No. 10-444

In The

Supreme Court Of The United States

STATE OF MISSOURI,
Petitioner,

v.

GALIN E. FRYE,
Respondent.

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

BRIEF OF AMICI CURIAE CONNECTICUT AND ELEVEN OTHER STATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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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?

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INTERESTS OF THE AMICI CURIAE

The twelve *amici* states have a compelling interest in defending the presumptively valid judgments of their courts against post-conviction claims of ineffective assistance. They therefore have a strong interest in ensuring that the law governing such claims is properly applied. Thus, the *amici* states have a substantial interest in this Court's determination of whether to review the decision of the Missouri Court of Appeals for the Western District.[1]

STATEMENT OF THE CASE

Galin Frye repeatedly drove while his driving privileges were revoked. He collected three misdemeanor convictions over a two-year period. He faced a fourth conviction when, on August 14, 2007, the State of Missouri charged him with a Class D felony for the same conduct. A4.[2] In Missouri, driving while revoked is a Class D felony on the second or subsequent conviction for driving while intoxicated, or on the fourth

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[1] In Connecticut, the Chief State's Attorney serves as the equivalent of the Attorney General for criminal matters. CONN. CONST. Amd. XXIII; CONN. GEN. STAT. § 51-278(c). Therefore, Supreme Court Rule 37.4 permits the Chief State's Attorney of Connecticut, as well as the Attorneys General for the other *amici* states, to file supporting briefs on behalf of their respective states without the permission of the parties. Counsel of record for all parties received notice at least ten days prior to the due date of the amicus curiae's intention to file this brief.

[2] "A [number]" refers to the corresponding page of the petitioner's appendix.

conviction for any other offense. MO. REV. STAT. § 302.321.2 (2005).

With respect to the August 2007 charge, the State conveyed to Frye's counsel a plea offer with two alternatives. A4. The State would recommend a three-year term of incarceration, deferred after ten days, in exchange for Frye's guilty plea to the felony charge, or ninety days incarceration in exchange for Frye's guilty plea to a reduced misdemeanor charge. A4. Frye's counsel did not convey the offer to him before it expired. A5. On March 3, 2008, he entered an "open" guilty plea to the class D felony. A6. The State recommended the same three-year deferment. The sentencing court rejected the recommendation, and sentenced Frye to three years incarceration. A6.

Post-conviction, Frye claimed that his guilty plea was involuntary because his lawyer did not convey to him the antecedent offer, which he would have accepted. A7. The trial court rejected Frye's claim, but the Missouri Court of Appeals ("the Missouri court") reversed. The Missouri court held that counsel's failure to convey the plea offer constituted deficient performance. Citing this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), the Missouri court reasoned that "the result of the proceeding" would have been different had counsel conveyed the offer to Frye, because he would have accepted it, and the trial court would have been bound to accept the guilty plea for the misdemeanor charge, for which there was a one-year maximum term of incarceration. Frye, therefore, would have avoided the felony conviction and the three-year term. Hence, the Missouri court held that Frye was

prejudiced, and this prejudice, coupled with the deficient performance in failing to convey the offer, constituted ineffective assistance of counsel in violation of the Sixth Amendment's counsel clause. A8-A23.

The Missouri court recognized that it could not invade the State's control over the charge. Therefore, it remanded the case so that Frye could either insist upon going to trial, or plead guilty to the felony charge or any amended charge the State may have offered. A24.

REASONS FOR GRANTING THE PETITION

Amici respectfully urge this Court to grant the petition because the issues raised are of overriding importance to the states; because the question presented has not been, but should be, settled by this Court; and, because the Missouri court, like many others, has decided the important question raised by the petition in ways that conflict with this Court's relevant decisions.

I. The issues presented by the petition are of overriding importance to the states, because they affect efforts to dispose of criminal cases through plea bargaining

The Missouri court's decision represents a national trend that impairs the states' ability to manage swelling criminal caseloads through plea disposition. This case is emblematic of cases nationwide that have failed to apply, or have misapplied, this Court's precedents. Consequently, there exists a substantial threat to the benefits of plea bargaining recognized by this Court. *Bordenkircher v. Hayes*, 434 U.S. 357, 361-62 (1978); *Santobello v. New York*, 404 U.S. 257, 260-61 (1971); *Brady v. United States*, 397 U.S. 742, 752, 758 (1970). Attorney-Client communications are privileged; the State can only avoid post-conviction litigation regarding an unexecuted plea bargain by declining to extend offers. Alternatively, states face the equal (perhaps greater) impact of exponential litigation emanating from the plea offers they do extend. This Hobson's choice would be easier to digest if it were necessitated by the Constitution and this Court's precedents. Neither requires it.

In *Lafler v. Cooper*, No. 10-209, 79 U.S.L.W. 7 (August 24, 2010), this Court is asked to decide whether a habeas petitioner is entitled to relief where counsel deficiently advised him to reject a plea offer and he was subsequently convicted upon a fair trial. Seventeen states have joined to support the petition, stating that recognition of such a claim "has resulted in a variety of clumsy endeavors to provide a remedy where one is neither deserved nor warranted." Brief of *Amici Curiae*,

Lafler v. Cooper, at 5. This case presents another example, albeit that this criminal case was fairly disposed of by subsequent plea, rather than a trial.

In the Missouri court's view, Frye's constitutional deprivation will be remedied once he is given the option to go to trial or to accept another plea offer, even though either can result in the felony conviction. Yet, the bases for the Missouri court's finding of ineffective assistance – that counsel failed to convey the earlier offer and that Frye received a felony conviction – will still hold true. Thus, even *after* the exercise of the Missouri court's "remedy," the doctrine of *res judicata* could mandate a finding of ineffective assistance. Absent a procedural bar, the State would find itself in an infinite loop of litigation with Frye. Further, the Eighth Circuit has adopted the rule, at issue in *Lafler*, that a subsequent fair trial does not cure the constitutional deprivation. *Engelen v. United States*, 68 F.3d 238, 241 (8th Cir. 1995). Thus, on federal habeas review, the Eighth Circuit would be compelled by its earlier decisions to find that the Missouri court's remedy contravened or unreasonably applied federal law. 28 U.S.C. § 2254(d). This predicament results from a failure to recognize that there is no available remedy, because there is no constitutional violation.

In its Sixth Amendment jurisprudence, this Court has measured prejudice from counsel error against the objective standard of that which constitutes a fair trial, which the counsel guarantee exists to secure. *Hill v. Lockhart*, 474 U.S. 52, 59-60 (1985), *citing Strickland v. Washington*, 466 U.S. at 695 ("As we explained in *Strickland* . . . these predictions of the outcome at a

possible trial, where necessary, should be made objectively . . . ."). In *Strickland*, the Court held that a defendant is prejudiced, and counsel therefore *constitutionally* ineffective, when counsel's deficient performance renders the trial unfair. A trial is not unfair unless the defendant is deprived of a substantive or procedural entitlement. *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). When the entitlement to a fair trial has been entirely waived through plea disposition, a defendant is prejudiced, and counsel therefore *constitutionally* ineffective, when counsel's deficient performance prompted the waiver. The plea of guilty that waived the entitlement to a trial is deemed involuntary. *Hill*, 474 U.S. at 56.

Cases like the one at bar, which measure prejudice by comparing the terms of disposition – whether by trial or subsequent plea – to the *subjective* terms of an earlier plea offer, divest the analysis of objectivity. The analysis focuses not on whether there has been a departure from guaranteed rights as viewed from the Constitution's perspective, but on whether, from the *defendant's* perspective, there has been a departure from a more favorable result.

To this end, courts around the country have developed tests, not recognized by this Court, to assuage a defendant's disappointment. In the Second Circuit, for example, a defendant can show ineffective assistance if, but for attorney error, he would have accepted an offer. *Purdy v. United States*, 208 F.3d 41, 49 (2nd Cir. 2000). The same is true in many states. *E.g., People v. DeBella*, 219 P.3d 390, 400 (Colo. App. 2009), *rev'd on other grounds*, 233 P.3d 664 (Colo. 2010); *Cottle v.*

State, 733 So.2d 963, 967 (Fla. 1999); *Elmore v. State*, 285 Ark. 42, 44 (1985); *State v. Winters*, 317 Wis.2d 401, 421 (2009) (claim that counsel failed to *timely* convey offer).

Other designs exist to ensure that a defendant receive – not what the Constitution entitles him to receive – what he would have preferred. For example, in New York, a defendant can prove ineffective assistance if he shows that a plea offer was made, that counsel failed to inform him of the offer, and that he *would have been willing* to accept it. *People v. Fernandez*, 5 N.Y.3d 813, 814 (2005). Florida requires additionally that the defendant show he would have received a "lesser sentence." *Cottle, supra.*

Further, while most jurisdictions recognize a claim of ineffective assistance in the foregone plea context, there is conflict with respect to the principles that govern adjudication. For example, in Connecticut, a habeas petitioner can establish ineffective assistance if his attorney conveys a plea offer to him, but does not do so "meaningfully." *Sanders v. Commissioner of Correction*, 83 Conn. App. 543 (2004). In contrast, the Colorado court in *DeBella* agreed that:

> Such a rule would open the floodgates to ineffective assistance claims based on a convicted defendant's shallow understanding of the proceedings against him.

DeBella, 219 P.3d at 401.

Some courts require proof that a defendant would have accepted a plea offer, but assume, without a showing, the equally speculative conclusion that the trial court would have accepted and imposed its terms, because, *inter alia*, the inquiry would be "extremely difficult to resolve." *Cottle*, 733 So.2d at 968 (and collecting cases, citations omitted), *quoting Turner v. Tennessee*, 858 F.2d 1201, 1207 (6th Cir. 1988) ("we think it unfair and unwise to require litigants to speculate as to how a particular judge would have acted under particular circumstances").[3] In California, though, it must be established that the court would have approved the plea. *In re Alvarez*, 2 Cal.4th 924 (1992). Moreover, courts disagree on how a defendant can prove he would have accepted an offer. In New York, "[a] defendant's self-serving statement, without more, is insufficient." *Fernandez*, 5 N.Y.3d at 814. In South Carolina, "a defendant's self-serving statement may be sufficient to establish actual prejudice". *Davie v. South Carolina*, 381 S.C. 601, 613 (2009).

As a result of these structures, the system has become mired in litigation addressing whether the State extended an offer; whether counsel conveyed it timely, meaningfully, or at all; whether the defendant would have accepted it; and, whether the court would have imposed its terms. The offers of proof often focus on the "he-said, she-said" dispute over whether and how counsel conveyed the State's offer to the defendant.

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[3] In a different context, in *Corbitt v. New Jersey*, 439 U.S. 212, 221 (1978), this Court stated that plea terms more favorable to the defendant do not invalidate sentence imposed after trial where there is no assurance the court would have accepted the plea; *see infra*, n.5.

Frequently, experts are employed to guide a court in its determination of whether counsel dutifully conveyed the offer. *E.g., DeBella*, 219 P.3d at 400-01 (separate experts testifying that short phone call inadequate to convey offer, and that lengthy psychological examination necessary for counsel to be sure client understood offer).

Courts have developed the law haphazardly. The states and the federal government frequently endure layered litigation to resolve factual disputes regarding a plea offer that was intended to avoid a single trial. *E.g., United States v. Herrera*, 412 F.3d 577, 582 (5th Cir. 2005) (remanding for evidentiary hearing on communications between attorney and client); *Griffin v. United States*, 330 F.3d 733, 739 (6th Cir. 2003) (remanding for evidentiary hearing on whether there is a "reasonable probability" defendant would have accepted offer). All of this notwithstanding that there is no *entitlement* to a plea offer. *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977). Rulings like the Missouri court's lose sight of the common factor in this Court's Sixth Amendment jurisprudence: constitutional deprivation is not measured by what would have happened, but by what a defendant was *entitled* to have happen. This blindness strains governmental resources and the criminal justice system.

The "[d]isposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons." *Santobello*, 404 U.S. at 261. However, an approach that ignores the Constitution's objectivity, and instead finds constitutional prejudice by measuring the disposition

against the subjective terms of an earlier offer, corrodes the benefit of plea bargaining. Among other things, this approach impedes the objective of finality in criminal convictions; instead, it launches the type of litigation that underlies the petition that is now before this Court.

The subjective approach also sacrifices prosecutorial and judicial discretion. "The State to some degree encourages pleas at every important step in the criminal process." *Brady*, 397 U.S. at 750. Prosecutors may withdraw an offer at any time until its terms are "embodied in the judgment of the court." *Mabry v. Johnson*, 467 U.S. 504, 507-08 (1984), *dictum on another point of law disavowed, Puckett v. United States*, 129 S.Ct. 1423, 1430 n.1 (2009). Judges typically have discretion to accept or reject an offer. The subjective approach, which finds prejudice by comparing the judgment to an antecedent plea offer, robs judges and prosecutors of discretion. It permits the *attorney's error*, rather than the Constitution, to fix a defendant's rights, and it fixes those rights by the terms offered to him at the time of the error. Prosecutors and judges must, therefore, ignore later developments, such as continuing criminal conduct by the defendant or the uncovering of additional facts through pre-sentence investigation, in order to effectively remedy the loss of those "rights." *E.g., Ebron v. Commissioner of Correction*, 120 Conn. App. 560, 589, *cert. granted*, 297 Conn. 912 (2010) ("damning" criminal history must be ignored because entry of earlier plea would have ensured its secrecy); *but see Alabama v. Smith*, 490 U.S. 794, 801 (1989) (no violation where sentence imposed after trial greater than that imposed pursuant to vacated plea, because more information available after

trial). Indeed, where a foregone plea offer is followed by a fair trial, the attorney's error has fixed the defendant's "rights" by the plea offer terms, and the jury's deliberation and verdict are nullified.

This Court has clearly stated that the merely executory plea bargain does *not* fix the defendant's rights. *Mabry v. Johnson*, 467 U.S. at 507-08 The creation of a constitutional right from the State's conveyance of a plea offer drains state resources and impedes plea disposition in criminal cases. The resolution of this matter is thus important to the states.

II. The questions raised by the petition have been decided in ways that conflict with this Court's relevant decisions

This Court has repeatedly stated that a defendant's Sixth Amendment rights are fixed by the objective fair trial standard. Where, as here, the contest is between a foregone plea bargain and the dispositive plea, objectivity requires that prejudice be measured not by comparing those events to each other, but by comparing each event to the fair trial standard. The Missouri court's employment of a single inquiry, to determine which plea arrangement was more favorable to Frye, was inappropriate. This Court's precedents, recognizing that the purpose of the Sixth Amendment is to ensure a fair trial, *Strickland*, 466 U.S. at 689, require two separate inquiries in cases like this: 1) Whether counsel's failure to convey the earlier plea offer threatened the delivery of a fair trial; and, 2) Whether the later plea, which waived the trial, was voluntary.

A. Failure to convey a plea offer timely, "meaningfully," or at all, is not an error of constitutional magnitude

The *Strickland* formula determines whether counsel's assistance, when required by the Constitution, has been denied through attorney ineffectiveness. However, *Strickland* does not establish whether counsel's assistance is guaranteed in the first instance. It is *Powell v. Alabama*, 287 U.S. 45 (1932), and its progeny that inform whether counsel's assistance is guaranteed at particular times or events.

Powell guarantees counsel's assistance at trial. But *Powell* also recognizes a pre-trial period, from arraignment to trial, that is "perhaps the most critical period of the proceedings . . . during which the accused requires the guiding hand of counsel." *United States v. Wade*, 388 U.S. 218 (1967), *citing Powell*, 287 U.S. at 57. *Powell's* "critical period" began a recognition that counsel's assistance may be necessary prior to trial, to secure the right to a fair trial. However, some courts have erroneously read *Powell* to hold that counsel's assistance is guaranteed at any event occurring during this "critical period." *See, e.g., Nunes v. Mueller*, 350 F.3d 1045, 1052-53 (9th Cir. 2003).

Powell's "critical period," at which counsel's assistance is *perhaps required*, does not define those times or events at which counsel's assistance is *guaranteed* by the Constitution. Indeed, this Court has recognized a right to counsel even *before* arraignment (i.e., *before* commencement of *Powell's*

"critical period") if counsel's absence may have affected the defense *at trial. Escobedo v. Illinois*, 378 U.S. 478, 486 (1964). "The principle of *Powell v. Alabama* and succeeding cases," this Court has explained, "is that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial . . . ." *Wade*, 388 U.S. at 227.

Thus, this Court "has expanded the constitutional right to counsel only when new contexts appear presenting the same dangers that gave birth initially to the right itself" – dangers that threaten the delivery of a fair trial. *United States v. Ash*, 413 U.S. 300, 310-11 (1973). Counsel's assistance is guaranteed at those events, which this Court has labeled "critical *stages*," that may derogate from the right to a fair trial, regardless of *when* those events occur. *Gerstein v. Pugh*, 420 U.S. 103, 122 (1975) (emphasis added) (This Court "has identified as 'critical stages' those pretrial procedures that would *impair defense on the merits* if the accused is required to proceed without counsel"); *Wade*, 388 U.S. at 227-28 (emphasis added) (certain pretrial events "are not critical stages *since there is minimal risk that . . . counsel's absence . . . might derogate from [the] right to a fair trial*"). Moreover, "the opportunity to cure defects at trial causes the confrontation to cease to be critical." *Ash*, 413 U.S. at 316. Therefore, unless the plea negotiation results in the *acceptance* of a plea offer and accompanying waiver of rights, subsequent fair disposition – whether by another plea arrangement or by trial – causes the earlier plea negotiation to "cease to be critical." Counsel's failure to convey the plea offer, though

professionally repugnant, does not implicate the Constitution at all.

The *Wade-Ash* line of cases defines the stages at which counsel's assistance is guaranteed. The *Strickland-Hill* line of cases informs whether counsel's assistance was, in fact, effectively delivered at those stages. A constitutional quagmire would result if *Strickland-Hill* finds counsel ineffective with respect to an event at which *Wade-Ash* holds counsel is not guaranteed at all. Therefore, it is by necessity that *Strickland-Hill* shares the *Wade-Ash* focus on the fair trial right. Thus, even if the *Strickland-Hill* test for ineffectiveness were applied, it would not be met by the failure to convey the plea offer.

Strickland-Hill does not focus solely on whether counsel's conduct constituted professional negligence. To be sure, courts have found counsel's failure to convey a plea offer offensive to the ethics of the legal profession. *E.g., Lawyer Disciplinary Board v. Turgeon*, 210 W.Va. 181 (2000); *In re Longacre*, 155 Wash.2d 723 (2005). Some jurisdictions recognize a tort sounding in malpractice for failure to convey a plea offer. *E.g., Krahn v. Kinney*, 43 Ohio St.3d 103 (1989); *Falkner v. Foshaug*, 108 Wash. App. 113 (2001). At times, the cause of action is recognized without regard to whether a conviction has been overturned because counsel was *constitutionally* ineffective. *Krahn, supra.* Other courts, recognizing that such a cause of action might result in "a flood of nuisance litigation" from "criminals who 'may be guilty, [but] . . . could have gotten a better deal,'" require a showing of actual innocence. *Foshaug, supra*, at 123-24.

The question raised by this and similar cases, though, is whether failure to convey the offer rises to a *constitutional* violation. A "breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." *Nix v. Whiteside*, 475 U.S. 157, 165 (1986).

> [T]he purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

Strickland, 466 U.S. at 689. Thus, a constitutional deprivation is not presumed merely from counsel's professional error.

There are indeed certain Sixth Amendment contexts where prejudice *is* presumed. *Id.* at 692. Those contexts are narrowly circumscribed. *Mickens v. Taylor*, 535 U.S. 162, 166 (2002). In claims of ineffective assistance of counsel, a defendant *must* affirmatively prove that he has been prejudiced. *Strickland*, 466 U.S. at 693. The Missouri court and courts with similar holdings have abandoned this requirement. This abandonment has turned these cases into constitutional referenda on attorney professionalism, and it has erroneously set them among those cases where prejudice is presumed.

Some courts admit to the adoption of a presumed prejudice rule. In *United States v. Rodriguez*, 929 F.2d 747 (1st Cir. 1991), the First Circuit stated that "a failure by defense counsel to inform a defendant of a plea offer can constitute ineffective assistance on grounds of incompetence alone." *Id.* at 753. The Florida Supreme Court also agrees that "an inherent prejudice" emanates from the foregone plea.[4] *Cottle*, 733 So.2d at 969; *see also*, *State v. James*, 48 Wash.App. 353, (1987) (if counsel failed to convey offer, "we would have no hesitation in concluding that [defendant was] denied effective assistance of counsel on this error alone.").

Other courts abandon the prejudice requirement through an unwitting inversion of the *Strickland-Hill* formula – instead of finding ineffective assistance resulting from prejudice, they find prejudice from a premature conclusion that there has been ineffective assistance. *E.g., Nunes*, 350 F.3d at 1052 (defendant lost right to effective assistance in conveyance of plea, *therefore* he was prejudiced); *Ebron v. Commissioner of Correction, supra*, 120 Conn. App. at 582 (same).

The case at bar is an example of the latter approach. In its prejudice analysis, the Missouri court recognized that there is no entitlement to a plea offer. The Missouri court reasoned, though, that the entitlement Frye lost was an entitlement to the effective assistance of counsel. A22. Thus, Frye was prejudiced *because* he lost the entitlement to effective assistance.

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[4] In *Florida v. Nixon*, 543 U.S. 175, 179, 189 (2004), this Court found error in the Florida Supreme Court's presumption of prejudice.

Under *Strickland*, a defendant receives ineffective assistance *because* he was prejudiced.

The trend toward finding prejudice from a lost plea appears to have started long before *Strickland* and *Hill*. In *People v. Whitfield*, 40 Ill.2d 308, 311 (1968), the Illinois Supreme Court stated that "it follows logically that if a defendant has a right to make a decision to plead not guilty, he also has the right to make the decision to plead guilty." *See also, Beckam v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1981). Most, if not all, of the United States Courts of Appeals recognize a claim of ineffective assistance of counsel for a lost plea bargain, but many have not undertaken an independent analysis of the constitutional implications. Instead, they have relied on other jurisdictions' analyses, and much can be traced to the Third Circuit's pre-*Strickland-Hill* decision in *Caruso v. Zelinsky*, 689 F.2d 435 (1982). *E.g., United States v. Day*, 969 F.2d 39, 44 (3rd Cir. 1992)(Third Circuit citing its decision in *Caruso*); *Turner v. Tennessee*, 858 F.2d 1201, 1207 (6th Cir. 1988) (citing *Caruso*); *United States v. Blaylock*, 20 F.3d 1458, 1466 (9th Cir. 1994) (citing *Day*, which cited *Caruso*); *Teague v. Scott*, 60 F.3d 1167, 1170 & n.13 (5th Cir. 1995) (citing *Caruso* and *Blaylock*, which cited *Day*); *Engelen v. United States*, 68 F.3d 238, 241 (8th Cir. 1995) (citing *Caruso*, *Blaylock*, and *Turner*, which cited *Caruso*).[5]

[5] This Court vacated the Sixth Circuit's *Turner* decision in light of its ruling in *Smith, supra*, 490 U.S. 794. On remand, the Sixth Circuit persisted that *Turner* was "unaffected" by *Smith*, and affirmed the original opinion. The State petitioned this Court a second time, challenging the lower court's authority to order a remedy, but not raising the issues presented in the instant petition.

(continued...)

Caruso, having been decided before *Strickland-Hill*, does not contemplate *Strickland's* prejudice requirement, as amplified by *Fretwell*. *Caruso* drew its conclusion, that a subsequent fair trial does not cure a foregone plea, from this court's holding in *Rose v. Mitchell*, 443 U.S. 545 (1978). *Caruso, supra*, at 438. In *Rose*, this court held that racial discrimination in jury selection was so systemically cancerous that *prejudice need not be shown*. *Rose, supra*, at 557.

Hence, *Caruso's* legacy is a house built upon a foundation in which the cornerstones of *Strickland* and *Hill* – and their prejudice requirement – are notably missing. For example, the *Day* court stated that "[t]he Sixth Amendment right to effective assistance of counsel guarantees *more than* the Fifth Amendment right to a fair trial." *Day*, 969 F.2d at 45 (emphasis added). In fact, "the Sixth Amendment right to counsel exists . . . in order to protect the fundamental right to a fair trial." *Strickland*, 466 U.S. at 684.

Notwithstanding *Hill*, many courts maintain *Whitfield's* bilateral view in foregone plea cases. *E.g., Williams v. Jones,* 583 F.3d 1254, 1255 (10th Cir. 2009) ("This case merely presents the converse of *Hill*"); *Coulter v. Herring*, 60 F.3d 1499, 1504 n. 7 (11th Cir. 1995) ("we believe that *Hill* also applies when a defendant decided to accept a plea offer.");

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[5](...continued)
Tennessee v. Turner, No. 91-776, 60 U.S.L.W. 3439 (December 17, 1991). The petition was denied. *Tennessee v. Turner,* 492 U.S. 902 (1992). Subsequently, this Court granted certiorari on the question of remedy. *Arave v. Hoffman*, 552 U.S. 1008 (2007), but the question became moot. *Arave v. Hoffman,* 552 U.S. 117 (2008).

Commonwealth v. Mahar, 442 Mass 11, 14 (2004) (citing *Hill*, and stating that the right to counsel "plainly includes counsel's effective assistance in connection with the defendant's decision whether to accept or reject a plea bargain offer"); *Cottle*, 733 So.2d at 967; *People v. Curry*, 178 Ill.2d 509 (1997), *citing Whitfield*, *supra*. *Hill* does not require such symmetry. The *Hill* rule is one-sided because its focus is on the fair trial right – a right which plea *forfeiture* does not threaten. *Roe v. Flores-Ortega*, 528 U.S. 470, 485 (2000) ("the decision whether to plead guilty (*i.e.*, waive trial) rest[s] with the defendant . . . [thus] counsel's advice in *Hill* might have caused [him] to forfeit a judicial proceeding to which he was otherwise entitled.").

Caruso's legacy, which sacrifices *Strickland-Hill's* prejudice requirement, also sacrifices *Fretwell's* amplification that *Strickland-Hill* prejudice must be based on the loss of a substantive or procedural entitlement. *Strickland* itself set forth a non-exhaustive list of things to which a defendant has no entitlement and which, therefore, "should not be considered in the prejudice determination." *Strickland*, 466 U.S. at 695. *Fretwell* expounded that *Strickland* prejudice is shown when a defendant is deprived of a "substantive or procedural right to which the law entitles him." *Fretwell*, 506 U.S. at 372.

Thus, when this Court held, in *Nix*, *supra*, 475 U.S. 157 (1986), that the loss of an opportunity to testify falsely was not prejudicial because there is no right to do so, it was not merely because false testimony is lawless. Rather, it was because false testimony is within a broader category of things to which there is no

entitlement. *Fretwell*, 506 U.S. at 370 n. 3. Likewise, in *Fretwell*, counsel's failure to object based upon an incorrect interpretation of the law was not prejudicial, even though the objection *would have* been sustained. There is no *entitlement* to an incorrect interpretation of the law. In *Williams v. Taylor*, 529 U.S. 362 (2000), this Court overruled a determination that *Strickland* prejudice was absent where there *was* a loss of an entitlement. Some have misinterpreted this Court's reversal in *Williams* to be not a reversal of the lower court *pursuant to Fretwell*, but a reversal of *Fretwell* itself. *E.g., Ebron*, 120 Conn. App. at 581 ("we note that the United States Supreme Court has revisited the *Fretwell* decision in *Williams v. Taylor*").

The failure to reverse the pre-*Strickland-Hill* trend has led to a struggle to turn the lost plea into a lost entitlement. Some courts have found an entitlement to the offer once it has been extended by the State. *E.g., Nunes*, 350 F.3d at 1052 (recognizing "right to counsel's assistance in making an informed decision once a plea had been put on the table."); *Ebron*, 120 Conn. App. at 582 (issue is not whether defendant was deprived of plea offer, but whether he was deprived of effective assistance "with respect to a plea offer freely made by the state."). This Court has rejected the notion that entitlement springs from a State's discretionary act in extending an offer. *Mabry*, 467 U.S. at 508 & n.5; *see also Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981).

Some courts have found an entitlement to a "lesser sentence" which has been lost by the forfeiture of the plea bargain. *E.g., Ebron*, 120 Conn. App. at 582;

Engelen, 68 F.3d at 241). This Court has held that a lesser sentence does not constitute prejudice, unless it is legally incorrect. *Glover v. United States*, 531 U.S. 198, 204 (2001); *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

Here, the Missouri court recognized that a "lesser sentence," standing alone, is not an appropriate gauge of prejudice. A22-A23 & n.5. It found Frye was prejudiced, though, because he lost the opportunity to plead to the reduced misdemeanor charge, which carried a lesser maximum sentence. *Id.* The question, then, is whether Frye was *entitled* to the misdemeanor notwithstanding that his conduct warranted the felony. This Court has answered that question in the negative. In *United States v. Goodwin*, 457 U.S. 368 (1982), the Court, citing its "acceptance of plea negotiation as a legitimate process," held that due process is not offended by increased charges following a foregone plea deal, where the criminal conduct meets the definition of the crime charged (absent an improper motive such as prosecutorial vindictiveness or racial bias). *Id.* at 378-382 & nn. 10, 11; *see also, Bordenkircher*, 434 U.S. at 364 (In case where enhanced charges followed breakdown in plea negotiations, stating that if conduct is "properly chargeable" under a constitutionally valid statute, "some selectivity in enforcement is not in itself a federal constitutional violation").

In sum, courts have resisted reversing the *pre-Strickland-Hill* trend of finding a constitutional violation in the foregone plea context. In cases like Frye's, which are disposed by plea, this resistance has led to the conclusion that the foregone plea invalidates

the disposition. This Court's precedents command otherwise.

B. A foregone plea offer does not render a subsequent guilty plea invalid

The Missouri court reasoned that the lost plea bargain invalidated Frye's subsequent plea of guilty. A22 (plea offer can be withdrawn by the prosecution "unless . . . the [withdrawn] plea agreement impaired the voluntariness of the [dispositive] guilty plea"). Counsel's failure to convey a plea offer does not invalidate a disposition by subsequent plea.

In *Brady, supra*, 397 U.S. 742, this Court recognized that a plea is a defendant's admission in open court that he has committed the act with which he is charged, as well as his consent to judgment without trial. *Id.* at 748. The waiver of trial, like all constitutional rights, must be voluntary, knowing and intelligent. *Id.* The voluntariness of a plea is measured by consideration of all surrounding relevant circumstances. *Id.* at 749. However, even if a circumstance is a "but for" cause of a plea, it does not mean that it caused the plea to be "coerced and invalid as an involuntary act." *Id.* at 750. Here, the failure to convey the earlier plea offer was a "but for" cause of Frye's ultimate plea – disposition through the earlier plea would have truncated the proceedings. But, as in *Brady*, this circumstance did not render invalid the plea by which Frye was adjudged.

In *Puckett, supra*, 129 S.Ct. 1423, this Court held that a prosecutor's breach of a plea agreement "does not

cause the guilty plea, *when entered*, to have been unknowing or involuntary." *Id.* at 1430 (emphasis added). In the context of a plea breach, this Court noted, "the question with regard to prejudice is not whether Puckett would have entered the plea had he known about the *future* violation." *Id.* at 1433 n. 4 (emphasis added).

Conversely, where this Court has heard claims that guilty pleas were rendered involuntary due to a deprivation of constitutional rights that *preceded* the decision to plead guilty, it has stated that:

> The focus of federal habeas inquiry is the nature of the advice and the voluntariness of the plea, not the existence as such of an antecedent constitutional infirmity.

Tollett v. Henderson, 411 U.S. 258, 265-66 (1973). Here, even if the failure to convey the earlier plea offer constituted a deprivation of the right to counsel, it was an "antecedent infirmity" that could not have made Frye's plea involuntary "when entered."

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

Brady, 397 U.S. at 755 (citation omitted). Here, there is no indication that Frye's counsel performed deficiently with respect to the *dispositive* plea. Nor is there an indication that Frye was unaware of the direct *consequences* of the dispositive plea, or the value of the commitments that were made to him as part of that plea, or that the plea was improperly induced. Accordingly, the plea must stand.

In disposing of cases by plea, "scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is a substantial doubt that the State can sustain its burden of proof." *Brady*, 397 U.S. at 752. Decisions like the Missouri court's reopen cases already adjudicated, without a showing that there is some doubt respecting the merits of a case – the very showing upon which the calculi established by this Court's ineffective assistance and plea validity cases rest. Thus, "scarce judicial and prosecutorial resources" are being squandered.

III. CONCLUSION

The petition should be granted.

Respectfully submitted,

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