Nos. 10-444 & 10-209

IN THE

Supreme Court of the United States

MISSOURI,

Petitioner,

v.

GALIN E. FRYE,

Respondent.

On Writ of Certiorari to the Court of Appeals of Missouri, Western District

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BLAINE LAFLER,

Petitioner,

v.

ANTHONY COOPER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE CONSTITUTION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

WILLIAM H. DEVANEY
ALEXANDRA MEGARIS
VENABLE LLP
1270 Avenue of the Americas
New York, NY 10020
(212) 307-5500

JOHN F. COONEY
Counsel of Record
VENABLE LLP
575 7th Street, N.W.
Washington, D.C. 20004
(202) 344-8300
jfcooney@venable.com

[Additional Counsel Listed On Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

VIRGINIA SLOAN
President
MARY SCHMID MERGLER
THE CONSTITUTION PROJECT
1200 18th Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 580-6923

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INTEREST OF THE *AMICUS CURIAE*

The Constitution Project[1] is an independent, not-for-profit think tank that promotes and defends constitutional safeguards and seeks consensus solutions to difficult legal and constitutional issues. It respectfully submits this brief as *amicus curiae* in support of Respondent Galin Frye (Docket Number 10-444) and Respondent Anthony Cooper (Docket Number 10-209).

The Constitution Project achieves its goal through constructive dialogue across ideological and partisan lines, and through scholarship, activism, and public education efforts. It has earned wide-ranging respect for its expertise and reports, which are designed to make constitutional issues a part of ordinary political debate. The Constitution Project frequently appears as *amicus curiae* before the United States Supreme Court, the federal courts of appeals, and the highest state courts in support of the protection of constitutional rights.

The Constitution Project's National Right to Counsel Committee is a bipartisan committee of independent experts representing all segments of America's justice system.[2] Established in 2004, the National Right to

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[1] No counsel for a party or a party to this proceeding authored this brief in whole or in part, and no counsel for a party or party to this proceeding made a monetary contribution intended to fund either the preparation or the submission of this brief. No person other than *amicus curiae*, its members, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of the Parties' consent for *amicus curiae* to submit a brief in this proceeding are filed with this brief.

[2] The Committee members are as follows (affiliations listed for identification purposes only): **Hon. Rhoda Billings** (Co-Chair), Professor Emeritus, Wake Forest Law School; Justice,

North Carolina Supreme Court, 1985-1986, Chief Justice, 1986; Judge, State District Court, 1968-1972; **Robert M. A. Johnson** (Co-Chair), District Attorney, Anoka County, Minnesota; former President, National District Attorneys Association; **Hon. Timothy K. Lewis** (Co-Chair), Appellate Practice Group, Schnader Harrison Segal & Lewis LLP; Judge, United States Court of Appeals for the Third Circuit, 1992-1999; Judge, United States District Court for the Western District of Pennsylvania, 1991-1992; former Assistant United States Attorney, Western District of Pennsylvania; former Assistant District Attorney, Allegheny County, Pennsylvania; **Hon. Walter Mondale** (Honorary Co-Chair), Senior Counsel, Dorsey & Whitney LLP; Vice President of the United States, 1977-1981; United States Senator (D-MN), 1964-1977; former Minnesota Attorney General, who organized the *amicus* brief of 22 states in support of Gideon in *Gideon v. Wainwright*; **Hon. William S. Sessions** (Honorary Co-Chair), Partner, Holland and Knight LLP; Director, Federal Bureau of Investigation, 1987-1993; Judge, United States District Court for the Western District of Texas, 1974-1987, Chief Judge, 1980-1987; United States Attorney, Western District of Texas, 1971-1974; **Shawn Marie Armbrust**, Executive Director, Mid-Atlantic Innocence Project; former Northwestern journalism student who helped exonerate death row inmate Anthony Porter; **Hon. Jay W. Burnett**, Former Judge, 351st Criminal District Court, Harris County, Texas, appointed 1984; Judge, 183rd Criminal District Court, Harris County, Texas, 1986-1998; Visiting Criminal District Judge, 2nd Judicial Administrative Region of Texas, 1999-2000; **Alan Crotzer**, Senior Clerk, Department of Juvenile Justice; 2006 DNA exonoree; **Dr. Tony Fabelo**, Director of Research, Justice Center of the Council of State Governments; former Senior Associate, The JFA Institute; former Executive Director, Texas Criminal Justice Policy Council; **Hon. Norman S. Fletcher**, Of Counsel, Brinson, Askew, Berry, Seigler, Richardson & Davis; Justice, Supreme Court of Georgia, 1989-2005, Chief Justice, 2001-2005; **Monroe Freedman**, Professor of Law and Former Dean, Hofstra University School of Law; **Susan Herman**, Associate Professor of Criminal Justice, Pace University; former Executive Director, National Center for Victims of Crime; **Bruce Jacob**, Dean Emeritus and Professor of Law, Stetson University College of Law; former Assistant Attorney General for the State of Florida,

Counsel Committee's mission was to examine, across the country, whether criminal defendants and juveniles charged with delinquency who are unable to retain their own lawyers receive adequate legal representation, consistent with the United States Constitution, decisions of this Court, and rules of the legal profession.

The National Right to Counsel Committee spent several years examining the ability of state courts to provide adequate counsel to indigent individuals charged in criminal and juvenile delinquency cases who are unable to afford lawyers. In 2009, the Committee issued its report, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, which included the Committee's findings on the vindication of the right to counsel nationwide, and based on those findings, made twenty-two

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represented Florida in *Gideon v. Wainwright*; **Abe Krash**, Retired Partner, Arnold & Porter LLP; former Visiting Lecturer, Yale Law School; Adjunct Professor, the Georgetown University Law Center; represented Clarence Gideon in *Gideon v. Wainwright*; **Charles J. Ogletree, Jr.**, Founding and Executive Director, Jesse Climenko Professor of Law, Charles Hamilton Houston Institute for Race and Justice, Harvard Law School; **Bryan Stevenson**, Director, Equal Justice Initiative of Alabama; Professor of Law, New York University School of Law; **Larry D. Thompson**, General Counsel, PepsiCo, Inc.; Deputy Attorney General of the United States, 2001-2003; former United States Attorney, Northern District of Georgia; **Hubert Williams**, President, Police Foundation; former New Jersey Police Director; former Special Advisor to the Los Angeles Police Commission; **Norman Lefstein** (Reporter and Member), Professor of Law and Dean Emeritus, Indiana University School of Law, Indianapolis; **Robert Spangenberg** (Reporter), President, The Spangenberg Group.

substantive recommendations for reform.[3] The Committee recommended that states provide sufficient funding and oversight to comply with constitutional requirements and endorsed litigation seeking prospective relief on behalf of a class of indigent defendants when states fail to comply with those requirements. *See id.* at 183-200, 210-213. The Committee also made recommendations for the federal government, criminal justice agencies, bar associations, judges, prosecutors, and defense lawyers to address the indigent defense crisis facing the nation. *See id.* at 200-209. *Justice Denied* has been cited in a wide variety of national news outlets, state newspapers, and state court opinions, and publicly praised by a wide array of public figures. *See e.g.*, Editorial, *The Sorry State of Indigent Defense*, WASH. POST, Dec. 9, 2010; Steven Zeidman, *Indigent Defense: Caseload Standards*, NEW YORK LAW JOURNAL, Mar. 24, 2010 *available at* http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202446663975; Attorney General Eric Holder, Address at the American Council of Chief Defenders Conference (June 24, 2009), *available at* http://www.justice.gov/ag/speeches/2009/agspeech-090624.html.

Accordingly, The Constitution Project has an interest as *amicus curiae* in these two important cases regarding the Sixth Amendment right to counsel currently pending before the Court.

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[3] *Justice Denied* is available on The Constitution Project's website, *www.constitutionproject.org*.

SUMMARY OF ARGUMENT

Because the overwhelming majority of criminal cases are settled through plea bargaining, effective assistance of counsel during that process is critical to the overall administration of justice. This is particularly true for indigent defendants who, because of the chronic underfunding of indigent defense systems, are more likely than others to accept a plea bargain.

The Sixth Amendment right to counsel ensures that plea negotiations, which largely operate outside the rules of criminal procedure and the rules of evidence, result in fair and reliable outcomes. In *Hill v. Lockhart*, 474 U.S. 52 (1985), this Court expressly recognized that the Sixth Amendment protects a defendant's right to effective assistance of counsel during the plea bargaining process. *See also Premo v. Moore*, 131 S. Ct. 733 (2011) (applying ineffective assistance of counsel test, but finding no violation, where defendant accepted a plea offer before his lawyer moved to suppress a supposedly illegally obtained confession); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480-81 (2010) (applying ineffective assistance test and finding Sixth Amendment violation where immigrant defendant pled guilty, on his lawyer's advice, to a felony that made him subject to deportation). While the law in this area is well-established and imposes a substantial burden on the defendant to show that an error by his counsel was of a constitutional dimension, the courts below correctly found that the Respondents had carried that burden.

Contrary to Petitioners' argument, a subsequent trial or plea colloquy that is consistent with Sixth Amendment norms cannot cure a constitutional violation of the right to counsel that occurred at the prior plea bargaining stage. It is the adversarial

process itself, not a trial alone, to which a defendant's Sixth Amendment right to counsel is tied. As such, an analysis of prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), focuses on whether counsel's ineffective assistance caused a breakdown in the adversarial process as a whole—not just whether the ineffective assistance prevented the defendant from ultimately receiving a fair trial.

The adversarial process breaks down where, as here, a defendant's counsel fails him anywhere in the plea process and, as a result, the defendant receives a sentence substantially greater than he otherwise would have had he not been denied his constitutional right to counsel. In such a case, reinstatement of the original plea offer comes as close as possible to redressing the constitutional harm. Such a remedy, which courts routinely grant, is constitutionally permissible and indeed is consistent with this Court's holding in *United States v. Morrison*, 449 U.S. 361, 364 (1981), that remedies for the deprivation of the Sixth Amendment right to counsel should be tailored to the injury suffered from the constitutional violation.

ARGUMENT

I. This Court Has Long Recognized That A Defendant Has A Constitutional Right To Effective Assistance Of Counsel During Plea Bargaining.

A. Plea Bargaining Is A Critical Stage Of A Criminal Prosecution.

The dominance of plea bargaining in the modern criminal justice system led two scholars to conclude that "[plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice

system." Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1912 (1992) (emphasis added). The numbers certainly support that conclusion. In 1984 (the year *Strickland* was decided), the percentage of criminal convictions in federal court secured pursuant to pleas was already 87.14%. U.S. Department of Justice, *Sourcebook of Criminal Justice Statistics*, Table 5.22.2010.[4] By 2010, of the 89,741 criminal convictions in federal district court, 97.4% (87,418) were disposed of pursuant to pleas of guilty or *nolo contendere*. *Id.* Similarly, in 2006 (the last year for which such statistics are available), 94% of all felony convictions in state courts were by guilty plea. U.S. Department of Justice, *Sourcebook of Criminal Justice Statistics*, Table 5.46.2006.[5]

The prevalence of plea bargaining over the last several decades has fundamentally altered the modern criminal justice system. Whereas the system originally was premised on confrontation at trial, plea bargaining has supplanted the jury trial, and the full panoply of rights that follows, as the primary mode of resolving criminal prosecutions. As a result, the main function of defense counsel in the vast majority of cases has become the negotiation of an effective plea bargain.

As this Court has observed, disposition of charges through a plea is not only an essential part of the process, but a highly desirable one:

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[4] Available online at http://www.albany.edu/sourcebook/pdf/t5222010.pdf.

[5] Available online at http://www.albany.edu/sourcebook/pdf/t5462006.pdf.

> It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Santobello v. New York, 404 U.S. 257, 261 (1971). However, "all of these [benefits] presuppose fairness in securing agreement between an accused and a prosecutor." *Id.* For the plea bargaining *process* itself to be fair, as contemplated in *Santobello*, constitutionally effective assistance of defense counsel is required during that process.

In *United States v. Wade*, 388 U.S. 218 (1967), the Court explained that the right to effective assistance of counsel extended to all "critical stages" of a criminal proceeding. Not surprisingly, given its observation in *Santobello*, this Court has recognized that plea bargaining is a critical stage of a criminal prosecution: "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." *Padilla*, 130 S. Ct. at 1486 (2010) (emphasis in original); *see also Williams v. Jones*, 571 F.3d 1086, 1090-91 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 3385 ("The plea bargaining process is a critical stage of a criminal prosecution."). Because the decision to enter a guilty plea "ranks as a 'critical stage' at which the right to counsel adheres," *Iowa v. Tovar*, 541 U.S. 77, 81 (2004), it

necessarily follows that a decision to reject a guilty plea is also a critical stage at which the right to effective assistance of counsel adheres. *See United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 438 (3d Cir. 1982) ("We have held that entering a guilty plea . . . is a critical stage . . . . It seems to us that the decision to reject a plea bargain offer and plead not guilty is also a vitally important decision and a critical stage at which the right to effective assistance of counsel attaches."). As the Supreme Court of California has similarly stated:

> Both alternate decisions—to plead guilty or instead to proceed to trial—are the products of the same attorney-client interaction and involve the same professional obligations of counsel. Application of the constitutional guarantee of effective assistance of counsel to the advice given a defendant to plead guilty necessarily encompasses the counterpart of that advice: to reject a proffered plea bargain and submit the issue of guilt to the trier of fact.

In re Alvernaz, 830 P.2d 747, 753-54 (Cal. 1992).

To achieve fair and reliable results, the criminal justice system relies upon defense counsel to effectively navigate plea negotiations and the plea process. This unquestionably includes communicating plea offers to the client as well as accurately applying the applicable law when advising the client to reject or accept a plea. A defendant who, through the error or neglect of counsel, does not accept a plea bargain that is more favorable than the conviction and sentence he ultimately receives is prejudiced when he loses the benefit of that initial bargain. Similarly, a defendant is prejudiced if, through the error or neglect of counsel, he rejects a plea, goes to

trial, and is convicted of multiple charges or charges for a higher offense. Indeed, the practice of overcharging, which commonly is employed by prosecutors to encourage defendants to settle the case through a plea, can easily prejudice a defendant who does not accept a plea offer due to counsel's ineffective performance.

Because the overwhelming majority of criminal cases are settled through the plea process, counsel's effective assistance to his client during this process is critical to the overall administration of justice. The Sixth Amendment right to counsel ensures that plea negotiations, which largely operate outside the rules of criminal procedure and the rules of evidence, result in fair and reliable outcomes. The Court's well-established precedent that a defendant must show that counsel did not exercise reasonable competence in representing him, *Strickland*, 466 U.S. at 688, is sufficiently rigorous in the plea bargaining process to prevent ineffective assistance of counsel claims from deteriorating into post-sentencing expressions of "defendant's remorse."[6] Thus, under the Court's

[6] Indeed, the strictness of the *Strickland* standard has led many critics to argue that it undermines defendants' Sixth Amendment rights. *See* Kenneth Williams, *Does Strickland Prejudice Defendants on Death Row?*, 43 U. RICH. L. REV. 1459, 1461 (2009) (arguing *Strickland*'s prejudice prong "needs to be eliminated rather than re-tooled"); William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 93-94 (1994) (contending that the *Strickland* line of decisions has "undermined, if not virtually destroyed, the right of indigent accused" to have reasonably competent counsel and describing *Strickland* as having been "roundly and properly criticized for fostering tolerance of abysmal lawyering"). In practice, the prejudice prong of *Strickland* has served to deny relief to victims of even the most egregious forms of attorney misconduct.

decisions, not every error or neglect by counsel in the plea bargaining process is sufficient to state an ineffective assistance claim. Rather, the defendant must carry the heavy burden of showing that counsel's failure to demonstrate reasonable competence was of constitutional dimension. *See Premo*, 131 S. Ct. at 741 (holding that "strict adherence to the *Strickland* standard [is] all the more essential when reviewing the choices an attorney made at the plea bargaining stage.").

B. Contrary To Petitioners' Argument, *Strickland* And Its Progeny Recognize Forms Of Prejudice Other Than The Deprivation Of A Fair Trial.

Petitioners claim that the only cognizable form of prejudice under *Strickland* is the denial of a fair trial. Pet. State of Missouri Br. 18-25 & Pet. Lafler Br. 13-20. This position is refuted by this Court's precedent, including *Strickland* itself. *See Strickland*,

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See United States v. Voigt, 877 F.2d 1465, 1467 (10th Cir. 1989) (relief denied where counsel used Demerol throughout trial); *Curnutt v. State*, No. M2009-00346-CCA-R3-PC, 2010 WL 565670, at *7 (Tenn. Crim. App. Feb. 18, 2010) (no relief where lead counsel fell asleep at least twice during trial); *Graley v. State*, 582 So. 2d 811, 812 (Fla. Dist. Ct. App. 1991) (Garrett, J., concurring) (denied relief where counsel was under the influence of cocaine during plea negotiations); *Dorsey v. State*, 739 P.2d 528, 529-30 (Okla. Crim. App. 1987) (no relief where both trial judge and prosecutor admitted smelling alcohol on defense counsel's person). Accordingly, The Constitution Project's National Right to Counsel Committee has called for the *Strickland* standard to be replaced by a straightforward test for determining ineffective assistance of counsel that would simply ask whether the accused received "competent" and "diligent" representation, as required by the rules of professional conduct adopted by the legal profession. *Justice Denied* at 212-213.

466 U.S. at 686; (holding that a Sixth Amendment violation can occur at sentencing), *Hill*, 474 U.S. at 57 (holding that a Sixth Amendment violation can occur at the plea bargaining stage). Additionally, Petitioners' contention that a conviction at fair trial or guilty plea subsequent to a Sixth Amendment violation cures that violation is not supported by the decisions of this Court or the circuits that have considered the issue. *See Strickland* at 696 (holding that the prejudice inquiry turns on whether "the decision reached would reasonably likely have been different absent the errors"); *Williams*, 571 F.3d at 1091 (same); *Julian v. Bartley*, 495 F.3d 487, 498 (7th Cir. 2007) (same); *Wanatee v. Ault*, 259 F.3d 700, 703-04 (8th Cir. 2001) (same); *United States v. Garivia*, 116 F.3d 1498, 1514 (D.C. Cir. 1997) (per curiam) (same); *Boria v. Keane*, 99 F.3d 492, 498-99 (2d Cir. 1996) (same); *Coulter v. Herring*, 60 F.3d 1499, 1504 & n.7 (11th Cir. 1995) (same); *United States v. Brannon*, 48 Fed. Appx 51, 53 (4th Cir. 1994) (per curiam) (same); *United States v. Blaylock*, 20 F.3d 1458, 1468 (9th Cir. 1994) (same); *United States v. Day*, 969 F.2d 39, 45 (3d Cir. 1992) (same); *United States v. Rodriguez Rodriguez*, 929 F.2d 747, 751 & n.1 (1st Cir. 1991) (per curiam) (same); *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1981) (same).

Under *Strickland*, to establish ineffective assistance of counsel, a defendant must show (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, *the result of the proceeding would have been different*." *See Strickland*, 466 U.S. at 694 (emphasis added). As noted above, this Court unequivocally stated in *Hill v. Lockhart* that the Sixth

Amendment protects a defendant's right to effective assistance of counsel during the plea bargaining process. 474 U.S. at 57. Further, in *Iowa v. Tovar*, this Court explicitly confirmed that plea bargaining is a "critical stage" of criminal proceedings for Sixth Amendment purposes. *See* 541 U.S. at 80-81; *see also Premo*, 131 S. Ct. at 741. And, further eroding Petitioners' argument, plea bargaining is not the only part of a criminal proceeding outside of the trial to which the right to effective assistance of counsel attaches. Indeed, this Court has long recognized that the *Strickland* line of cases applies to criminal proceedings as a whole, not simply the actions of counsel between opening and closing statements. *See Rompilla v. Beard*, 545 U.S. 374, 380-81 (2005) (applying *Strickland* to sentencing); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (applying *Strickland* to appeals process).

It is the adversarial process as a whole, not a trial alone, that secures a defendant's Sixth Amendment rights, and a variety of errors and omissions during the process can lead to constitutional ineffectiveness. *See, e.g.*, *United States v. Cronic*, 466 U.S. 648, 656 (1984) (stating that insufficient time for trial preparation, even without any specific allegation of deficient performance, can serve as a basis for an ineffective assistance claim); *Strickland*, 466 U.S. at 686 (holding that deficient performance at a capital sentencing hearing can give rise to an ineffective assistance claim); *Morrison*, 449 U.S. at 364-65 (compiling cases in which pre-trial violations of the Sixth Amendment occurred). As such, an analysis of prejudice under *Strickland* focuses not on a particular point in a criminal prosecution at which counsel's assistance was ineffective, but rather whether the result of that ineffective assistance caused a break-

down in the adversarial process as a whole. *See Strickland*, 466 U.S. at 696 ("the ultimate focus of inquiry [in an ineffective assistance of counsel claim] must be on the fundamental fairness of the proceeding whose result is being challenged"); *see also Cronic*, 466 U.S. at 656 (announced the same day as *Strickland*, holding that "if the *process* loses its character as a confrontation between adversaries, the constitutional guarantee has been violated.)" (emphasis added); *Morrison*, 449 U.S. at 363 (the right to counsel is "fundamental to our system of justice" and is "meant to ensure fairness in the adversary criminal *process*") (emphasis added). When an attorney's incompetence robs an individual of his right to a fair, adversarial process, that individual's Sixth Amendment rights have undoubtedly been violated. *See Cronic*, 466 U.S. at 656.

All circuits that have addressed the issue have held that a defendant who rejects a plea deal as a result of his lawyer's constitutionally deficient performance and proceeds to trial has been prejudiced if the sentence he receives at trial is higher than the sentence offered in the plea deal. *See Williams*, 571 F.3d at 1091; *Julian*, 495 F.3d at 498; *Wanatee*, 259 F.3d at 703-04; *Garivia*, 116 F.3d at 1514; *Boria*, 99 F.3d at 498-99; *Coulter*, 60 F.3d at 1504 & n.7; *Brannon*, 48 F. App'x at 53; *Blaylock*, 20 F.3d at 1468; *Day*, 969 F.2d at 45; *Rodriguez Rodriguez*, 929 F.2d at 751 & n.1; *Beckham*, 639 F.2d at 267. We are aware of no federal precedent supporting Petitioners' contention that the only form of prejudice recognized under *Strickland* is the denial of a fair trial. Indeed, as the Sixth Circuit in *Lafler* stated, "[N]o federal circuit case holds so." *See Cooper v. Lafler*, 376 Fed. Appx 563, 572 (6th Cir. 2010), *cert. granted*, 131 S.

Ct. 856 (No. 10-209, 2011 Term) (quoting *Williams*, 571 F.3d at 1093).

Petitioners' argument that any ineffective assistance of counsel was remedied by the subsequent plea that Frye entered into and the trial Cooper received similarly fails. This Court in *Strickland* found that "mechanical rules" like the one Petitioners propose are inapplicable in ineffective assistance of counsel cases. 466 U.S. at 696; *see also Rose v. Mitchell*, 443 U.S. 545, 559 (1979) (rejecting the contention that a subsequent fair trial remedied a violation of the 14th Amendment caused by racial discrimination in grand jury selection). Moreover, as noted, *Strickland* stated that it is not the fairness of the trial alone, but rather of the proceedings as a whole that is dispositive. 466 U.S. at 696. At least three circuits that have considered the issue have specifically rejected the notion that a fair trial cures ineffective assistance of counsel at the plea bargaining stage. *See Blaylock*, 20 F.3d at 1466; *Day*, 969 F.2d at 44; *Rodriguez Rodriguez*, 929 F.2d at 751 & n.1. As the Third Circuit stated in *Day*, the "Sixth Amendment right to effective counsel guarantees more than the Fifth Amendment right to fair trial." 969 F.2d at 45.

In sum, a proceeding is not fundamentally fair when a defendant receives a sentence substantially greater than he otherwise would have had his constitutional rights not been violated in the plea bargaining process. This type of prejudice is cognizable under the Sixth Amendment.

C. Frye And Cooper Each Have Met The Standard For Establishing Ineffective Assistance Of Counsel As Set Forth In *Strickland*.

At a minimum, effective assistance requires informing the defendant of the existence of a plea offer and advising the defendant to reject or accept an offer based on accurate and complete information and legal analysis. *See Julian*, 495 F.3d at 497 (holding that advising a client based on a misreading of clear precedent constitutes deficient performance); *Blaylock*, 20 F.3d at 1465-66 (failure to inform defendant of a plea offer constitutes deficient performance). And, as explained above, prejudice is established when a defendant receives a significantly longer sentence than he otherwise would have absent his attorney's constitutionally deficient performance. *Caruso*, 689 F.2d at 438.

Frye's attorney's failure to convey the plea offer to his client fell below an "objective standard of reasonableness," the benchmark set by this Court for determining ineffective assistance of counsel. *See Padilla*, 130 S. Ct. at 1482 (quoting *Strickland*, 466 U.S. at 688). The Missouri Supreme Court, finding the record devoid "of *any* evidence of *any* effort" to inform Frye of the plea offer, held that the performance of Frye's attorney was constitutionally deficient under the first prong of the *Strickland* test. *Frye v. State*, 311 S.W.3d 350 (Mo. Ct. App. 2010), *cert. granted*, 131 S. Ct. 856 (2011) (emphasis in original). Other courts have similarly concluded that the failure to inform the defendant of the very existence of a plea offer constitutes deficient performance. *See, e.g., Blaylock*, 20 F.3d at 1465-66; *Rodriguez*, 929 F.2d at 752. The decision of whether to accept a plea offer was Frye's to make. The failure

to even make him aware of such an offer, however, constitutes both "a gross deviation from accepted professional standards" generally, and deficient performance of counsel under *Strickland* specifically. *Caruso*, 689 F.2d at 438.

Furthermore, Frye was clearly prejudiced by his attorney's failure to convey the plea offer when he received a three-year sentence from the court—two years longer than the maximum sentence he could have received under the plea that was never communicated to him. *Frye*, 311 S.W.3d at 352-53; *see also Caruso*, 689 F.2d at 438 (prejudice is established when a defendant receives "a significant additional term of imprisonment that resulted from counsel's failure to communicate the plea offer which he would have accepted").

Cooper was likewise denied effective assistance of counsel when his attorney incorrectly informed him that the evidence in his case could not possibly support a conviction for the crime with which he had been charged. Cooper was convicted at trial. Had Cooper accepted the plea offer, the prosecution would have recommended a sentence of between 51 to 85 months. Instead, Cooper was sentenced to a term of 185 to 360 months. *Id.* at 563, 567.

Cooper's attorney gave him advice that fell below the objective standard of reasonableness. *See Wanatee*, 259 F.3d at 704 (finding that attorney's failure to fully explain implications of felony murder rule constitutes deficient performance). The Sixth Circuit found that the claim of Cooper's attorney about the dispositive nature of a victim's injuries in determining intent under Michigan law was clearly wrong, citing multiple long-standing Michigan cases in direct opposition. *Cooper*, 376 F. App'x at 567. "Providing

such erroneous advice in the face of settled Michigan law is obviously deficient performance," the circuit court held. *See id.* Other circuits have found the deficient performance prong met when attorneys gave their clients incorrect or even incomplete advice. *Julian*, 495 F.3d at 497 (finding that the misreading of unambiguous precedent on a factor in sentencing constitutes deficient performance); *Wanatee*, 259 F.3d at 704 (finding that attorney's failure to fully explain implications of the felony murder rule constitutes deficient performance). As such, the clearly erroneous advice given by Cooper's attorney on a seminal legal point constitutes constitutionally deficient performance under the *Strickland* standard.

Cooper was prejudiced by this deficient performance. The court below found that the evidence supported Cooper's assertion that he would have pled guilty had he been fully and accurately informed of the governing law. *Cooper*, 376 F. App'x at 571-72. Cooper was prejudiced when he acted upon his attorney's erroneous statement of the law, went to trial, was convicted, and as a result received a sentence much longer than he would have absent the incorrect advice. *See Wanatee*, 259 F.3d at 704 (holding that the defendant can establish prejudice by showing "that he would have accepted the plea but for counsel's advice, and that had he done so, he would have received a lesser sentence").

In short, Frye and Cooper's Sixth Amendment rights were violated when they received ineffective assistance of counsel during the plea bargaining process. Their attorneys' performance fell well below an objective standard of reasonableness, and they were prejudiced by their attorneys' errors. *See Wanatee*, 259 F.3d at 704; *Blaylock*, 20 F.3d at 1467. As such,

both Respondents have met the well-established standard for ineffective assistance of counsel set forth by this Court in *Strickland*, and extended to the plea process in *Hill v. Lockhart*. The Court should apply that settled law and affirm the decisions below.

II. Because Indigent Defendants Plead Guilty At An Even Higher Rate Than Others, Petitioners' Proposed Standard For Prejudice Would Deprive Most Indigent Defendants Of Full Protection Under The Sixth Amendment.

For the overwhelming majority of criminal defendants whose criminal charges will be resolved through the plea process rather than trial, the need for effective assistance of counsel is greatest during plea bargaining. This is particularly true for indigent defendants who, because of a systemic lack of resources, are more likely to accept a plea bargain. *See* U.S. Department of Justice, *Defense Counsel in Criminal Cases* Table 17 (2000) (finding that federal and state prison inmates represented by court-appointed lawyers were more likely to plead guilty than those represented by private lawyers).[7]

Under Petitioners' proposed prejudice standard, the plea process itself would not be subject to the Sixth Amendment unless counsel's constitutionally inadequate representation ultimately resulted in the deprivation of a fair trial. Such a limitation on the Sixth Amendment right to counsel would fall most heavily on indigent defendants for the simple reason that they are the least likely to proceed to trial.

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[7] Available online at http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf.

In *Gideon v. Wainwright*, this Court ruled that the Sixth and Fourteenth Amendments of the Constitution guarantee the provision of counsel to indigent persons accused of a crime in state felony proceedings. 372 U.S. 335 (1963). However, almost five decades later, the indigent defense system in the United States is in a state of crisis, threatening compliance with this Court's ruling in *Gideon*.[8] Defense services in criminal and juvenile cases are woefully underfunded, resulting in a system that inadequately compensates assigned counsel; pressures defendants to waive counsel; assigns incompetent or inexperienced counsel; appoints counsel late in the process; understaffs public defense offices; and fails to provide defense counsel sufficient investigative resources. As a result, many indigent defense systems fail to provide constitutionally adequate representation, and the promise of equal justice under the law remains elusive.

Inadequate funding is the most debilitating problem in the administration of indigent defense. Even before the economic downturn beginning in 2008, many states that fund their own indigent defense

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[8] The problems in indigent defense are well known and widely studied and documented in *Justice Denied*. In addition, in 2003, to commemorate the fortieth anniversary of *Gideon v. Wainwright*, the Standing Committee on Legal Aid and Indigent Defendants of the American Bar Association ("ABA") undertook to examine the state of indigent defense since *Gideon*. It held hearings at four different locations across the country to document indigent defense problems, including excessive caseloads. Numerous witnesses from several states testified. The resulting report, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (2004) (hereafter *Gideon's Broken Promise*), revealed numerous impediments in the delivery of indigent defense services.

systems (rather than relying on county funding) had actually decreased their support of these defense systems.[9] With the budget shortfalls resulting from the 2008 economic downturn, that trend can only have continued.

The inadequate funding for indigent defense systems is readily apparent when one closely examines the disparity between funding for prosecution services versus funding for indigent defense. For example, in 2007, the Spangenberg Group conducted a study in Tennessee comparing the overall resources allotted to prosecution and defense. The Spangenberg Group, *Resources of the Prosecution and Indigent Defense Functions in Tennessee* (2007).[10] The study concluded that total prosecution funding that could be attributed to indigent cases ranged between $130 and $139 million for fiscal year 2005, while funding for indigent defense totaled approximately $56.4 million. *Id.*

Because of inadequate funding, indigent defense attorneys in much of the United States are burdened with excessive caseloads. Professional rules of conduct governing lawyers require that an attorney's workload be controlled to allow for competent representation in each case. American Bar Association, Model Rules of Prof'l Conduct R. 6.I (2007). Guidelines issued by the National Legal Aid and Defender Association (NLADA) similarly require that, prior to accepting an appointment, defense attorneys ensure they have adequate time available

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[9] *Justice Denied* at 59.

[10] Available online at http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/defender/downloads/TN_CompStudyFINAL_7_30_07.authcheckdam.pdf.

to provide quality representation. NLADA, Performance Guidelines For Criminal Def. Representation (4th Printing). In reality, however, workloads for indigent defense counsel far exceed these national standards, and excessive caseloads continue to plague indigent defense systems across the country. *See* U.S. Department of Justice, *State Public Defender Programs*, 2007 13, 18 (2009); U.S. Department of Justice, *County-based and Local Public Defenders Offices*, *2007* 8 (2010).[11]

As a result of overwhelming workloads, there is increased pressure on defense attorneys representing indigents and, in turn, their clients to accept guilty pleas to expedite the movement of cases. Another byproduct of excessive workloads is error, including during the plea process, because counsel simply does not have the time or resources to perform effectively.

In *Strickland*, the Court recognized that the obligation of counsel to provide effective assistance entails "certain basic duties," including advocating the defendant's cause, demonstrating loyalty to the client, avoiding conflicts of interest, consulting with the defendant on important decisions, keeping the defendant informed of important developments, conducting reasonable factual and legal investigations, and bringing to bear the necessary skills and knowledge. 466 U.S. at 688. When lawyers handle an excessive number of cases, however, they are forced to spend their time in court as well as handling emergencies and other matters that cannot be postponed. As a result, they are unable to perform essential tasks such as client interviews, legal research, drafting

[11] Available online at http://bjs.ojp.usdoj.gov/content/pub/pdf/clpdo07.pdf.

motions, requesting investigative or expert services, interviewing witnesses, and preparing for hearings. *Gideon's Broken Promise* 19.

In Missouri, a study commissioned by the Public Defender Commission found that "excessive caseloads can and do prevent Missouri State Public Defenders from fulfilling the statutory requirements [for representations] and their ethical obligations and responsibilities as lawyers." *Justice Denied* 69 (citing The Spangenberg Group, *Assessment of the Missouri State Public Defender System* 7 (2005)). The Missouri State Public Defender Deputy Director stated that 2004 caseloads required trial public defenders to dispose of a case every 6.6 hours of every working day. *Id.* These caseloads led the Missouri Public Defender Commission in 2007 to promulgate an emergency regulation, which became permanent the following year, that would allow it to limit the ability of an overloaded district public defender office to accept additional cases. MO. CODE REGS. ANN. tit. 18, §10-4.010. Here, Frye was represented by the public defender's office of Columbia, Missouri.

Similarly, NLADA released a report regarding Michigan's public defense system in 2008, finding that, "the state of Michigan fails to provide competent representation to those who cannot afford counsel in its criminal courts." NLADA, *Evaluation of Trial-Level Indigent Defense Systems in Michigan, A Race to the Bottom* (Jun. 2008).[12] Some of the problems plaguing the system were due to excessive caseloads. *Id.* at 57-70. The Michigan Campaign for Justice concluded: "Across the state, attorneys have

[12] Available online at http://www.michigancampaignforjustice.org/docs/Michigan%20NLADA%20report.pdf.

caseloads well above the national standards. In one county, a misdemeanor contract firm handles so many cases that the attorneys spend an average of 32 minutes per case." Cooper was indigent and represented by counsel appointed to him by the Michigan Circuit Court for Wayne County.

As noted, when attorneys have too many cases, they often are unable to comply with their professional duty to keep clients informed of the status of their case and promptly respond to client requests for information. In fact, many indigent defense attorneys do not meet with their client until the day the client enters a guilty plea and is sentenced. *Gideon's Broken Promise* 16. Testimony collected by the ABA's Standing Committee on Legal Aid and Indigent Defendants reveals just how little client contact defense attorneys have with their clients. A study of all felony cases over a five-year period in Quitman County, Mississippi showed that 42% of the indigent defense cases were resolved by guilty plea on the day of arraignment, which was the first day the attorney met the client. *Gideon's Broken Promise*, 16 & n.150 (citing testimony of Robert McDuff).

Furthermore, excessive caseloads can lead to attorney mistakes that seriously undermine a client's right to counsel. This is particularly likely when the attorney is inexperienced in the practice of criminal law. In California, a statewide survey of judges and indigent defense attorneys conducted for the California Commission on the Fair Administration of Justice found a "statistically significant correlation between having an excessive caseload and using attorneys with less than [three] years [of] experience" to handle serous felony and "three-strike" cases. *Justice Denied* 69 (quoting Laurence A. Benner and Lorena S. Stern,

Systemic Factors Affecting the Quality of Criminal Defense Representation: Preliminary Report to the California Commission on the Fair Administration of Justice 29 (2007)).[13]

Indigent defense attorneys also frequently lack access to and funding of important services such as experts, investigators, and interpreters. *Justice Denied* 93-94; *Gideon's Broken Promise* 10-11. As the Court recognized in *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985), "mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and . . . a criminal trial is fundamentally unfair if the [prosecution] proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." The lack of non-lawyer services severely hampers the ability of defense attorneys to effectively negotiate a plea deal with the prosecution, especially because prosecutors have open access to the services of state and federal law enforcement and experts.

"The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Strick-*

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[13] Other states report similar experiences. In Alabama, newly-minted attorneys just out of law school are reportedly just as likely as experienced attorneys to be assigned to serious cases, even homicide prosecutions. *Justice Denied* 92, n.251 (citing *Gideon's Broken Promise* at 58-62). Similarly, in 2007 in Caddo Parish, Louisiana, new public defenders with no training were assigned existing caseloads of their predecessors, regardless of prior experience. One attorney, right out of law school, started with a caseload of 270 felony drug cases. *Id.* n.257 (citing The Spangenberg Group, *Review of the Caddo Parish Indigent Defender Office* 11 (2007)).

land, 466 U.S. at 685. Because the overwhelming majority of criminal cases settle through plea bargaining, the right to counsel during plea bargaining plays a crucial role in the adversarial system. For the institutional reasons described above, however, it is indigent defendants who bear the brunt of inadequate public defense resources and the consequent ineffective representation during the plea process. Indeed, without appropriate resources and time to investigate, meet with the client, and conduct legal research, counsel cannot effectively advise a client whether to accept a plea offer.

III. The Logical Remedy For Ineffective Assistance Of Counsel During Plea Bargaining Is To Give The Defendant The Benefit Of The Lost Bargain.

In *Morrison*, 449 U.S. at 364, this Court ruled that violations of the Sixth Amendment are subject to the general rule that remedies be tailored to the injury suffered from the constitutional violation and not unnecessarily infringe on competing interests. Chief among those competing interests is society's interest in pursuing the administration of criminal justice. *Id.* There is no persuasive reason to depart from this general rule for cases involving plea negotiations. Where a defendant fails to enter a plea bargain because of the constitutionally deficient performance of his attorney, his injury is the lengthier sentence that is imposed. The remedy properly tailored to this injury is providing the defendant the benefit of the lost plea offer. As such, Frye and Cooper should be allowed to accept the original pleas because such a remedy comports with the rule set out in *Morrison*.

In *Blaylock*, 20 F.3d at 1468, the Ninth Circuit reasoned that where a defendant was deprived of the opportunity to accept a plea offer, putting him in the position he was prior to the Sixth Amendment violation usually will involve reinstating the original offer. Here, granting Frye and Cooper the option to go to trial would not remedy the deprivation of the right to counsel. Reinstatement of the original plea offer is the only remedy that comes as close as possible to redressing the constitutional harm, and doing so does not unnecessarily offend any competing interest.

Contrary to Petitioners' argument, requiring the government to reinstate its original plea offer is constitutionally permissible, and has been found so by many courts. *Santobello v. New York*, 404 U.S. at 263; *Blaylock*, 20 F.3d at 1468 (citing *Mabry v. Johnson*, 467 U.S. 504, 510 n.11 (1984)); *United States v. Partida-Parra*, 859 F. 2d 629, 635 (9th Cir. 1988). For example, in *Santobello*, the defendant was indicted on two felony counts under New York law. After negotiations, the Assistant District Attorney in charge of the case agreed to permit the defendant to plead guilty to a lesser-included offense and further agreed to make no recommendation as to the sentence. At the defendant's appearance for sentencing months later, a new prosecutor recommended the maximum sentence, which the judge imposed. The defendant appealed the sentence on the grounds that the State had promised that there would be no sentence recommendation by the prosecution. This Court found for the defendant, holding that when a guilty plea was induced based on a promise of the prosecutor, the promise must be fulfilled. *Santobello*, 404 U.S. at 262. In determining the appropriate remedy, the Court found that "the interests of justice and appropriate recognition of the duties of the

prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state courts" for further consideration as to whether the circumstances required that there be specific performance of the agreement on the plea, or if the defendant should be allowed to withdraw his guilty plea. *See id.* at 262-263. Either way, the Court made it clear that courts have remedial power to order that the defendant be given the benefit of the lost bargain.

Lower courts routinely require defendants to be allowed to accept a plea offer where counsel's incompetence was the reason the defendant did not accept the offer in the first place. *See Satterlee v. Wolfenbarger*, 453 F.3d 362, 370 & n.7 (6th Cir. 2006) (affirming lower court decision to release defendant after government defied conditional writ requiring reoffer of original plea agreement); *Nunes v. Mueller*, 350 F.3d 1045, 1056-57 (9th Cir. 2003) (requiring government to reoffer identical plea agreement or release defendant within 120 days); *Alvernaz v. Ratelle*, 831 F. Supp. 790, 797-99 (S.D. Cal. 1993) (requiring government to reoffer original plea deal or release defendant within 30 days).

CONCLUSION

The Court should affirm the holdings of the lower courts that Frye and Cooper received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments and remand the cases with instructions that Frye and Cooper be allowed to accept the original plea offers.

Respectfully submitted,

WILLIAM H. DEVANEY
ALEXANDRA MEGARIS
VENABLE LLP
1270 Avenue of the Americas
New York, NY 10020
(212) 307-5500

VIRGINIA SLOAN
President
MARY SCHMID MERGLER
THE CONSTITUTION PROJECT
1200 18th Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 580-6923

JOHN F. COONEY
Counsel of Record
VENABLE LLP
575 7th Street, N.W.
Washington, D.C. 20004
(202) 344-8300
jfcooney@venable.com

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