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No. 10-444

IN THE

Supreme Court of the United States

MISSOURI,
Petitioner,

v.

GALIN E. FRYE,
Respondent.

On Petition for a Writ of Certiorari
To the Supreme Court of Missouri

REPLY BRIEF

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PETITIONER'S REPLY

Mr. Frye takes issue with the State's assertion that he "never alleged that his guilty plea (his waiver of his right to trial) was not knowing, intelligent, and voluntary." Opp.Br. 2. He points out that his post-conviction motion alleged that his "guilty plea was entered in an unknowing, involuntary and unintelligent manner" because his plea counsel "unreasonably failed to inform [Mr. Frye] of the state's [earlier] plea offer[.]' " Opp.Br. 2-3.

But in making this argument, Mr. Frye either misunderstands the State's assertion or is purposely taking the State's assertion out of context. The petition asserted:

> In Mr. Frye's case, the Missouri court adopted a test for prejudice that does not vindicate any constitutional right. Mr. Frye did not go to trial, and he never alleged that his guilty plea (his waiver of this right to trial) was not knowing, intelligent, and voluntary. Instead, Mr. Frye asserted that he was prejudiced because counsel's failing to communicate a favorable plea offer caused him to miss out on the opportunity of obtaining a lesser sentence.

Pet. 9. This argument was part of the State's claim that Mr. Frye had not alleged prejudice (i.e., an involuntary plea) in the manner required by *Hill v. Lockhart*. *See* Pet. 7-11. And, in that context, the problem with Mr. Frye's claim remains: the bald allegation that Mr. Frye's plea was unknowing, unintelligent, and involuntary was not supported by any allegations or evidence showing that his plea was unknowing, unintelligent, and involuntary.

At the post-conviction evidentiary hearing, with regard to prejudice, the evidence showed only that Mr. Frye missed an earlier opportunity to plead guilty under more favorable terms. But that missed opportunity did not render Mr. Frye's later-in-time guilty plea involuntary, unknowing, or unintelligent. The missed plea offer had expired by the time Mr. Frye pleaded guilty; it no longer existed. And, accordingly, it could not have affected Mr. Frye's decision to plead guilty. *See Mabry v. Johnson*, 467 U.S. 504, 510 (1984) (a withdrawn plea offer "in no sense induced" the defendant's guilty plea). Thus, while it might have been more accurate for the State to assert that Mr. Frye never alleged or proved *facts* showing that his plea was involuntary, unknowing or unintelligent, the relevant point is that Mr. Frye never alleged that his plea was involuntary as required by *Hill v. Lockhart*. And that, of course, is the relevant question: was Mr. Frye required to allege and prove—according to the express terms of *Hill v. Lockhart*—that but for counsel's alleged error, he would not have pleaded guilty and would have insisted on going to trial?

I. A plea offer, standing alone, is not a "critical stage" of a criminal proceeding.

In an attempt to suggest that counsel's failing to convey a plea offer was an error of constitutional magnitude, Mr. Frye asserts, "The plea bargaining process is a critical stage of a criminal prosecution." Opp.Br. 4. In support, Mr. Frye cites *Iowa v. Tovar*, 541 U.S. 77, 81 (2004), and to the dissenting opinion in *Burger v. Kemp*, 483 U.S. 776, 803-804 (1987). Opp.Br. 4.

But neither of these cases supports Mr. Frye's assertion. In *Tovar*, the Court merely stated the

well-settled proposition that "*The entry of a guilty plea*, whether to a misdemeanor or a felony charge, ranks as a 'critical stage' at which the right to counsel adheres." 541 U.S. at 81 (emphasis added). Here, Mr. Frye's claim of ineffective assistance of counsel centers not on the *entry* of his guilty plea, but on counsel's failing to convey a plea offer at a time prior to the entry of his guilty plea. Thus, while *Tovar* certainly confirmed that a defendant has a right to the effective assistance of counsel at a guilty plea hearing, it did not hold that plea negotiations are a "critical stage" of criminal proceedings.

There is some passing language in the dissenting opinion in *Burger v. Kemp* (referring to the defendant's arguments) about the "critical stages" of "pretrial plea negotiations and post-trial appeal," 483 U.S. at 803-804 (Blackmun, J., dissenting), but the Court was not specifically asked to consider (and did not answer the question) whether a defendant who pleads guilty can base a claim of prejudice on an earlier, missed opportunity to plead guilty under more favorable terms. Rather, in *Burger v. Kemp*, the Court considered whether a defendant who had stood trial had received ineffective assistance due to a possible conflict of interest. But conflict-of-interest claims differ from other claims of ineffective assistance of counsel, in that, once an actual conflict of interest is established (and once it can be shown that the conflict "adversely affected" counsel performance), such claims warrant a "presumption of prejudice." *See Strickland v. Washington*, 466 U.S. 668, 692 (1984).

In their brief, the *amici curiae* in support of the petition point out that in *Powell v. Alabama*, 287 U.S. 45, 57 (1932), the Court recognized that, in some cases, "perhaps the most critical period of the

proceedings . . . [is] the time of arraignment until the beginning of . . . trial." This can hardly be gainsaid, for in most cases, counsel's preparation and advice in advance of trial are critical to the fairness of the trial. But even when a claim of ineffective assistance of counsel is based on conduct that occurred pre-trial (e.g., a failure to investigate), under *Strickland*, prejudice is gauged by whether counsel's failing to investigate affected the fairness of the subsequent trial. Thus, even if counsel utterly fails to investigate a witness that, according to all professional norms, should have been investigated during the critical pre-trial period, the jury's verdict will not be undone unless the defendant can show a reasonable probability that the witness's testimony would have affected the outcome of the trial.

The same should be true in the guilty-plea context. Events that occur during the "critical" pre-trial period should only give rise to a claim of ineffective assistance of counsel insofar as they have some bearing on the fairness of the guilty-plea hearing that results in conviction. In other words, in evaluating counsel's pre-plea performance and any resulting prejudice, the inquiry should be limited to determining whether counsel correctly advised the defendant with regard to the guilty plea (and waiver of trial) that was *actually entered*. The inquiry should not be expanded to consider other potential pleas that *might* have been entered if counsel had taken other action—even if other actions might have been professionally required. In short, even if counsel's conduct fell below an objective standard of reasonableness, any claim of prejudice should still be evaluated in light of what the Constitution requires. *See generally United States v. Cronic*, 466 U.S. 648, 665 n. 38 (1984) ("We address not what is prudent or

appropriate, but only what is constitutionally compelled.").

II. Because plea negotiations are not the type of "proceeding" contemplated in *Strickland*, the Missouri court should have adhered to the holding in *Hill v. Lockhart*.

In his brief, Mr. Frye attempts to cast the petitioner's argument as seeking an extension of the holding in *Hill*. Opp.Br. 5. After pointing out that various courts have held that failing to convey a plea offer constitutes deficient performance, he argues:

> the Petitioner suggests pursuant to *Hill* that Mr. Frye is entitled to no relief from this ineffective assistance at a critical stage in the criminal proceedings if he does not elect to set aside the more onerous conviction following a subsequent guilty plea and elect to go to trial. Petitioner extends *Hill*, too far.

Opp.Br. 4-5. But the petitioner is not seeking as extension of *Hill*; the petitioner is seeking adherence to *Hill*.

As discussed in the petition (Pet. 3-4, 9-11), the Missouri court expressly declined to apply *Hill*'s test for prejudice. Instead, the Missouri court opted to rely on what it termed "*Strickland*'s looser emphasis on whether a defendant can establish 'an adverse effect on the defense.' " App. A17. The Missouri court stated, "According to *Strickland*, the test of prejudice is whether 'the result of the proceeding would have been different.' " App. A17.

The practical effect of this holding is to equate plea negotiations with trial proceedings. And by arguing that plea negotiations are a "critical stage"

of criminal proceedings, Mr. Frye is urging the same result. But as the Court recognized in *Hill*, guilty plea proceedings differ fundamentally from trial proceedings. The fairness of trial is not an issue, and, accordingly, in determining whether the defendant was prejudiced, the focus must turn to the fairness of the *waiver* of the right to trial. In other words, petitioner is not "suggest[ing] pursuant to *Hill* that Mr. Frye is entitled to no relief from this ineffective assistance at a critical stage" (Opp.Br. 5); rather, petitioner is pointing out that Mr. Frye has not shown *prejudice* pursuant to *Hill* and, thus, that Mr. Frye has not made the requisite showing of ineffective assistance of counsel.

In sum, Mr. Frye would have the Court accept the Missouri court's conclusion that plea negotiations are a separate "proceeding" (or, as Mr. Frye asserts, a "critical stage" of a criminal proceeding) that is comparable to a trial. But the Court has never held that plea negotiations should be given the same degree of protection that surrounds a trial. To the contrary, the Court has held that "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. As the Court stated in *Mabry*, "It is the ensuing guilty plea that implicates the Constitution." *Id.* at 507-508. Accordingly, after a guilty plea, in evaluating whether counsel's error resulted in prejudice, claims should be limited to determining whether counsel's error affected the validity of the waiver of the right to trial (and the guilty plea) that the defendant actually made.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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