No. 10-444

In the Supreme Court of the United States

STATE OF MISSOURI, PETITIONER

v.

GALIN E. FRYE

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

LANNY A. BREUER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

ANTHONY A. YANG
Assistant to the Solicitor General

DEBORAH WATSON
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether defense counsel's failure to convey a prosecutor's guilty-plea offer to respondent deprived respondent of his Sixth Amendment right to the effective assistance of counsel, where respondent later entered an open guilty plea to a felony but asserts that he would have accepted the prosecutor's offer to plead guilty to an uncharged misdemeanor if the offer had been communicated to him.

2. What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and rules:

In the Supreme Court of the United States

No. 10-444

STATE OF MISSOURI, PETITIONER

v.

GALIN E. FRYE

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents an asserted Sixth Amendment claim of ineffective assistance of counsel based on counsel's failure to advise respondent of a plea offer extended by the State, after which respondent was convicted on his plea of guilty without a plea agreement. Because a large portion of federal criminal prosecutions are resolved by way of plea agreements, the government has a substantial interest in the resolution of this case.

STATEMENT

1. On August 14, 2007, the State of Missouri filed a criminal complaint charging respondent with one count of driving while his driver's license was revoked (DWR), in violation of Mo. Rev. Stat. § 302.321 (2000). J.A. 11.

Respondent previously had been convicted on at least four separate felony and six separate misdemeanor charges, including at least three misdemeanor DWRs. J.A. 18-19, 34-35. In accordance with state law, the State charged respondent's DWR offense as a Class D felony carrying a four-year maximum term of imprisonment based on respondent's prior DWR convictions. J.A. 11-12; see Mo. Rev. Stat. §§ 302.321.2, 558.011.1(4) (2000 & Supp. 2006).

The public defender's office in Columbia, Missouri, including attorney Michael Coles, represented respondent. J.A. 1, 39-40. In order to schedule respondent's preliminary hearing after respondent's community-college "exam season," J.A. 46; cf. J.A. 21-22, the office sought and obtained a continuance moving that hearing from November 9, 2007, to January 4, 2008. J.A. 1-2, 46.

Meanwhile, on November 15, 2007, the State's attorney wrote respondent's counsel offering two alternative plea agreements. J.A. 50 (letter). First, if respondent agreed to plead guilty to the felony charge, the prosecutor offered to recommend a three-year prison sentence, defer to the court's views regarding probation, but request that ten days be served in jail as "shock" incarceration. J.A. 40-41, 50. Alternatively, the prosecutor indicated that he could bring an "amended misdemeanor" charge for which the prosecutor would recommend a longer, 90-day prison sentence in exchange for respondent's guilty plea. See *ibid.* The prosecutor required a response by December 28, 2007. J.A. 42, 50. Respondent later testified that his trial counsel never communicated this offer to him. J.A. 33-34.

On December 30, 2007, respondent was arrested for committing another DWR offense. See J.A. 47-48, 61. In an internal memo prepared for use at respondent's

January 4 preliminary hearing, respondent's counsel wrote that respondent had acquired a "new misd[emeanor]" case. J.A. 51; see J.A. 43-44, 61.[1] Counsel also knew that the prosecutor here had a practice of "revok[ing]" any outstanding offers "if a new case was charged." J.A. 45.

On January 4, 2008, the criminal proceedings resumed and respondent waived his right to a preliminary hearing. J.A. 2. At his subsequent arraignment, respondent pleaded not guilty. J.A. 5. On March 3, 2008, respondent changed his plea to an "open" guilty plea—*i.e.*, a plea entered without the benefit of a plea agreement—to the Class D felony charged by the State. J.A. 13, 16. In a plea colloquy with the trial court, respondent stated that his guilty plea had not been induced by any promises, threats, or coercion, J.A. 17, and that he understood both that he would relinquish his numerous trial and appeal rights by pleading guilty, J.A. 14-15, and that the court could impose a sentence of up to four years of imprisonment, J.A. 16-17.

On May 5, 2008, the trial court accepted respondent's guilty plea. J.A. 21. The prosecutor recommended a three-year prison sentence, deferred to the court on probation, but asked for ten days of "shock" incarceration in county jail. J.A. 22. After considering a Sentencing Assessment Report (SAR) about respondent's criminal record and other matters pertinent to respondent's sentencing, the court sentenced respondent to three years

---

[1] In fact, the State charged respondent with felony (not misdemeanor) DWR for his December 30, 2007 offense. In January 2009, respondent pleaded guilty to that felony charge and was sentenced to three years of imprisonment. See *State* v. *Frye*, No. 0811-CR02644-01 (Mo. Cir. Ct.) (docket available at http://www.courts.mo.gov/casenet).

of imprisonment. J.A. 21, 23; see Mo. Rev. Stat. § 217.760 (Supp. 2006); Mo. Sup. Ct. R. 29.07(a).

2. a. On June 9, 2008, respondent filed a motion for postconviction relief in state court, alleging that his counsel's failure to communicate the State's plea offer to him had violated his Sixth Amendment right to the effective assistance of counsel. J.A. 8; J.A. 25-29 (amended motion).

At an evidentiary hearing, respondent's primary trial counsel (Michael Coles) testified that he had received the State's plea offer but did not recall if he had conveyed it to respondent. J.A. 39. Counsel testified that respondent had been difficult to contact because he lived in another city and had changed his telephone number. J.A. 41. Counsel also stated that he did not recall seeing respondent again until after the State's offer expired, *ibid.*, but admitted that he had an address for respondent. J.A. 44. Respondent, in turn, testified that he had not been told of the State's plea offer until after he had been convicted and sentenced. J.A. 33-34. Respondent asserted without elaboration that, had he known of the offer, he would have agreed to plead guilty to a misdemeanor. J.A. 34.

b. The motion court denied relief. J.A. 52-57. First, the court found that, even if respondent's counsel had failed to inform respondent of the offer, counsel was not at fault because respondent failed to remain in contact with counsel. J.A. 53. Alternatively, the court assumed that counsel's performance was deficient but held that respondent failed to show cognizable prejudice. J.A. 53-57. The court reasoned that the "only way to properly evaluate the alleged ineffectiveness of [respondent's] plea counsel" under the Sixth Amendment is to evaluate the effect of counsel's error on respondent's "waiver of

trial by [a] guilty plea [that was] knowing and voluntary." J.A. 53-55 (quoting *Beach* v. *State*, 220 S.W.3d 360, 364 (Mo. Ct. App. 2007) (applying *Hill* v. *Lockhart*, 474 U.S. 52 (1985))). And because respondent did not claim that he "would have gone to trial [rather than plead guilty] but for his counsel's errors," the court concluded that any alleged error did not violate the Sixth Amendment. J.A. 53, 56.

The motion court explained that a contrary rule would raise two problems. J.A. 55. First, allowing challenges to guilty pleas based on assertedly deficient plea negotiations would significantly undermine the finality of criminal convictions based on such pleas. *Ibid.* Second, no appropriate remedy would be available because the court had "no power to require the State to reinstate the alleged favorable plea offer" and, even if it did, the State could simply "withdraw[] it before it was accepted by the trial court." J.A. 55-56 (citation omitted). Remanding the case for trial likewise would not be an appropriate remedy because respondent had already made the decision to plead guilty to a felony rather than go to trial and did not claim "he would have gone to trial but for his trial counsel's actions." J.A. 57.

3. The Missouri Court of Appeals reversed. J.A. 58-80. The court explained that, under *Strickland* v. *Washington*, 466 U.S. 668 (1984), respondent was required to prove his Sixth Amendment claim by demonstrating that (1) his counsel's performance was deficient and (2) counsel's error prejudiced respondent. J.A. 63. The court concluded that respondent satisfied both criteria.

The court of appeals first held that respondent sufficiently established that counsel's performance was deficient. J.A. 63-70. The court noted, *inter alia*, that respondent's trial counsel never testified that he phoned

respondent about the offer and that the record indicated no effort to mail the offer. J.A. 67-70.

The court of appeals also held that respondent established prejudice under *Strickland* because, it concluded, the result of the proceeding would have been different but for counsel's error. J.A. 70-79. The court recognized that this Court stated in *Hill* that a defendant who has pleaded guilty must demonstrate prejudice under *Strickland* by showing a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." J.A. 70 (quoting *Hill*, 474 U.S. at 59). But the court of appeals concluded that *Hill* did not reflect "the only way prejudice can be established" and did not undermine "*Strickland*'s looser emphasis" on "whether 'the result of the proceeding would have been different,'" J.A. 71-72. See J.A. 71-76. The court thus concluded that respondent's failure to contend that he would have insisted on going to trial was not dispositive. J.A. 73-74, 76.

The court of appeals recognized that a "plea agreement standing alone is without constitutional significance" and that defendants have "no constitutional right to a plea bargain." J.A. 76 (citations omitted). The court also recognized that the State may withdraw its plea offer "without recourse"—even after the defendant has accepted the deal—so long as a court has not yet accepted the resulting guilty plea. J.A. 77. The State here, the court observed, "may well have withdrawn the [o]ffer, even if accepted by [respondent], if it became aware prior to sentencing of [respondent's] new charge on December 30, 2007." J.A. 77 n.4. But the court concluded that respondent had established prejudice because, if his counsel had timely communicated the State's offer, respondent could have "accept[ed] the

[o]ffer and * * * submitted to a guilty plea hearing" on a misdemeanor offense before he received his new DWR charge. J.A. 78 n.6. The sentencing court then "would have been bound to accept the guilty plea for the misdemeanor charge" with a "maximum jail sentence" of one year because "[t]he State ha[s] exclusive control over the charging of [respondent's] offense." J.A. 77-78. Such offers to modify how the State charges an offense, the court of appeals reasoned, were distinct from cases in which the State simply offers a "non-binding sentencing recommendation" in exchange for a guilty plea, because defendants in the latter cases would be "hard pressed to establish prejudice" from offers that would not bind the trial court's sentencing options. J.A. 78 n.5.

The court of appeals therefore "deem[ed] the guilty plea withdrawn" and remanded to allow respondent to decide whether to "insist on a trial" or to "plead guilty to the charged [felony] offense or to such other amended charge as the State may deem it appropriate to offer." J.A. 79-80. The court recognized that this result "may not seem a satisfactory remedy," but it concluded that it was "not empowered to order the State to reduce the charge against [respondent]" to a misdemeanor, and the only other option was to "ignore the merits of [respondent's] claim" by denying relief. J.A. 79.

SUMMARY OF ARGUMENT

Respondent's Sixth Amendment right to the effective assistance of counsel was not violated when his attorney failed to communicate the State's plea offer to respondent. The purpose of the right to counsel is to guarantee criminal defendants the assistance of counsel necessary to justify reliance on the ultimate outcome of the criminal proceeding. Where, as here, a defendant with the

advice of counsel voluntary pleads guilty to the offense charged by the State, and he knowingly and intelligently waives the constitutional rights associated with the criminal trial to which he would have been entitled, the ensuing conviction is a valid and reliable determination of guilt. The Sixth Amendment demands no more.

1. A convicted defendant who claims that he was denied his right to the effective assistance of counsel must establish that (1) counsel's performance was constitutionally "deficient" and that (2) counsel's errors "prejudiced the defense." *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984). Such prejudice requires a reasonable probability that counsel's performance affected the outcome. *Ibid.* Not all differences in outcome, however, can constitute cognizable prejudice. Because the touchstone of the inquiry is reliability and fundamental fairness, cognizable prejudice occurs only if counsel's error deprives the defendant of a "substantive or procedural right to which the law entitles him" in his defense. *Lockhart* v. *Fretwell*, 506 U.S. 364, 372 (1993).

a. The failure to communicate a plea offer is not cognizable prejudice under *Strickland* because it does not render the defendant's subsequent conviction or sentence unreliable or deprive the defendant of a right that he would have been entitled to assert in his defense. In this case, respondent was unaware of the prosecution's plea offer until after he had entered his guilty plea. Respondent thus voluntarily, knowingly, and intelligently waived his rights associated with a criminal trial unaffected by knowledge of the offer. The resulting conviction, moreover, is neither unreliable nor fundamentally unfair. No defendant has a constitutional right to a plea bargain: the prosecutor may withdraw an accepted offer and, if not withdrawn, the court may reject it. Counsel's

failure to communicate a plea offer thus will not deprive the defendant of a right to which he was entitled and cannot constitute prejudice under *Strickland*.

b. Moreover, when a defendant who has pleaded guilty seeks to challenge his guilty plea, he must establish that, but for counsel's error, he would have rejected the plea and insisted on trial. *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985). That particular application of *Strickland*'s prejudice standard applies whenever a defendant attempts to overturn his guilty plea. The only way to challenge a guilty plea in this context is to show that the plea is itself invalid, because a valid guilty plea extinguishes all claims of antecedent error by counsel. And to invalidate his own guilty plea, the defendant must show that it was not a voluntary, knowing, and intelligent waiver of the rights that the defendant would have enjoyed had he insisted on a criminal trial. The defendant must therefore show that, but for his counsel's error, he would have chosen trial instead of the guilty plea that supports his conviction. Respondent, who asserts only that he would have pleaded guilty under different terms, does not even seek to make that showing.

2. The absence of any appropriately tailored remedy confirms that the Sixth Amendment is not violated by counsel's failure to communicate a plea offer. The remedy ordered by the Missouri Court of Appeals illustrates the point. The remedy of a new trial will result either in an acquittal (contradicting respondent's claim that he would have pleaded *guilty*) or the same felony conviction that respondent has challenged. Allowing the parties to negotiate a new agreement is equally flawed because it is impossible to restore the *status quo ante*, including the risks and incentives that might have led to a plea bargain. The option of imposing a new judgment that

incorporates the terms of the prosecution's uncommunicated offer entails multiple problems. It overlooks the critical difference between an entitlement and a mere hope or expectation of benefits from a plea agreement; it impermissibly displaces prosecutorial discretion to withdraw or modify the offer; it violates separation-of-powers principles by conferring on courts the Executive's discretion regarding plea bargains and charging decisions; and it displaces the discretion that the trial judge has to accept or reject the agreement and enter an appropriate sentence. In short, the inability to identify any appropriate remedy simply underscores the absence of a constitutional injury in need of remedy.

ARGUMENT

I. DEFENSE COUNSEL'S FAILURE TO COMMUNICATE A PLEA OFFER TO RESPONDENT DID NOT VIOLATE RESPONDENT'S SIXTH AMENDMENT RIGHT TO COUNSEL

A defendant's Sixth Amendment right "to have the Assistance of Counsel for his defence" in a "criminal prosecution[]," U.S. Const. Amend. VI, is not violated when his attorney fails to communicate a prosecutor's guilty plea offer to the defendant. This Court has long held that the right to counsel "exists * * * in order to protect the fundamental right to a fair trial" and that its animating "purpose" therefore is to ensure that the accused "has the assistance necessary to justify reliance on the outcome of the proceeding." *Strickland* v. *Washington*, 466 U.S. 668, 684, 691-692 (1984); accord *Mickens* v. *Taylor*, 535 U.S. 162, 166 (2002) (stating that the Sixth Amendment accords the right to counsel "not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.") (quoting

United States v. *Cronic*, 466 U.S. 648, 658 (1984)). The right to counsel also applies to "pretrial events that might appropriately be considered to be parts of the trial itself," *United States* v. *Ash*, 413 U.S. 300, 310 (1973), including a defendant's "entry of a guilty plea" in court. *Iowa* v. *Tovar*, 541 U.S. 77, 81 (2004); *id.* at 87 ("A plea hearing qualifies as a 'critical stage'" of the criminal process.).

Because a guilty plea waives the right to trial and other constitutional rights, the plea must be voluntary, knowing, and intelligent. See *United States* v. *Ruiz*, 536 U.S. 622, 628-629 (2002). When a defendant has not waived counsel, the assistance of counsel is a critical ingredient in determining the validity of the plea. *McMann* v. *Richardson*, 397 U.S. 759, 770-771 (1970).

Under *Strickland*, the general test for determining ineffective assistance of counsel requires a showing of deficient performance and prejudice to the defendant. In *Hill* v. *Lockhart*, 474 U.S. 52 (1985), this Court held that *Strickland*'s "prejudice" prong requires the defendant to demonstrate "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59. That standard reflects the underlying constitutional purpose of counsel at a guilty plea: to ensure that a defendant understands his constitutional rights, his options at trial, and the consequences of a conviction. It follows that the one ineffective-assistance claim available to challenge a guilty plea is the claim in *Hill*: but for counsel's errors, the defendant would not have waived trial and pleaded guilty. Respondent cannot satisfy that standard because he entered an open guilty plea and has never contended that, but for his counsel's

error, he "would not have pled guilty and would have insisted on going to trial." J.A. 61, 73-74.

Respondent contends only that his counsel failed to communicate a plea offer from the prosecutor. But respondent's lack of knowledge of that offer did not undermine his comprehension of his rights, his knowledge of his trial option, or the consequences he faced upon conviction. Because counsel's failure to communicate a plea offer has no impact on any of the prerequisites for a valid and reliable determination of guilt through his guilty plea, respondent cannot establish the "prejudice" necessary for ineffective assistance of counsel.

A. Counsel's Failure To Communicate The Prosecutor's Plea Offer To Respondent Did Not Cause Cognizable Sixth Amendment Prejudice Because It Did Not Render Respondent's Conviction Or Sentence Unreliable Or Fundamentally Unfair

A convicted defendant's claim that he was denied the effective assistance of counsel requires proof that (1) counsel's performance was constitutionally "deficient" and that (2) counsel's errors "prejudiced the defense." *Strickland*, 466 U.S. at 687. The error must create a reasonable probability of a different outcome. *Id.* at 694. But because reliability and fundamental fairness serve as the inquiry's touchstone, cognizable prejudice occurs only if counsel's error deprives the defendant of a "substantive or procedural right to which the law entitles him" in his defense. *Lockhart* v. *Fretwell*, 506 U.S. 364, 372 (1993). The failure to communicate a plea offer does not prejudice a defendant under *Strickland* because it does not render the defendant's subsequent conviction or sentence unreliable or deprive the

defendant of a right that he would have been entitled to assert in his defense.[2]

1. Although this Court has extended *Strickland* to ineffective-assistance challenges to guilty pleas, it is useful first to examine the roots of *Strickland* itself. This Court has recognized that the Sixth Amendment right to counsel is a right to the "*effective* assistance of counsel" because the purpose of the Sixth Amendment is to ensure a "fair trial." *Strickland*, 466 U.S. at 684-686 (citation omitted; emphasis added). And because the Court has "derived the right to effective representation from the purpose of ensuring a fair trial," it has "also derived the limits of that right from that same purpose." *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 147 (2006). Those limits reflect that the right to effective assistance simply requires "the assistance necessary to justify reliance on the outcome of the proceeding" by ensuring that the defendant is convicted and sentenced in a "trial whose result is reliable." *Strickland*, 466 U.S. at 687, 692.

The Court has "made clear that 'the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation . . . [but] simply to ensure that criminal defendants receive a fair trial.'" *Cullen* v. *Pinholster*, 131 S. Ct. 1388, 1403 (2011) (quoting *Strickland*, 466 U.S. at 689). For that reason, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a

[2] Because the question presented assumes the court of appeals correctly concluded that counsel's conduct was deficient (J.A. 63-70), see Pet. i, this brief assumes *arguendo* that failing to communicate a plea offer is deficient performance under *Strickland*.

just result." *Ibid.* (quoting *Strickland*, 466 U.S. at 686) (emphasis omitted). The "ultimate focus" is "the fundamental fairness of the proceeding whose result is being challenged," which turns on whether "the result of the particular proceeding is [itself] unreliable" because of a "breakdown in the adversarial process." *Strickland*, 466 U.S. at 696.

A defendant asserting an ineffective-assistance claim therefore must establish that counsel's deficient performance "prejudiced the defense" with errors "so serious as to deprive the defendant of a fair trial, a *trial* whose *result is reliable*." *Strickland*, 466 U.S. at 687 (emphasis added); see *id.* at 694 (the "result of [the] proceeding" must be "unreliable, and hence the proceeding itself unfair"). Although the defendant need not prove by a preponderance of the evidence that counsel's errors "determined the outcome" of his case, he must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Ibid.* In other words, the defendant must establish a "probability sufficient to undermine confidence in the outcome" with errors that "render[] the result unreliable." *Id.* at 687, 694.[3]

Those concerns for reliability and fundamental fairness have equal applicability to ineffective-assistance challenges to guilty pleas. *Hill*, 474 U.S. at 57-58. The failure to communicate a prosecutor's plea offer to the

---

[3] This Court has recognized an exception to the normal requirement of actual prejudice by presuming prejudice in contexts that involve the "denial of the assistance of counsel altogether" or involve counsel "burdened by an actual conflict of interest" that affected the lawyer's performance. *Strickland*, 466 U.S. at 692 (discussing *Cronic*, *supra*, and *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980)). That exception does not apply here.

defendant does not render the outcome of the prosecution unreliable. At most, it halts plea negotiations and thereby allows the full criminal process for determining innocence or guilt to run its course. A defendant's subsequent guilty plea may be entirely valid, notwithstanding the absence of information about a prosecutor's earlier plea offer. A plea-based conviction in that setting does not distort the "proper functioning of the adversarial process" in the proceedings, much less suggest that "the result of the particular proceeding is *unreliable* because of a breakdown in the adversarial process." *Strickland*, 466 U.S. at 686, 696 (emphasis added). It therefore cannot establish the type of "prejudice" necessary to establish a *Strickland* violation.

Respondent contends that counsel's failure prejudiced him by denying him "the opportunity to present a plea agreement to the court for acceptance in exchange for a lesser sentence." Br. in Opp. 6. And if he had had that "opportunity," respondent argues, "'the result of the proceeding would have been different.'" *Id.* at 7 (quoting *Strickland*, 466 U.S. at 694). The "prejudice" relevant under *Strickland*, however, is not simply a sufficient likelihood of any "different" result. Cognizable prejudice must reflect that the actual result in a criminal case—here respondent's conviction and sentence based on his open guilty plea—was "unreliable" due to a "breakdown in the adversarial process that our system counts on to produce just results." 466 U.S. at 696. An aborted plea negotiation is irrelevant to that inquiry.

2. This Court's decisions in *Fretwell* and *Nix* v. *Whiteside*, 475 U.S. 157 (1986), confirm that an alleged effect on the outcome is not cognizable prejudice when the challenged attorney deficiency does not undermine the fairness or reliability of the proceeding. In both

cases, the Court held that a showing that the defendant would have secured a more favorable result if his counsel had not been deficient did not demonstrate cognizable prejudice, where the error did not render the proceeding's actual result unfair or unreliable. Those cases demonstrate that respondent's analysis of "prejudice," which "focus[es] solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Fretwell*, 506 U.S. at 369.

In *Fretwell*, the defendant was sentenced to death after a sentencing proceeding in which his counsel failed to raise an objection based on an appellate decision that would have invalidated the only aggravating factor on which the jury based its capital sentence. See 506 U.S. at 366-367. Although the relevant appellate decision had since been overruled, Fretwell argued he was prejudiced by his lawyer's failure to object at sentencing because, at the time, the objection would have invalidated his capital sentence. *Id.* at 368. This Court rejected that contention, even though it accepted that Fretwell had shown that "the outcome would have been different but for counsel's error." *Id.* at 369-370. The "'prejudice' component of the *Strickland* test," the Court reasoned, focuses on whether counsel's deficient performance "renders the result of the trial unreliable or the proceeding fundamentally unfair." *Id.* at 372. Where counsel's error "does not deprive the defendant of any substantive or procedural right to which the law entitles him," the result of those proceedings are neither unreliable nor unfair. *Ibid.*

The Court in *Whiteside* similarly held that Whiteside could not establish cognizable prejudice from his claim that, if defense counsel had allowed him to testify

falsely, "the jury might have believed his perjury" and acquitted him. 475 U.S. at 175-176. *Strickland*'s prejudice prong, the Court explained, required that Whiteside show that his counsel's purportedly deficient performance sufficiently diminished "confidence in the *result* of his trial." *Id.* at 175 (emphasis added). And because Whiteside's "truthful testimony could not have prejudiced the result," the Sixth Amendment was not violated. *Id.* at 175-176; see *id.* at 184, 186-187 (Blackmun, J., concurring) (emphasizing that Whiteside had not established "legally cognizable prejudice" because he "was deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial").

This Court has since reiterated its understanding that a "likelihood of a different outcome" will not itself qualify as "legitimate 'prejudice'" because the "prejudice" relevant under *Strickland* requires that "'counsel's deficient performance render[] the result of the trial unreliable or the proceeding fundamentally unfair.'" *Williams* v. *Taylor*, 529 U.S. 362, 392, 393 n.17 (2000) (quoting *Fretwell*, 506 U.S. 372). No separate inquiry into fundamental fairness is required once cognizable *Strickland* prejudice is shown. *Id.* at 393; accord *Glover* v. *United States*, 531 U.S. 198, 204 (2001). But a defendant must establish that counsel's deficient performance deprived him of a "substantive or procedural right to which the law entitles him." *Williams*, 529 U.S. at 393.

The court of appeals emphasized that respondent's three-year sentence was longer than the maximum one-year sentence that might have applied had respondent been told of and accepted the prosecution's offer to allow him to plead guilty to a misdemeanor. But as *Fretwell* illustrates, that bare potential for a better sentence is

insufficient. A plea offer from the prosecution provides the defendant with no substantive or procedural right to which a defendant is entitled, much less one that affects the reliability or fundamental fairness of the subsequent criminal proceedings that independently lead to the defendant's conviction.

"[T]here is no constitutional right to plea bargain." *Weatherford* v. *Bursey*, 429 U.S. 545, 561 (1977). Even if a defendant receives and accepts a plea offer from a prosecutor, the resulting "plea bargain standing alone is without constitutional significance." *Mabry* v. *Johnson*, 467 U.S. 504, 507 (1984). The plea bargain "is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest." *Ibid.* The prosecution can therefore withdraw from the deal before a court accepts the defendant's guilty plea and cannot be forced to honor the withdrawn agreement. *Id.* at 505, 510; see *id.* at 511 (explaining that it is irrelevant whether "the prosecutor was negligent or otherwise culpable" in withdrawing a plea offer). The court of appeals thus correctly recognized that a plea offer, even one "accepted by the defendant," can be "withdrawn without recourse" at "any time before it is accepted by the court." J.A. 76-77.[4]

Because an unexecuted plea offer lacks constitutional significance, defense counsel's failure to convey a prosecutor's plea offer to a defendant does not constitute

---

[4] The rule is the same in the federal system. See, *e.g.*, *Williams* v. *Jones*, 571 F.3d 1086, 1094 (10th Cir. 2009), cert. denied, 130 S. Ct. 3385 (2010); *United States* v. *Kuchinski*, 469 F.3d 853, 857-858 (9th Cir. 2006); *United States* v. *Springs*, 988 F.2d 746, 749 (7th Cir. 1993); *Government of the Virgin Islands* v. *Scotland*, 614 F.2d 360, 364-365 (3d Cir. 1980).

prejudice under *Strickland*. The lost opportunity to accept a plea bargain does not deprive the defendant of a "substantive or procedural right to which the law entitles him," *Fretwell*, 506 U.S. at 372. And a defendant's guilty plea can be valid without knowledge of the uncommunicated plea offer. See pp. 20-25, *infra*. When a defendant enters such a valid guilty plea, counsel's earlier failure to convey a plea agreement does not undermine the reliability or fairness of the ensuing conviction.

B. A Guilty Plea May Be Collaterally Attacked Only By Showing That The Defendant, But For Counsel's Error, Would Not Have Pleaded Guilty And Would Have Insisted On Going To Trial

Strickland's focus on the reliability and fundamental fairness of the result of a criminal proceeding is embodied in this Court's jurisprudence on ineffective-assistance claims challenging convictions based on guilty pleas. In *Hill*, the Court held that *Strickland*'s "prejudice" prong requires the defendant to demonstrate "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 474 U.S. at 59. That standard applies whenever a defendant challenges his guilty plea with a *Strickland* claim and reflects the special status of guilty-plea convictions: knowing, voluntary, and intelligent guilty pleas constitute a break in the chain of events and generally extinguish any claims relating to the deprivation of constitutional rights that occurred before the entry of the plea. Because antecedent attorney conduct may not be challenged, the one ineffective-assistance claim available to upset a guilty plea is therefore the claim in *Hill*: but for counsel's errors, the defendant

would not have pleaded guilty. Respondent has never claimed to satisfy that standard. J.A. 61, 73-74.

1. "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" *Hill*, 474 U.S. at 56 (quoting *North Carolina* v. *Alford*, 400 U.S. 25, 31 (1970)). "That is so because a guilty plea constitutes a waiver of [the] constitutional rights" that the defendant would have enjoyed had he insisted on the alternative of a full criminal trial. *Parke* v. *Raley*, 506 U.S. 20, 29 (1992). And like waivers of constitutional rights generally, a guilty-plea-based waiver of the rights associated with the foregone trial must be voluntary, knowing, and intelligent. See *Ruiz*, 536 U.S. at 628-629; *Brady* v. *United States*, 397 U.S. 742, 748 (1970); cf. Fed. R. Crim. P. 11(b) (specifying federal procedure for accepting guilty pleas).

If the defendant has entered a guilty plea that is voluntary, knowing, and intelligent, it is well established that the plea itself waives claims of antecedent legal error, including constitutional error. A guilty plea is more than "a confession which admits that the accused did various acts," it is an "admission that he committed the crime charged." *United States* v. *Broce*, 488 U.S. 563, 570 (1989) (citations omitted). A guilty plea therefore "represents a break in the chain of events which has preceded it in the criminal process." *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973). "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Ibid.*; see also, *e.g.*,

Broce, 488 U.S. at 570; *McMann*, 397 U.S. at 766-768. That holds true even if the defendant was unaware of the earlier constitutional violation when he entered his guilty plea. *Tollett*, 411 U.S. at 265-266. Thus, with one exception not relevant here, a collateral challenge to a guilty plea is "confined to whether the underlying plea was both counseled and voluntary." *Broce*, 488 U.S. at 569.[5] That rule reflects, *inter alia*, a strong structural interest in finality that applies with "special force with respect to convictions based on guilty pleas." *Bousley* v. *United States*, 523 U.S. 614, 621 (1998).

2. *Hill*'s formulation of *Strickland*'s prejudice standard for challenges to guilty pleas is a logical corollary of the guilty-plea waiver rule. *Hill* applies when a defendant has pleaded guilty "upon the advice of counsel" and limits ineffective-assistance claims to those challenging the "voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel" was deficient. *Hill*, 474 U.S. at 56-57 (citing, *e.g.*, *Tollett* and *McMann*). Thus, to overturn the guilty plea, the defendant must show a "reasonable probability that, but for counsel's errors, he would not have pleaded

---

[5] This Court has recognized a narrow exception to the general waiver rule for certain constitutional claims alleging that—when "judged on its face—the charge [against the defendant] is one which the State may not constitutionally prosecute." *Broce*, 488 U.S. at 575 (citation and emphasis omitted). Double-jeopardy claims and claims of prosecutorial vindictiveness (alleging that the prosecutor filed a more serious charge because the defendant exercised the right to appeal a conviction on a lesser charge) are exempted because "the constitutional infirmity in the proceedings lay in the State's power to bring any indictment at all" and the relevant claim can be resolved "on the basis of the existing record." *Id.* at 574-575. Ineffective-assistance claims do not fall within this exception.

guilty and would have insisted on going to trial." *Id.* at 59.

Hill focuses on the defendant's hypothetical choice between the guilty plea that the defendant actually entered and trial that the defendant waived because a guilty plea *is* a waiver of trial. As explained above, a guilty plea must encompass a voluntary, knowing, and intelligent "waive[r of the] constitutional rights that inhere in a criminal trial," *i.e.*, the rights that the defendant would have enjoyed *had he insisted on a criminal trial*. See *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004); *Raley*, 506 U.S. at 29. The defendant therefore must show that his waiver of those rights was invalid because, if he had been properly assisted by counsel, he would not have pleaded guilty and would have insisted on exercising his right to trial.

In the context of that choice, defense counsel has the responsibility to "inform a defendant of the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea would forego." *Libretti* v. *United States*, 516 U.S. 29, 50-51 (1995). Counsel must advise the defendant on whether the defendant has a realistic opportunity to avoid conviction on some or all charges by going to trial, including a discussion of legal defenses that could be available, in order to assist the defendant's evaluation of whether a guilty plea is the preferable alternative to a full trial. See *ibid.*; *Hill*, 474 U.S. at 59; *Tollett*, 411 U.S. at 266-268. Cf. *Broce*, 488 U.S. at 573-574 (concluding that a "conscious waiver is [not] necessary with respect to each potential defense relinquished by a plea of guilty"). Counsel must also explain the range of punishments for the charged offense, see *Tollett*, 411 U.S. at 268; see *Hill*, 474 U.S. at 56, and, in some contexts, the

immigration consequences of pleading guilty. See *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1481-1482 (2010) (discussing the "unique nature of deportation" and its "close connection to the criminal process").[6] And counsel must advise the defendant of the rights within the criminal process that the defendant would waive by pleading guilty, including the right to hold the prosecution to its burden of proof. See *Libretti*, 516 U.S. at 50-51; *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969). But if counsel adequately explains the agreement that underlies the plea, as well as the defendant's rights, the consequences of the plea, and its comparative advantages over the option of trial, the guilty plea is effectively counseled and cannot be challenged.

Premo v. *Moore*, 131 S. Ct. 733 (2011), illustrates that *Hill* focuses on a binary choice between the defendant's actual plea and the trial he waived. In *Premo*, the defendant (Moore) confessed to the police and later followed his counsel's advice to accept the State's offer to "plead no contest to felony murder in exchange for [the minimum] sentence." *Id.* at 738. Moore later sought

---

[6] In *Padilla*, this Court held that, in certain circumstances, the Sixth Amendment requires defense counsel to advise a criminal defendant whether pleading guilty would carry a risk of deportation. 130 S. Ct. at 1486. Because that advice was relevant to Padilla's decision to plead guilty pursuant to a plea agreement rather than go to trial, cf. *Commonwealth* v. *Padilla*, 253 S.W.3d 482, 483 (Ky. 2008) (noting agreement), the Court had no occasion to analyze whether a defendant could attack his attorney's advice on a guilty plea when his claim was that, but for deficient counseling in or about plea negotiations, he would have pleaded guilty to a different offense or obtained a better sentence. The Court's statement that it has "long recognized that the negotiation of a plea bargain is a critical phase of litigation," 130 S. Ct. at 1486, appears to address the decision to enter a guilty plea based on a negotiated plea bargain rather than go to trial.

postconviction relief on the ground that his lawyer provided ineffective assistance by failing to pursue suppression of Moore's confession before advising him to "accept[] the plea offer." *Ibid.* The Ninth Circuit granted habeas relief. Like the court of appeals in this case (J.A. 71-72), Judge Berzon concluded in her concurring opinion that *Hill* reflects only one alternative way to establish *Strickland* prejudice in "plea bargain cases." *Moore* v. *Czerniak*, 574 F.3d 1092, 1133 (9th Cir. 2009) (concurring opinion), rev'd, 131 S. Ct. 733 (2011). In Judge Berzon's view, *Strickland*'s "ordinary" prejudice standard could be separately satisfied, *ibid.*, by establishing a reasonable possibility that Moore would have "obtained a better plea agreement" from the State if his counsel had first moved to suppress his confession. 131 S. Ct. at 745.

This Court squarely rejected that rationale, holding that "the appropriate standard for prejudice in cases involving plea bargains" was "established in *Hill*." *Premo*, 131 S. Ct. at 745. And because Moore failed to establish that he would have gone to trial but for his counsel's purported error, no relief could be granted. *Ibid.*

3. Any number of actions by defense counsel could potentially affect whether a defendant might obtain a favorable plea agreement with the prosecutor. Those actions may involve litigation tactics (such as suppression motions) aimed at weakening the prosecution's case either to lead the prosecutor to the bargaining table or to secure more "leverage" for "a better plea bargain," *Moore*, 574 F.3d at 1134 (Berzon, J., concurring). The failure to take such actions could arguably be deficient, but after the defendant has entered a guilty plea, the prejudice inquiry necessary to show that his *plea* should

be set aside turns on whether, absent counsel's errors, the defendant would have insisted on his right to a fair trial. Whether earlier errors by counsel—in plea negotiations or otherwise—might have secured a more favorable agreement is irrelevant to that question.

II. THE ABSENCE OF AN APPROPRIATE REMEDY CONFIRMS THAT RESPONDENT DID NOT SUFFER AN INJURY COGNIZABLE UNDER THE SIXTH AMENDMENT

This Court has held that "[c]ases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). Unlike a normal *Strickland* case, this case admits of no appropriate remedy for counsel's failure to communicate the prosecutor's plea offer to respondent. The court of appeals' primary solution does not remedy respondent's claimed harm: a lost opportunity to accept a prosecution plea offer and (perhaps) plead guilty to a misdemeanor DWR charge pursuant to a plea agreement. The court of appeals' suggestion that the parties might decide on their own to negotiate a plea agreement likewise fails to provide an appropriate remedy. Other remedial options adopted in other contexts are equally unsatisfactory. In the end, the unavailability of an appropriately tailored remedy underscores the conclusion that respondent did not suffer a cognizable Sixth Amendment injury.

1. The court of appeals ordered respondent's guilty plea withdrawn and remanded the case to allow respondent to choose between standing trial on the felony DWR charge or entering a guilty plea on that charge without the benefit of a plea agreement. J.A. 79-80. The

court also suggested that the parties might decide to negotiate a plea agreement and that respondent might thereafter enter a guilty plea "to such other amended charge as the State may deem it appropriate to offer." J.A. 79. Neither option provides a remedy appropriately tailored to redress respondent's claimed injury.

a. Respondent pleaded guilty to the State's felony DWR charge. He now argues that, but for his counsel's error, he would have had the opportunity to plead guilty to the same DWR offense charged as a misdemeanor. A remedy that erases *any* finding of guilt cannot logically redress respondent's constitutional claim that he lost an opportunity to *admit* his guilt to a lesser charge. Yet that is precisely the remedy underlying the court of appeals' decision to give respondent the choice between a trial on the State's felony charge and pleading guilty to that charge.

If petitioner chooses a trial, the trial would produce either an acquittal or no remedy at all for respondent's alleged injury. An acquittal would be a windfall entirely untethered from respondent's own claim that he would have pleaded guilty but for his counsel's error. And if respondent were found guilty after trial, there is no reason to think that his sentence would be any lower than the sentence he already received when he *admitted* responsibility with a guilty plea.

The alternative of pleading guilty to a felony without the benefit of a plea agreement is similarly deficient. It simply puts respondent in the position he was in *after* his counsel's error. And, when confronted with the choice between trial and an open guilty plea, respondent pleaded guilty. It would be a waste of judicial resources to give respondent that same choice again.

b. Nor is the court of appeals' remedy warranted to encourage the State to offer respondent a new plea agreement. The fundamental flaw in that approach is that it is impossible to restore the *status quo ante*. The essence of plea bargaining is "mutuality of advantage," *Brady*, 397 U.S. at 752, and vacating respondent's conviction "cannot recreate the balance of risks and incentives on both sides that [previously] existed." *State* v. *Greuber*, 165 P.3d 1185, 1190 (Utah 2007) (quoting *Commonwealth* v. *Mahar*, 809 N.E.2d 989, 1001 (Mass. 2004) (Sosman, J., concurring)).

The decision to enter a plea bargain is normally driven by a number of factors, including (1) the uncertain prospects of a conviction, (2) the unknown severity of the criminal sentence, (3) the costs associated with trial, and (4) other promises that might be made in an agreement. New negotiations would unfairly provide the defendant with the advantages of time: important witnesses die, disappear, or become unavailable, or their memories fade. See *Premo*, 131 S. Ct. at 745-746. The risk of acquittal, moreover, is a key element in the State's plea-bargaining calculus and, to preserve the State's incentive to avoid that risk, a court must allow the possibility for acquittal, even though doing so risks the very windfall discussed above.

Other distortions in the parties' plea-bargaining incentives are often equally significant. After a defendant has pleaded guilty and been sentenced, the parties acquire important insight into the severity of the sentence that would result if they were to negotiate a new plea. For instance, the prosecutor's original plea offer here suggested the alternatives of (1) a felony plea for which the State would recommend a three-year term of imprisonment, defer to the court on probation, and request

that respondent serve ten days of "shock" incarceration; or (2) a misdemeanor plea with a recommended 90-day jail sentence. J.A. 50. Those alternatives made sense before the parties knew the sentence that would be imposed, because each alternative involved trade-offs.[7] But after petitioner entered an open guilty plea to the felony and the trial court considered his Sentencing Assessment Report, the court imposed a full, three-year term of imprisonment, notwithstanding the State's recommendation of ten days shock incarceration. J.A. 22-23. That knowledge will significantly alter the parties' future plea-bargaining assessments, even with respect to a possible misdemeanor charge.

Some foregone plea offers may also contemplate benefits no longer relevant when the parties reopen negotiations. Prosecutors commonly extend plea offers requiring the defendant's cooperation in an investigation or separate prosecution, which may have ended years later.

The critical point is that plea negotiations are the product of a unique set of incentives that can never be restored to the *status quo ante*. As such, the opportunity to enter new negotiations is not appropriately tai-

---

[7] Although the court of appeals appears to have credited respondent's unelaborated testimony in postconviction proceedings that he would have accepted the misdemeanor plea, J.A. 34, 65-66, 78, that choice may not have been clear before his conviction. Any benefit of avoiding a felony conviction on his record would have been significantly reduced in light of respondent's multiple prior felonies. J.A. 34-35. Moreover, the possibility of having only ten days of incarceration (rather than 90) could have led respondent to accept the felony plea offer in the hope of avoiding a significant disruption in his college education. Cf. J.A. 22-23, 42 (documenting respondent's successful requests for a continuance and brief suspension of his sentence's execution to avoid interrupting his college exams).

lored to remedy a claimed injury resulting from a lost opportunity to negotiate in the past.

2. Some courts have attempted to mitigate those problems by modifying the defendant's criminal sentence to reflect the terms of a lost plea offer. See, *e.g.*, *State* v. *Kraus*, 397 N.W.2d 671, 676 (Iowa 1986) (requiring judgment to be entered according to prior plea offer unless it is rejected by the defendant). That modification could, for instance, alter the charge of conviction, the associated term of imprisonment, or both. That course entails multiple problems.

First, it overlooks the "critical difference between an entitlement and a mere hope or expectation" to benefits that might flow to a defendant who accepts a plea offer. *Mabry*, 467 U.S. at 507 n.5. A plea offer is without legal force until it is embodied in a guilty plea. *Id.* at 507-508. Accordingly, even if respondent had accepted the offer in this case, the prosecutor would have been free to withdraw it for any reason. See p. 18, *supra*. And, even if the prosecutor did not withdraw the offer, the trial judge would have been entitled to reject it. *Santobello* v. *New York*, 404 U.S. 257, 262 (1971). Thus, instead 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. That result anomalously places the defendant in a better position than a defendant who actually *accepts* a plea offer.

Second, enforcing the terms of a prior offer improperly displaces prosecutorial discretion. A prosecutor before trial may obtain information indicating "a basis for further prosecution" or "simply may come to realize that information possessed by the State has a broader significance." *United States* v. *Goodwin*, 457 U.S. 368,

381 (1982). A prosecutor's "initial decision should not freeze future conduct" because the "prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the social interest in prosecution." *Id.* at 382.[8]

Indeed, freezing the prosecutor's prior plea offer and transforming it into a criminal sentence would contravene separation-of-powers principles.[9] In the federal system, the Executive Branch "retain[s] 'broad discretion' to enforce the Nation's criminal laws." *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Wayte* v. *United States*, 470 U.S. 598, 607 (1985)); *Greenlaw* v. *United States*, 554 U.S. 237, 246 (2008) ("'[T]he Executive Branch has exclusive authority and

---

[8] In this case, for example, the prosecutor's plea offer was conveyed to respondent's counsel on November 15, 2007, during a two-month break in the proceedings. Respondent then committed another DWR offense on December 30, and, under the prosecutor's normal practice, the new crime would have led the prosecutor to withdraw any previous offer. See pp. 2-3 & n.1, *supra*.

Although the court of appeals believed that respondent could have accepted the prosecutor's offer and might have been able to schedule a hearing to plead guilty pursuant to the agreement *before* respondent committed the new offense, J.A. 78 n.6, there would have been no apparent reason to expedite such a hearing. The case had been continued at respondent's request to January 4, 2008, J.A. 2, 46, and his counsel presumably would not have anticipated that respondent would so promptly violate the law. In any event, this Court has properly rejected Sixth Amendment claims seeking to capitalize on such temporal happenstance. See pp. 15-16, *supra* (discussing *Fretwell*).

[9] Although a federal court reviewing a state conviction on habeas may not be bound by state separation-of-powers principles, it would be unusual for a federal court in enforcing the Sixth Amendment (which, in pertinent part, applies identically to federal and state governments) to order a remedy against a state government that would contravene the *federal* separation of powers if employed against the United States.

absolute discretion to decide whether to prosecute a case.'") (citation omitted). Like the decisions whether to prosecute and what charges to bring, the decisions whether to engage in plea bargaining and the sort of deal to offer belongs solely to the Executive. Although a trial court may reject certain plea agreements, it cannot compel the prosecutor to plea-bargain or dictate the terms of any deal. See, *e.g.*, *United States* v. *Redondo-Lemos*, 955 F.2d 1296, 1299, 1302 (9th Cir. 1992); *Scotland*, 614 F.2d at 364-365; accord J.A. 80 n.6 (explanation by Missouri Court of Appeals that it could not direct the State "to offer pleas or to amend charges").[10] And where, as here, the prosecutor previously offered to bring a new, lesser charge to which the defendant might plead guilty, enforcing that offer would entail dismissing the old count and charging the new one—requiring judicial assumption of a strictly executive function. See *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978); J.A. 79 ("[W]e are not empowered to order the State to reduce the charge against [respondent].").

Third, imposing a sentence on collateral review based only on the prosecutor's prior offer would improperly displace the trial judge's discretion in accepting plea bargains and entering an appropriate sentence. An actual plea agreement does not displace the court's ability to accept or reject a sentence recommendation or the entire agreement. See *Santobello*, 404 U.S. at 262; *Lynch* v. *Overholser*, 369 U.S. 705, 719 (1962); Fed. R. Crim. P. 11(c)(3)-(5); Mo. Sup. Ct. R. 24.02(d)(2) and (4). It would therefore be highly anomalous to give dispos-

[10] Both federal and Missouri judges are barred from any role in plea negotiations. See Fed. R. Crim. P. 11(c)(1); Mo. Sup. Ct. R. 24.02(d).

itive force to an unaccepted offer based on counsel's failure to communicate that offer.

3. The remedial problems become even more pronounced with respect to claims that counsel's deficient performance denied the defendant a *better* plea agreement than the prosecutor offered or the defendant accepted. Evaluating the complex judgments that might guide the prosecutor to agree to a different bargain would embroil the courts in a quintessentially executive function. And, if the professionally deficient failure to communicate a plea agreement can constitute ineffective assistance warranting the vacatur of a conviction based on an open guilty plea, similar claims would follow based on alleged deficient attorney performance that led to an insufficiently generous plea agreement.

The inability to identify any appropriate remedy lays bare the conceptual difficulties associated with the court of appeals' conclusion that respondent established a Sixth Amendment violation. That "examination of the remedial question * * * serves only to underscore one thing: the absence of anything in need of remedying in the first place." *Williams* v. *Jones*, 571 F.3d 1086, 1109 (10th Cir. 2009) (Gorsuch, J., dissenting), cert. denied, 130 S. Ct. 3385 (2010).

CONCLUSION

The judgment of the Missouri Court of Appeals should be reversed.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

LANNY A. BREUER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

ANTHONY A. YANG
Assistant to the Solicitor General

DEBORAH WATSON
Attorney

APRIL 2011