No. _____

IN THE

Supreme Court of the United States

STATE OF MISSOURI,
Petitioner,

v.

GALIN EDWARD FRYE,
Respondent.

On Petition for a Writ of Certiorari
To the Missouri Court of Appeals, Western District

PETITION FOR WRIT OF CERTIORARI

CHRIS KOSTER
Attorney General
JAMES R. LAYTON
Solicitor General
SHAUN J MACKELPRANG
Chief Counsel, Criminal Div.
Counsel of Record
P. O. Box 899
Jefferson City, MO 65102
shaun.mackelprang@ago.mo.gov
(573) 751-3321

Attorneys for Petitioner

QUESTION PRESENTED

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?

PARTIES TO THE PROCEEDING

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OPINIONS BELOW

The Missouri Supreme Court's June 29, 2010, Order denying petitioner's application for transfer is included in the Appendix ("App.") at A1.

The Missouri Court of Appeals April 27, 2010, Order denying rehearing or transfer is included in the Appendix at A2.

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 Appendix at A3-A25.

The post-conviction motion court's judgment, entered November 18, 2008, is included in the Appendix at A26-A31.

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 . . . 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

This petition seeks to clarify whether a defendant who pleads guilty can, contrary to the holding in *Hill v. Lockhart*, 474 U.S. 52 (1985), successfully assert a claim of ineffective assistance of counsel without showing that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial.

On August 14, 2007, the state charged Mr. Frye with the class D felony of driving with a revoked license, § 302.321, Mo. Rev. Stat. 2000. App. A4. (The offense was enhanced to felony status due to Mr. Frye's multiple prior convictions. *See* App. A37-A38.)

On November 15, 2007, the prosecutor sent a plea offer to Mr. Frye's attorney. App. A4. The state's plea offer included two options: (1) that Mr. Frye plead guilty to the felony charge in exchange for a three-year sentence, with the possibility of probation at the court's discretion, and with a further condition that Mr. Frye serve ten days "shock" incarceration in the county jail; or (2) that Mr. Frye plead guilty to a reduced misdemeanor charge in exchange for a ninety-day term of incarceration in the county jail. App. A4-A5. This plea offer was not communicated to Mr. Frye before the offer expired. App. A5-A6.

On March 3, 2008, Mr. Frye entered an "open plea," meaning that there was no plea agreement with the state. App. A6, A35. At that time, Mr. Frye stated that he understood the trial rights he was giving up by pleading guilty. App. A33-A34. Mr. Frye stated that he knew the court could impose any sentence within the range of punishment, and he assured the court that no promises or threats had been made to induce his plea. App. A34-A36.

At sentencing, the prosecutor recommended a three-year sentence, deferring to the court on the issue of probation but requesting ten days "shock" incarceration if the court were to grant probation. App. A6. The sentencing court did not grant probation, and it imposed a three-year sentence. App. A6.

After sentencing, Mr. Frye filed a post-conviction motion, alleging that counsel was ineffective for failing to tell Mr. Frye about the state's plea offer. App. A7. After an evidentiary hearing, the motion court 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. App. 19, A27.

In finding no prejudice, the motion court relied on the test established in *Hill v Lockhart*. App. A29. In *Hill* the Court held that, after a guilty plea, "in order to satisfy [*Strickland*'s] '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 59. 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." App. A31.

Mr. Frye appealed, and the state argued that Mr. Frye had failed to show prejudice as required by *Hill*. App. A15. But the Missouri Court of Appeals rejected the state's argument and concluded that the post-conviction motion court had clearly erred in applying

Hill to Mr. Frye's claim of ineffective assistance of counsel. App. A21. The court of appeals stated:

> 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.

App. A17. The Court then held that Mr. Frye could show *Strickland* 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 plea offer. App. A17.

In other words, although Mr. Frye failed to allege or prove that his guilty plea was invalid (i.e., that his waiver of his right to trial was invalid), the court of appeals vacated the plea and held that Mr. Frye should be allowed to plead guilty again (without any plea offer from the state) or to stand trial.[1] App. A24.

The Petitioner, State of Missouri, seeks review of the Missouri court's decision because the Missouri court has adopted a rule that expands the right to

---

[1] The court of appeals rejected Mr. Frye's claim that he should be given the benefit of the expired plea offer. App. A24. The court of appeals recognized that it was "not empowered to order the State to reduce the charge" and recommend a lesser sentence. App. A24. Mr. Frye sought transfer to the Missouri Supreme Court, arguing that the court of appeals should have ordered specific performance of the expired plea offer; and it appears that Mr. Frye intends to pursue this claim, as he has been granted an extension of time to file a petition for a writ of certiorari. *Galin E. Frye, Applicant v. Missouri*, No. 10A312.

the effective assistance of counsel beyond its intended purpose—to protect a defendant's fundamental right to a fair trial. The Missouri court's rule conflicts with the aims (and the limits) expressed in *Strickland v. Washington* and *Hill v. Lockhart*, and it permits a defendant who has not shown a violation of the right to fair trial to "reset" the proceedings and start over. Such a rule is unfair to the state, and it hinders the orderly administration of justice.

REASONS FOR GRANTING THE PETITION

The purpose of the right to effective assistance of counsel is to preserve a defendant's right to a fair trial: "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). This case, like *Lafler v. Cooper* (petition for writ of certiorari pending, No. 10-209), addresses a move by lower courts away from the standard set by the Court in *Strickland v. Washington*—and, thus, away from the constitutional underpinnings of the right to the effective assistance of counsel.

In *Lafler v. Cooper*, the issue is whether trial counsel's deficient advice to reject a plea agreement can result in any "prejudice" (as that term is used in *Strickland*) if the defendant is later given a fair trial. Here, the issue is similar: whether trial counsel's failing to communicate a plea offer can result in any "prejudice" if the defendant later enters a knowing, intelligent, and voluntary guilty plea.

This petition should be granted for three reasons. First, the Missouri court has expanded the right to the effective assistance of counsel beyond its protective purpose of ensuring a fair trial, and, in so doing, the Missouri court has exceeded the bounds of the constitution and effectively held that a defendant has a constitutional right to a particular plea bargain. Second, because most criminal cases are resolved through the plea process, this expansion of the right to effective assistance of counsel in guilty-plea cases has the potential to undermine the finality of convictions in a great number of cases. Third, the Missouri court's opinion directly conflicts with a decision of the United States Court of Appeals for the

Seventh Circuit in *United States v. Springs*, 988 F.2d 746 (7th Cir. 1993), and it exacerbates the wider conflict identified in *Lafler v. Cooper*.

I. By refusing to follow the test established in *Hill v. Lockhart*, and by holding that a defendant who pleads guilty can show prejudice without showing that the waiver of his right to trial was invalid, the Missouri court has expanded the right to the effective assistance of counsel beyond its constitutional basis.

In *Strickland v. Washington*, 466 U.S. 668, 684 (1984), the Court continued a long line of cases that stand for the proposition that "the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." More recently, the Court observed that the right to effective assistance of counsel is bounded 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).

As a means of protecting a defendant's basic right to a fair trial, in *Strickland* the Court devised the now-familiar two-part test for analyzing claims of ineffective assistance of counsel. First, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688. Second, the defendant must, in most cases, affirmatively prove "prejudice." *Id*. at 694.

In formulating a test for prejudice, the Court noted that "[i]t is not enough for the defendant to show that the errors had some conceivable effect on

the outcome of the proceeding." *Id*. at 693. After some discussion about various standards, the Court then settled upon the following: "The 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. The Court also made plain that this test was designed to gauge the fairness of a defendant's trial: "When a defendant challenges a conviction, 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.

When a defendant pleads guilty, of course, there is no trial, and the reliability of the verdict is generally not in question. Thus, in the wake of *Strickland*, it was not immediately apparent how claims of ineffective assistance of counsel should be resolved after a guilty plea.

The answer came in *Hill v. Lockhart*. There, the Court affirmed *Strickland*'s general framework, but the Court altered the second part of the test and held that "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." 474 U.S. at 59. While different from the *Strickland* test for prejudice, the *Hill* test, too, was designed, ultimately, to safeguard the defendant's fundamental right to a fair trial. The test in *Strickland* ensures that the trial itself is fair; the test in *Hill* ensures that the waiver of trial is fair. And, under *Hill*, if the waiver is not fair (e.g., if it is coerced), then the defendant's right to a fair trial is restored. In short, the "prejudice" that each test seeks to remedy is the loss of the constitutional right to a fair trial.

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.

In other words, Mr. Frye essentially alleged that, although he waived his right to trial with a full understanding of what he was giving up, he was nevertheless entitled to have his waiver vacated because, but for counsel's error, he could have waived his right to trial earlier and obtained better terms from the state. But this sort of prejudice—the perceived prejudice associated with a longer sentence—is not the sort of prejudice that *Hill* and *Strickland* were designed to remedy. Rather, because the right to effective assistance of counsel is derived from the fundamental right to a fair trial, any claim of ineffective assistance of counsel must be limited to curing a deprivation of that fundamental right. *See United States v. Gonzalez-Lopez*, 548 U.S. at 147. As the Court has stated:

> an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. 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.

Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993) (footnote omitted). *See also Mabry v. Johnson*, 467

U.S. 504, 508-09 (1984) ("It is only when the consensual character of the plea is called into question that the validity of a guilty plea may be impaired."), *abrogated in part on other grounds, Puckett v. United States*, 129 S.Ct. 1423, 1430 n. 1 (2009).

The Missouri court attempted to justify its decision to reject *Hill* under the facts of this case by stating that it was merely applying the ordinary *Strickland* test for prejudice. App. A17. The Missouri court stated: "Reliance on *Hill*'s 'template' that a defendant must contend that 'but for' counsel's ineffective assistance the defendant would have insisted on going to trial as determinative of whether a defendant can establish prejudice completely ignores *Strickland*'s looser emphasis on whether a defendant can establish 'an adverse effect on the defense.' " App. A16-A17.

But, in fact, by refusing to follow *Hill*, the Missouri court ignored the basis for both *Strickland* and *Hill*—that the right to effective assistance of counsel is inseparably tied to the fairness of trial, and not merely a defendant's ability to obtain the lowest sentence. As the Court explained in *Lockhart v. Fretwell*, "Unreliability 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." 506 U.S. at 372. In other words, the *Strickland* test for determining prejudice is not "looser," as suggested by the Missouri court; rather, it is tailored to evaluating the fairness of a trial.

In short, Mr. Frye's claim of prejudice—that he was prejudiced by the loss of a plea offer—is not a claim of constitutional magnitude. There is no right to the lowest possible sentence, and there is no right

to a plea offer from the state. Indeed, even when a plea offer is nominally accepted by the defendant, the agreement alone does not create any constitutionally protected right. "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 v. Johnson*, 467 U.S. at 507.

In sum, because claims of ineffective assistance of counsel are limited to curing errors that have infringed on the defendant's fundamental right to a fair trial, the Missouri court's reformulation of the test for prejudice—to protect a defendant's purported right to accept a plea offer—improperly expands the right to the effective assistance of counsel beyond its constitutional basis.

II. The Missouri court's expansion of the right to the effective assistance of counsel will undermine the doctrine of finality and hinder the orderly administration of justice.

In adopting a modified test for proving prejudice under the circumstances of this case, the Missouri court also overlooked the balance *Hill* struck between finality of convictions and the vindication of a defendant's rights. That modified test significantly undermines the finality of guilty pleas, and it may be used to undermine the finality of trials.

In *Hill*, in formulating the appropriate test for prejudice after a guilty plea, the Court maintained a balance between preserving the finality of reliable convictions and vindicating the invalid waiver of a defendant's right to trial. The Court stated, "we believe that requiring 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 then highlighted the importance of preserving the finality of guilty pleas:

> "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 result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea."

Id. (quoting *United States v. Timmreck*, 441 U.S. 780, 784 (1979)). By requiring defendants to prove that, but for counsel's error, they would not have pleaded guilty and instead would have gone to trial, the Court balanced the important interests of finality against the important interest of preserving the right to trial.

In Mr. Frye's case, the Missouri court created another "inroad on the concept of finality," but it did so without any showing that Mr. Frye's guilty plea was unfair. Mr. Frye has never alleged nor attempted to prove that his guilty plea was not knowing, intelligent, and voluntary, and he has never asserted that, but for counsel's error, he would have gone to trial. As a consequence, this new inroad on the concept of finality is made without any of the

benefits that come from vindicating the right to a fair trial.

The illusory benefit of the Missouri court's new test for prejudice is illustrated by the ineffectual nature of the "relief" granted to Mr. Frye. Mr. Frye sought to obtain the shorter sentence that he might have received under the state's expired plea offer, but the Missouri court concluded that it was "not empowered to order the State" to reinstate its offer. App. A24. Thus, the Missouri court simply vacated the reliable guilty plea that Mr. Frye had entered and stated that Mr. Frye can now "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." App. A244. The Missouri court acknowledged that it "may not seem a satisfactory remedy for Frye," but the court concluded that its "alternative is to ignore the merits of Frye's claim[.]" App. A24.

But the lack of any effective remedy should have led the Missouri court to recognize that, in fact, Mr. Frye had failed to demonstrate the violation of any constitutional right. If Mr. Frye had stood trial, and if it were determined that his trial was unfair, the natural remedy would be to order a new trial. Likewise, if a defendant is improperly induced to waive the right to trial, the natural remedy is to vacate the waiver (i.e. the guilty plea) and permit the defendant to stand trial. Here, because Mr. Frye did not suffer either deprivation, he is not entitled to any remedy.

Moreover, the remedy ordered by the Missouri court is unwarranted. If Mr. Frye now elects to plead guilty (as one might expect since he never alleged that he wanted to stand trial), then the finality of the

original plea was undermined for naught. And, in the process, limited judicial resources were squandered.

If, on the other hand, Mr. Frye elects to stand trial, then he has been granted a windfall that he is not entitled to under the law. Mr. Frye waived his right to trial, and there has never been any showing that the waiver was invalid. Allowing Mr. Frye to take back his waiver—without any showing that the waiver was improperly induced—gives Mr. Frye a second chance to stand trial when the state's ability to try the case might be materially prejudiced due to the passage of time.

The result is that a defendant who finds himself in Mr. Frye's place will have the ability to compare the outcome of his guilty plea to the state's initial plea offer. If the initial plea offer is more favorable, the defendant can then have the plea undone. The defendant can then demand a trial and force the state to prove its case after a considerable passage of time. This sort of conduct is not consistent with the orderly administration of justice.

Alternatively, the Missouri court's rule could encourage a defendant who learns that counsel has failed to communicate a plea offer to cause even greater waste. The defendant could elect to stand trial, gamble on receiving a lesser sentence or acquittal, and then have the trial proceedings vacated if the trial turns out worse than the state's expired plea offer. This is the type of situation that underlies the petition in *Lafler v. Cooper* (petition for writ of certiorari pending, No. 10-209), where the issue is whether counsel's deficient advice during plea negotiations can result in prejudice if the defendant is subsequently given a fair trial and

sentenced to more than the state's initial plea offer.

In sum, because there was no violation of Mr. Frye's right to a fair trial, the Missouri court erred in formulating a test that has the effect of undermining the finality of guilty pleas. The vast majority of criminal cases are resolved through the plea process, and the Missouri court's rule will inevitably impair the orderly administration of justice.

III. The Missouri court's decision conflicts with a decision of the United States Court of Appeals for the Seventh Circuit, and it presents the other half of a question that has engendered broad conflict.

The Missouri court's opinion also conflicts with a decision of the United States Court of Appeals for the Seventh Circuit. In *United States v. Springs*, 988 F.2d 746, 748-49 (7th Cir. 1993), the Seventh Circuit addressed a claim of ineffective assistance of counsel related to plea negotiations. There, plea counsel told the defendant to reject a plea offer because "the judge was likely to give him a sentence substantially lower" than the government's offer. As it turned out, when the defendant subsequently pleaded guilty not pursuant to the government's first offer, the defendant received a longer sentence. *Id*. at 749. But the court held that even assuming that counsel's advice was deficient, counsel's advice did not result in any "prejudice" because "[n]ot every adverse consequence of counsel's choices is 'prejudice' for constitutional purposes." *Id*. (citing *Lockhart v. Fretwell*, 506 U.S. at 369-70). To the contrary, because the defendant had voluntarily pleaded guilty, the fact that he received a longer sentence did not demonstrate "prejudice" because " '[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*. (quoting *Fretwell*, 506 U.S. at 372). Similarly, here, Mr. Frye has not suffered the deprivation of any fundamental constitutional right.

Although the conflict over the specific issue in Mr. Frye's case may not be widespread, it is the other half of a question that has arisen in cases where, after rejecting or missing a favorable plea offer, the defendant is accorded a fair trial (instead of a fair guilty plea). The issue in those cases is whether a defendant who receives a fair trial can nevertheless show *Strickland* prejudice from counsel's errors in plea negotiations. And like the Missouri court and the Seventh Circuit here, the courts addressing that issue have reached conflicting conclusions. Some courts confronted with that issue have granted the defendant a new trial. *See e.g. United States v. Gordon*, 156 F.3d 376, 381-82 (2nd Cir. 1998). Others have specifically enforced the forgone plea offer. *See e.g. Hoffman v. Arave*, 455 F.3d 926, 942-43 (9th Cir. 2006).[2] A third group has crafted compromise remedies. *See e.g. Boria v. Keane*, 99 F.3d 492, 498-99 (2nd Cir. 1996) (ordering defendant's sentence to be reduced to the time he had already served and defendant discharged because that period was more than double what he would have served under the plea offer); *Beckham v. Wainwright*, 639 F.2d 262,

[2] In *Arave v. Hoffman*, 552 U.S. 1008 (2007), the Court granted certiorari, in part, to address this issue. The Court ordered the parties to answer the following question: "What, if any, remedy should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial?" *Id*. But, ultimately, the case was dismissed as moot. *Arave v. Hoffman*, 552 U.S. 117 (2008).

267 n. 7 (5th Cir. 1981) (permitting defendant to choose between reinstatement of the original plea or a new trial). And, finally, some courts have held that no remedy is appropriate because there is no prejudice if the defendant receives a fair trial. *See e.g. State v. Greuber*, 165 P.3d 1185, 1188-91 (Utah 2007).

Currently, the issue of whether "prejudice" can be shown after the defendant receives a fair trial is pending before the Court in *Lafler v. Cooper*, No. 10-209. Mr. Frye's case represents the other half of that controversy—just as *Hill* represented the other half of the question answered by *Strickland*—as it raises the analogous question of whether "prejudice" can be shown after a fair and reliable guilty plea. The issues combine to pose a serious question that the Court should answer: whether a defendant can base a claim of ineffective assistance of counsel on a superseded plea offer.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

CHRIS KOSTER
Attorney General

JAMES R. LAYTON
Solicitor General
SHAUN J MACKELPRANG
Chief Counsel, Criminal Div.
Counsel of Record

P. O. Box 899
Jefferson City, MO 65102
shaun.mackelprang@ago.mo.gov
(573) 751-3321

Attorneys for Petitioner

September 27, 2010

APPENDIX

TABLE OF CONTENTS

In the Supreme Court of Missouri

SC90856
WD70504

May Session, 2010

Galin E. Frye,
Appellant,

vs. (TRANSFER)

State of Missouri,
Respondent.

Now at this day, on consideration of the appellant's application to transfer and respondent's application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said applications be, and the same are hereby denied.

STATE OF MISSOURI-Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session, 2010, and on the 29th day of June, 2010, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 29th day of June, 2010.

/s/ Thomas F. Simon Clerk
_____ D.C.

Missouri Court of Appeals

WESTERN DISTRICT

April 27, 2010

IMPORTANT NOTICE

To: All attorneys of Record

Re: GALIN E FRYE #514200 (24.035), APPELLANT

vs.

STATE OF MISSOURI, RESPONDENT

WD70504

Please be advised that Respondent's motion for Rehearing is **OVERRULED** and motion for transfer to Supreme Court is **DENIED**. See Rule 83.04.

/s/ Terence G. Lord

Terence G. Lord
Clerk

cc: EMMETT D. QUEENER (573) 882-9468
SHAUN J MACKELPRANG (573) 751-5391

In the Missouri Court of Appeals Western District

GALIN E. FRYE,	)	
	)	
Appellant,	)	**WD7504**
	)	
v.	)	**OPINION FILED:**
	)	**March 23, 2010**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

Appeal from the Circuit Court of Boone County, Missouri

The Honorable Clifford E. Hamilton, Jr., Judge

Before Division Four: THOMAS H. NEWTON, Chief Judge, JOSEPH M. ELLIS, Judge and CYNTHIA L. MARTIN, Judge.

Galin Frye appeals the motion court's denial of his Rule 24.035 motion for post-conviction relief following an evidentiary hearing. Frye contends that the motion court clearly erred in denying his motion because he received ineffective assistance of counsel as a result of trial counsel's failure to inform him of a plea offer made by the State. The plea offer would have permitted Frye to plead to the amended charge of misdemeanor driving while revoked instead of going to trial on the charge of felony driving while revoked. Frye claims he would have taken the plea offer amending his charge to a misdemeanor had he known about the offer. Frye thus contends that his subsequent entry of an "open" guilty plea to the

felony charge of driving while revoked was unknowing, involuntary, and unintelligent. We reverse and remand.

Factual and Procedural History

On August 14, 2007, the State charged Galin Frye ("Frye") with one count of the class D felony driving while his driving privilege was revoked in violation of Section 302.321.[1] Frye had previously been convicted of three misdemeanor driving while revoked charges on May 21, 2004, April 20, 2006, and February 10, 2006.

Frye's preliminary hearing was scheduled for November 9, 2007. Frye contacted counsel the day before to inform him that he could not attend the hearing. Trial counsel appeared on Frye's behalf and received a continuance of the preliminary hearing to January 4, 2008. Frye had no scheduled court appearances between November 9, 2007, and January 4, 2008.

On November 15, 2007, the State sent Frye's trial counsel a written plea offer ("Offer"). The Offer was file stamped as received in trial counsel's office on November 19, 2007. The Offer stated:

> My recommendation is a[sic] follows: 3 and defer, on the felony with 10 days "shock" in the Boone County Jail; **OR** 90 days to serve on an amended misdemeanor in the Boone County Jail.
>
> I am going to subpoena witnesses for the preliminary hearing on January 4, 2008. I will need to know if Mr. Frye

[1] All statutory references are to RSMo 2000 as supplemented unless otherwise indicated.

> will be waiving [sic] to preserve the offer by noon on December 28, 2007.

Trial counsel's highlighting of, and other pen marks on, the written Offer, coupled with trial counsel's testimony at the post-conviction hearing, confirm that trial counsel actually received and read the Offer approximately one week after it was mailed.

Frye testified at the post-conviction hearing that he had no knowledge of the Offer until after he was convicted, sentenced, and incarcerated.[2] At the time of the Offer, Frye lived in St. Louis, Missouri. Trial counsel had Frye's mailing address. Frye testified at the post-conviction hearing that during the Offer window he did not see or speak with trial counsel and that his mailing address did not change.

Trial counsel testified at the post-conviction hearing that trial counsel could not recall whether he had communicated the Offer to Frye. Trial counsel testified that there was no correspondence in his file to indicate any effort was made by his office to mail the Offer to Frye. Trial counsel could not recall speaking with, seeing, or ever attempting to contact Frye during the Offer window of November 15, 2007, to December 28, 2007.

On January 4, 2008, Frye appeared for his continued preliminary hearing. Trial counsel, who was unable to attend, placed a note in Frye's file for the docket attorney covering the hearing. The note stated "-Probably should-Talk to him, from St. Louis, rec is tagged-Also has new misd, (go ahead & enter) WAIVE." Trial counsel interpreted his note during

---

[2] Frye testified at the post-conviction hearing that his post-conviction counsel sent him a copy of the Offer while he was incarcerated.

the post-conviction hearing. He testified that his note indicated that the Offer was included in the file and should be discussed with Frye. By this time, however, the Offer had expired. Frye testified that the docket attorney did not advise him of the expired Offer at the time of the preliminary hearing. Trial counsel interpreted his note's reference to "new misd" as referring to the fact that Frye had received another charge. Frye testified during his post-conviction hearing that he received another misdemeanor driving while revoked charge on December 30, 2007.[3] This was two days after the Offer expired. It is unclear how trial counsel knew of Frye's new charge, though we surmise Frye must have had a discussion of some sort with his counsel between December 30, 2007, the date of the new charge, and January 4, 2008, the date of the preliminary hearing for which trial counsel had prepared the hand written instructions for the docket attorney.

On March 3, 2008, Frye entered an "open" guilty plea to the class D felony of driving while revoked. The new charge Frye received on December 30, 2007, was not addressed during the guilty plea hearing. The State recommended a three year sentence, deferred, with ten days shock time. This was identical to the first of the two options that had been described in the Offer. The sentencing court did not accept the State's recommendation. Frye was sentenced on May 5, 2008 to three years imprisonment in the Missouri Department of Corrections.

---

[3] The record does not reflect where the new charge was received.

On June 9, 2008, Frye filed a *pro se* motion seeking post-conviction relief pursuant to Rule 25.035 ("Motion"). Frye's Motion alleged that trial counsel was ineffective for failing to communicate the Offer. Following an evidentiary hearing, the motion court denied Frye's Motion. This appeal follows.

Standard of Review

Appellate review of the disposition of a motion filed under Rule 24.035 is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. Rule 24.035(k); *Krider v. State,* 44 S.W.3d 850, 856 (Mo.App. W.D.2001). The trial court's "findings and conclusions are clearly erroneous only if, after reviewing the entire record," we are left with a "definite and firm impression that a mistake has been made." *Id*.

Analysis

In Frye's sole point on appeal, he contends that the motion court clearly erred in denying his Motion following an evidentiary hearing because his guilty plea was unknowing, involuntary, and unintelligent. Frye contends that trial counsel failed to inform him of the Offer. Frye contends that had he known of the Offer he would have accepted the prong of the Offer which would have permitted him to plead to an amended misdemeanor charge of driving while revoked, and that he would not have entered an "open" guilty plea to the class D felony charge of driving while revoked.

A guilty plea must be a "voluntary expression of the defendant's choice, and a knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences." *State v.*

Roll, 942 S.W.2d 370, 375 (Mo. banc 1997). Once a guilty plea is entered, all claims that counsel was ineffective are waived, "except to the extent that the conduct affected the voluntariness and knowledge with which the plea was made." *Worthington v. State*, 166 S.W.3d 566, 573 (Mo. banc 2005).

The plea process in a criminal adjudication warrants the same constitutional guarantee of effective assistance of counsel as trial proceedings. *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). To prevail on an ineffective assistance of counsel claim following a guilty plea, Frye must show by a preponderance of the evidence that: (1) trial counsel's performance was deficient because he failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise in similar circumstances; and (2) the deficient performance prejudiced Frye. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Simmons*, 955 S.W.2d 729, 746 (Mo. banc 1997). If either the performance prong or the prejudice prong is not met, then we need not consider the other, and Frye's claim of ineffective assistance of counsel must fail. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.

Performance Prong

To satisfy the performance prong, Frye must show by a preponderance of the evidence that trial counsel's failure to inform him of the Offer fell below an objective standard of reasonableness. Reasonableness is looked at in light of all of the circumstances, and the prevailing professional norms at the time of the alleged error. *Strickland*, 466 U.S. at 688-89, 104 S.Ct. 2052. Frye must overcome the presumption that any challenged action was sound trial strategy,

and that counsel rendered adequate assistance of counsel, making all significant decisions in the exercise of professional judgment. *Id*. at 689-90, 104 S.Ct. 2052.

"Failure of defense counsel to communicate a plea offer ordinarily constitutes deficient performance" of counsel. *Members v. State*, 204 S.W.3d 210, 212 (Mo.App. W.D.2006) (citing *State v. Colbert*, 949 S.W.2d 932, 946 (Mo.App. W.D.1997)). In *Members*, defendant contended his guilty plea was involuntary and that he received ineffective assistance of counsel because counsel had not communicated a plea offer. *Id*. at 211. The motion court did not permit the defendant an evidentiary hearing. Id. We concluded that the failure to communicate a plea offer satisfies the performance prong of Strickland. *Id*. at 213. Because the motion court had not permitted the defendant an evidentiary hearing to determine whether, in fact, the offer had not been communicated, we reversed and remanded the case for an evidentiary hearing. Id. In Colbert, defendant claimed he was not advised of the State's plea offer for twenty-five years imprisonment on Count I and five years imprisonment on Counts II and III, for a total of thirty years imprisonment. 949 S.W.2d at 945. Defendant claimed that he was prejudiced as a result, since unaware of the offer, he elected to go to trial where he was convicted and received life imprisonment on one count and multiple year sentences on other counts to run consecutive with the life sentence. *Id*. at 938, 946. The court found defendant had sufficiently alleged ineffective assistance of counsel based on counsel's failure to communicate an offered plea and remanded the case for an evidentiary hearing. *Id*. at 946.

In *Cottle v. Florida*, 733 So.2d 963 (Fla.1999), the court held that "[t]he caselaw uniformly holds that counsel is deficient when he or she fails to relate a plea offer to a client." *Id*. at 966 (citation omitted). Similarly, in *Turner v. Texas*, 49 S.W.3d 461 (Tex.App.2001), the court held that defense counsel's failure to communicate a deadline attached to a plea offer constituted ineffective assistance of counsel. The court held that it was not reasonable trial strategy for trial counsel to withhold the deadline from the defendant merely because trial counsel believed the defendant would be forced to make a faster decision. *Id*. at 470. The court stated "the only reasonable strategy ... would have been to timely notify Appellant of the imminently approaching deadline." *Id*.

Here, Frye contends the Offer was not communicated to him at all. We can conceive of no reasonable trial strategy that would justify trial counsel's failure to communicate the Offer to Frye. We conclude, consistent with Members, that if Frye was not advised of the Offer, he has established the Strickland performance prong. We turn our attention, therefore, to whether Frye established that he was not told of the Offer.

In its Findings of Fact, Conclusions of Law, and Judgment, the motion court acknowledges Frye's testimony that he was not advised of the Offer until after he was incarcerated. The motion court did not indicate whether it found Frye's testimony to be believable. The motion court acknowledged trial counsel's testimony that he could not recall whether he had informed Frye about the Offer. The trial court found trial counsel's testimony to be credible. The effect was a finding that trial counsel credibly reported no recollection of informing Frye of the

Offer. The motion court did not make an express finding with respect to whether Frye knew of the Offer. However, the motion court found that "even assuming that counsel failed to tell Movant of the offer, counsel cannot be faulted for failing to inform Movant of an offer when Movant fails to stay in touch with counsel."

The motion court was required to "issue findings of fact and conclusions of law on all issues presented." Rule 24.035(j) (emphasis added). While " '[t]here is no precise formula to which findings of fact and conclusions of law must conform,' they must address all of the issues raised and be sufficiently specific to allow for meaningful appellate review." *Grimes v. State*, 260 S.W.3d 374, 375 (Mo.App. W.D.2008) (quoting *Ivory v. State*, 211 S.W.3d 185, 189 (Mo.App. W.D.2007)). We are typically required to remand a case back to the court for requisite findings of fact that have not been made. *Id*. We do not believe the absence of an express finding of fact as to Frye's knowledge of the Offer requires remand, however. The motion court found trial counsel's testimony credible. Trial counsel's testimony included not only his concession of no memory one way or the other of having informed Frye of the Offer but also a general discussion of difficulties trial counsel had communicating with Frye. By finding that "even if" Frye did not know of the Offer it was Frye's fault, the motion court can be reasonably assumed to have made the implicit finding that Frye did not know of the Offer and that he was to blame for his lack of knowledge. We believe, therefore, that the motion court's findings of fact are "sufficiently specific to allow for meaningful appellate review." Id. We agree with the trial court's implicit finding that Frye was not informed of the Offer. We do not agree,

however, that the record supported a finding that Frye was to blame for trial counsel's failure to communicate the Offer.

At the post-conviction hearing, trial counsel testified:

> Counsel, we've talked about this on the phone. I have wracked my brain to try to remember what happened in Mr. Frye's case. I can tell you that I do remember that communication—I'm not suggesting through faults of his own, but he lived in St. Louis, and communication—I believe I had different phone numbers from time to time. **I'm not sure if I communicated this to him or not**, simply because I don't remember him being in court with me as often as most of my other clients; that he was from St. Louis, and that I think that he missed court a few times. And I don't believe I saw him again until after this offer would have been revoked by operation of the language of it, of the letter.

(Emphasis added.) Although trial counsel testified that Frye "missed court a few times," the only missed court appearances reflected in the record were between January 4, 2008, and March 3, 2008, after the Offer expired. During the Offer window, Frye never failed to appear in court because there were no scheduled court appearances during that time. Though trial counsel stated that Frye had different phone numbers from time to time, the only specific evidence relating to how this impacted trial counsel's

communication with Frye was trial counsel's testimony that: "Oh, I called him on the 28th and noted in my file that his phone was not in service," referring to January 28, 2008. Trial counsel also testified that on February 4, 2008, Frye gave him an updated number, suggesting Frye initiated contact with him to provide this information. Trial counsel never testified that he made any unsuccessful effort to contact Frye by phone during the Offer window. Instead, trial counsel conceded: "I'm not sure if I communicated this [the Offer] to him or not."

The record also indicates that there was no communication by mail between trial counsel and Frye during the Offer window. Frye's client file is void of correspondence to Frye communicating the Offer. Trial counsel testified that the absence of a letter in Frye's file reflecting transmittal of the Offer would tend to indicate that no effort was made to communicate the Offer to Frye in writing.

Pursuant to the Rules of Professional Conduct that govern the Missouri Bar, Frye's trial counsel had an absolute duty to keep Frye informed of plea communications. Rule 4-1.4 states: "(a) A lawyer shall: (1) keep the client reasonably informed about the status of the matter; [and] ... (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation." See also *In re Crews*, 159 S.W.3d 355, 359 (Mo. banc 2005). Pursuant to Rule 4-1.4 comments one and two, counsel is required to keep the client informed of significant developments in the case, and "a lawyer who receives from opposing counsel ... a proffered plea bargain in a criminal case ***must promptly inform the client of its substance.***" (Emphasis added).

The motion court correctly noted that "[t]he reasonableness of counsel's actions [to determine if the performance prong was met] may be determined or substantially influenced by the defendant's own statement or actions." *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. However, counsel's failure to act is only justifiable in circumstances where, because of the defendant's own conduct, counsel was unable to properly carry out his responsibilities. *State v. Johnson*, 901 S.W.2d 60, 63 (Mo. banc 1995) (finding that trial counsel was not ineffective for failing to call a witness because the defendant failed to inform him of the witness's existence until after trial). It is only when a defendant's behavior leads to a fundamental lack of information on the part of counsel that counsel is excused from the reasonable standard of performance. *Id.*; *see also Cherco v. State*, 309 S.W.3d 819, 825-26 (Mo.App. W.D. 2010) (finding the performance prong of *Strickland* was not met because defendant failed to stay in touch with counsel, despite repeated attempts by counsel to contact him). In this case, trial counsel could not be excused from his absolute duty to communicate the Offer to Frye unless Frye's behavior caused trial counsel to be unable to do so. The record is void of ***any*** evidence of ***any*** effort by trial counsel to communicate the Offer to Frye during the Offer window, let alone any evidence that Frye's conduct interfered with trial counsel's ability to do so.

Reviewing the entire record, therefore, we are left with a definite and firm impression that a mistake has been made. The trial court clearly erred in blaming Frye for "failing to stay in touch" with counsel during the six week Offer window, a finding which effectively shifted to Frye the duty to "stay in

touch," and which divested trial counsel of his absolute duty to communicate the Offer to his client. As there was no evidence that any effort of any kind was made by trial counsel to timely inform Frye of the Offer, we conclude that Frye established by a preponderance of the evidence that he was not informed of the Offer while the Offer was pending or before his guilty plea. As a result, trial counsel's performance was deficient. *Members*, 204 S.W.3d at 213. The *Strickland* performance prong has been met. We now determine whether trial counsel's failure to communicate the Offer prejudiced Frye.

Prejudice Prong

In *Strickland*, the Supreme Court articulated the standard for prejudice, stating that a defendant must show a reasonable probability that, but for counsel's alleged deficiencies, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. The *Strickland* prejudice prong has since been interpreted by the Court in *Hill*, in the context of guilty pleas, to mean that in order to show prejudice, "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." *Hill*, 474 U.S. at 59, 106 S.Ct. 366. The State contends that because Frye did not contend that "but for" trial counsel's failure he would have insisted on going to trial, Frye cannot establish prejudice as a matter of law. We disagree.

In *Hill*, the Supreme Court extended the *Strickland* analysis to guilty plea proceedings, noting that "our justifications for imposing the 'prejudice' requirement ... are also relevant in the context of guilty pleas." *Hill*, 474 U.S. at 57, 106 S.Ct. 366

(citing *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052). These justifications were:

> The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. ***Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.***

Id. (citing *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052) (emphasis added). *Hill* thus acknowledges that the *Strickland* inquiry for "prejudice" necessarily depends on the specific evidence and circumstances surrounding the claimed error. *Id*. It follows, therefore, that the determinative factors for evaluating whether counsel's ineffectiveness is prejudicial must be based on the specific facts and circumstances of the case. Reliance on *Hill*'s "template" that a defendant must contend that "but for" counsel's ineffective assistance the defendant would have insisted on going to trial as determinative of whether

a defendant can establish prejudice completely ignores *Strickland*'s looser emphasis on whether a defendant can establish "an adverse effect on the defense." *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052. 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. According to *Strickland*, the test of prejudice is whether "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. *See Colbert*, 949 S.W.2d at 940 ("To demonstrate prejudice, the movant must show a reasonable probability that, but for his attorney's unprofessional errors, ***the result of the proceeding would have been different.***") (citing *State v. Harris*, 870 S.W.2d 798, 814 (Mo. banc 1994), *cert. denied*, 513 U.S. 953, 115 S.Ct. 371, 130 L.Ed.2d 323 (1994)) (emphasis added).

In a case similar to the one before us, our Supreme Court has demonstrated its agreement with this approach to establishing prejudice. In *Dobbins v. State*, 187 S.W.3d 865 (Mo. banc 2006), Dobbins, relying on the advice of counsel, rejected a ten year imprisonment plea with the State, and instead entered an "open" guilty plea. *Id*. at 866. Dobbins was subsequently sentenced to eighteen years for possession of marijuana with the intent to distribute. *Id*. Dobbins filed a Rule 24.035 motion alleging counsel affirmatively mislead him about his eligibility for early release. *Id*. The Supreme Court found that Dobbins received ineffective assistance of counsel based on counsel's affirmative misrepresen-

tation, and in discussing whether prejudice had been established, noted:

> Counsel's ineffectiveness must be joined with prejudice to afford Dobbins relief. In this case, ***Dobbins was prejudiced because he rejected an offer to plead to a charge resulting in a 10-year sentence. If he had known he was not able to challenge the sentence, he would not have entered an open plea, but would have accepted the offer***, which matched the lowest sentence he could have received under the open plea agreement. Moreover, the facts relating to Dobbins' understanding of the pleas and his agreement that no one had promised leniency for the plea are irrelevant. It was not the sentence to be imposed that concerned Dobbins-it was his eligibility for sentence reduction as to any sentence that was imposed. ***His attorney's affirmative misrepresentation as to his ability to challenge the sentence prejudiced Dobbins by causing him to plead guilty when he otherwise would not have done so.***

Id. at 867 (emphasis added). Reading the above passage as a whole, it is apparent the Supreme Court did not employ the narrow *Hill* "but for" test to find prejudice in *Dobbins*. As in *Dobbins*, Frye did not accept a plea offer that he says he would have accepted but for counsel's ineffective assistance. As in *Dobbins*, Frye does not contend in his post-conviction motion that but for counsel's ineffective

assistance, he would not have pled guilty and would have insisted on going to trial.

Here, the motion court denied Frye's post-conviction motion because "[e]ven assuming that counsel can be faulted for failing to tell Movant about this plea offer, Movant would not be entitled to a remand because claims under Rule 24.035 must include a claim that Movant would have gone to trial but for his counsel's errors." The motion court did not discuss *Dobbins*. Instead, the motion court cited *Beach v. State*, 220 S.W.3d 360 (Mo.App. S.D. 2007), which addresses *Dobbins*. The court in *Beach* read *Dobbin*'s statement that defendant was caused "to plead guilty when he otherwise would not have done so" to mean Dobbins would not have plead guilty and would have insisted on going to trial. *Beach*, 220 S.W.3d at 367. The Southern District stated, "this sentence clearly states that, but for ineffectiveness of plea counsel, Dobbins would not have pleaded guilty. By implication, the only alternative to not pleading guilty is to go to trial. Thus, the Court applied the *Hill* standard without citation." *Id*. at 368. We decline to so interpret *Dobbins*. The Southern District's reading of a single sentence in *Dobbins* out of context ignores the balance of the Supreme Court's discussion which included the statement that had the defendant "known he was not able to challenge the sentence, ***he would not have entered an open plea, but would have accepted the offer.***" *Dobbins*, 187 S.W.3d at 867 (emphasis added). *Beach*'s interpretation of *Dobbins* and its application of *Hill* would leave a defendant with no recourse even if the defendant has clearly established that "but for" his counsel's ineffective assistance the outcome of his proceeding would have been different. Our court does not construe *Hill* to bar other means

of establishing prejudice when insisting on going to trial cannot possibly remediate ineffective assistance that has affected the outcome of the proceeding. *Cherco*, 309 S.W.3d at 829-30 (finding ineffective assistance of counsel during the sentencing phase may warrant remand for resentencing without an allegation by the defendant that he would not have pled guilty and would have insisted on going to trial); *see also Members*, 204 S.W.3d at 213 (finding that a defendant has been prejudiced if the defendant proves that counsel failed to communicate a plea offer that the defendant would have accepted).

Other jurisdictions have found prejudice when counsel fails to inform a defendant of a plea offer, notwithstanding defendant's failure to contend he would have insisted on going to trial. In *Turner*, the court found "the record shows that Appellant was prejudiced by defense counsel's ineffectiveness and that, but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceedings would have been different." 49 S.W.3d at 470. The court went on to conclude that when a defendant was not informed of a deadline placed on a plea offer, and when "the record shows that Appellant would have timely accepted the offer had the deadline been properly conveyed to him, Appellant has satisfied the burden of showing prejudice." *Id*. In *Cottle*, defendant claimed he received ineffective assistance of counsel because his counsel failed to convey the State's plea offer. 733 So.2d at 964-65. The court held that "an inherent prejudice results from a defendant's inability, due to counsel's neglect, to make an informed decision whether to plea bargain, which exists independently of the objective viability of the actual offer." *Id*. at 969 (citations omitted).

In light of the foregoing, we find the motion court's conclusion that Frye was not prejudiced by trial counsel's failure to communicate the Offer merely because Frye did not contend that he would have insisted on going to trial to be a clearly erroneous finding of fact based on a clearly erroneous declaration of the law.

The motion court also concluded that remand of Frye's case would not be proper because now that the Offer has expired, the State cannot be compelled to renew the Offer. Moreover, according to the motion court, the State would have the power to withdraw the Offer, even if renewed, at any time before sentencing.

"While a defendant has no constitutional right to a plea bargain, *Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977), during negotiations he is entitled to presuppose fairness in the agreement." *State v. Price*, 787 S.W.2d 296, 299 (Mo.App. W.D. 1990) (citing *Santobello v. New York*, 404 U.S. 257, 261, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971)). This fairness guarantee was restricted in *Mabry v. Johnson*, 467 U.S. 504, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984). A "plea agreement standing alone is without constitutional significance." *Id.* at 507. Thus, "[u]nless a plea agreement impaired the voluntariness or intelligence of a guilty plea, the defendant has no constitutional right to have the plea specifically enforced." *Price*, 787 S.W.2d at 299 (citing *Mabry*, 467 U.S. at 510, 104 S.Ct. 2543). The Court in *Mabry*, in discussing a plea offer, "found that the question of whether a prosecutor was negligent or otherwise culpable in first making and then withdrawing an offer was not relevant to a due process argument." *Price*, 787 S.W.2d at 299-300

(citing *Mabry*, 467 U.S. at 511, 104 S.Ct. 2543). Thus, it does in fact appear that a plea offer can be withdrawn at any time before it is accepted by the court, and a plea offer once accepted by the defendant can be withdrawn without recourse,[4] unless, as noted in Mabry, the plea agreement impaired the voluntariness of the guilty plea.

However, we are not dealing with a case of claimed prosecutorial misconduct. *Price*, *Mabry*, and the other cases cited by the motion court in its Judgment relating to the enforceability of a plea offer or agreement all arose in the context of a defendant's claim of prosecutorial misconduct in withdrawing or failing to honor a plea. Here, the claimed constitutional violation relates to Frye's entitlement to effective assistance of counsel. The motion court suggests that unless there is a suitable means of remediating the demonstrated ineffective assistance of counsel, there can be no prejudice. In other words, the motion court suggests that because we cannot compel the State to renew the Offer, Frye is not prejudiced because we cannot, by remanding this case, restore Frye to the position he would have been in but for the ineffective assistance.

We do not believe the determination of prejudice can be bootstrapped in this fashion. The State had exclusive control over the charging of Frye's offense. Thus, 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

[4] For example, the State may well have withdrawn the Offer, even if accepted by Frye, if it became aware prior to sentencing of Frye's new charge on December 30, 2007.

charge.[5] The maximum jail sentence that the trial judge could have imposed for the misdemeanor plea was one year imprisonment. Section 558.011. The maximum sentence for the class D felony to which Frye entered an "open" guilty plea was four years. *Id*. Frye received three years. Because of trial counsel's failure to inform Frye of the Offer, Frye pled guilty to a felony instead of a misdemeanor and was subject to a maximum sentence of four years instead of one year. We conclude that notwithstanding the practical difficulties associated with Frye's recourse, Frye has nonetheless established prejudice pursuant to *Strickland*. We are left with a definite and firm impression that a mistake was made. We find that Frye did sufficiently prove, by a preponderance of the evidence, that he was prejudiced through trial counsel's failure to convey the State's Offer.[6]

---

[5] Of course, the trial court would have been free to sentence Frye along the continuum of the range of punishment applicable to the misdemeanor, just as it was free to sentence Frye along the continuum of the range of punishment for the felony to which Frye entered his "open" plea. Had the Offer only addressed a non-binding sentencing recommendation in exchange for a plea of guilty on the original felony charge of driving while revoked, Frye would be hard pressed to establish prejudice, notwithstanding counsel's failure to communicate the Offer, as the State's Offer would not have been binding, in any manner, on the trial court.

[6] We are aware that Frye's new misdemeanor charge apparently influenced trial counsel's decision not to request an extension of the Offer from the State. That new charge was obtained by Frye after the Offer window expired. Trial counsel's belief about whether he could have persuaded the State to renew the Offer is irrelevant as Frye does not contend ineffective assistance of counsel on this basis. It is sufficient for Frye's showing of prejudice that the Offer window would have permitted Frye to accept the Offer and to have submitted to a guilty plea hearing on the amended charge in advance of receiving yet another charge for driving while revoked.

We are left then with discerning the appropriate recourse for Frye's established Rule 24.035 violation. Rule 24.035(j) provides that if a basis for Rule 24.035 relief is determined to exist, "the court shall vacate and set aside the judgment and shall discharge the movant or resentence the movant or order a new trial or correct the judgment and sentence ***as appropriate.***" (Emphasis added.) Though in this case, the ***"appropriate"*** remediation might be to afford Frye the opportunity to plead guilty to the amended charge of misdemeanor driving while revoked, we appreciate that we are not empowered to order the State to reduce the charge against Frye. A remand, therefore, may leave Frye with but two options—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. Though this is [sic] may not seem a satisfactory remedy for Frye, our alternative is to ignore the merits of Frye's claim, which we are unwilling to do.

Our Supreme Court faced the same constraint we face today in Dobbins. Upon finding prejudice arising out of a similar scenario where a defendant claimed ineffective assistance of counsel prejudiced him from accepting an earlier plea offer, the Court reversed the judgment and remanded the case. *Dobbins*, 187 S.W.3d at 867. We will do the same, deferring to Frye whether he desires to insist on a trial or to plead guilty to the charged offense or to such other amended charge as the State may deem it appropriate to offer.[7] In either case, we will be

[7] In *Turner*, the Texas Court of Appeals remediated a similar set of circumstances by reversing the trial court's

affording Frye that to which he is entitled—the effective assistance of counsel. We are cognizant that the State did absolutely nothing wrong in this case and is not responsible for Frye's trial counsel's failure to communicate the Offer.

Conclusion

We reverse the judgment entered on the guilty plea and deem the guilty plea withdrawn. We remand this case for further proceedings.

_____

Cynthia L. Martin, Judge

All Concur.

---

judgment and remanded the case "with orders to withdraw the appellant's plea, require the State to reinstate the plea offer as it existed prior to the Sixth Amendment violation, and allow the appellant to replead to the indictment." 49 S.W.3d at 471. We do not share the Texas court's belief that we are empowered to mandate the State to offer pleas or to amend charges, notwithstanding our finding that Frye's Sixth Amendment rights have been violated.

IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

GALIN E. FRYE,	)	
Movant,	)	
	)	
vs.	)	CASE NO. 08BA-CV03050
	)	
STATE OF MISSOURI,	)	
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Now on this 18th day of November, 2008, the court enters the following findings of fact and conclusions of law as required by Rule 24.035(j):

On March 3, 2008, Movant pled guilty to one count of felony of driving while revoked pursuant to a plea agreement where the State recommended three years in the Department of Corrections and deferred to the court as to probation. On May 5, 2008, Movant was sentenced to three years in the Department of Corrections.

Movant timely filed his *pro se* motion for post-conviction relief and following appointment of counsel, Movant filed his amended motion on September 5, 2008.

On October 3, 2008, an evidentiary hearing was held where Movant and his counsel testified.

Claim 8a) Movant's only claim is that his counsel was ineffective for failing to inform him that the State had made an offer for him to plead to a misdemeanor driving while revoked with a 90 day jail sentence. Movant claims that had he known the

State had made that offer, he would have accepted that plea offer. Movant does not claim that he would have gone to trial but for his counsel's actions.

Movant testified at the evidentiary hearing that he was unaware that the State had made a misdemeanor plea offer. Movant testified that had he known about the plea offer, he would have accepted that offer.

Movant's trial counsel testified that he could not recall whether he had informed Movant about the misdemeanor plea offer but that he did recall that Movant was extremely difficult to get in touch with and that he had changed his telephone number multiple times. Counsel also testified that the misdemeanor offer expired on December 28, 2008 and that counsel was aware that the prosecutor, Brent Nelson did not normally extend his offers past the revocation date. Counsel testified the misdemeanor offer had expired and was revoked before his saw Movant in court. Thus, there was no misdemeanor offer to accept. This Court finds counsel's testimony credible. Even assuming that counsel failed to tell Movant of the offer, counsel cannot be faulted for failing to inform Movant of an offer when Movant fails to stay in touch with counsel.

In any event, Movant's claim cannot succeed. Even assuming that counsel can be faulted for failing to tell Movant about his plea offer, Movant would not be entitled to a remand because claims under Rule 24.035 must include a claim that Movant would have gone to trial but for his counsel's errors. This Court agrees with the Southern District Court of Appeals analysis in Beach v. State, 220 S.W.3d 360 (Mo.App., S.D. 2006):

In the present case, Movant's only allegation of prejudice is that, but for plea counsel's alleged misadvice with regard to his chances for probation, he would not have rejected the fifteen-year plea offer previously extended by the State. Based upon this fact, and applying the above legal principles, we conclude the following. Movant's constitutional right to effective assistance of counsel is premised upon and exists to provide protection of Movant's constitutionally guaranteed fundamental right to a fair trial. However, Movant's plea of guilty waived his right to a trial, so no trial was held. Thus, the only way to properly evaluate the alleged ineffectiveness of Movant's plea counsel is by what effect, if any, counsel's alleged error had upon Movant's waiver of his right to a fair trial, i.e., is his waiver of trial by guilty plea knowing and voluntary. So, if there is a reasonable probability that, but for plea counsel's alleged error, Movant would not have pleaded guilty thereby waiving his right to a trial, but would have insisted upon going to trial, then Movant's constitutionally guaranteed fundamental right to a fair trial has been denied, and Movant is constitutionally prejudiced by the alleged ineffective assistance of his counsel. If, however, despite the alleged error by counsel, Movant asserts, as he has in his Rule 24.035 motion, that he would have persisted in waiving his constitutional right to a fair trial by pleading guilty, then Movant has not been denied his right to a fair trial and is not constitutionally prejudiced by counsel's alleged ineffectiveness. Based upon the allegations contained in Movant's motion, we

conclude that Movant's conviction is not the result of a violation of Movant's constitutional right to effective assistance of counsel and, as such, is not cognizable under Rule 24.035. A contrary conclusion raises two problems. To conclude otherwise challenges the finality in all criminal convictions entered as a result of a guilty plea—a concern directly addressed by the United States Supreme Court in *Hill, supra*. Virtually every criminal case resolved by a guilty plea involves plea negotiations, and, in those few that do not, an argument could be made that plea counsel was ineffective for not engaging in plea negotiations. Therefore, if any perceived prejudice to a movant in such plea negotiations rises to the level of constitutional prejudice to support an ineffective assistance of counsel claim, every guilty plea would require an evidentiary hearing on the ensuring Rule 24.035 motion. The *Hill* court resolved this potential finality question by premising a Movant's constitution prejudice upon whether, but for plea counsel's alleged error, the Movant would have pleaded not guilty and insisted upon a trial. Aside from the finality issue, a contrary conclusion presents a practical problem as well: What is Movant's remedy? If, upon remand and an evidentiary hearing, the movant court finds that the Movant's alleged facts are true, then the motion court would be required to vacate and set aside the judgment and set the case for either resentencing or trial. See Rule 24.035(j). Yet, setting the case for resentencing would not be an effective remedy because the motion court has no power to require the State to reinstate the alleged favorable plea offer.

> The State could simply refuse to offer Movant any plea agreement. In the absence of the alleged favorable plea offer or any other plea offer, setting the case for trial would not be an appropriate remedy because, based upon the record before the motion court, Movant has already made the decision to plead guilty based on the terms of the alleged less-favorable plea agreement rather than insist on a trial.

[citations omitted].

Here, Movant does not claim he would have gone to trial. He only claims that he would have accepted the misdemeanor offer that no longer existed. Movant is not even entitled to a plea agreement or plea offer. State v. Honorable Cynthia Eckelkamp, 133 S.W.3d 72 (Mo.App. E.D. 2004).

Nor is Movant entitled to a remand. Movant would not be able to take advantage of the plea offer as it has been withdrawn by the State, the State would not be required to renew that offer. Even if the State was required to renew the offer, it would have the option of withdrawing it before it was accepted by the trial court. See Griffith v. State, 845 S.W.2d 684, 686-687 (Mo.App. S.D. 1993); Stokes v. State, 688 S.W.2d 19, 22 (Mo.App. E.D. 1985). See Bryan v. State, 134 S.W.3d 795, 804 (Mo.App. S.D. 2004) (for similar facts; "A second difficulty is that Bryan contends he was denied the opportunity to plead guilty on terms he now finds acceptable. Remanding the case would be an ineffective remedy since we have no power to require the State to reinstate any of the various plea offers which Bryan previously turned down. [citations omitted]. Assuming we reversed the trial court's decision and remanded the

case, the State could simply refuse to offer Bryan any plea agreement"); see also Rowland v. State, 129 S.W.3d 507 (Mo.App. S.D. 2004). Because Movant 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 and because a remand would be improper, this Court finds that Movant is entitled to no relief.

Movant's claim is denied.

SUMMARY

It is the conclusion of this Court that Movant has failed to show that his conviction or sentence violates the Constitution or laws of this State or of the United States.

WHEREFORE, it is the judgment of this Court that all of the Movant's claims are denied. Costs taxed against Boone County, Missouri.

SO ORDERED, this 18th day of November, 2008.

/s/ Gene Hamilton
Gene Hamilton
Circuit Judge, Division I

[Excerpt from the Legal File, pp. 19-26]

Guilty Plea and Sentencing Hearing
March 3, 2008

* *

THE COURT: Case Number 3869, State vs. Galen Edward Frye.

MR. COLES: Yes, your Honor.

THE COURT: You are Galen Edward Frye?

THE DEFENDANT: Yes, sir.

THE COURT: And you appear here with Mr. Coles. He's an attorney who has been appointed to represent you. Is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: What's the matter before the Court?

MR. COLES: Your Honor, we wish to withdraw our plea of not guilty and enter a plea of guilty on this matter. We would note for the Court that this will be in the way of an open plea.

THE COURT: Okay. You heard what your attorney said, Mr. Frye. Is that what you want to do?

THE DEFENDANT: Yes, sir.

THE COURT: Please raise your right hand and be sworn.

(THE WITNESS WAS SWORN BY DEPUTY CLERK OF COURT SEVERS.)

* * *

THE COURT: Please take the witness stand.

(The witness complied.)

* * *

GALEN EDWARD FRYE

being first duly sworn, testified as follows:

* * *

EXAMINATION

BY THE COURT:

Q. Mr. Frye, please state your full name.

A. Galin Edward Frye.

Q. Do you understand that by pleading guilty today you're waiving up certain rights that you have?

A. Yes.

Q. Do you understand that among those rights is the right to be tried by a jury?

A. Yes.

Q. Do you understand that if you were tried by a jury, you might be acquitted, found not guilty of this offense?

A. Yes.

Q. But do you understand that there is no acquittal from a plea of guilty?

A. Yes.

Q. Do you understand that if you stood a jury trial, the prosecuting attorney would have to bring her witnesses into the courtroom, they would have to testify, and you and your attorney could be here and cross-examine those witnesses?

A. (Nodding head.)

Q. Do you understand the verdict of the jury would have to be unanimous, all 12 people would have to agree?

A. Yes.

Q. Do you understand the burden of proof would be on the State and that burden of proof would be to prove you guilty beyond a reasonable doubt?

A. Yes.

Q. Do you understand that you'd have the right to present evidence on your own behalf if you wanted to?

A. Yes.

Q. Do you understand that, as the defendant, you'd would have a right to testify if you wanted to, but no one could force you to testify?

A. Yes.

Q. Do you understand that even if you were found guilty by the jury you'd have a right to appeal this Court's decisions?

A. Yes.

Q. Do you understand that if an appellate court found that this trial court had done something wrong, the case might be reversed and you might be released outright?

A. Yes.

Q. Now, knowing those rights to a jury trial, do you desire to waive them today and plead guilty?

A. Yes.

Q. You're charged in the Information with the Class D felony of driving while your license was revoked. Do you understand that the range of punishment for that offense is by a fine, a jail term, a combination of a fine or jail term, or up to four years in the Department of Corrections?

A. Yes.

THE COURT: State intend to make a recommendation, Ms. Wilson?

MS. WILSON: Judge, I understand that this is an open plea.

THE COURT: I'm sorry?

MS. WILSON: This is an open plea.

THE COURT: Okay. So there is no recommendation?

MS. WILSON: There is not.

THE COURT: And that was your understanding, Mr. Coles?

MR. COLES: Yes, your Honor.

BY THE COURT:

Q. Okay. And was that your understanding, Mr. Frye?

A. Yes.

Q. So you understand the full range of punishment still available to me?

A. Yes.

Q. And do you understand that among the things that I could do is to sentence you up to four years and require that you do the time?

A. Yes.

Q. Do you understand that another option would be to sentence you to such a sentence but suspend the execution of it and put you on probation?

A. Yes.

Q. But do you understand another option will be not to impose a sentence but just to put you on probation?

A. Yes.

Q. But do you understand the final decision is up to me?

A. Yes.

Q. And do you understand that if I put you on probation under either set of circumstances, a suspended execution or a suspended imposition, there's a requirement that you do two days in the county jail?

A. Yes.

Q. Has anybody promised you anything that's not been stated here in order to get you to plead guilty against your will?

A. No.

Q. Has anyone threatened you or coerced you in any manner in order to get you to plead guilty against your will?

A. No.

THE COURT: Is there any question of the legality of the arrest or of any search and seizure, Mr. Coles?

MR. COLES: No, your Honor.

BY THE COURT:

Q. Did you make any statements to the police about these matters, Mr. Frye?

A. No, sir.

Q. Looking at the Information, it alleges that this occurred on or about the August the 9th, 2007, here in Boone County, Missouri. And it alleges that at that place you operated a motor vehicle on a highway, on Creasy Springs Road, during a time when your driver's license was revoked under the laws of this state.

Is that true?

A. Yes, sir.

Q. And it alleges you knew that your driver's license was revoked.

Is that true?

A. Yes.

Q. It alleges three prior offenses. It alleges that on the 21st day of May, 2004, you were convicted of diving while revoked in the 13th Judicial Circuit Court of Boone County, Missouri, for events occurring on the 29th of December, 2003.

Is that true?

A. Yes.

Q. Were you represented by an attorney at that time?

A. Yes.

Q. It further alleges that on the 20th day of April, 2006, you were convicted of driving while revoked in the 13th Judicial Circuit Court, Boone County, Missouri, for events occurring on the 15th day of October, 2005.

Is that true?

A. Yes.

Q. And you were represented by counsel At that time?

A. Yes.

Q. It further alleges that on the 10th day of February, 2006, you were convicted of driving while revoked here in Boone County, Missouri, for events occurring on the 10th day of August, 2005.

Is that true?

A. Yes.

Q. Were you represented by an attorney at that time?

A. Yes.

Q. You've been represented in this matter by Mr. Coles. Have you had ample opportunity to meet with him and to discuss the case with him?

A. Yes.

Q. Is there anything you have asked him to do that he has refused to do?

A. No.

Q. Do you have any complaint about the way he's represented you?

A. No.

Q. Have you had any drug or alcohol today causing you to plead guilty against your will?

A. No.

THE COURT: Any other questions now, Mr. Coles?

MR. COLES: No, your Honor.

THE COURT: Has there been discovery?

MR. COLES: There has.

THE COURT: And do you believe that this plea of guilty is in your client's best interest?

MR. COLES: I do, your Honor.

BY THE COURT:

Q. Now, you understand, Mr. Frye, that Mr. Coles can give you advice and make recommendations to you, but it has to be your decision as to whether you plead guilty. Do you understand that?

A. Yes.

Q. And is this your decision to plead guilty?

A. Yes.