 695.

Although the *Strickland* test was tied to the reliability of the factfinder's determination of guilt at trial or trial-like proceedings, the Court held in *Hill v. Lockhart*, 474 U.S. 52, 57 (1985), that *Strickland*'s "two-part standard [is also] applicable to ineffective-assistance claims arising out of the plea process." 474 U.S. at 57. But the Court altered the showing that the accused must make to prove prejudice: "to satisfy the 'prejudice' requirement [after a guilty plea], the defendant must show that there is a reasonable probability that, but for counsel's errors, he would

not have pleaded guilty and would have insisted on going to trial." *Id*. at 58. In other words, after a guilty plea, prejudice is not gauged in terms of the reliability of the factfinder's verdict; rather, prejudice is gauged in terms of the validity of the accused's waiver of the right to trial.

While stated differently, both the *Strickland* test and the *Hill* test aim to protect the accused's right to a fair trial. The *Strickland* test protects that right by seeking to ensure that the factfinder's ability to determine guilt or innocence was not fettered by the mistakes of counsel and was, instead, governed by correct standards and reliable evidence. The *Hill* test, on the other hand, protects the right to a fair trial by seeking to ensure that the accused is not unfairly deprived of the right altogether. It does so by ensuring that the accused's guilty plea and concomitant waiver of trial is knowing, intelligent, and voluntary. In either case—after a trial or after a guilty plea—if counsel's error results in the requisite prejudice, the remedy is to restore the defendant's right to a fair trial by vacating the judgment and ordering a new trial.

In sum, because the right to the effective assistance of counsel is limited to preserving the accused's right to a fair trial, any test for evaluating counsel's efforts must ultimately rest on whether the accused was robbed of a fair trial. Thus, here, where the case was resolved through a guilty plea, the question is, as the Court aptly stated in *Hill*, whether Mr. Frye, but for counsel's error, "would not have pleaded guilty and would have insisted on going to trial." 474 U.S. at 59.

III. Because plea negotiations are not a critical confrontation with the prosecution, and because counsel's error here in failing to communicate a plea offer did not infringe on Mr. Frye's right to a fair trial, there was no constitutional prejudice.

Here, Mr. Frye did not allege or prove that he was robbed of his right to a fair trial—he did not allege that, but for counsel's error in failing to convey the State's plea offer, he would not have pleaded guilty and would have insisted on going to trial. *See* J.A. 27-28, 34, 37. Mr. Frye's claim of prejudice was merely that, if counsel had informed Mr. Frye of the State's plea offer, there was a "reasonable probability . . . that [the trial judge] would have accepted the plea bargain to the amended misdemeanor charge, [that Mr. Frye] would have pled thereto and been sentenced in accordance with the plea offer, and consequently he would have avoided a felony conviction and would have served only ninety days in the county jail rather than three years in prison." J.A. 27-28. In short, Mr. Frye alleged that, if counsel had told him about the State's plea offer, he would have pleaded guilty sooner and obtained a lesser conviction and sentence.

But this sort of "prejudice"—the lost benefit of a favorable plea offer—is not the sort of prejudice that *Strickland* and *Hill* were designed to guard against. *See generally Premo v. Moore*, 131 S.Ct. 733, 745 (2011) (stating that, in light of the test in *Hill*, it was not "clearly established" that the probability of a "better plea agreement" would constitute "prejudice for *Strickland* purposes"). The question here, then, is whether plea negotiations that did not result in a guilty plea constitute a "critical confrontation" that

gives rise to the right to the effective assistance of counsel during such negotiations.

A. The negotiations that precede a plea bargain may be important to the accused in deciding to waive trial, but they are not a "critical confrontation" with the prosecution, particularly if they are unsuccessful, *i.e.*, if the accused does not waive trial.

In *Iowa v. Tovar*, 541 U.S. 77, 81 (2004), the Court observed that "[t]he entry of a guilty plea . . . ranks as a 'critical stage' at which the right to counsel adheres." In another case that resulted in a guilty plea, *Padilla v. Kentucky*, 130 S.Ct. 1473, 1486 (2010), the Court observed that plea negotiations are a "critical phase of litigation." These observations make sense in cases where the accused waived the right to trial in conjunction with accepting a specific plea offer, because waiving the right to trial in such cases settles the accused's fate, and the negotiations could have impelled the accused to waive trial.

But the Court has never held that a plea bargain standing alone has constitutional significance, or that the accused has any right to receive one. *See Mabry v. Johnson*, 467 U.S. 504, 507 (1984) ("A plea bargain standing alone is without constitutional significance[.]"); *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977) ("there is no constitutional right to plea bargain"). Thus, while plea negotiations can be "critical" in the general sense of the word, unaccepted plea offers and unsuccessful negotiations, unlike actual guilty-plea hearings, are not "critical confrontations" in which the effectiveness of counsel demands constitutional protection.

This is not to suggest that counsel has no duty to consult with the accused when the State extends an offer. To the contrary, under professional and ethical norms, counsel should be expected to discuss legitimate, acceptable offers with the accused. In addition, given the benefits that can accrue to the accused through plea bargaining, it might behoove counsel in a given case to discuss with the accused the possibility of approaching the prosecutor with an offer to waive trial in hopes of securing a plea bargain from the prosecutor. Such practices are widespread, and "defense attorneys must make careful strategic choices in balancing opportunities and risks." *Premo v. Moore*, 131 U.S. at 741.

But, while many complexities enter into the plea-bargaining process, and while counsel certainly *can* broker favorable results through the plea-bargaining process, it does not necessarily follow that counsel's *failing* to broker such favorable results outside the trial process constitutes "prejudice" of the sort justifying relief under *Strickland* and *Hill*. Indeed, because "the Sixth Amendment right to counsel exists . . . in order to protect the fundamental right to a fair trial," 466 U.S. at 684, there is no justification for extending that right to protect the defendant's purported right to receive the most favorable result that would have been possible or probable through more successful plea bargaining.

On the other hand, it can hardly be gainsaid that counsel's advice in deciding whether to waive trial and plead guilty is critical. The critical importance of counsel's assistance during plea negotiations that result in a waiver of trial has been recognized by the Court, but in such cases, the adequacy of counsel's performance has been gauged in terms of whether the defendant's waiver of trial and guilty plea were

knowing, intelligent, and voluntary. *See Hill*, 474 U.S. at 56-57 (" 'As we explained in *Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973), a defendant who pleads guilty upon the advice of counsel 'may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.' "). Thus, the critical nature of counsel's advice during plea negotiations lies not in counsel's ability to obtain certain favorable results, but in counsel's obligation to protect the defendant's right to a fair trial.

There is broad language in *Padilla v. Kentucky* that could be read to suggest that all "plea negotiations" are a "critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." 130 S.Ct. at 1486 (citing *Hill*, 474 U.S. at 57). But *Padilla*'s reliance on *Hill* indicates that plea negotiations are "critical" only because they can induce the accused to waive trial and plead guilty—any suggestion beyond that was *dicta*. And a review of *Padilla* confirms that the case did not alter the test for determining prejudice.

In *Padilla*, the defendant alleged that counsel was ineffective in advising him about deportation consequences that would follow his guilty plea. 130 S.Ct. at 1478. The defendant alleged that counsel not only failed to advise him of the consequences, but affirmatively told him that he "did not have to worry about immigration status since he had been in the country so long." *Id*. The defendant alleged he relied on counsel's advice in pleading guilty, and "he would have insisted on going to trial if he had not received incorrect advice from his attorney." *Id*. It was in that specific context—where the defendant alleged that he would not have given up his right to trial—that

the Court held that counsel's performance was deficient, and that the Court further observed that "we 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." *Id*. at 1486.

Accordingly, *Padilla* should be read as referring to "the negotiation of a plea bargain" that actually results in a waiver of trial and the entry of a guilty plea. In such cases, plea negotiations become critical because they will often be an important factor that influences the accused's decision to waive trial and plead guilty. The "critical confrontation" with the State still takes place at the guilty-plea hearing itself. Indeed, although the Court in *Padilla* expressly declined to decide the issue of prejudice, the Court seemingly recognized that prejudice must be tied to the defendant's decision to waive trial and plead guilty. *See generally id*. at 1485 ("to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain [and insist upon trial] would have been rational under the circumstances.").

In light of *Mabry*, it makes sense to invest the guilty plea and waiver of trial (as opposed to the plea bargain) with constitutional significance, for there is no right to a plea bargain, but there is a right to trial. And it is at the guilty-plea hearing that the accused will waive that right and be " '. . . brought before a tribunal with power to take his life or liberty[.]' " *See Gouveia*, 467 U.S. at 189 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462-463 (1938)). As the Court stated in *Mabry*, "It is the ensuing guilty plea that implicates the Constitution." 467 U.S. at 507-508. And it does so because it entails both a waiver of the accused's right to trial and the loss of

liberty. Thus, if counsel—due to some error—merely fails to secure a plea bargain, the accused cannot be constitutionally prejudiced by such an error because unsuccessful plea negotiations do not entail a waiver of the accused's right to trial.

Limiting claims of prejudice to the accused's waiver of trial and guilty plea also makes sense because it protects the fundamental interests of finality. The Court recognized as much in *Hill*: "a showing of 'prejudice' from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel will serve the fundamental interest in the finality of guilty pleas." 474 U.S. at 58. The Court observed that finality was particularly important in guilty-plea cases, given the great number of such cases:

> "Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions results from such pleas."

Id. (quoting *United States v. Timmreck*, 441 U.S. 780, 784 (1979)). These concerns remain true today. In fiscal year 2010, the Missouri circuit courts resolved 34,402 felony cases by trial and guilty plea. Of those cases, 33,539—97.49%—were resolved by guilty pleas.[5] In federal courts, the numbers are

[5] *See* Table 51, "2010 Annual Report – Supplement, Circuit Court - Cases Disposed: Tables 51-56, CIRCUIT AND ASSOCIATE CRIMINAL: Felony cases. Manner of disposition by

similar, with 96.64% of convictions in fiscal year 2008 being obtained after a guilty plea.[6]

There is language in *Holloway v. Arkansas*, 435 U.S. 475, 489-90 (1978), suggesting that an accused is prejudiced when, due to an actual conflict of interest, counsel fails to "explor[e] possible plea negotiations" for one of the individual defendants. But this language should not be read to mean that, in the ordinary case, counsel will be deemed ineffective for failing to procure a particular plea agreement for the accused.

In *Holloway* the Court confronted one of the rare circumstances in which prejudice from the denial of counsel must be presumed. Three defendants were forced to stand trial in a criminal case while represented by a single attorney who was, under the circumstances, laboring under an actual conflict of interest. The Court refused "to indulge in nice calculations as to the amount of prejudice" arising from the conflict. *Id*. at 488. Instead, the Court held that when a conflict of interest actually affects the adequacy of counsel's representation "prejudice is presumed regardless of whether it was independently shown." *Id*. at 489. In other words, the case did not hold that an attorney's failing to obtain a particular plea bargain would, in itself, constitute the sort of "prejudice" later identified in *Strickland*. Rather, in observing that counsel was prevented from seeking possible plea bargains, the Court in *Holloway* was

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circuit and county," available at http://www.courts.mo.gov/file.jsp?id=43754 (accessed on April 14, 2011).

[6] *See* Table 4.2, "Federal Justice Statistics, 2008-Statistical Tables," available at http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2008/tables/fjs08st402.pdf. (accessed on April 14, 2011).

merely listing the myriad ways an actual conflict of interest can curtail counsel's efforts. *Id*. at 489-490.

Additionally, *Holloway* was decided several years before *Strickland* and *Hill*; thus, to the extent that it suggests that the right to the effective assistance of counsel guarantees more than the right to a fair trial, it conflicts with the Court's subsequent decisions. In both *Strickland* and *Hill*, the Court made plain what is required to demonstrate prejudice from the ordinary errors of counsel, and in neither case did the Court suggest that a defendant could show prejudice by proving that, but for counsel's alleged error during plea negotiations, there was a reasonable probability that the defendant would have pleaded guilty to a more favorable plea agreement. Rather, the defendant must show either that the verdict rendered by the factfinder at trial was unreliable, i.e., that his trial was actually unfair (*Strickland*), or that he was unfairly deprived of his Constitutional right to trial altogether (*Hill*).

B. The State's plea offer to, or attempted plea negotiation with, Mr. Frye was not a "critical confrontation" to which the Sixth Amendment attaches a right to the effective assistance of counsel.

The State's plea offer to Mr. Frye, via his counsel, was not a "confrontation" involving Mr. Frye and "the prosecutorial forces of organized society." *Gouveia*, 467 U.S. at 189. Plea offers are often made under circumstances that do not involve the accused in any fashion. For instance, a prosecutor and defense attorney might run into each other in the hallway of the courthouse or at a 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. Moreover, if defense counsel alienates the prosecutor (*e.g.*, by asking for an unreasonable concession) and causes the prosecutor to immediately retract all of the offers, the accused should not be allowed to claim prejudice, because the accused's right to a fair trial has not been affected. Without a direct connection to events at trial or a waiver of trial, such conversations are not a "critical confrontation."

Here, when the state extended its plea offer, Mr. Frye was not subjected to any pre-trial procedures, and he was not confronted by any state agent. He was not, for example, required to assert any defenses (i.e., his trial was not affected in any fashion); he was not subjected to interrogation (i.e., no incriminating evidence was procured); and he was not placed in a lineup (i.e., no incriminating evidence was obtained under circumstances where Mr. Frye's right to confrontation was infringed). Rather, the State's plea offer was delivered to Mr. Frye's attorney, and Mr. Frye was never aware of the offer until after it had expired. The offer never exerted any kind of force on Mr. Frye, and it had no effect on his ability to receive a fair trial. Thus, the state's attempted plea negotiation was not a critical confrontation.

Of course, Mr. Frye's claim is that counsel *should* have communicated the State's plea offer to him, so that Mr. Frye could have been induced to waive his right to trial sooner. But this claim necessarily rests on the assumption that Mr. Frye's right to counsel encompassed something more than the right to a fair

trial—namely, that Mr. Frye also had a right to plead guilty to a particular plea offer once it was made by the State.

But there is no constitutional right to a plea bargain—even if the prosecutor extends a plea offer to the accused, and even if the accused agrees to accept it. "A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest." *Mabry*, 467 U.S. at 507. And, consistent with this principle, under Missouri rules, the trial court can reject any plea agreement. *See* MO. SUP. CT. RULE 24.02(d)4.

The Court in *Mabry* was analyzing whether the prosecutor could, consistent with the demands of the Due Process Clause, withdraw a plea offer after it had been accepted by the defendant. *See id*. at 505-506, 509. But that distinction should make no difference here. As the Court stated in *Strickland*, "the Sixth Amendment right to counsel exists . . . in order to protect the fundamental right to a fair trial." 466 U.S. at 684. It would make little sense to say the Constitution requires counsel to effectively defend or assert a purported "right" not even guaranteed by the Due Process Clause.

IV. Mr. Frye's result-oriented test for prejudice lacks a constitutional basis, and places unfair burdens on the state.

In asserting that he was prejudiced by the loss of a favorable plea offer, Mr. Frye urged the adoption of a result-oriented test that compares the ultimate result of his guilty plea with the result that might

have occurred if counsel had told him about the earlier plea offer. But as discussed above, the test adopted by *Strickland* and *Hill* was designed to protect the accused's right to a fair trial—not to ensure the best possible outcome or sentence for the accused. *See Kimmelman v. Morrison*, 477 U.S. 365, 396-397 (1986) ("it would shake that right [to the effective assistance of counsel] loose from its constitutional moorings to hold that the Sixth Amendment protects criminal defendants against errors that merely deny those defendants a windfall") (Powell, J., concurring).

Moreover, the rule that Mr. Frye urges is problematic in several respects. It unfairly places a burden on the State for the mistakes of defense counsel, and, depending on the remedy, it could unfairly burden the state by forcing the state to try cases after considerable delay. It will also create an incentive for defense attorneys to withhold favorable plea offers from their clients, as plea offers will be viewed as "insurance policies" against worse outcomes after trial; and, as a consequence, it will complicate the fluid nature of plea negotiations and cause prosecutors to refrain from even making offers.

A. A result-oriented test for prejudice would go beyond the Court's precedents and their constitutional basis.

Because the *Strickland* test for prejudice focuses on the verdict obtained at trial, there is a natural inclination to simply gauge prejudice from counsel's alleged errors by evaluating whether it is reasonably probable that the outcome of the case would have been more favorable to the defendant. Indeed, in *Strickland*, the Court spoke of prejudice in terms of "a result more favorable to the defendant." 466 U.S.

at 695. That is the kind of language on which Mr. Frye and the Missouri Court of Appeals crafted a test that looks for a "more favorable" result.

But that language does not constitute the holding in *Strickland*. Indeed, at the same time the Court was mentioning "a result," the Court also made plain that the prime concern in evaluating counsel's assistance is the reliability of the verdict. *See id*. at 691-692 ("The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."). *See Kimmelman v. Morrison*, 477 U.S. at 392-393 ("As *Strickland* makes clear, the right to effective assistance of counsel is personal to the defendant, and is explicitly tied to the defendant's right to a fundamentally fair trial—a trial in which the determination of guilt or innocence is "just" and "reliable.") (Powell, J., concurring). And, consistent with *Strickland*'s emphasis on reliability, the Court has recognized that there are "situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate 'prejudice.'" *Williams v. Taylor*, 529 U.S. 362, 391-392 (2000).

One such situation arose in *Lockhart v. Fretwell*, 506 U.S. 364, 366 (1993). There, the Court examined whether counsel was ineffective for failing to object to one of the state's aggravating circumstances in a capital sentencing proceeding. Based on case law that controlled at the time of his trial, the defendant argued that counsel should have objected to an aggravating circumstance that merely duplicated one of the elements of the underlying felony. *Id*. at 367. The defendant argued that, if counsel had objected and had the aggravating circumstance removed from the case, there was a reasonable probability that he

would not have been sentenced to death. *Id*. The United States District Court for the Eastern District of Arkansas agreed and held that counsel "had a duty to be aware of all law relevant to death penalty cases[.]" *Id*. The district court thus vacated the defendant's sentence of death. *Id*.

Thereafter, even though the case law that would have supported trial counsel's objection had been overruled, the United States Court of Appeals for the Eighth Circuit affirmed the district court's decision. *Id*. at 368. A majority held that "had counsel made the objection, the trial court would have sustained the objection and the jury would not have sentenced [the defendant] to death." *Id*. But a dissenting judge argued "that *Strickland* prejudice involves more than a determination that the outcome would have been different—it also involves the concepts of reliability and fairness." *Id*.

This Court granted certiorari and concluded that, because the case law that would have supported the objection had since been overruled—*i.e.*, because the trial had actually followed constitutionally adequate procedures—trial counsel was not ineffective. The Court began by observing, "Our decisions have emphasized that the Sixth Amendment right to counsel exists 'in order to protect the fundamental right to a fair trial.' " *Id*. (quoting *Strickland*, 466 U.S. at 684). The Court then observed that a prejudice "analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." 506 U.S. at 369. The Court recognized that "mere outcome" evaluation can produce unjust results: "To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the

defendant a windfall to which the law does not entitle him." *Id*. 369-370.

Accordingly, the Court held that "[u]nreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Id*. at 372. *See also id*. at 375 (the defendant's claim of prejudice was based on "the suggestion that he might have been denied 'a right the law simply does not recognize[.]' ") (O'Connor, J., concurring). In short, although a more "favorable" outcome was reasonably probable had counsel objected, the reliability of the trial—not the favorability of the outcome—was the appropriate gauge for determining whether the defendant was prejudiced. *See Williams v. Taylor*, 529 U.S. at 392 ("in *Lockhart*, we concluded that, given the overriding interest in fundamental fairness, the likelihood of a different outcome attributable to an incorrect interpretation of the law should be regarded as a potential 'windfall' to the defendant rather than the legitimate 'prejudice' contemplated by our opinion in *Strickland*."); *see also Cronic*, 466 U.S. at 658 ("Absent some effect of challenged conduct on the reliability of the . . . process, the [effective counsel] guarantee is generally not implicated.").

In *Nix v. Whiteside*, 475 U.S. 157 (1986), the Court identified another circumstance where simple outcome analysis runs contrary to the weightier aims of the Sixth Amendment. There, the defendant asserted that counsel was ineffective because counsel would not cooperate with the defendant in presenting perjured testimony. *Id*. at 162. The Court rejected the defendant's claim, holding that counsel's duty "is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth."

Id. at 166. In evaluating whether the defendant was prejudiced, the Court concluded that the defendant had "no valid claim that confidence in the result of his trial has been diminished by his desisting from the contemplated perjury." *Id*. Indeed, had counsel allowed the defendant to offer false testimony, any reliance by the jury on the perjurious testimony would have undermined the reliability of the verdict. *See id*. at 185 (Blackmun, J, concurring).

The decisions in *Lockhart v. Fretwell* and *Nix v. Whiteside* confirm that, under *Strickland* (and by extension *Hill*), reliability of the verdict is tied to the truth-seeking function of trial, i.e., the reliability of the factfinder's conclusions or the reliability of a guilty plea. Thus, if counsel's alleged error did not legitimately affect the reliability of the verdict, counsel's error is immaterial and there can be no *Strickland* prejudice.

An approach that focuses on the reliability of the truth-seeking function of trial—as opposed to whether the defendant was sentenced to ten years or five years—is superior because it accomplishes the ultimate aim of the Sixth Amendment, which is, as the Court stated in *Cronic*, to see "that the guilty be convicted and the innocent go free":

> The substance of the Constitution's guarantee of the effective assistance of counsel is illuminated by reference to its underlying purpose. "[T]ruth," Lord Eldon said, "is best discovered by powerful statements on both sides of the question."[] This dictum describes the unique strength of our system of criminal justice. "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."[] It is that "very premise" that underlies and gives meaning to the Sixth Amendment.[]

Cronic 466 U.S. at 655-56 (footnotes and citations omitted).

Here, there is no question that Mr. Frye is guilty of the charged offense, as he admitted his guilt at the guilty-plea hearing and he testified at his post-conviction evidentiary hearing that he still would have pleaded guilty even absent counsel's error. J.A. 18-19, 34, 37. The ultimate goal of the Sixth Amendment—reliability of Mr. Frye's conviction—was met by Mr. Frye's knowing, intelligent, and voluntary admission of guilt. In terms of the Constitution, any benefit beyond the protection of Mr. Frye's right to a fair trial would have been a windfall. In short, Mr. Frye's claim of prejudice rests on the assertion that he was denied the opportunity to obtain the best possible result—a right the Constitution simply does not recognize.

B. Except where the accused is unfairly deprived of the right to trial, the State should not bear the burden of counsel's errors during plea negotiations.

Generally, "[t]he Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel." *Kimmelman v. Morrison*, 477 U.S. at 379. This is required because "[w]here a State obtains a criminal conviction in a trial in which the accused is deprived of the effective assistance of counsel, the 'State . . . unconstitutionally deprives the defendant of his liberty.'" *Id*. at 383 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980)).

Here, the State did not obtain a conviction "in a trial [or plea proceeding] in which the accused [was] deprived of the effective assistance of counsel." Rather, Mr. Frye had counsel; he was advised of his rights before pleading guilty, and he said that he understood them; he understood the consequences of his plea; and he knew that he could be sentenced to any term of years within the range of punishment. J.A. 14-17. Thus, because Mr. Frye's conviction was obtained through constitutionally adequate guilty-plea procedures, the State should not be forced to bear the burden of an error of counsel that occurred during failed plea negotiations.

Had Mr. Frye *invalidly* waived his right to trial, the State would be obligated to reinstate his right to a fair trial. "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to *the injury suffered from the constitutional violation* and should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 364 (1981) (emphasis added). Here, there was no "injury suffered from [a] constitutional violation," because Mr. Frye was not unfairly induced to waive his right to trial. In short, "There is no effect of a constitutional dimension which needs to be purged to make certain that [Mr. Frye] has been effectively represented and not unfairly convicted." *Id*.

C. A result-oriented test for prejudice will undermine the State's efforts to effectively administer justice, and it will hamper plea negotiations.

As discussed above, *Hill*'s test for prejudice has the benefit of protecting both the accused's right to trial and society's countervailing interests in the

finality of guilty pleas. Conversely, a result-oriented test that does not require the defendant to prove that his guilty plea was invalid could fail to preserve the interests of finality in a vast number of cases.

But it is not just the number of cases that may be affected that argues in favor of adherence to *Hill*. "The plea process brings to the criminal justice system a stability and a certainty that must not be undermined by the prospect of collateral challenges in cases not only where witnesses and evidence have disappeared, but also in cases where witnesses and evidence were not presented in the first place." *Premo v. Moore*, 131 U.S. at 745-746. Here, the State has been ordered by the Missouri Court of Appeals to allow Mr. Frye to plead guilty again—a useless exercise and a waste of judicial resources—or to allow Mr. Frye to stand trial. J.A. 79-80. If Mr. Frye elects to stand trial, the State will be forced to try the case after a significant passage of time, with all of the disadvantages that can accrue over time. It might be suggested that this will pose little difficulty for the state because Mr. Frye's case might involve only one witness (the police officer who caught Mr. Frye driving with a revoked license), but imposing such a rule will also affect more complicated and serious cases involving multiple witnesses.

Additionally, if Mr. Frye stands trial and receives a sentence similar to the sentence he previously received, the alleged "prejudice" of the lost plea offer remains. Is Mr. Frye then entitled to file another post-conviction motion and assert that counsel's failure to communicate the plea offer was prejudicial because the result of his trial was worse than he would have received under the terms of the plea offer? And can he raise such a claim even though his trial was fair and counsel performed as reasonable

counsel at trial? Certainly not; but if the lost plea offer has constitutional significance after a valid guilty plea, it is difficult to see how that significance would be erased by a fair trial.

Granting constitutional significance to lost plea offers will also adversely affect the administration of justice. In the future, a defendant who finds himself in Mr. Frye's position of having missed an expired plea offer might be advised to stand trial in hopes of obtaining an acquittal. This will carry no real risk, for if the outcome of trial is worse than the terms of the expired offer, the defendant will be able to assert in a post-conviction motion that he was prejudiced by counsel's failure to timely communicate the more favorable plea offer. Indeed, a shrewd defense attorney seeking the best possible outcome for the client might strategically allow a favorable plea offer to expire without communicating it to the defendant, knowing that the expired offer will act as a sort of insurance policy against worse results at trial. And if specific performance of the lost offer is deemed the appropriate remedy, then any offer can be pocketed by defense counsel and held in reserve as the minimum criminal liability that can be imposed.

It might be suggested that a potential remedy for such ploys would be to require communication of plea offers in court. It might also be suggested that the risk of such ploys is minimal because many offers are communicated in open court already. But the risk is not limited to cases where the plea offer is not communicated to the accused. The advice of counsel will always be important for a defendant faced with choosing between pleading guilty and going to trial; and, if a lost plea offer will act as an insurance policy against worse results at trial, counsel will have an

incentive to give the defendant unreasonable advice, to induce the accused to reject the plea offer.

On the other hand, if defense counsel is held responsible for errors during plea negotiations, then counsel's duty of loyalty to the client will impel reasonable steps to communicate the offer and give good advice about such offers. And it will be the rare case where counsel fails to do so; for, if counsel knows that the defendant will forever lose any plea offer that is not accepted, then counsel has no incentive to withhold it or provide unreasonable advice about it.

In the end, if a lost plea offer is deemed to be either an enforceable contract or a lost benefit that warrants a new trial, prosecutors will view plea negotiations with skepticism and trepidation, and plea negotiations will lose their fluidity. The risk of an unraveled guilty plea or trial will encourage prosecutors to withhold offers altogether or make less favorable offers. Indeed, if a prosecutor knows that any plea offer will be the effective minimum sentence in the case (i.e., if specific performance is deemed the appropriate remedy), the prosecutor will be inclined to refrain from plea negotiations altogether, and that is beneficial to no one.

V. Even if an error at the plea-bargain stage constituted ineffective assistance of counsel, Mr. Frye has already received the full relief appropriate: a new, fully adequate guilty plea proceeding.

In granting certiorari, the Court certified an additional question: "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?" The key to answering that question lies not in the assumption in the first clause (injury in connection with the first plea offer), but in the fact stated in the second: that Mr. Frye's subsequent guilty plea and waiver of trial was knowing, intelligent and voluntary (i.e., that Mr. Frye was later "convicted and sentenced pursuant to constitutionally adequate procedures"). Two lines of precedent show that given what happened later, Mr. Frye is not entitled to any further remedy.

First, it has long been the rule that where the accused receives ineffective assistance of counsel, the remedy is to grant the accused a new trial—not to grant the accused what was probably lost due to counsel's error. Thus, in cases involving errors of counsel at trial, the question is whether, but for counsel's error, there is a reasonable probability that the factfinder would have had a reasonable doubt as to the accused's guilt. *Strickland*, 466 U.S. at 695. Where the accused actually proves prejudice, there is a reasonable probability that, but for counsel's error, the accused would have been acquitted. Yet, the remedy is not acquittal and discharge; the remedy is to vacate the unreliable conviction and order a new trial. And that new trial—even if it also results in a conviction—is a sufficient remedy for the earlier deprivation of the right to counsel. In other words, although it is reasonably probable that trial counsel's deficient performance deprived the accused of an acquittal, the appropriate remedy is simply a "constitutionally adequate procedure."

Here, instead of an acquittal, counsel's error may have cost Mr. Frye a lesser conviction and sentence. But like the accused who loses a reasonable probability of acquittal, Mr. Frye is not entitled to have

the lesser conviction and sentence entered in his behalf. He is only entitled to constitutionally adequate procedures as a remedy. And he has already been accorded a constitutionally adequate guilty-plea hearing.

Second, it has long been recognized that "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." *Tollett v. Henderson*, 411 U.S. 258, 259 (1973). In *Tollett v. Henderson*, for example, the defendant alleged in a federal habeas petition that his constitutional rights had been violated because African-Americans had been excluded from the grand jury that indicted him. The Court rejected the claim, concluding, "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." *Id*. at 267.

Here, Mr. Frye solemnly admitted in open court that he was guilty, and his guilty plea was "in no sense induced by" counsel's failure to communicate the State's earlier offer. *See Mabry*, 467 U.S. at 510 ("Respondent's plea was in no sense induced by the prosecutor's withdrawn offer"). In fact, because Mr. Frye had no knowledge of the expired offer before he pleaded guilty, it could not have affected his decision to plead guilty. Mr. Frye decided to plead guilty independently of any plea offers, and he fully understood the possible consequences.

The constitutionally adequate proceedings that secured Mr. Frye's guilty plea and sentence were a sufficient remedy for any previous deprivation of the right to the effective assistance of counsel, and they

broke the chain of events that included ineffective assistance. Mr. Frye "was fully aware of the likely consequences when he pleaded guilty; it is not unfair to expect him to live with those consequences now." *Id*. at 511.

CONCLUSION

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

Respectfully submitted,

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