

# PLEADING FOR A BARGAIN: THE UPCOMING DEBATE OVER COMPETING STANDARDS OF PREJUDICE IN *MISSOURI V. FRYE*

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## I. INTRODUCTION

In *Missouri v. Frye*,<sup>1</sup> the Supreme Court will address a novel question: whether a criminal defendant who pleads guilty can invoke the Sixth Amendment's protection against ineffective assistance of counsel for his attorney's failure to communicate an earlier, more favorable plea offer.<sup>2</sup> In adjudicating this question, the Court will have to decide which of three competing standards of prejudice should apply, and which remedy is appropriate in this unique factual scenario.<sup>3</sup> More importantly, the Court will be asked to weigh defendants' interest in the reliability of the adversarial process against the state's interest in the finality of its results, a balance carefully struck in past cases.<sup>4</sup>

## II. FACTS

On August 14, 2007, the State of Missouri charged Galin Frye with one count of felony driving for driving with a revoked license.<sup>5</sup> Before his preliminary hearing, the State sent Frye's trial counsel a written

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1. *Missouri v. Frye*, No. 10-444 (U.S. argued Oct. 31, 2011).

2. *See* Brief for the Petitioner at i, *Frye*, No. 10-444 (U.S. Apr. 15, 2011), 2011 WL 1593613, at \*i (framing the question presented as whether "a defendant who validly pleads guilty [can] successfully assert a claim of ineffective assistance of counsel by alleging that, but for counsel's error in failing to communicate a plea offer, he would . . . have pleaded guilty sooner with more favorable terms").

3. *See infra* Parts V.A, V.C.

4. *See infra* Part V.B.

5. *Frye v. Missouri*, 311 S.W.3d 350, 351 (Mo. Ct. App. 2010), *cert. granted*, No. 10-444 (U.S. argued Oct. 31, 2011).

plea offer.<sup>6</sup> A date stamp confirms that trial counsel’s office received that offer on November 19, 2007, and his own annotations confirm that he read it.<sup>7</sup> The terms of the offer presented Frye with two options: he could either plead to the felony with a recommended deferred sentence of three years, or he could serve ninety days on an amended misdemeanor charge.<sup>8</sup> The offer was set to expire on December 28, 2007.<sup>9</sup> Frye claimed that during the offer’s window he did not see or speak with trial counsel.<sup>10</sup> Accordingly, he did not know about the State’s then-expired plea offer when, on March 3, 2008, he entered an open guilty plea to the felony driving charge.<sup>11</sup> Shortly thereafter, the trial court sentenced Frye to three years imprisonment.<sup>12</sup>

Frye then filed a motion seeking post-conviction relief in state court.<sup>13</sup> Frye’s motion alleged that trial counsel rendered ineffective assistance by failing to communicate the State’s plea offer.<sup>14</sup> Following an evidentiary hearing, the court denied Frye’s motion.<sup>15</sup> The Missouri Court of Appeals, however, reversed the lower court’s denial,<sup>16</sup> and the Missouri Supreme Court denied transfer.<sup>17</sup>

On September 27, 2010, the State of Missouri filed a petition for writ of certiorari in the United States Supreme Court.<sup>18</sup> On January 7, 2011, the Court granted certiorari,<sup>19</sup> certifying the additional question of what remedy should be provided for ineffective assistance of counsel during plea negotiations.<sup>20</sup>

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6. *Id.*

7. *Id.* at 352.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 353.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 361.

17. Brief for the Petitioner, *supra* note 2, at 1. In Missouri, transfer is a parallel review process for motions for post-conviction relief that have been denied. *See* MO. SUP. CT. R. 83.04 (“Transfer by this Court is an extraordinary remedy that is not part of the standard review process . . .”). Because “motions for reconsideration . . . shall not be accepted or filed,” a denial of transfer amounts to a final judgment. *Id.*

18. Petition for Writ of Certiorari, *Missouri v. Frye*, No. 10-444 (U.S. Sept. 27, 2010), 2010 WL 3875742.

19. *Missouri v. Frye*, 131 S. Ct. 856, 856–57 (2011).

20. *Id.*

### III. LEGAL BACKGROUND

The starting point for any claim of ineffective assistance of counsel is the standard set forth in the Supreme Court's 1984 decision in *Strickland v. Washington*.<sup>21</sup> In cases preceding *Strickland*, the Court had held that the Sixth Amendment's right "to have the Assistance of Counsel"<sup>22</sup> includes the right to *effective* assistance of counsel,<sup>23</sup> and that counsel could deprive a defendant of that right by "failing to render adequate legal assistance."<sup>24</sup> But it was not until *Strickland* that the Court articulated a clear standard for claims of ineffective assistance of counsel, which is still in use today.<sup>25</sup>

*Strickland's* "well-worn two pronged standard"<sup>26</sup> first asks whether counsel's performance was deficient.<sup>27</sup> As the Court explained in *Strickland*, "this requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."<sup>28</sup> Second—and more important to this case—the defendant must demonstrate that the deficient performance prejudiced her.<sup>29</sup> Specifically, "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."<sup>30</sup> Because of that language, the Court has come to refer to *Strickland's* test for prejudice as the "outcome-determinative test."<sup>31</sup> Notably, *Strickland* only addressed claims of ineffective counsel in the context of a trial; its stated purpose was "simply to ensure that criminal defendants receive a fair trial."<sup>32</sup>

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21. 466 U.S. 668 (1984).

22. U.S. CONST. amend. VI.

23. *McMann v. Richardson*, 397 U.S. 759, 771 (1970) ("[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel . . .").

24. *Strickland*, 466 U.S. at 686 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980)) (internal quotation marks omitted).

25. *See, e.g.*, *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011) ("There is no dispute that the clearly established federal law here is *Strickland v. Washington*.").

26. Jenny Roberts, *Proving Prejudice, Post-Padilla*, 54 *HOW. L.J.* 693, 699 (2011) (citation omitted).

27. *Strickland*, 466 U.S. at 687.

28. *Id.*

29. *Id.*

30. *Id.* at 694.

31. *See, e.g.*, *Lockhart v. Fretwell*, 506 U.S. 364, 380 n.6 (1993) (referring to "*Strickland's* outcome-determinative test for prejudice").

32. *Strickland*, 466 U.S. at 689.

Within a year, however, the Court applied *Strickland* to claims of ineffective assistance of counsel during plea-bargaining. In *Hill v. Lockhart*,<sup>33</sup> the Court recognized that plea negotiations are a critical phase of criminal prosecution, on par with the trial itself, and thus warrant the same Sixth Amendment protections.<sup>34</sup> *Hill* also illustrates that the Court views effective assistance of counsel in the plea-bargaining context through the lens of the Due Process Clause.<sup>35</sup> According to Supreme Court precedent, involuntary plea bargains are a violation of due process.<sup>36</sup> In *Hill*, the Court construed petitioner's claim as "alleging that his guilty plea was involuntary by reason of ineffective assistance of counsel."<sup>37</sup> Thus, the Court implied that counsel's actions in *Hill* violated due process.

Echoing *Strickland*'s outcome-determinative test for prejudice, the *Hill* Court held that the relevant inquiry is "whether counsel's constitutionally ineffective performance affected the outcome of the plea process."<sup>38</sup> The Court went on, however, to say that "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."<sup>39</sup> Whether this last statement placed a gloss on the outcome-determinative test is a point of contention among the parties in this case.<sup>40</sup>

Regardless, *Hill* is materially different from the present case. In *Hill*, the petitioner implied, but did not allege, that but for counsel's failure to inform him about his probation status, he would have rejected the state's plea offer and would have opted for trial.<sup>41</sup> Here, Frye is alleging quite the opposite, contending that he would have *accepted* the plea offer in lieu of trial had counsel communicated it to him.<sup>42</sup> Thus, Frye is not claiming that he was deprived of a fair trial; in

33. 474 U.S. 52 (1985).

34. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) ("We have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." (citing *Hill*, 474 U.S. at 57)).

35. U.S. CONST. amend. XIV, § 1.

36. *Boykin v. Alabama*, 395 U.S. 238, 244 (1969).

37. *Hill*, 474 U.S. at 56.

38. *Id.* at 59.

39. *Id.*

40. See *infra* Part V.A.

41. See *Hill*, 474 U.S. at 60 ("Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial.")

42. See Brief for Respondent at 8–9, *Missouri v. Frye*, No. 10-444 (U.S. July 15, 2011), 2011 WL 2837937, at \*8–9 ("Had counsel informed Frye of the state's plea offer, he would have

fact, he did not want a trial at all. Accordingly, this case does not fall squarely within the ambit of either *Strickland* or *Hill*.

In sum, aside from some notable aberrations in *Lockhart v. Fretwell*<sup>43</sup> and *Nix v. Whiteside*,<sup>44</sup> discussed below,<sup>45</sup> *Hill* and *Strickland* represent the legal landscape facing the parties as they square off before the Court. It is worth noting that the Roberts Court seems to have taken an interest in questions arising from ineffective assistance of counsel in the plea-bargaining context, perhaps to better define this area. Two terms ago, for example, the Court heard arguments in *Padilla v. Kentucky*,<sup>46</sup> holding that counsel performed deficiently by failing to inform his client of the collateral consequences of a guilty plea.<sup>47</sup> Last term, the Court addressed the question of prejudice during plea negotiations in *Premo v. Moore*<sup>48</sup> and is poised to do so again this term, both in the present case and its companion, *Lafler v. Cooper*.<sup>49</sup>

#### IV. HOLDING

In *Frye v. Missouri*, an undivided Missouri Court of Appeals reversed the lower court's denial of Frye's motion for post-conviction relief due to ineffective assistance of counsel.<sup>50</sup> Under *Strickland*'s performance prong, the court held that trial counsel's utter failure to inform Frye of the State's plea offer "fell below an objective standard of reasonableness."<sup>51</sup> Notably, the State did not challenge this part of the appellate court's holding in its petition for certiorari.<sup>52</sup>

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accepted it.").

43. 506 U.S. 364 (1993).

44. 475 U.S. 157 (1986).

45. See *infra* Part V.A.

46. 130 S. Ct. 1473 (2010).

47. *Id.* at 1483.

48. 131 S. Ct. 733, 741 (2011) (holding that counsel's representation was adequate though he failed to file a motion to suppress defendant's confession—a motion counsel deemed "futile"—before advising him to accept a plea offer).

49. *Lafler v. Cooper*, No. 10-209 (U.S. argued Oct. 31, 2011). *Lafler* asks whether "a defendant [was] denied his Sixth Amendment right to the effective assistance of counsel where counsel's affirmative misadvice causes the defendant to decline a favorable plea offer, and the defendant is subsequently convicted at trial." Brief of Respondent Anthony Cooper at i, *Lafler*, No. 10-209 (U.S. July 18, 2011), 2011 WL 2837936, at \*i.

50. *Frye v. Missouri*, 311 S.W.3d 350, 351 (Mo. Ct. App. 2010), *cert. granted*, No. 10-444 (U.S. argued Oct. 31 2011).

51. *Id.* at 353.

52. See Petition for Writ of Certiorari, *supra* note 18, at i (posing the question presented as whether *Strickland*'s outcome-determinative test or *Hill*'s insistence on trial test for prejudice applies).

More controversial, however, was the second part of the Missouri court's opinion, wherein it held that the court below had erred in concluding that, under *Strickland's* second prong, Frye was not prejudiced by counsel's deficient performance.<sup>53</sup> Here, the court applied *Strickland's* outcome-determinative test to the plea-bargaining context rather than *Hill's* insistence on trial test, the standard more familiar to that context.<sup>54</sup> According to the court, *Hill's* test for prejudice was merely a "template" for "*Strickland's* looser emphasis on whether a defendant can establish 'an adverse effect on the defense.'"<sup>55</sup> The court cited similar "adverse effect" language in *Hill* to support this claim.<sup>56</sup> The court concluded that the proper test for prejudice was the one announced in *Strickland*: whether the result of the proceeding would have been different but for counsel's error.<sup>57</sup> Although Frye did not contend that he would have opted for trial, he did claim that he would have taken the plea offer had he known about it, achieving a different result.<sup>58</sup> Accordingly, the Court of Appeals held that the lower court's denial of Frye's motion was "clearly erroneous."<sup>59</sup>

Although the court found in favor of Frye on the merits, it declined to order specific performance of the plea offer as a remedy, stating that it lacked the authority to do so.<sup>60</sup> Instead, it remanded the case to the lower court, acknowledging that although this could lead to an identical outcome, the "alternative is to ignore the merits of Frye's claim, which we are unwilling to do."<sup>61</sup>

## V. ARGUMENTS AND ANALYSIS

The crux of the parties' disagreement in this case is threefold: the applicable standard of prejudice, the policy implications of that standard, and the proper remedy. What follows is an exposition and analysis of both sides' arguments.

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53. *Frye*, 311 S.W.3d at 359.

54. *Id.* at 357.

55. *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 693 (1984)).

56. *Id.* ("[T]he defendant must show that [a particular error of counsel] actually had an adverse effect on the defense." (quoting *Hill v. Lockhart*, 474 U.S. 52, 57 (1985)) (internal quotation marks omitted)).

57. *Id.*

58. *Id.* at 351.

59. *Id.* at 359.

60. *Id.* at 360 ("[W]e are not empowered to order the State to reduce the charge against Frye.").

61. *Id.* at 361.

*A. The Standards Debate: Outcome-Determinative, Insistence on Trial, or Fundamental Unfairness?*

The main point of contention between the parties concerns which of three standards should be applied to determine whether Frye was prejudiced by his attorney's performance. Frye urges that the proper inquiry is derived from *Strickland* itself and asks whether the defendant has shown a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."<sup>62</sup> Under this outcome-determinative standard, Frye is all but assured of prevailing, given that the State does not dispute that Frye would have accepted the prosecution's offer of a misdemeanor charge had he known about it.<sup>63</sup>

The State counters that although *Strickland* required only a showing that results would have differed, *Hill* "altered that showing"<sup>64</sup> by requiring proof that but for counsel's errors, the defendant "would have insisted on going to trial."<sup>65</sup> On its face, the State's argument seems contrary to a fair reading of *Hill*. To begin with, the *Hill* Court stated explicitly that it was applying the "same two-part standard" as in *Strickland* to the plea-bargaining process, without caveats.<sup>66</sup> Moreover, the language relied upon by the State is taken out of context. The Court did require that "the defendant," as opposed to a defendant, evince an intention to go to trial to meet the prejudice requirement.<sup>67</sup> That, however, appears to be a case-specific application of a more general proposition adduced in the immediately preceding sentence, which reads: the "'prejudice' requirement . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process."<sup>68</sup> An insistence on trial inquiry is only relevant, then, insofar as it illuminates whether a particular plea process was negatively impacted, and not for its own sake. Thus, it appears that rather than altering the test in *Strickland*, as the State alleges, *Hill* is endorsing *Strickland*'s outcome-determinative test for

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62. Brief for Respondent, *supra* note 42, at 27 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)) (internal quotation marks omitted).

63. *Id.*

64. *Id.* at 16.

65. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

66. *Id.* at 57 (emphasis added).

67. *Id.* at 59 (emphasis added).

68. *Id.*; see also *Roberts*, *supra* note 26, at 704 (2011) ("*Hill* initially articulated a broad prejudice inquiry that asked whether, given competent representation, the outcome of the plea process would have been different.").

prejudice.

Appearances, however, can be deceiving; the Court has shown itself reluctant to apply *Hill*'s more general language to claims of ineffective counsel in the plea-bargaining context. Last term in *Premo v. Moore*, a case cited repeatedly in the State's brief,<sup>69</sup> the Court reversed the Ninth Circuit's finding of prejudice where counsel failed to file a motion suppressing certain evidence before advising the defendant to accept the state's plea offer.<sup>70</sup> The Court reaffirmed that *Hill*'s insistence on trial standard governs the "prejudice [inquiry] in cases involving plea bargains."<sup>71</sup> Significantly, the Court also rejected a concurrence below<sup>72</sup> that reasoned that the defendant suffered prejudice because he could have negotiated a better plea offer but for counsel's failure to suppress evidence.<sup>73</sup> Thus, the Court has already rejected an argument that closely resembles the gravamen of Frye's complaint—that Frye was prejudiced because, but for counsel's omission, he would have accepted a plea offer with more favorable terms.<sup>74</sup>

Furthermore, even if Frye could convince the Court to abrogate its holding in *Premo*, the State has another arrow in its quiver. Specifically, the State relies upon *Lockhart v. Fretwell* and *Nix v. Whiteside* for the proposition that an "analysis [like Frye's] focusing solely on *mere outcome determination* . . . is defective."<sup>75</sup> Under *Fretwell*, the relevant standard is not whether counsel's error produced a different result, but whether it rendered the proceeding "fundamentally unfair or unreliable."<sup>76</sup> As the Seventh Circuit noted, the fundamental unfairness test is a higher standard than the outcome-determinative test set forth in *Strickland*.<sup>77</sup> Perhaps for this

69. Brief for the Petitioner, *supra* note 2, at 18, 20, 35.

70. *Premo v. Moore*, 131 S. Ct. 733, 739 (2011).

71. *Id.* at 745.

72. *Id.*

73. *Moore v. Czerniak*, 534 F.3d 1128, 1165 (9th Cir. 2008) (Berzon, J., concurring), *rev'd*, 131 S. Ct. 733 (2011).

74. See Brief for Respondent, *supra* note 42, at 27 ("Frye Suffered Prejudice Because Had He Been Informed of the Plea Offer the Outcome Would Have Been Different: He Would Have Received a Much Shorter Sentence . . .").

75. Brief for the Petitioner, *supra* note 2, at 30 (emphasis added) (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993)) (internal quotation marks omitted).

76. *Fretwell*, 506 U.S. at 369.

77. See *Washington v. Smith*, 219 F.3d 620, 632 (7th Cir. 2000) (noting that "there is some superficial tension between *Strickland*'s statement of the prejudice standard . . . [and] the heightened prejudice standard in *Lockhart*").

reason, the Court in *Williams v. Taylor*<sup>78</sup> clarified that the *Fretwell* test applies only in situations where counsel's deficient performance "does [not] deprive the defendant of a substantive or procedural right to which the law entitles him."<sup>79</sup> The State contends that this is the case here<sup>80</sup>—neither Frye nor any other criminal defendant has a constitutional right to a particular plea bargain.<sup>81</sup> Accordingly, the State argues that *Fretwell's* heightened prejudice standard ought to apply to this case.<sup>82</sup>

In a deft legal gambit, Frye attempts to redefine the procedural right in this case as an entitlement to information rather than a right to the plea offer itself.<sup>83</sup> Specifically, Frye contends that because he "was entitled to be informed of the plea offer extended by the state," he was deprived of a procedural right and therefore received ineffective assistance of counsel.<sup>84</sup> Yet Frye claims elsewhere in his brief that ineffective assistance of counsel rendered his guilty plea involuntary and uninformed.<sup>85</sup> Thus, Frye's attempt to reframe the procedural right in order to avoid the heightened prejudice standard is circular: an uninformed plea is a predicate to ineffective assistance of counsel, and ineffective assistance of counsel is a predicate to an uninformed plea. Consequently, Frye's attempt to divine a violated procedural right, thereby bringing his case within the ambit of the more lenient standard in *Strickland*, is ultimately unconvincing.

In sum, the State has the edge in the debate over which legal standard to apply in this case. Given the Court's decision in *Premo v. Moore* and Frye's inability to coherently demonstrate a deprivation of his rights, the Court likely will apply *Hill's* insistence on trial or

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78. 529 U.S. 362 (2000).

79. *Id.* at 393 (emphasis omitted); *see also id.* ("Cases such as *Nix . . .* and *Lockhart . . .* do not justify a departure from a straightforward application of *Strickland* when the ineffectiveness of counsel *does* deprive the defendant of a substantive or procedural right."). For an example of how the federal circuit courts have applied this threshold deprivation test, see *United States v. Springs*, 988 F.2d 746, 749 (7th Cir. 1993), in which the Seventh Circuit held that because the defendant had "no substantive or procedural right to bargain-basement sentences . . . [he] did not suffer 'prejudice.'" *Id.*

80. Brief for the Petitioner, *supra* note 2, at 27.

81. *Mabry v. Johnson*, 467 U.S. 504, 507 (1984) ("A plea bargain standing alone is without constitutional significance . . .").

82. Brief for the Petitioner, *supra* note 2, at 30–31.

83. *See* Brief for Respondent, *supra* note 42, at 36 ("Frye was entitled to effective counsel who would advise him of the State's plea offer. He was entitled to awareness of the alternatives available to him before he decided whether to accept a plea offer and plead guilty.").

84. *Id.* at 34.

85. *Id.* at 24–25.

*Fretwell's* fundamental unfairness standard to Frye's case.

*B. The Debate Behind the Debate: Reliability of the Adversarial Process versus the Finality of Its Results*

The standards debate, critical as its resolution will be to the adjudication of *Missouri v. Frye*, sets the stage for an equally important policy discussion underlying the parties' arguments. *Strickland* itself deemphasizes "mechanical rules"<sup>86</sup> and urges courts to focus on the two competing interests implicated by the right to effective assistance of counsel—namely, the reliability of the adversarial process and the finality of its results.<sup>87</sup> The outcome-determinative standard set forth in *Strickland* is less of a legal talisman than a practical attempt to balance defendants' interest in a reliable process with the state's interest in the finality of convictions.<sup>88</sup> A low standard, which makes it easy for defendants to prove counsel was ineffective, would "encourage the proliferation of ineffectiveness challenges,"<sup>89</sup> thus undermining existing convictions. A high standard, which places a heavy burden on defendants to prove ineffective assistance, would prevent defendants from asserting their right to effective assistance of counsel, a fundamental part of a fair trial.<sup>90</sup>

The parties, sensitive to the importance of these policy arguments, devote considerable portions of their briefs to discussing them. The State lays out a parade of horrors that will follow from the application of *Strickland's* outcome-determinative test in this case.<sup>91</sup> The State makes two particularly egregious claims—that a decision in favor of Frye will lead to a proliferation of ineffective assistance of counsel challenges, and that it will provide defense counsel with an incentive to intentionally withhold plea offers from their clients.

First, the State asserts that the application of *Strickland's* outcome-determinative standard to plea negotiations will "fail to

86. *Strickland v. Washington*, 466 U.S. 668, 696 (1984).

87. *See id.* at 693, 687 (discussing "the profound importance of finality in criminal proceedings" and of "a trial whose result is reliable").

88. Ivan Fong, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 STAN. L. REV. 461, 486 (1987) ("Thus, *Strickland* appears to balance evenly the competing interests . . .").

89. *Strickland*, 466 U.S. at 690.

90. *See Fong, supra* note 88 ("If, on the other hand, defendants face too stringent a standard for proving ineffectiveness, then their attorneys' errors [would be] insufficient to establish a remediable claim . . .").

91. *See* Brief for the Petitioner, *supra* note 2, at 34–37.

preserve the interests of finality in a vast number of cases.”<sup>92</sup> This essentially rehashes a concern the Court expressed in *Strickland* about the proliferation of challenges,<sup>93</sup> only here, the State is arguing against, rather than for, the standard in *Strickland*.

Is it plausible that the application of *Strickland* will lead to an increase in ineffective assistance of counsel claims in the plea-bargaining context? At first blush, this seems likely: in 1983, the year before the Court decided *Strickland*, there were seventy-two district court ineffective assistance of counsel decisions published in a major database; in 2010, there were 7,687.<sup>94</sup> Although this is a significant increase, ineffective assistance of counsel challenges to attorney performance during plea negotiations currently account for a relatively small portion of habeas petitions—around thirty percent.<sup>95</sup> As the Court recently noted in *Padilla v. Kentucky*, this may be because defendants who collaterally attack their plea bargains run the risk of a less favorable outcome on remand.<sup>96</sup> One concern is that this “significant limiting principal”<sup>97</sup> does not apply here. The remedy sought is not a new trial with all its attendant uncertainty, but precisely the same plea bargain that the prosecutor initially offered.<sup>98</sup> If challenging a plea bargain becomes a riskless endeavor—and raising a challenge becomes easier under the more lenient prejudice standard in *Strickland*—it seems reasonable that there will be more ineffective assistance of counsel claims of this nature.

The State’s second policy argument is less compelling. The State contends that affirming the Missouri court will provide defense attorneys with a perverse incentive to intentionally withhold plea offers from their clients as an “insurance policy.”<sup>99</sup> In the event that trial does not end in a verdict as favorable as the offer, a defendant could reclaim the banked offer by alleging ineffective assistance of

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92. *Id.* at 35.

93. *See Strickland*, 466 U.S. at 690 (concluding that a lower standard for prejudice would “encourage a proliferation of ineffectiveness challenges”).

94. Westlaw Search Results for “ineffective assistance of counsel,” WESTLAW, <http://westlaw.com> (search “ineffective assistance of counsel & da(1983)” and “ineffective assistance of counsel & da(2010)” in the DCT database).

95. *See Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 n.14 (2010) (citing VICTOR FLANGO, NAT’L CTR. FOR STATE COURTS, HABEAS CORPUS IN STATE AND FEDERAL COURTS 36–38 (1994)).

96. *Id.*

97. *Id.* at 1485.

98. Brief for Respondent, *supra* note 42, at 37.

99. Brief for the Petitioner, *supra* note 2, at 36.

counsel.<sup>100</sup> This argument is unconvincing for two reasons. First, as the American Bar Association claims in its amicus brief, this “sandbagging” tactic would violate ethics rules because it would entail a failure to “communicate to [one’s] client an evidently advantageous plea offer.”<sup>101</sup> This is not a viable strategy for all but the least ethical practitioners. Second, an iteration of the same argument could be made against ineffective assistance claims generally. Because post-conviction relief is available for ineffective assistance of counsel,<sup>102</sup> defense attorneys will conceivably always have an incentive to “sandbag” in some way, hoping that their intentional mistakes will furnish the basis for a future ineffective assistance of counsel claim—and a second bite at the proverbial apple—should they lose at trial. Yet, the Court apparently has not found this potential harm sufficiently compelling to overrule *Strickland*.<sup>103</sup>

Despite the implausibility of the State’s “insurance policy” argument, the State’s arguments concerning the potential increase in ineffective assistance claims could sway a Court closely divided on the standards debate. Applying the less stringent standard in *Strickland* while permitting ineffective assistance claimants the remedy of their original plea offers may well lead to the relitigation of numerous guilty pleas.<sup>104</sup> In order to avoid a deluge of ineffective assistance claims, the Court may decide in favor of a more stringent standard.

### C. *The Question of Remedies*

If Frye prevails on his ineffective assistance of counsel claim, he will still need to convince the Court that the appropriate remedy is specific performance—allowing him “to plead guilty to a misdemeanor with a recommendation of a ninety-day jail sentence.”<sup>105</sup> The question of the proper remedy for ineffective assistance of counsel in failing to communicate a plea offer is one of novel impression for the Court. In its order granting certiorari, the Court

100. *Id.*

101. Brief of the American Bar Association as Amicus Curiae in Support of Respondents at 15, *Missouri v. Frye*, No. 10-444 (U.S. July 22, 2011), 2011 WL 3151278, at \*15.

102. *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668, 671 (1984) (“This case requires us to consider the proper standards for judging a criminal defendant’s contention that the Constitution requires a conviction or death sentence to be set aside because counsel’s assistance at the trial or sentencing was ineffective.”).

103. *See, e.g.*, *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011) (“There is no dispute that the clearly established federal law here is *Strickland v. Washington*.”).

104. *See supra* Part V.B.

105. Brief for Respondent, *supra* note 42, at 37.

requested that the parties brief and argue an additional issue: “[W]hat remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations”?<sup>106</sup> There are only a handful of cases remotely on point, but from the authorities cited by the parties, the shape of a permissible remedy in this context begins to emerge.

In 1971, for example, the Supreme Court held that specific performance was an appropriate remedy in plea bargain cases, though subject to certain rules and restrictions: *Santobello v. New York*<sup>107</sup> establishes that, notwithstanding the Solicitor General’s concerns about displacing prosecutorial discretion,<sup>108</sup> a court may order the government to “fully comply with the [plea] agreement—in effect, specific performance of the contract.”<sup>109</sup> Specific performance is limited to *executed* plea agreements, however, and even then is only available to remediate an involuntary or unknowing guilty plea.<sup>110</sup> Furthermore, the trial judge retains the authority to reject the terms of a plea offer during sentencing.<sup>111</sup>

Given these guidelines, Frye’s proposed remedy appears almost entirely appropriate for three reasons. First, *Santobello* establishes a precedent for the remedy of specific performance.<sup>112</sup> Second, if the Court has reached the stage where it must consider the proper remedy, it likely will have already determined that Frye’s plea was involuntary or unknowing.<sup>113</sup> Third, as Frye observes, ordering specific

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106. *Missouri v. Frye*, 131 S. Ct. 856, 856–57 (2011).

107. 404 U.S. 257 (1971).

108. See Brief for the United States as Amicus Curiae Supporting Petitioner at 29, *Missouri v. Frye*, No. 10-444 (U.S. Apr. 22, 2011), 2011 WL 1536720, at \*29 (“[E]nforcing the terms of a prior offer displaces prosecutorial discretion.”).

109. *Puckett v. United States*, 129 S. Ct. 1423, 1430 (2009) (citing *Santobello*, 404 U.S. at 263).

110. See *Mabry v. Johnson*, 467 U.S. 504, 507, 510 (1984) (holding that “[a] plea bargain standing alone is without constitutional significance . . . until embodied” in an executed agreement, and that “because it did not impair the voluntariness or intelligence of his guilty plea, respondent’s inability to enforce the prosecutor’s offer is without constitutional significance”).

111. *Santobello*, 404 U.S. at 262 (1971) (“A court may reject a plea in exercise of sound judicial discretion.”).

112. See *id.* at 263 (“The ultimate relief to which petitioner is entitled we leave to the discretion of the state court, which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea . . .”).

113. See *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (noting that the cognizable claim in ineffective assistance cases within the plea-bargaining context is “that [defendant’s] plea was ‘involuntary’ as a result of ineffective assistance of counsel”); see also Brief for Respondent, *supra* note 42, at 24 (“Failure to communicate a plea offer renders a subsequent guilty plea unknowing, unintelligent, and involuntary . . .”); cf. *Chaffin v. Stynchcomb*, 412 U.S. 17, 28 n.15 (1977) (“Because we have concluded that [Petitioner’s argument is not meritorious], we need

performance would not usurp the trial judge's discretion because the ninety-day jail sentence is merely a recommendation.<sup>114</sup> The one sticking point for Frye is that, as the Solicitor General rightly argues, the plea agreement was unexecuted because Frye never accepted it.<sup>115</sup> “[P]lea bargains are essentially contracts,”<sup>116</sup> and without acceptance, no contract is formed.<sup>117</sup> Accordingly, unless the Court alters its existing precedent in this area, Frye's proposed remedy is actually inappropriate.

## VI. LIKELY DISPOSITION

The likeliest outcome is a reversal of the Missouri Court of Appeals. The State has two ways to win, each well grounded in precedent. First, the Court may hold that *Hill* cabined the application of *Strickland* to cases where defendants would have insisted on going to trial.<sup>118</sup> Second, the State could prevail on its argument that straightforward application of *Strickland*'s outcome-determinative test is unwarranted under *Williams* because the loss of a plea offer does not amount to deprivation of a substantive or procedural right.<sup>119</sup> Indeed, in oral argument, Justice Breyer telegraphed that the Court might apply the insistence on trial or fundamental unfairness standard, endorsing “the idea of ineffective assistance of counsel during the plea bargaining stage,” but proposing that the Court apply “two tougher standards for this area.”<sup>120</sup>

Given the force of the State's arguments, Frye finds himself in the unenviable position of having to argue against the weight of authority. First, he will have to convince the Court that his novel interpretation of *Hill* is warranted, despite the fact that the Court just recently rejected that interpretation in *Premo v. Moore*. Second, Frye will have

not consider what remedy would be required.”).

114. See Brief for Respondent, *supra* note 42, at 45 (“The trial court retains the authority to reject the plea offer.”).

115. See Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 108, at 29 (“[I]nstead of restoring the defendant to his original position, the remedy of specific performance awards him with something he never had: a legal entitlement to the benefits of the offer.”).

116. *Puckett v. United States*, 129 S. Ct. 1423, 1430 (2009).

117. RESTATEMENT (SECOND) OF CONTRACTS §§ 18, 50 (1981) (stating that a valid contract requires a “manifestation of mutual assent,” and “acceptance of an offer is a manifestation of assent to the terms thereof”).

118. See *supra* Part V.A.

119. See *Mabry v. Johnson*, 467 U.S. 504, 507 (1984) (“A plea bargain standing alone is without constitutional significance . . .”).

120. Transcript of Oral Argument, *Missouri v. Frye* at 16, No. 10-444 (U.S. Oct. 31, 2011).

to convince the Court of his circular argument that an uninformed guilty plea is both the predicate and consequence of ineffective assistance of counsel in the plea negotiation phase. It is difficult to imagine the Court sustaining such an incoherent position.

In addition to having the stronger side of the standards debate, the State benefits from the support of the Solicitor General's office as *amicus curiae*. In the first two terms of Chief Justice Roberts's tenure, the Court sided with the Government in nearly ninety percent of cases for which the Solicitor General submitted an *amicus* brief.<sup>121</sup> Moreover, given the miniscule chance of prevailing on an ineffective assistance of counsel claim brought in federal court for a noncapital case—only one in every 1,692 is successful<sup>122</sup>—the probabilities weigh against Frye and his amici in this case.

Nonetheless, Frye should be heartened by the Court's holding in *Padilla v. Kentucky* two terms ago. Although the Court did not reach the issue of prejudice in that case,<sup>123</sup> *Padilla* represents a significant expansion of the right to effective counsel.<sup>124</sup> The Court imposed on counsel an affirmative obligation to advise clients of the collateral, as well as the direct, consequences of their pleas.<sup>125</sup> Of equal importance to *Padilla*'s holding were its proponents: Justices Alito and Roberts joined the liberal wing of the Court in a concurring opinion.<sup>126</sup> This is surprising, especially given Justice Alito's dissent in *United States v. Gonzalez-Lopez*,<sup>127</sup> in which he expressed characteristically pragmatic concerns that the finality of convictions would be imperiled if the right to counsel of choice, a close cousin of the right to effective counsel, were expanded.<sup>128</sup>

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121. Ryan Juliano, Note, *Policy Coordination: The Solicitor General as Amicus Curiae in the First Two Years of the Roberts Court*, 18 CORNELL J.L. & PUB. POL'Y 541, 552 (2009).

122. See Joseph L. Hoffman, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 811 (2009) (citing a Vanderbilt-NCSC study).

123. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478 (2010) ("Whether he is entitled to relief depends on whether he has been prejudiced, a matter we do not address.").

124. Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1118 (2011) ("*Padilla* is a landmark interpretation of the Sixth Amendment's right to effective assistance of counsel . . .").

125. *Padilla*, 130 S. Ct. at 1482.

126. *Id.* at 1487 (Alito, J., concurring).

127. 548 U.S. 140 (2006).

128. See *id.* at 160 (Alito, J., dissenting) ("Under the majority's holding, some defendants will be awarded new trials even though it is clear that the erroneous disqualification of their first-choice counsel did not prejudice them in the least."); see also Bibas, *supra* note 124, at 1150 (describing Justice Alito's approach as "intensely pragmatic. . . . befit[ting] his experience as a federal prosecutor").

Perhaps Justice Alito's concerns about finality were allayed in *Padilla* by the majority's observation that collateral attacks on guilty pleas account for a relatively small fraction of habeas petitions. As previously discussed, however, the limiting principle posed by the risk of a less favorable sentence on remand does not apply here. Thus, Justices already concerned with the impact of ineffective assistance claims on the finality of convictions are bound to be more receptive to the State's claim that a decision for Frye will "fail to preserve the interests of finality in a vast number of cases."<sup>129</sup> This was evident during oral argument when Justice Alito worried aloud that defendants could too easily prove prejudice under the outcome-determinative standard.<sup>130</sup> Accordingly, any liberal coalition in favor of Frye likely will not find an ally in Justice Alito or Chief Justice Roberts, Justice Alito's codissenter in *Gonzalez-Lopez*.

Similarly, Justices Scalia and Thomas will almost certainly oppose any decision favoring Frye. In his dissent to the majority opinion in *Padilla*, which Justice Thomas joined, Justice Scalia explicitly stated that he "reject[s] the significant further extension [of the right to effective counsel] that the Court . . . would create," and implicitly called into question whether even *Strickland* was rightly decided.<sup>131</sup>

In sum, the Court likely will reverse the Missouri court of appeals, rejecting the application of the *Strickland* standard to the plea-bargaining context. Even if *Padilla* signals that the Court is favorably disposed to an expansion of the effective counsel right, affirmation of the Missouri court probably would be decided narrowly, in a five-four split. And, even if the Court were to affirm, it would be unlikely to order specific performance of the plea bargain because Frye did not accept the State's offer. Ultimately, the decision will come down to what a majority of the Court finds more disconcerting: the ineptitude of Frye's counsel or the finality concerns raised by the State. For the ninety percent of convicts who enter the criminal justice system on a plea bargain,<sup>132</sup> much may ride on that determination.

129. Brief for the Petitioner, *supra* note 2, at 35.

130. See Transcript of Oral Argument, *supra* note 120, at 39 (Alito, J.) ("The point is just that prejudice isn't going to be very tough to show, is it?").

131. *Padilla*, 130 S. Ct. at 1495 (Scalia, J., dissenting); see also *id.* ("Even assuming the validity of these holdings . . .").

132. Allison O. Larsen, *Bargaining Inside the Black Box*, 99 GEO. L.J. 1567, 1612 n.102 (2011) ("[R]oughly ninety percent of the criminal defendants convicted . . . plead guilty rather than exercise their right to stand trial before a court or jury." (internal quotation marks and citation omitted)).