No. 10-209 & 10-444

In the Supreme Court of the United States

BLAINE LAFLER,
Petitioner,
v.
ANTHONY COOPER,
Respondent.

STATE OF MISSOURI,
Petitioner,
v.
GALIN E. FRYE,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

BRIEF OF *AMICUS CURIAE* CENTER ON THE ADMINISTRATION OF CRIMINAL LAW, NEW YORK UNIVERSITY SCHOOL OF LAW, SUPPORTING RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The Center on the Administration of Criminal Law (the "Center") is an organization dedicated to developing and promoting best practices in the administration of criminal justice through academic research, litigation, and participation in the formulation of public policy. The Center's litigation component aims to use its empirical research and experience with criminal justice practices to assist in important criminal justice cases in state and federal courts throughout the United States.

The Center is well-suited to provide historical and empirical context to aid this Court's understanding of the importance of the Sixth Amendment right to effective assistance of counsel during the plea process. This brief provides that context and also proposes prophylactic measures that would, if adopted, reduce the risk going forward that counsel's ineffective assistance will deprive a defendant of an opportunity to make informed decisions about his defense during plea negotiations.[1]

SUMMARY OF ARGUMENT

This Court has recognized that "[t]he disposition of criminal charges by agreement between the prosecutor and the accused … is an essential component of the

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* represents that this brief was authored solely by *amicus curiae* and its counsel and that no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties were notified of *amicus curiae*'s intention to file this brief in accordance with Supreme Court Rule 37, and all parties consent to the filing of this brief.

administration of justice." *Santobello v. New York*, 404 U.S. 257, 260 (1971). The prevalence of plea bargaining has revolutionized criminal law in this country. Because most defendants forgo their right to trial and resolve criminal charges against them through a plea, the plea process determines the outcomes of the overwhelming majority of criminal cases in the United States.

The obvious disparities in power, information, and resources between defendants and prosecutors make effective assistance of counsel in plea negotiations crucial. The right to effective assistance of counsel is an essential check on the operation of the plea system and is critical to ensuring that defendants' plea decisions are voluntary and intelligent. Accordingly, this Court has recognized that effective assistance of competent counsel is the touchstone for the constitutional legitimacy of the plea process. *See, e.g.*, *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

In *Hill v. Lockhart*, this Court held that "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." 474 U.S. 52, 58 (1985). "*[I]n the context of guilty pleas*," this Court explained, *Strickland*'s prejudice requirement "focuses on whether counsel's constitutionally ineffective performance *affected the outcome of the plea process*." *Id.* at 58-59 (emphasis added). Hill argued that his plea was involuntary because his attorney had misinformed him as to when he would be eligible for parole. On those facts, therefore, Hill had to "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.

Petitioners and the United States as *amicus curiae* miscast *Hill* as identifying the *only* circumstance in which the right to counsel at the plea bargain stage may be effectively enforced. The Court in *Hill* naturally described the showing of prejudice required in a way that made sense in that particular context: there, the defendant pleaded guilty based on allegedly incorrect information about the consequences of his plea. But the Court conspicuously did *not* attempt to announce in *Hill* a one-size-fits-all rule for every circumstance. Rather, the Court emphasized that *Strickland* prejudice may manifest itself in a variety of ways. *See id.* at 59-60.

When counsel's deficient performance deprives a defendant of a meaningful opportunity to consider a plea agreement, that defendant's right "to make [a] fundamental decision[] regarding his case," *Jones v. Barnes*, 463 U.S. 745, 751 (1983), has been irrevocably compromised. As the federal courts of appeals have uniformly concluded (along with most state appellate courts that have considered the question), such a defendant demonstrates prejudice if there is a "reasonable probability that" "counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59. In other words, defendants like Cooper and Frye—who either were deprived entirely of the opportunity to consider a plea offer, or rejected an offer based on counsel's patently deficient advice—demonstrate prejudice if there is a reasonable probability that, but for counsel's unprofessional errors, they would have accepted a lawful plea agreement offered by the prosecution.

The prejudice suffered by such defendants cannot be "cured" by a subsequent fair trial. Once the deprivation of the right to make a fundamental decision about one's defense is complete, a showing of prejudice flowing from *that deprivation* is sufficient to satisfy *Strickland*. That concept of prejudice fits comfortably within this Court's precedents, which establish that the Sixth Amendment right to effective assistance of counsel is not merely in service of a defendant's Fifth Amendment right to a fair trial. Recognizing prejudice in such circumstances is essential to ensuring that the right to effective assistance of counsel at every critical phase of criminal proceedings is not an empty promise at the plea phase—which, as a practical matter, is usually the only phase of proceedings. Moreover, because States are free to devise, as a matter of state law, appropriate remedies for violations of their citizens' federal constitutional rights, this Court should defer to the remedy fashioned by the courts of the State of Missouri in No. 10-444.

When the State offers a plea, it is making a statement that the interests of justice and enforcement of law are adequately served by that offer. Almost by definition, a higher sentence is overly punitive in the circumstances by the State's own calculus. Of course, where a defendant makes a fully informed decision to reject a plea offer and go to trial, it is only reasonable and fair that acceptance of a later offer (if any), or disposition without a plea deal, result in a harsher sentence. But when a defendant's "rejection" is simply the result of a failure of defense counsel to communicate the offer, or the result of patently deficient advice concerning the offense with which the defendant is charged, the interests of justice are not

served by over-punishment. It therefore benefits both defendants and the prosecution to ensure that defendants make a fully informed decision about any plea bargain offered. Simple prophylactic procedures, including ensuring that all plea offers are made on the record in the presence of the defendant, would further that goal. A few States have already adopted such procedures, designed to safeguard defendants' rights to make critical decisions about their defense in light of all the relevant information available.

ARGUMENT

I. A MEANINGFUL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA NEGOTIATIONS IS DEMANDED BY THE SIXTH AMENDMENT AND IS A CRITICAL COMPONENT OF THE ADMINISTRATION OF CRIMINAL LAW

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. In the United States today, virtually all criminal defendants resolve criminal charges by pleading guilty. Absent the effective assistance of counsel, the disparities in information and power inherent in that process would undermine confidence in the outcome. As this Court has long recognized, defendants are entitled to effective assistance of counsel during the critical plea bargaining phase so that they can make voluntary and intelligent decisions during that process. *Hill*, 474 U.S. at 56; *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). Contrary to petitioners' argument, the Sixth Amendment right to effective assistance of counsel protects more than a defendant's right to a fair trial; it

also protects a defendant's right to make informed decisions about his or her defense—including whether to plead guilty or proceed to trial. This Court should continue to safeguard that right by holding that a defendant may demonstrate prejudice by showing that, but for counsel's unprofessional errors, he would have accepted a pending offer for a lesser sentence than the one he ultimately received through a subsequent plea or after trial. Only by making the right to counsel at the plea stage meaningful can this Court ensure a tolerable degree of confidence in the plea process and its outcomes.

A. Confidence In The Plea Process And Its Outcomes Is Essential To The Administration Of Criminal Law

Nearly all criminal charges in the U.S. are resolved through plea agreements. According to the United States Sentencing Commission, "[i]n fiscal year 2009, more than 96 percent of all offenders [pleaded guilty], a rate that has been largely the same for ten years."[2] Statistics from state courts are virtually identical. In 2006, the most recent year for which data are available, some 95% of convictions obtained in state courts in the seventy-five most populous counties in the U.S. were obtained through guilty pleas.[3] "[P]lea bargaining … is not some adjunct to the criminal justice system; it *is*

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[2] U.S. Sentencing Commission, *Overview of Federal Criminal Cases—Fiscal Year 2009*, at 3 (2010), *available at* http://www.ussc.gov/Research/Research_Publications/2010/20101230_FY09_Overview_Federal_Criminal_Cases.pdf.

[3] *See* Thomas H. Cohen & Tracey Kyckelhahn, *Felony Defendants in Large Urban Counties, 2006*, Bureau of Justice Statistics Bulletin (U.S. Dep't of Justice), rev. July 15, 2010, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf.

the criminal justice system." Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1911-12 (1992). Confidence in the fairness of outcomes achieved through the plea process is therefore absolutely central to the administration of criminal law in this country.

The modern trend favoring guilty pleas was driven in large part by prosecutors' desire to lighten their caseloads. *See* George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America*, 44, 124 (2003).[4] Because most criminal cases are resolved without trial, a prosecutor's decision about what plea to offer and accept frequently amounts to a final adjudication of guilt and punishment. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 Stan. L. Rev. 869, 878 (2009).

Lawmakers have taken account of this phenomenon, and "now legislate[] with precisely this framework of prosecutorial power over pleas in mind." *Id.* at 880. Indeed, "the Department of Justice and the various United States Attorneys' Offices often argue before Congress that legislation with inflated or mandatory punishments should be passed or retained because those laws give prosecutors the leverage they need to exact pleas and to obtain cooperation from defendants." *Id.*[5] As a result, state and federal

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[4] The practice has gained widespread support from judges for similar reasons. Plea bargaining not only creates more space on judges' calendars for growing civil dockets, Fisher, *supra*, at 123-24, it also guards against "the reputational blow of a reversal." *Id.* at 176.

[5] *See* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 728 & n.5 (2005) (providing examples).

prosecutors can typically choose from a menu of charges—and, therefore, from a menu of potential sentences, often including mandatory minimums. That prosecutorial leverage puts overwhelming pressure on defendants to plead and accept an offer of a lesser sentence. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 538 (2001).

Plea agreements may therefore result in sentences that reflect (more accurately than post-trial sentences) the intended punishment for the crime. Because "[p]leas and cooperation with the government are the preferred norm, not the exception," Barkow, *Institutional Design*, 61 Stan. L. Rev. at 880, "[c]riminal statutes now commonly permit (or purport to require) draconian punishments that no one expects to be imposed in the typical case"; "'[l]eniency' has therefore become not merely common but a systemic imperative." Sanford H. Kadish et al., *Criminal Law and Its Processes: Cases and Materials* 1006 (8th ed. 2007); *see also* Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 Stan. L. Rev. 1399, 1402 (2003) ("Given the extreme severity of sentencing in the United States by world standards … it is hard to take seriously the notion that ninety percent of those serving our remarkably heavy sentences are the beneficiaries of 'bargains.'"); Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 Crim. L.Q. 67, 87 (2005); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. Pa. L. Rev. 79, 129–30 (2005).

Because the punishment imposed through plea bargaining is, in a very real sense, the sentencing

norm, the public must have confidence that the results of that process reflect a fair and reliable outcome reached through a fundamentally fair process.

B. The Legitimacy Of Plea Bargaining Has Historically Depended On Effective Assistance Of Counsel To Counter The Inherently Coercive And Asymmetric Confrontation Between Prosecutor And Defendant

Effective assistance of counsel is central to the institutional legitimacy of plea deals, both because of the inherent risk of coercion during plea negotiations, and because of the stark information and other asymmetries between the parties.

Absent effective counsel, criminal defendants would be wildly disadvantaged vis-à-vis prosecutors at the bargaining table. In 2009, "[m]ore than half of the federal offenders sentenced … had not completed high school and only 5.4 percent of offenders had completed college." U.S. Sentencing Commission, *Overview of Federal Criminal Cases – Fiscal Year 2009*, at 3 (2010), *available at* http://www.ussc.gov/Research/Research_Publications/2010/20101230_FY09_Overview_Federal_Criminal_Cases.pdf. In light of this Court's recognition that "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law," *Powell v. Alabama*, 287 U.S. 45, 69 (1932), these statistics are a stark reminder that educated defendants are a relative rarity in our criminal justice system.

Beyond the obvious information and resource disparities between prosecutors and defendants, and in large part due to the systemic legislative "correction" for plea bargaining, *see supra*, 7-8, there are significant

disparities between sentences imposed through pleas and those imposed after a trial. Defendants who choose to go to trial thus risk suffering a severe "trial penalty." Candace McCoy, *Bargaining in the Shadow of the Hammer: The Trial Penalty in the USA*, *in The Jury Trial in Criminal Justice* 23, 25 (Douglas D. Koski ed., 2003); *see also* Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 Colum. L. Rev. 959, 992 (2005) (average penalty ranged from 13 to 461 percent depending on the state and the offense); Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. Mich. J.L. Reform 345, 347–48 (2005) (average sentence for federal defendants who go to trial is three times higher than the sentence for defendants who plead to similar charges). The trial penalty phenomenon only amplifies the risk of coercion inherent in all plea bargaining negotiations.[6]

The trial penalty burdens the innocent as well as the guilty. Even innocent defendants may choose to

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[6] The true trial penalty is likely substantially higher than these statistics suggest, given that most studies compare similar charges in assessing the trial penalty and do not account for the common practice of allowing a defendant to plead to a lesser offense than the one initially charged. *See* Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 Marq. L. Rev. 213, 227–28 (2007).

Prosecutors may also seek to impose additional penalties on those who exercise their right to go to trial, including property forfeiture, charges against friends and family, civil or regulatory sanctions, or immigration consequences. Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 Cal. L. Rev. 1585, 1611 & n.97 (2005).

plead guilty rather than face trial and the attendant risk of a much harsher sentence. Indeed, some scholars have argued that such defendants are even more risk-averse than their guilty counterparts—and therefore more likely to accept a plea. Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 Yale L.J. 2011, 2012 (1992).[7] And because sentencing guidelines often prescribe harsher punishments for those claiming innocence (and thus not accepting responsibility), the pressure on innocent defendants to plead guilty is substantial. *See* Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 Am. Crim. L. Rev. 1363, 1394–98 (2000). The effects of this pressure are evident at least in the federal courts, where acquittal rates have steadily dropped as guilty pleas have risen. Wright, *Trial Distortion*, 154 U. Pa. L. Rev. at 102 (showing that acquittal rates fell from a peak of 5.5% of adjudicated case outcomes in 1971 to just 1% in 2002). Although guilty pleas have crowded out all trial outcomes, they have taken the heaviest toll on acquittals. *Id.* at 106.

Driven by the inherent disparities between defendants and prosecutors, as well as the grave risk of

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[7] *See also* Innocence Project, *250 Exonerated, Too Many Wrongfully Convicted* 32-33 (2010), *available at* http://www.innocenceproject.org/docs/InnocenceProject_250.pdf ("27% [of 250 inmates exonerated by DNA evidence] were convicted based at least in part on false confessions, admissions or guilty pleas."); *see also* Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 74 (2008) (analyzing the cases of 200 convicts exonerated by DNA testing, 9 of whom had pleaded guilty to a rape or murder that they did not commit).

coercion at the bargaining table, this Court has long recognized a Sixth Amendment right to effective assistance of counsel during the plea process. The need for counsel's assistance to remedy information and other asymmetries between prosecutors and defendants is a consistent thread throughout this Court's Sixth Amendment decisions. *See, e.g.*, *Williams v. Kaiser*, 323 U.S. 471, 476 (1945) (because "[a] layman is usually no match for the skilled prosecutor," the right to effective counsel during plea negotiations is "'fundamental.'") (quoting *Powell*, 287 U.S. at 70); *id.* at 475-76 ("Only counsel [can] discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate."); *Van Moltke v. Gillies*, 332 U.S. 708, 721 (1948) ("Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered."); *Santobello v. New York*, 404 U.S. 257, 262 (1971) ("[T]he adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances."); *Hill*, 474 U.S. at 56 ("Where … a defendant is represented by counsel during a plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'") (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

Petitioners' and the United States' argument that the right to counsel attaches only at the entry of a guilty plea cannot be squared with these and other

precedents of this Court recognizing that the Sixth Amendment right to effective assistance of counsel attaches at the initiation of criminal proceedings against the accused, for any "'critical' stage[]" of those proceedings. *Maine v. Moulton*, 474 U.S. 159, 170 (1985) (citation omitted); *contra Frye* Petr. Br. 19; *Lafler* Petr. Br. 12 n.3; *Frye* U.S. Br. 23 n.6; *Lafler* U.S. Br. 18.

Moulton, for example, involved law enforcement's surreptitious recording of conversations between the defendant and a codefendant cooperator, after the defendant had been charged. 474 U.S. at 176-77. Holding that the defendant's Sixth Amendment right to counsel had been violated, the Court explained that the right attaches at the initiation of criminal proceedings, because "'[i]t is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" *Id.* at 170 (quoting *United States v. Gouveia*, 467 U.S. 180, 189 (1984)). In light of the arguments pressed here by petitioners and the United States, it is worth quoting the Court's opinion in *Moulton* at some length:

> The assistance of counsel cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself. Recognizing that the right to the assistance of counsel is shaped by the need for the assistance of counsel, we have found that the right attaches at earlier, 'critical' stages in the criminal justice

> process "where the results might well settle the accused's fate …."

Id. (citation omitted).

Plea negotiations invariably take place after the initiation of criminal proceedings, and no phase of criminal proceedings requires a more direct confrontation between the defendant and prosecutor or is more likely to "settle the accused's fate." Thus, as this Court very recently reaffirmed, "the *negotiation of a plea bargain* is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) (emphasis added).

C. A Defendant Who Is Deprived Of The Opportunity To Make An Informed Decision Regarding The Prosecution's Plea Offer Is Prejudiced If He Receives A Harsher Sentence Than He Would Have, But For Counsel's Unprofessional Errors

Under *Hill*, a defendant who accepts a plea based on counsel's deficient advice demonstrates *Strickland* prejudice if there is "a reasonable probability" that the "outcome of the plea process" would have been different but for counsel's errors. 474 U.S. at 59. In the instant cases, respondents Cooper and Frye were denied the opportunities to make informed decisions about whether to accept pending plea offers. As the federal courts of appeals uniformly have concluded, defendants like Cooper and Frye demonstrate prejudice under *Strickland* where there is a reasonable probability that the outcome of the plea process would have been different—*i.e.*, that they would have *accepted* the State's pending plea offer—but for counsel's unprofessional errors.

In *Strickland*, this Court adopted a two-part standard for evaluating claims of ineffective assistance of counsel. The defendant must show that (1) "counsel's representation fell below an objective standard of reasonableness," 466 U.S. at 687-88; and that (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

Applying that test in *Hill*, this Court held that "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." 474 U.S. at 58. "*[I]n the context of guilty pleas*," this Court explained, *Strickland*'s prejudice requirement "focuses on whether counsel's constitutionally ineffective performance *affected the outcome of the plea process*." *Id.* at 58-59 (emphasis added). Hill argued that his plea was involuntary because his attorney had misinformed him as to when he would be eligible for parole. On those facts, therefore, Hill had to "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.

Petitioners and the United States as *amicus curiae* misread *Hill* as identifying the *only* circumstance in which there can be prejudice from the ineffective assistance of counsel at the plea bargain stage. *Hill* is not so circumscribed. The Court in *Hill* naturally described the showing of prejudice required in a way that made sense in that particular context: there, the defendant pleaded guilty instead of proceeding with trial, and allegedly made that decision based on incorrect information about the consequences of his plea. But the Court did *not* suggest, much less hold,

that a defendant could not demonstrate *Strickland* prejudice, as a matter of law, unless he or she had entered a guilty plea relying on the deficient advice of counsel.

When counsel's deficient performance deprives a defendant of a meaningful opportunity to consider a plea offer, that defendant's right "to make [a] fundamental decision[] regarding his case," *Jones v. Barnes*, 463 U.S. 745, 751 (1983), has been irrevocably compromised. *See also Nunes v. Mueller*, 350 F.3d 1045, 1053 (9th Cir. 2003) (quoting *Jones* and holding that such a defendant has been deprived of "the right to participate in the decision as to, and to decide, his own fate—a right also clearly found in Supreme Court law"); *In re Alvernaz*, 830 P.2d 747, 755 (Cal. 1992) (citing *Jones* for the proposition that "a defendant possesses a constitutionally protected right to participate in the making of certain decisions which are fundamental to his or her defense").

A defendant's right to make fully informed decisions about his or her case is distinct from the right to a fair trial, but is no less important, particularly in view of the high proportion of criminal cases resolved through plea bargaining. As this Court recently reminded in the choice-of-counsel context, "[i]t is true enough that the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." *United States v. Gonzales-Lopez*, 548 U.S. 140, 145 (2006); *see also Williams v. Jones*, 571 F.3d 1086, 1092 (10th Cir. 2009) ("*Gonzalez-Lopez* recognizes that counsel can be ineffective where 'his mistakes have harmed the defense.' Surely, the plea process is part of the

defense.") (quoting *Gonzalez-Lopez*, 548 U.S. at 147), *cert. denied*, 130 S. Ct. 3385 (2010).

As the federal courts of appeals have uniformly concluded, such a defendant demonstrates prejudice under *Strickland* and *Hill* if there is a "reasonable probability that" "counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59. In other words, defendants like Cooper and Frye—who either were deprived entirely of the opportunity to consider a plea offer, or rejected an offer based on counsel's patently deficient advice—demonstrate prejudice if there is a reasonable probability that, but for counsel's unprofessional errors, they would have accepted the plea.

The prejudice suffered by such defendants cannot be "cured" by subsequent constitutionally adequate procedures. Once the deprivation of the right to make a fundamental decision about one's defense is complete, a showing of prejudice flowing from that deprivation is sufficient to satisfy *Strickland.* That concept of prejudice fits comfortably within this Court's precedents, and it is essential to ensuring that the right to effective assistance of counsel at every critical phase of criminal proceedings is not an empty promise at the plea phase—which, as a practical matter, is often the most critical and indeed the only phase of proceedings.

Petitioners and their *amici* create a straw man by framing the issue as whether the defendants have a constitutional right to a plea bargain, or a right to receive the lowest possible sentence. Defendants, of course, do not have a freestanding right to receive a particular plea offer or any plea offer at all. But defendants also do not have a constitutional right to an appeal, *Jones*, 463 U.S. at 751, yet defendants are

entitled to effective assistance of counsel when there is an opportunity to appeal, *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000).

"Incompetent advice [during plea bargaining] distorts the defendant's decisionmaking process," *Padilla*, 130 S. Ct. at 1493 (Alito, J., concurring), thereby depriving him or her of the right "to make certain fundamental decisions regarding [his] case," including "whether to plead guilty," *Jones*, 463 U.S. at 751; *see also Frye* U.S. Br. at 17 ("[A] defendant must establish that counsel's deficient performance deprived him of a 'substantive or procedural right to which the law entitles him.'") (citation omitted). For these reasons, petitioners' and the Solicitor General's reliance on *Lockhart v. Fretwell*, 506 U.S. 364 (1993), and *Nix v. Whiteside*, 475 U.S. 157 (1986), is entirely misplaced. *See, e.g.*, *Frye* U.S. Br. 15-17.

In *Whiteside*, the defendant petitioned for habeas corpus relief from his state murder conviction on the ground that his counsel was ineffective for refusing to cooperate in presenting perjured testimony. 475 U.S. at 162-63. Because the attorney conformed to "accepted norms of professional conduct" in refusing to assist perjury against his client's wishes, this Court "discern[ed] no failure to adhere to reasonable professional standards that would in any sense make out a deprivation of the Sixth Amendment right to counsel." *Id.* at 171. In other words, the defendant's claim failed step one of *Strickland*, so the later discussion of whether Whiteside was "prejudiced" by his failure to perjure himself is superfluous dicta. *See id.* (counsel's "representation of Whiteside f[ell] well within accepted standards of professional conduct and the range of reasonable professional conduct acceptable

under *Strickland*"). In the instant cases, by contrast, there is no genuine dispute that counsel's errors fell outside "accepted standards of professional conduct." (As the Solicitor General points out, the questions presented are premised on the fact that they did. *Frye* U.S. Br. 13 n.2.)

Moreover, nothing in this Court's discussion of prejudice in *Whiteside* suggests, much less "confirm[s]," *Frye* U.S. Br. 15, that there is no "cognizable prejudice" when counsel's unprofessional errors undermine the fairness of the plea process. Indeed, it is startling that the United States would compare Whiteside's desire to present perjured testimony with these defendants' insistence on the right to make informed decisions fundamental to their liberty.

Fretwell is equally inapposite. There, the defendant argued that he had been prejudiced by his counsel's failure to make an objection at the capital sentencing phase of his trial based on a then-valid Eighth Circuit decision, *Collins v. Lockhart*, 754 F.2d 258 (8th Cir. 1985), holding that a death sentence is unconstitutional if based on an aggravating factor that duplicates an element of the underlying felony. *Fretwell*, 506 U.S. at 384. Although the Eighth Circuit had since overruled *Collins*, thereby recognizing that *Collins* was legally erroneous, that court held on habeas review that Fretwell had shown prejudice under *Strickland*, because the trial court would have sustained the *Collins* objection, had it been made at Fretwell's trial. This Court reversed, explaining that a defendant seeking to demonstrate *Strickland* prejudice must show that counsel's errors rendered the proceedings "unfair or unreliable." *Id.* at 369. The Court explained

that Fretwell's sentencing was neither unfair nor unreliable, because "ineffectiveness of counsel [did] not deprive [Fretwell] of any substantive or procedural right to which the law entitles him." *Id.* at 372.

As in *Whiteside*, Fretwell was not entitled "'to the luck of a lawless decisionmaker.'" *Id.* at 370 (quoting *Whiteside*, 475 U.S. at 175, in turn quoting *Strickland*). That is, a defendant cannot "demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry." *Id.* at 373 (O'Connor, J., concurring); *id.* at 373-74 (listing the "likely effect of perjured testimony," "the impact of a meritless Fourth Amendment objection," and "the effect of an objection [that is] wholly meritless under current governing law" as the only factors the Court has held to be impermissible considerations in the prejudice inquiry).

A defendant who receives ineffective assistance of counsel during plea negotiations because counsel withheld information, or provided materially false information relevant to the fundamental decision to plead or go to trial, has been deprived of his right to exercise authority over fundamental decisions in his defense. That is a substantive right to which the law entitles him, *see Barnes*, 463 U.S. at 751, the deprivation of which renders the outcome fundamentally "unfair" under *Fretwell*. *See Padilla*, 130 S. Ct. at 1493 (Alito, J., concurring) ("[I]ncompetent advice [during plea bargaining] distorts the defendant's decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question."); *cf. Gonzales-Lopez*, 548 U.S. at 145 (defendant's Sixth Amendment rights cannot be simply "disregarded so long as the trial is, on the whole, fair").

Adopting variants of this reasoning, *every* federal court of appeals—and all but two state appellate courts to have addressed the question—recognize that a defendant who rejects a favorable plea offer and proceeds to trial is entitled to relief under the Sixth Amendment if he can prove that there is a reasonable probability that he would have accepted the plea offer but for counsel's unprofessional errors. *See United States v. Rodriguez*, 929 F.2d 747, 753 n.1 (1st Cir. 1991) ("[T]he fact that a defendant, after rejecting a guilty plea, still receives all the constitutional protections of trial does not preclude an attack on sixth amendment grounds if counsel's performance during plea bargaining" was ineffective.); *United States v. Gordon*, 156 F.3d 376, 380 (2d Cir. 1998) (defendant suffered prejudice, even though the government had not made a formal plea offer, because "he did not have accurate information upon which to make his decision to pursue further plea negotiations or go to trial," due to counsel's errors); *United States v. Day*, 969 F.2d 39, 42 (3d Cir. 1992) (defendant stated claim for ineffective assistance of counsel where he alleged that he would have accepted a plea bargain but for trial counsel's failure to explain that defendant might be classified as a "career offender"); *Arnold v. Thaler*, 630 F.3d 367, 372 (5th Cir. 2011) ("[T]o establish that he was prejudiced by his counsel's deficient performance, [defendant] need only demonstrate a reasonable probability that he would have accepted the … plea offer before it was withdrawn, had his counsel told him about the offer."); *Griffin v. United States*, 330 F.3d 733, 737 (6th Cir. 2003) ("The second element of the *Strickland* test in the plea offer context is that there is a reasonable probability the petitioner would have pleaded guilty given competent advice."); *Julian v.*

Bartley, 495 F.3d 487, 498 (7th Cir. 2007) ("In the context of plea agreements, the prejudice prong focuses on whether the deficient information was the decisive factor in a defendant's decision to plead guilty or to proceed to trial."); *Kingsberry v. United States*, 202 F.3d 1030, 1032 (8th Cir. 2000) (holding that "prejudice is possible, notwithstanding a subsequent fair trial, where counsel failed to provide accurate advice regarding a plea agreement offer"); *Nunes*, 350 F.3d at 1053 (prejudice resulted where defendant was deprived of "the right to counsel's assistance in making an informed decision once a plea had been put on the table"); *Williams v. Jones*, 571 F.3d at 1090 n.3 ("[A] defendant is required to show that counsel's performance fell below an objective level of reasonableness and that, but for counsel's deficient performance, the defendant would have accepted the plea offer and pled guilty."); *Coulter v. Herring*, 60 F.3d 1499, 1504 (11th Cir. 1995) ("In other words, in this instance, Coulter 'must show that there is a reasonable probability that, but for counsel's errors, he would ... have pleaded guilty and would [not] have insisted on going to trial.'") (quoting *Hill*, 474 U.S. at 59); *In re Alvernaz*, 830 P.2d at 754; *People v. Curry*, 687 N.E.2d 877, 882 (Ill. 1997); *Commonwealth v. Mahar*, 809 N.E.2d 989, 993-94 (Mass. 2004); *In re Plante*, 762 A.2d 873, 876 (Vt. 2000); *Cottle v. State*, 733 So.2d 963, 966-67 (Fla. 1999); *Williams v. State*, 605 A.2d 103, 108 (Md. 1992); *Lloyd v. State*, 373 S.E.2d 1, 3 (Ga. 1988); *Larson v. State*, 766 P.2d 261, 263 (Nev. 1988); *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986); *Tucker v. Holland*, 327 S.E.2d 388, 394-96 (W. Va. 1985); *State v. Simmons*, 309 S.E.2d 493, 497-98 (N.C. Ct. App. 1983); *State v. Donald*, 10 P.3d 1193, 1200 (Ariz. Ct. App. 2000); *Ex parte Lemke*, 13 S.W.3d 791,

796-97 (Tex. Crim. App. 2000), *In re McCready*, 996 P.2d 658, 659-60 (Wash. Ct. App. 2000); *State v. Lentowski*, 569 N.W.2d 758, 761 (Wis. Ct. App. 1997); *Lyles v. State*, 382 N.E.2d 991, 994 (Ind. Ct. App. 1978).

Any other rule would render the Sixth Amendment right to counsel at the plea bargaining stage an empty promise, as a right without the possibility of relief from its deprivation is no right at all.

II. PROSECUTORS SHOULD BE ENCOURAGED TO OFFER ANY PLEA BARGAIN ON THE RECORD IN THE PRESENCE OF THE DEFENDANT

As this Court has long recognized, "the remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law. Federal law simply 'sets certain minimum requirements that States must meet but may exceed in providing appropriate relief.'" *Danforth v. Minnesota*, 552 U.S. 264, 288 (2008) (quoting *American Trucking Assn's, Inc. v. Smith*, 496 U.S. 167, 178-79 (1990)); *see also Teague v. Lane*, 489 U.S. 288, 298-99 (1989); *Danforth*, 552 U.S. at 289 ("While we have ample authority to control the administration of justice in the federal courts[,] … we have no comparable supervisory authority over the work of state judges."). Accordingly, if this Court agrees that respondents have a Sixth Amendment right to effective assistance during plea negotiations, it should defer to the Missouri courts as to the proper remedy in No. 10-444, *Missouri v. Frye*.

Petitioners' asserted fears that recognizing prejudice (and a remedy for it) in these circumstances will open the "floodgates" are unfounded. It bears emphasis that *every* federal court of appeals—and all

but two States to have considered the question—currently recognize prejudice under *Hill* and enforce Sixth Amendment rights in these circumstances, so a decision in respondents' favor would essentially maintain the status quo.

And, as this Court observed in *Padilla*, "[s]urmounting *Strickland*'s high bar is never an easy task." 130 S. Ct. at 1485. Similar "floodgates" claims were raised and rejected in *Hill*, and "[a] flood did not follow in that decision's wake." *Id.* at 1484-85; *see also* Gray Proctor & Nancy King, *Post*-Padilla*:* Padilla*'s Puzzles for Review in State and Federal Courts*, 23 Federal Sentencing Reporter 239, 244 (2011) ("Although Padilla will probably result in an increase in prisoner filings, successful collateral challenges will be more of a trickle than the roaring stream of upset convictions evoked by the 'floodgates' imagery.").[8]

In the federal courts, pleas of guilty and *nolo contendere* rose sharply between 1991 and 2001, Wright, *Trial Distortion*, 154 U. Pa. L. Rev. at 91, concurrent with many of the federal court decisions recognizing that claims of ineffective assistance at the plea stage demand a remedy, *see, e.g.*, *Rodriguez*, 929 F.2d at 753 n.1; *Gordon*, 156 F.3d at 380; *Day*, 969 F.2d at 42; *Coulter*, 60 F.3d at 1504. There is no evidence that the widespread, nearly uniform development in Sixth Amendment jurisprudence has dampened

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[8] Similarly, in *Henderson v. Morgan*, this Court called Petitioner's fears that a decision in favor of the defendant would invite countless collateral attacks on judgments "exaggerated." 426 U.S. 637, 646-47 (1976). "Normally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused." *Id.* at 647.

prosecutors' enthusiasm for plea bargaining to even the slightest degree.

Petitioner Frye also argues that a ruling in respondents' favor would encourage defense attorneys intentionally to withhold offers, on the theory that such a strategy would be a win-win for their clients. *Frye* Petr. Br. 28. But the states are quite capable of crafting rules to prevent that sort of gamesmanship.

Arizona is a case in point. Like all the federal appellate courts and the majority of states that have addressed the issue, the Arizona Court of Appeals has held that "a defendant may state a claim for post-conviction relief on the basis that counsel's ineffective assistance led the defendant to make a uninformed decision to reject a plea bargain and proceed to trial." *Donald*, 10 P.3d at 1200. In response to that decision, the Arizona trial courts now routinely conduct a so-called *Donald* hearing when a defendant rejects a plea offer and decides to proceed to trial. *Donald* hearings are meant "to ensure, *prior to trial*, that [the defendant] adequately understood the state's plea offer and the consequences of conviction." *State v. Ware*, No. 2 CA-CR 2011-0010-PR, 2011 WL 1630274, at *2 (Ariz. Ct. App. Apr. 26, 2011); *id.* (denying defendant's ineffective assistance claim because he rejected plea offers following *Donald* hearings and therefore could not show prejudice); *see also Rivera-Longoria v. Slayton*, 242 P.3d 171, 172 (Ariz. Ct. App. 2010) (noting that the defendant had rejected a plea offer at a *Donald* hearing before asking for the offer to be reinstated).

States could of course devise other, even simpler, procedures towards the same goal. In New Jersey, for example, "[p]rior to the arraignment/status conference

the prosecutor and the defense attorney shall discuss the case, including any plea offer … and report thereon at the arraignment/status conference." N.J. Ct. R. 3:9-1(b). The rules further provide that "[e]ach status conference shall be held in open court with the defendant present." N.J. Ct. R. 3:9-1(c). In addition, "[a]ny plea offer to be made by the prosecutor shall be in writing and forwarded to the defendant's attorney." N.J. Ct. R. 3:9-1(b). New Jersey's rules "reflect the importance of informed plea bargaining, requiring that a defendant be advised at the pretrial conference of the sentencing exposure for the offenses charged." *State v. Dennis*, 2011 WL 31360, at *3 (N.J. Super. App. Div. Jan. 6, 2011) (citing Sylvia B. Pressler & Peter G. Verniero, *Current N.J. Court Rules*, cmt. 1.4.2. on R. 3:9-2 (2011)).

Other states may soon follow suit. For example, in *In re Alvernaz*, *see supra*, 16, the Supreme Court of California encouraged the memorialization of plea offers in order to discourage future claims that "with effective representation, [the defendant] would have accepted the proffered plea bargain." 830 P.2d at 756. Specifically, the court encouraged "parties to memorialize in some fashion prior to trial" (1) the fact that a plea bargain offer was made, (2) that the defendant was advised of the offer, its precise terms, and the range of punishments that could result from either accepting the plea bargain or proceeding to trial, and (3) the defendant's response to the offer. *Id.* at 756 n.7. That court observed that if parties take these steps, "subsequent claims of ineffective assistance of counsel in[volving] the defendant's decision to reject the offer are likely to fail unless the record establishes

that the information provided the defendant, as memorialized, was incomplete or inaccurate." *Id.*[9]

Requiring that defendants make crucial decisions about their own defense on the record, or that they be advised of critical information on the record, is not a new or radical innovation but a logical extension of current practice. For example, since 1969 this Court has required that the record must reflect that a guilty plea was entered knowingly and voluntarily. *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969) ("What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence."). The Federal Rules of Criminal Procedure and many state jurisdictions also require judges to develop the basis of a guilty plea on the record. Fed. R. Crim. P. 11(b)(3) ("Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea."); *see, e.g.*, *Watt v. State*, 420 S.E.2d 769, 770 (Ga. Ct. App. 1992) ("[T]he record as a whole must show that the defendant understood the rights he was waiving and that the plea was entered voluntarily … ."); *People v. Lopez*, 525 N.E.2d 5, 7 (N.Y. 1988) (requiring defendant to

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[9] A Florida state judge has similarly advocated for all plea offers to appear on the record. Hon. Anthony K. Black (Judge, 13th Judicial Circuit) & Susan S. Matthey (senior staff attorney of the 13th Judicial Circuit), *Advice to the Criminal Bar: Preparing Effectively for Allegations of Ineffectiveness*, 82 Fla. B.J. 49, 50 (May 2008) ("[I]f the record reflects when plea offers are conveyed and rejected, such will allow for a summary denial of allegations of ineffective assistance of counsel for failure to convey a plea offer.").

describe the circumstances of the commission of the crime and holding that where "factual recitation negates an essential element of the crime pleaded to, the court may not accept the plea without making further inquiry to ensure that defendant understands the nature of the charge and that the plea is intelligently entered"); *see also Santobello*, 404 U.S. at 261 ("[Federal Rule of Criminal Procedure] 11, governing pleas in federal courts, now makes clear that the sentencing judge must develop, on *the record*, the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge.").

A ruling in respondents' favor should incentivize prosecutors to take proactive steps toward ensuring that defendants are fully informed of any plea offer by, at a minimum, advising defendants of the terms of any plea offer on the record in open court. Providing incentives for compliance with such procedures (and for proactive steps by the prosecution to ensure communication of an offer even in the absence of state-mandated procedures) ultimately inures to the benefit of both defendants and prosecutors, as the prosecution should have a keen interest in resolving criminal charges, if possible, on terms that the State believes fairly serve the interests of justice.

When the State offers a plea, the offer reflects the State's judgment that the interests of justice and law enforcement are adequately served by that offer. Almost by definition, then, a higher sentence is overly punitive in the circumstances, by the State's own calculus. Of course, where a defendant makes a fully informed decision to reject a plea offer and go to trial, it is only reasonable and fair that acceptance of a later

offer (if any), or disposition without a plea deal, result in a harsher sentence. There must be some incentive to avoid imposing costs on the State to prepare for and try the case. But when a defendant's "rejection" is simply the result of a failure of defense counsel to communicate the offer, or the result of patently deficient advice concerning the offense with which the defendant is charged, the interests of justice are not served by over-punishment.

CONCLUSION

This Court should hold that a defendant who demonstrates a reasonable probability that he would have accepted a pending plea offer for a lesser sentence, but for counsel's unprofessional errors, suffers prejudice for Sixth Amendment purposes. This Court should defer to the courts of the State of Missouri as to the appropriate remedy for defendant Frye's constitutional injury.

Respectfully submitted,

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