

10-444 SEP 27 2010

No. \_\_\_\_\_ OFFICE OF THE CLERK

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IN THE  
**Supreme Court of the United States**

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**STATE OF MISSOURI,**  
*Petitioner,*

v.

**GALIN EDWARD FRYE,**  
*Respondent.*

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

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**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?

**PARTIES TO THE PROCEEDING**

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

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## 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.<sup>1</sup> 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

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<sup>1</sup> 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. Cronin*, 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).<sup>2</sup> 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,

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<sup>2</sup> 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,

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