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IN THE SUPREME COURT OF THE UNITED STATES

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MISSOURI, :

Petitioner :

v. : No. 10-444

GALIN E. FRYE. :

- - - - - x

Washington, D.C.

Monday, October 31, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

CHRIS KOSTER, ESQ., Attorney General, Jefferson City, Missouri; on behalf of Petitioner.

ANTHONY A. YANG, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Petitioner.

EMMETT D. QUEENER, ESQ., Assistant Public Defender, Columbia, Missouri; on behalf of Respondent.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 10-444, Missouri v. Frye.

General Koster.

ORAL ARGUMENT OF CHRIS KOSTER

ON BEHALF OF THE PETITIONER

MR. KOSTER: Mr. Chief Justice, and may it please the Court:

But for counsel's error, defendant would have insisted on going to trial. That is the test for prejudice. But in Mr. Frye's case, that test was not met. The truth is, despite counsel's error, Mr. Frye knowingly waived his right to trial and solemnly admitted his guilt. Under both Hill and Premo, Mr. Frye has failed to show prejudice, and therefore his guilty plea remains voluntary, intelligent, and final.

Mr. Frye may not assert ineffective assistance by alleging that, but for counsel's error, he could have gotten a better deal on an earlier date. That is not the standard. And the court of appeals should be reversed.

JUSTICE SOTOMAYOR: Counsel, sometimes one's experience has to be challenged. I, for one, have never heard of a case in which parties are discussing a plea,

1 except in the most unusual of circumstances, and they  
2 advance a court date to enter the plea. In most cases,  
3 they just wait till the court date and tell the judge:  
4 I'm ready to plead guilty.

5 This is such an unusual case, because the  
6 plea happens on day one. The court below is assuming  
7 that between day one and day five, or three or four, the  
8 guy would have come in and pled guilty, would have  
9 advanced the later court date?

10 MR. KOSTER: Well, the plea -- the plea  
11 occurred on March 3rd, 2008 --

12 JUSTICE SOTOMAYOR: No, that's the second  
13 plea, but --

14 MR. KOSTER: It went -- the -- right. The  
15 plea offer --

16 JUSTICE SOTOMAYOR: I'm talking about the  
17 plea deal.

18 MR. KOSTER: The plea offer expired on  
19 December 28th, 2007, I believe, and --

20 JUSTICE SOTOMAYOR: He commits the crime on  
21 the 29th or the 30th -- he commits a second offense on  
22 the 29th or 30th?

23 MR. KOSTER: That actually was a fifth  
24 offense, but yes.

25 JUSTICE SOTOMAYOR: All right. My point is,

1 how reasonable could it be for the -- for a court to  
2 assume that the plea offer had been made and that he  
3 would have taken it before the January court date that  
4 was set?

5 MR. KOSTER: It would be less than likely,  
6 but not impossible, I would say. And it would depend on  
7 a myriad of circumstances, many of which are as -- as --  
8 could be just dependent on the defense counsel's own  
9 personal schedule.

10 But the scheduling of a plea once -- once an  
11 agreement has been made between a prosecutor and a  
12 defense counsel, the scheduling of a plea I think is  
13 largely a basis of convenience and does not  
14 necessarily -- is not necessarily based on the  
15 preliminary hearing date or any future scheduled date.

16 CHIEF JUSTICE ROBERTS: Well, I suppose the  
17 defendant might think, you know, there is really bad  
18 evidence out there that they don't have yet. And if  
19 I -- I want to nail this deal down as soon as possible.  
20 I mean, that would be a reason to -- to move things up  
21 and get the plea in early, wouldn't it?

22 MR. KOSTER: It could be. I would say that  
23 that is --

24 CHIEF JUSTICE ROBERTS: I mean, I don't know  
25 how often that happens.

1                   MR. KOSTER: That's possible. I don't --  
2 right. But it's also exactly another reason to keep the  
3 discretion of offering these plea bargains and the  
4 ability to take these plea bargains back solely in the  
5 hands of the prosecutors of the country.

6                   JUSTICE ALITO: I'm really puzzled by what  
7 as a practical matter is at stake in this case. Under  
8 the State court decision, the defendant has the option  
9 of either pleading guilty to the charge, in which case  
10 he will be right back where he is now, or he can insist  
11 on a trial.

12                   And if he insists on a trial, you need to  
13 prove that he was driving with a revoked license. That  
14 seems to me -- if there ever was a slam-dunk trial, that  
15 seems to me that's the slam-dunk trial. You introduce  
16 the records of -- showing that his license was revoked,  
17 and you have the officer testify on such and such a date  
18 he was driving. So, I don't really see what is involved  
19 in this case.

20                   MR. KOSTER: The last part of the question  
21 was?

22                   JUSTICE ALITO: I don't see what is at stake  
23 here. I don't see what that -- as a practical matter,  
24 this seems to be -- to me to be a case about nothing.

25                   Am I wrong? Am I missing something?

1           MR. KOSTER: As a former -- as a former  
2 prosecutor myself, I would agree with this. This  
3 gentleman went into court. He had two options before  
4 him. There was not a third option. The -- the plea  
5 that was -- that left reality on December 28th was not  
6 there on March 3rd. He had a binary choice between two  
7 options on March 3rd. He chose not trial. By choosing  
8 not trial, it leaves us without a situation where either  
9 Hill or Premo prejudice can be shown.

10           JUSTICE KENNEDY: But we take the case on  
11 the assumption that he hadn't heard of the earlier  
12 better offer. Am I wrong about that?

13           MR. KOSTER: In this case, the defendant was  
14 unaware of the earlier better offer. That is correct.  
15 But in this case also, the defendant went out 2 days  
16 later and picked up a fifth charge. So, one of the  
17 considerations that I think has to be left with the  
18 Court is that the possibility that this particular  
19 defendant was ever going to see this plea offer is  
20 almost nil. This was his fifth arrest for driving while  
21 revoked.

22           JUSTICE BREYER: I mean, aren't we taking  
23 this on -- isn't there an assumption that there's a  
24 finding, or some lower court judge made a finding that  
25 if he had known about the better deal that was offered,

1 he would have taken it?

2 MR. KOSTER: That -- what is in the record  
3 is that he would have taken the 90-day deal on the  
4 misdemeanor.

5 JUSTICE BREYER: Yes.

6 MR. KOSTER: But there is also an important  
7 element in the record, that when he went in front of the  
8 court on March 3rd and the felony offer was given to the  
9 judge, which was 3 years and defer on probation plus 10  
10 days' shock time, the judge in Columbia, Missouri, gave  
11 the felony offer the back of his hand.

12 And so, while, yes, the record says that --

13 JUSTICE BREYER: Well, then that's a causal  
14 problem. You're saying that, even if he had accepted  
15 it, it would have gone to the judge, and the judge would  
16 have turned it down anyway. The judge wouldn't have  
17 accepted it.

18 MR. KOSTER: If the judge --

19 JUSTICE BREYER: Is that your point?

20 MR. KOSTER: Yes, Your Honor.

21 JUSTICE BREYER: Well, then there's a --  
22 somebody must have found somewhere that this made a  
23 difference.

24 MR. KOSTER: That --

25 JUSTICE BREYER: That the failure to tell

1 him about the special offer of the misdemeanor did in  
2 fact make a difference because he would have accepted it  
3 and he would have ended up with it.

4 MR. KOSTER: Well, and that is the problem  
5 that brings us here today. The Missouri Court of  
6 Appeals said that --

7 JUSTICE BREYER: Yes.

8 MR. KOSTER: -- through a -- a  
9 misinterpretation, we believe, of the Strickland  
10 standard and, more importantly, a misreading of where  
11 Hill and Premo takes us. Cert was granted on this case  
12 just at the same time that Premo was very clearly  
13 re-articulating the Hill standard.

14 And so, the court of appeals had gone back  
15 towards Strickland with a very broad reading just as  
16 this Court was coming down with an opinion that very  
17 clearly re-articulated the Hill standard, the two-part  
18 performance and prejudice test.

19 And that's what we are asking be reversed.

20 JUSTICE ALITO: Suppose he had snapped up  
21 this deal as soon as it was offered. By the time he  
22 appeared before the court to answer a formal plea of  
23 guilty, would the court have known that he had in the  
24 interim been arrested yet again for driving without a  
25 license?

1           MR. KOSTER: The court probably would have  
2 known as a result of a pre-sentence investigation. And  
3 perhaps more importantly, Your Honor, the prosecutor  
4 himself would have known about the -- the second arrest,  
5 and he would have withdrawn it.

6           And if I may, it's not always -- we've  
7 concentrated so far in the case before and today on  
8 subsequent criminal actions. You know, back home in  
9 Missouri, the criminal reporting system, we still use on  
10 five-part carbon paper that you've got to press hard  
11 with a pen to get down to the fifth page. It is also  
12 possible that the prosecutor learns at a subsequent date  
13 of a criminal history that is -- that is material that  
14 predates the plea offer. And so, in both directions,  
15 it's important that prosecutors have full discretion to  
16 take these pleas back.

17           JUSTICE KENNEDY: Well, regardless, your  
18 legal position is that there is no basis for setting  
19 aside the plea if an earlier, better offer was not  
20 communicated.

21           That's your legal position, right?

22           MR. KOSTER: My legal position is that a  
23 finding -- a conviction was entered on March 3rd. He  
24 pled guilty. The question before the Court is, what  
25 satisfies a standard by which we are going to unwind it?

1 A Sixth Amendment violation would satisfy that standard,  
2 and if -- if there was a Sixth Amendment violation, if  
3 the plea was truly involuntary, we would unwind it.

4 But the search for a better deal that is  
5 antecedent to the events of March 3rd is not the Sixth  
6 Amendment violation that should begin unwinding --

7 JUSTICE KENNEDY: You say -- you say  
8 there's --

9 MR. KOSTER: -- 97 percent of the  
10 convictions in the country.

11 JUSTICE KENNEDY: -- no Sixth Amendment  
12 violation when the counsel fails to communicate a  
13 favorable offer to the defendant. That's your position.

14 MR. KOSTER: No. Respectfully, Your Honor,  
15 that is not my position. My position is that  
16 ineffective assistance is a two-part test, that there  
17 was a performance breach in the failure to communicate,  
18 but once the performance breach is accepted, then it has  
19 to be run through the Hill standard to find whether  
20 prejudice has occurred, and then we would find a Sixth  
21 Amendment breach. But we -- we do not get there  
22 logically because the offer did not exist after -- after  
23 December 28.

24 JUSTICE SCALIA: Well, I -- I didn't  
25 understand that to be your position.

1           There -- there is a statement in your brief  
2   that the question is whether plea negotiations that did  
3   not result in a guilty plea constitute a critical  
4   confrontation that gives the rise to effective  
5   assistance of counsel during such negotiations.  So, I  
6   thought your position was that so long as the plea  
7   negotiations don't result in a guilty plea, effective  
8   assistance of counsel doesn't even come into the  
9   equation.

10           MR. KOSTER:  I -- there's a question in --

11           JUSTICE SCALIA:  I mean, you can say yes or  
12   no.  I mean, you could retract -- retreat from --

13           MR. KOSTER:  Is the question --

14           JUSTICE SCALIA:  -- that, I suppose, if you  
15   want.

16           MR. KOSTER:  Is the question whether I  
17   believe that plea negotiations are a critical stage?

18           JUSTICE SCALIA:  When they do not result in  
19   a guilty plea.

20           MR. KOSTER:  I believe they are not -- I  
21   believe that -- that plea negotiations are not a  
22   critical stage under the laws of this Court.

23           JUSTICE KENNEDY:  That's what we took the  
24   case for.  We didn't -- we wouldn't have taken the case  
25   if we were concerned about what happened in March and

1 what happened in February. We took the case because of  
2 your position, that this is not a Sixth Amendment  
3 violation in these circumstances.

4 MR. KOSTER: I do not -- there is a factual  
5 question as to whether or not plea negotiations in this  
6 case really ever engaged when all that ever occurred was  
7 the prosecutor sent a letter to the defense attorney.

8 Only in the most technical of readings --

9 JUSTICE SCALIA: Yes, but we don't care  
10 about that. You know, what do we care about that? I  
11 mean, we don't take cases to figure out those -- those,  
12 you know, picky, picky factual questions. The issue  
13 that I thought was important here is whether this is a  
14 critical stage when -- when the defendant is not -- does  
15 not accept the -- the plea and plead guilty.

16 MR. KOSTER: Plea negotiations I don't  
17 believe are a critical stage, because the fate -- in the  
18 back and forth between a prosecutor and a defense  
19 attorney, the fate of the accused is not -- is not set.  
20 And these -- of course, these negotiations can take  
21 place over a very long time. Either party can get up  
22 from the table and walk away at any time. And then,  
23 perhaps most importantly, the -- the dialogue of the  
24 negotiations are not used against the defendant at  
25 critical stages, which would contrast it, I suppose,

1 with a Miranda situation in a custodial interrogation  
2 where that would be a critical stage.

3 JUSTICE SCALIA: And if it were a critical  
4 stage, I suppose that counsel would be ineffective, not  
5 only if he was a lousy lawyer and didn't know the law,  
6 but if he was a bad negotiator. I mean -- right? Being  
7 a good criminal lawyer means you -- you got to be a good  
8 horse trader, right?

9 MR. KOSTER: I agree that that would be one  
10 of the extensions, if critical stage analysis --

11 JUSTICE SCALIA: Yes. You tell him to turn  
12 down a deal --

13 MR. KOSTER: -- was applied to plea  
14 negotiations.

15 JUSTICE SCALIA: -- that in fact, you know,  
16 was a pretty good deal, that would be ineffective  
17 assistance of counsel. So, you must -- you must know  
18 how to handle yourself in the used car lot, right?

19 MR. KOSTER: I understand that that would be  
20 one of the ramifications --

21 JUSTICE KAGAN: So, Mr. Koster --

22 JUSTICE BREYER: This is on the basic  
23 question --

24 JUSTICE KENNEDY: It's -- it's very odd for  
25 you to say that -- to me -- that this is not a critical

1 stage. If it results in a guilty plea and the -- and  
2 the attorney has not done sufficient research to uncover  
3 a defense, it can be set aside then. So, it's -- so,  
4 you're saying it's not a critical stage depending on  
5 what the end result is. That's very difficult.

6 I thought we were going to tell attorneys,  
7 you have an obligation during the plea bargain process  
8 to use professional competence. And you say, well, you  
9 do or you don't. That doesn't make much sense.

10 MR. KOSTER: My understanding, Your Honor,  
11 is that attorneys are guaranteed to the accused at  
12 critical stages, such as arraignments, plea hearings,  
13 trials, but then there is an implied guarantee that  
14 comes with that critical stage, and that implied  
15 guarantee is that their -- that the attorney appointed  
16 will do research, analysis, and preparation that  
17 prepares him for the critical stage.

18 But when David Boyce is sitting home on a  
19 Saturday night with a file open in his lap preparing for  
20 a case on Monday, that moment is not a critical stage of  
21 trial, on a Saturday night in his den, but it prepares  
22 for, it is precedent to, a critical stage. And the  
23 failure to engage in that preparation analysis can lead  
24 to performance and prejudice at critical stages, but it  
25 itself is not.

1                   JUSTICE BREYER: Well, the -- the  
2 question -- I make a counter-assumption. The problem  
3 that I -- I have the feeling that I'd like you and the  
4 others to comment on, is that you're worried deeply  
5 about a practical problem, and that the practical  
6 problem is that it would be too easy, as just was  
7 suggested by the question, to find that the lawyer,  
8 after the defendant is convicted, did a bad job during  
9 the plea negotiation, in which case everybody will get  
10 two or three bites at the apple. And one of the reasons  
11 for that is every brief has been lifting the standards,  
12 particularly in respect to prejudice, from Hill, which  
13 was addressing a different question. It was addressing  
14 the question of missed -- bad performance by the lawyer  
15 at trial. And that's hard to track what the effects  
16 are, and it isn't that hard to say the trial was unfair,  
17 give him a new one.

18                   That won't work here, I don't think. So  
19 suppose what we did, instead of saying there was no  
20 right, you simply said you have to prove with some  
21 certainty, work out a standard, that there really was  
22 inadequate assistance during the plea bargaining, and  
23 you have to show something more than a reasonable  
24 probability that this would have led to the plea, et  
25 cetera. You have to show that it would have happened.

1           Or you have a -- in other words, you have  
2 two tougher standards for this area, but you don't  
3 reject the idea of inadequate assistance of counsel  
4 during the plea bargaining stage. I'd like people's  
5 views, insofar as they are willing to give them, on that  
6 question.

7           MR. KOSTER: Ineffective assistance of  
8 counsel is a -- is a term of art, and it is a two-part  
9 test. I believe that there can be performance breaches  
10 that occur between -- at the -- at the plea bargaining  
11 stage, but that prejudice does not occur until we return  
12 to a critical stage, which is -- is when that -- when  
13 that plea, when the product of that plea negotiation is  
14 returned to a critical stage, and then it has critical  
15 stage protections over it, where the judge is there, and  
16 there's an allocution and the rest of the protections --

17           JUSTICE GINSBURG: Well, the open -- the  
18 open plea that was made -- that's a critical stage. In  
19 fact, he took a plea. But he, I think, has a plausible  
20 argument that the plea he made, the open plea with no  
21 bargain in the picture, that that plea was not  
22 intelligently made because he didn't know that there had  
23 been an offer for him to plead to a misdemeanor rather  
24 than a felony.

25           MR. KOSTER: In Tollett -- may I?

1 JUSTICE GINSBURG: Yes.

2 MR. KOSTER: In Tollett v. Henderson, the  
3 question of the defendant Mr. Henderson's knowing waiver  
4 in that case, where the breach was infinitely more  
5 egregious in my view, which was the 1948 court packing  
6 that occurred and the African American citizens were  
7 excluded from that grand jury pool.

8 Mr. Henderson's lack of knowledge about a  
9 previous constitutional deprivation was not -- did not  
10 make his waiver unknowing. Same with the analysis in  
11 McMann and in Parker and in Brady, to say there is no  
12 limiting principle that will allow this omission to  
13 unwind the knowing quality of Mr. Frye's waiver and then  
14 not open up the floodgates to all sorts of  
15 pre-constitutional deprivations.

16 I'd like to reserve the balance of my time,  
17 Your Honor. Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
19 Mr. Yang.

20 ORAL ARGUMENT OF ANTHONY A. YANG

21 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,  
22 SUPPORTING THE PETITIONER

23 MR. YANG: Mr. Chief Justice, and may it  
24 please the Court:

25 When a defendant pleads guilty --

1 JUSTICE SOTOMAYOR: Are you taking the same  
2 position your -- I don't want to call him co-counsel --  
3 Petitioner's counsel is taking, that you are not  
4 entitled to an attorney at plea bargaining, unless you  
5 waive your -- unless you waive your right to a trial?

6 MR. YANG: No, we're not --

7 JUSTICE SOTOMAYOR: It's not a critical --

8 MR. YANG: We are not taking the view. In  
9 this case, the alleged deficiency is not really an  
10 interaction between the prosecution and the defense  
11 counsel in plea bargaining. The alleged deficiency is a  
12 failure to inform the defendant of things the defendant  
13 would want to know as going forward, and we're -- we are  
14 willing to assume the defendant has a right to be  
15 properly informed by counsel. But with any Strickland  
16 claim, the relevant inquiry is whether or not the  
17 defendant has shown cognizable prejudice as a result of  
18 a deficient performance by the counsel.

19 And when a defendant pleads guilty in open  
20 court, the conviction rests on the defendant's  
21 assertion, an admission of his own guilt, and his  
22 consent that there be judgment entered, a judgment of  
23 conviction, entered without trial.

24 And because the conviction rests on a  
25 consent judgment, it wipes free antecedent

1 constitutional errors. The one challenge that --

2 JUSTICE KAGAN: So, I think, Mr. Yang, what  
3 Justice Sotomayor was suggesting is that your position  
4 does in fact require you to say that if there were no  
5 counsel at all in the proceedings, that would be  
6 perfectly -- you know, there would not be a  
7 constitutional problem with that. Once he pleads  
8 guilty, it just wipes away the fact that no counsel has  
9 been appointed for him.

10 MR. YANG: A -- a guilty plea wipes free all  
11 kinds of constitutional violations that went before.

12 JUSTICE SCALIA: No, but the guilty -- I  
13 mean, no, the reason that is not true is that the guilty  
14 plea must be entered with advice of counsel. You  
15 acknowledge that, don't you?

16 MR. YANG: Correct. And the guilty plea --

17 JUSTICE SCALIA: So, the guilty plea doesn't  
18 erase everything if it has been entered without advice  
19 of counsel.

20 MR. YANG: Correct. When the counseled  
21 guilty plea is entered, this Court has held that the one  
22 remaining challenge that would be allowed is the  
23 challenge to the knowing and intelligent waiver of the  
24 right to trial, which is what the guilty plea is. Now,  
25 in order to show that you were prejudiced --

1 JUSTICE KAGAN: So, does that mean, Mr.  
2 Yang, a State could set up a system where it says we're  
3 going to do all our negotiating with the defendant with  
4 no counsel present in the room, but we're going to keep  
5 a lawyer on board just in the courtroom to advise him  
6 whether he should plead -- you know, what -- you know,  
7 to advise him about the plea that he has struck, even  
8 though he struck this plea with no counsel in the room,  
9 and that would be perfectly okay?

10 MR. YANG: We are not saying that -- that --

11 JUSTICE KAGAN: All the negotiations could  
12 be uncounseled.

13 MR. YANG: We are not taking the position  
14 that States can deprive counsel or deprive counsel from  
15 participation in the guilty plea process. But what we  
16 are saying --

17 JUSTICE KAGAN: Well, I don't understand how  
18 you can say that. It seems --

19 MR. YANG: No --

20 JUSTICE KAGAN: You are saying that, because  
21 you're saying that in the end, the guilty plea wipes all  
22 constitutional error away.

23 MR. YANG: Just as we're not saying that  
24 there can be coerced confessions, not just like we're  
25 saying that a statute can impermissibly burden the right

1 to trial by putting a death sentence on -- that's  
2 available only when you go to trial. We're not saying  
3 any of that is allowed. But what we are saying is  
4 when a -- and that was the Brady trilogy, Brady and  
5 McMann and ultimately in Tollett, which led to Hill.

6 What the Court recognized is when you plead  
7 guilty in open court, you are waiving your right to  
8 trial. And the relevant inquiry, the only inquiry once  
9 the defendant has admitted guilt, is to determine  
10 whether or not the waiver of the trial rights were  
11 knowing and voluntary. And the reason that that is a  
12 relevant inquiry is because you have a constitutional  
13 right to trial, and due process requires that the waiver  
14 of those trial rights be knowing, intelligent, and  
15 voluntary.

16 And in Hill, the Court confronted the  
17 question and said: You need to show deficient advice in  
18 the context of pleading guilty; and in addition, you  
19 need to show that that prejudiced you because, absent --  
20 if you had received proper advice, you would have  
21 actually not waived your right to trial; you would have  
22 asserted your right to trial and gone to trial. That's  
23 the standard that applies.

24 JUSTICE KENNEDY: If defense counsel gives  
25 wrong information to the defendant about witnesses that

1 can testify on his behalf and so forth, very bad legal  
2 advice, that's -- that can be ground for setting aside  
3 the plea, correct?

4 MR. YANG: It can, and because what's  
5 relevant --

6 JUSTICE KENNEDY: All right, so -- and  
7 that's because counsel pre the entry of the plea did not  
8 adequately advise his client.

9 MR. YANG: Right, right. The key is that --

10 JUSTICE KENNEDY: Why -- why is there no  
11 problem when he doesn't adequately advise a client of  
12 earlier better offers?

13 MR. YANG: It's a different prejudice. The  
14 -- when you plead guilty and your counsel has advised  
15 you wrongly in a way that would have changed your mind  
16 about the merits of going forward on trial, you can show  
17 that the waiver of the trial right is something that was  
18 prejudiced. But because -- had you known, had you been  
19 properly advised, you would have exercised the whole  
20 panoply of rights that the Constitution provides one who  
21 goes to trial, not only a right to a trial by jury but  
22 all the trial rights that go with it.

23 But when you instead plead guilty in open  
24 court -- and the claim here is not that the defendant  
25 would have exercised his rights to trial. The claim is

1 he would have waived his rights to trial either way.  
2 That is not prejudice to the -- that would overcome the  
3 guilty plea, which again rests on --

4 JUSTICE KAGAN: Well, Mr. Yang, there are  
5 different kinds of unfairness. One kind of unfairness  
6 is when you're badly advised and you, therefore, waive  
7 your right to trial when you would have gone. But  
8 there's another kind of prejudice, which is, you know,  
9 you and 10 other guys are all in the same situation, and  
10 those 10 other guys come up with a favorable plea deal  
11 because their lawyers are paying attention, and you come  
12 up with an unfavorable plea deal because your lawyer has  
13 fallen asleep. And to the extent that we have an  
14 effective assistance right that means something, that  
15 unfairness needs to be addressed by it, doesn't it?

16 MR. YANG: Well, when -- again, once --  
17 whether or not there was a prior error, once you plead  
18 guilty, the question is not whether there were other  
19 deals on the table; the question is whether that waiver  
20 of --

21 JUSTICE KAGAN: Well, I guess that's the  
22 question. Why isn't that the question?

23 MR. YANG: Well, right, but if it were the  
24 question, it would call into -- this Court, in -- in  
25 going back to Brady and then in Boykin, explained that

1 what's -- the relevant question when you enter a guilty  
2 plea is whether you have waived your rights to trial  
3 validly. And, in fact, that has to be spread upon the  
4 record. Rule 11(b) has now been modified by this Court  
5 to go through the things you have to check to make sure  
6 that that waiver of your trial rights are knowing and  
7 voluntary.

8           What we have here is not anything associated  
9 with the waiver of trial rights. What really the  
10 defendant is claiming is some entitlement be able to  
11 take another deal that would not have resulted in trial.  
12 But that is not relevant to the waiver of trial rights.  
13 That would be recognizing another type of right. But  
14 this Court has repeatedly held that there is no right to  
15 a guilty plea, there is no right to plea bargaining;  
16 once you have a plea agreement, there is no right to  
17 enforcement. The only rights that come into play is  
18 when that guilty plea is rendered into a judgment. And  
19 when you don't get there, but instead you plead guilty  
20 and you have waived your rights to trial, you have  
21 consented to the entry of judgment, and even if you had  
22 received better advice you would have consented to  
23 the -- you would not have gone forward to trial, you  
24 have -- the basis on which the conviction rests remains  
25 valid. And that's what --

1 JUSTICE SCALIA: You have admitted that you  
2 got what you deserved, right?

3 MR. YANG: Precisely. And this Court in  
4 Premo addressed the exact same question. In Premo,  
5 there was a contention that had counsel done better  
6 before by filing a motion to suppress, it would have  
7 been in a better position to secure a better plea  
8 agreement from the prosecution. But the Court concluded  
9 that, no, the relevant inquiry, once you have pled  
10 guilty, is whether or not you would have, if properly  
11 advised, insisted on your trial rights and gone to  
12 trial. That's the standard set forth in Hill. And the  
13 reason --

14 JUSTICE GINSBURG: Mr. Yang, in your view,  
15 is there any situation in which a defendant could regain  
16 a plea opportunity that he lost due to counsel's  
17 conceded inadequacy? And I think it is accepted that  
18 not telling him of the plea offer was ineffective  
19 representation. Is there any case where the defendant  
20 could regain the plea opportunity that he lost?

21 MR. YANG: If he pleads guilty?

22 JUSTICE GINSBURG: Yes. If he doesn't seek  
23 a trial, right.

24 MR. YANG: I'm sorry. I didn't catch that.

25 JUSTICE GINSBURG: Yes. If he doesn't want

1 to go to trial and he's going to plead guilty, is there  
2 any circumstance where he could regain that lost  
3 opportunity?

4 MR. YANG: If he has -- if he has pleaded  
5 guilty and he validly waived his rights to trial because  
6 he would not have asserted them, then I think under Hill  
7 what you have is a defendant who admits guilt, there's  
8 no real risk of any kind of error in that determination,  
9 and the judgment which must be set aside -- remember, we  
10 have to set aside the judgment. The judgment rests on  
11 the admission of guilt and the waiver of trial. The  
12 judgment cannot be set aside at that point, because this  
13 Court has long recognized the -- the special force of  
14 finality with respect to guilty pleas. That's because  
15 -- for several reasons.

16 First, guilty pleas are an important part of  
17 the system, and it would be -- both delay and impair the  
18 orderly administration of justice any time we open  
19 another avenue to challenge guilty pleas. But, two,  
20 once the defendant has stood up in open court and  
21 admitted guilt, there is almost no risk of error, and  
22 the defendant has gotten the proper sentence and the  
23 proper conviction.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 MR. YANG. Thank you.

1 CHIEF JUSTICE ROBERTS: Mr. Queener.

2 ORAL ARGUMENT OF EMMETT D. QUEENER

3 ON BEHALF OF THE RESPONDENT

4 MR. QUEENER: Mr. Chief Justice, and may it  
5 please the Court:

6 Galin Frye entered a plea of guilty to  
7 felony driving while revoked and was sentenced to 3  
8 years in prison. His trial lawyer failed to inform him  
9 that the prosecutor was willing to allow him to accept a  
10 plea offer to a misdemeanor charge and recommend 90 days  
11 in jail. Fundamental fairness and reliability of  
12 criminal process requires that an attorney provide his  
13 client information regarding matters in his case.

14 JUSTICE SCALIA: Why? Why is it unfair for  
15 the law to apply to this individual the punishment he  
16 deserved for the crime that he committed? I mean, the  
17 object of the system is to put -- is to punish people  
18 who commit crimes in a certain degree.

19 And here he admitted he did the crime, and  
20 he got the degree of punishment that the law provides.  
21 What could be more fair than that?

22 MR. QUEENER: Fairness includes a whole  
23 range of sentencing options. And in this case, the  
24 prosecutor was making a determination of what was fair  
25 in this case when he made the offer.

1 JUSTICE SCALIA: Ex ante, I suppose you  
2 could say that. But when you look at it later, it's  
3 clear that that would have been unfair. In fact, this  
4 individual was perfectly willing to admit that he had  
5 been guilty of more than what the prosecutor had  
6 offered.

7 MR. QUEENER: Part of the consideration that  
8 a defendant has to make during the plea bargaining  
9 process or plea negotiation process is determining the  
10 liability that he's willing to accept in entering a plea  
11 of guilty.

12 JUSTICE SCALIA: That's true, and he did  
13 that when he entered the plea of guilty. You -- you do  
14 not contest he was well advised when he entered that  
15 plea that it was knowledgeable and he admitted that  
16 that's what he had done and was willing to accept the  
17 degree of punishment prescribed by law.

18 MR. QUEENER: Well, he was -- the guilty  
19 plea in terms of what he was admitting to, he was  
20 willing to and had to agree that he had committed the  
21 crime of driving while -- while revoked. But the plea  
22 was open in terms of sentencing, and he was allowed to  
23 argue for something lower than the sentencing. He only  
24 knew that was the available options at that time.

25 He wasn't aware that the prosecutor had made

1 available an option to him to limit his exposure for  
2 that offense to 90 days.

3 JUSTICE SOTOMAYOR: Counsel, I have a  
4 two-part question.

5 MR. QUEENER: Okay.

6 JUSTICE SOTOMAYOR: All right. What exactly  
7 made his plea unknowing or involuntary, number one?

8 And, number two, identify the right he was  
9 deprived of, substantive or procedural, by his  
10 attorney's failure to communicate the plea.

11 MR. QUEENER: The plea was unknowing and  
12 involuntary because he was not made aware by his  
13 counsel's unprofessional representation of all of the  
14 circumstances available to him, the consequences of  
15 entering that guilty plea, that would have included the  
16 90-day on a misdemeanor if he had been aware of that.

17 JUSTICE ALITO: Suppose he had been told  
18 that -- suppose he had been told that, and the  
19 prosecutor said, well, yes, that's true; I made that  
20 offer, but it's off the table now. And apparently, this  
21 was then off the table. So, what good would it have  
22 done him to know about something that happened in the  
23 past but was no longer available?

24 MR. QUEENER: Well, this offer was only no  
25 longer on the table at the time he entered the plea of

1 guilty, because it had expired, and that was a result of  
2 counsel's ineffectiveness in failing to communicate that  
3 to him. The lower court, the court of appeals, made a  
4 finding that this offer was available, and he could have  
5 taken advantage of it before it expired. And that was a  
6 finding by the court below.

7 JUSTICE ALITO: No, I understand that, and  
8 it may have been unfair, but I don't see why it's  
9 involuntary. Because I don't see that -- advising him  
10 that he had an option at some point in the past which  
11 was no longer available really doesn't have much of a --  
12 doesn't have any bearing on the voluntariness of his  
13 plea to a later less-favorable offer.

14 MR. QUEENER: I -- that's -- it seems to me  
15 that that's involuntary in the sense that he didn't know  
16 it then. It's not that it's involuntary now because  
17 that he knows it. It was involuntary because he didn't  
18 know it then.

19 JUSTICE KENNEDY: Well, suppose the case in  
20 which a plea offer's made, not communicated, and  
21 expires. Then there's a guilty plea hearing. And he  
22 doesn't -- and the defendant enters a -- a guilty plea  
23 but doesn't know about the prior offer. Is -- is there  
24 injury?

25 MR. QUEENER: There is if there is an

1 increase in sentence. And that's the situation here.

2 JUSTICE KENNEDY: No, is the plea  
3 involuntary? Is it -- pardon me. Is it unknowing?

4 MR. QUEENER: It is --

5 JUSTICE KENNEDY: And what would he -- what  
6 would he have done had he known?

7 MR. QUEENER: It's unknowing in the sense  
8 that he did not know the full consequences of --

9 JUSTICE KENNEDY: Well, you know, Judge, I'm  
10 really sorry I didn't accept responsibility 3 months  
11 earlier.

12 MR. QUEENER: What he -- what's unknowing  
13 about that is the potential consequence that he is  
14 choosing in deciding to plead guilty. And if I may,  
15 that's the second part of your question. The right that  
16 he has is the right to make fundamental decisions in his  
17 case, one of which is to accept a plea bargain and plead  
18 guilty.

19 JUSTICE SCALIA: Doesn't -- doesn't the rule  
20 that the plea offer may be withdrawn at any time by the  
21 prosecutor -- indeed, even after it has been accepted --  
22 doesn't that well enough establish that there is no  
23 right to profit from that plea offer, that there is no  
24 constitutional right he's been deprived of, given that  
25 the prosecutor can withdraw it even after he accepts it?

1           MR. QUEENER: That can be -- excuse me --  
2 that can be -- excuse me -- that can be withdrawn at any  
3 time by the prosecutor, but we're not arguing that there  
4 is a right to a particular plea -- a particular plea.  
5 He is entitled to the right to make a knowing and  
6 voluntary acceptance of a plea, a knowing and voluntary  
7 guilty plea, and that requires that he know all of the  
8 information. And the record that we have in this case,  
9 there's nothing to suggest that that plea would not have  
10 gone forward. The mere potentiality for withdrawing the  
11 plea --

12           JUSTICE SCALIA: I -- I had hoped you were  
13 making some argument other than the knowing argument,  
14 because as prior discussion has shown, even if he had  
15 known, it would have made no difference to whether he  
16 accepted the later plea.

17           Suppose he had been told, "oh, by the way,  
18 there was an earlier plea. It's too late to accept it  
19 now. Do you want to take this plea?" He says, "well,  
20 oh, I'd like the earlier." "I'm sorry, the earlier plea  
21 is gone. Do you want to take this plea or not?" He  
22 would have taken it.

23           What does the knowledge of the earlier  
24 lapsed plea have to do with whether his guilty plea is  
25 knowing and voluntary? It doesn't seem to me to have

1 anything to do with that. So, I --

2 MR. QUEENER: Well, the knowing -- yes.

3 JUSTICE SCALIA: I thought you had some  
4 other argument that was somehow a right to profit from  
5 the earlier offer. And I find it hard to see that  
6 right, given that the prosecutor can withdraw the offer  
7 and, indeed, even withdraw it after it's accepted.

8 MR. QUEENER: The right is to enter that  
9 plea knowing the full consequences of what he's doing at  
10 that point, which includes the limitation on his  
11 exposure for the offense. This is sort of a sentencing  
12 issue. And an increase in sentence is a -- is  
13 prejudicial.

14 JUSTICE GINSBURG: But he's -- the Missouri  
15 Supreme Court said in what -- that the prosecutor --  
16 they would not -- they would not order the prosecutor to  
17 renew that earlier plea. So, they said the options were  
18 you can get a new trial -- you can get a trial or you  
19 can replead the open plea. But wasn't it -- didn't the  
20 court say we will not order the prosecutor to reinstate  
21 the earlier offer?

22 MR. QUEENER: That -- that is correct, Your  
23 Honor. Their finding, more specifically, I think was  
24 that they did not feel like they were empowered to do  
25 so. We certainly believe that they can -- they are

1 empowered to do so in the sense that this is a remedy  
2 provided for a constitutional violation.

3 JUSTICE BREYER: Yes, but what about as a  
4 constitutional violation that, in a context of a world  
5 where 95 percent of all people in prison are there as a  
6 result of bargaining and guilty pleas arranged with  
7 prosecutors -- in that context, it's fundamentally  
8 unfair to deprive a person of his liberty for 40 years  
9 instead of 6 months because the lawyer which he is  
10 guaranteed fell down on the basic, fundamental, obvious  
11 duty of communicating the relevant plea agreement?

12 MR. QUEENER: I agree with you completely,  
13 Your Honor.

14 JUSTICE SCALIA: And you would also --

15 JUSTICE BREYER: So, is there any support  
16 for me?

17 (Laughter.)

18 MR. QUEENER: That -- that is the issue  
19 where, in terms of the sentencing outcome, this is  
20 knowledge that he is required to -- that's required by  
21 his attorney to provide him a sentencing of --  
22 difference is a -- is prejudicial, excuse me, under  
23 Strickland, and the remedy for -- I guess going back in  
24 -- even more basic than that -- is that that ineffective  
25 assistance of counsel is -- has to be remedied.

1 JUSTICE SCALIA: But if that's ineffective  
2 assistance of counsel, surely it is ineffective  
3 assistance of counsel to advise him to turn down an  
4 offer that he should have snapped up. Isn't that  
5 ineffective assistance as well? If it's absolutely  
6 clear that this was a great deal, and the lawyer said,  
7 nah, you shouldn't take it -- is that ineffective  
8 assistance or not?

9 MR. QUEENER: I'm going to have to couch  
10 that in terms of saying it would depend on the  
11 circumstances. What you have to look at --

12 JUSTICE SCALIA: I gave you the  
13 circumstances. It's clearly a super deal. Any good  
14 lawyer would have told him to take it.

15 MR. QUEENER: Okay.

16 JUSTICE SCALIA: And this lawyer says don't  
17 take it.

18 Is that ineffective assistance?

19 MR. QUEENER: That would probably not be  
20 ineffective assistance.

21 JUSTICE SCALIA: It would not be?

22 MR. QUEENER: The question would then be  
23 whether or not there is prejudice from that, and that --

24 JUSTICE SCALIA: No, it would be ineffective  
25 assistance, and the question would be prejudice. Is

1 that it?

2 MR. QUEENER: I think an attorney can  
3 provide reasonable representation in making that sort of  
4 an offer.

5 JUSTICE SCALIA: Well, give me a yes -- a  
6 yes or no to the question whether, if every reasonable  
7 lawyer would have told him to snap up this offer, but  
8 his counsel tells him, no, turn it down -- yes or no, is  
9 that ineffective assistance?

10 MR. QUEENER: In that circumstance, it is  
11 ineffective assistance, because he has to do what is a  
12 reasonable standard of representation.

13 JUSTICE SCALIA: Then we're in the soup.  
14 Then we're in the soup because every one of these pleas  
15 is subject to the contention that, oh, there was an  
16 earlier plea, or I should have -- I should have taken it  
17 but -- I mean -- and I suppose that if he goes to trial,  
18 then you would also say that trial should not have  
19 occurred because it was the ineffective assistance of  
20 counsel that caused him to turn down the plea, and,  
21 therefore, we're going to -- right -- retry it and set  
22 aside the trial?

23 MR. QUEENER: Under that circumstance, that  
24 would --

25 JUSTICE SCALIA: Yes.

1 MR. QUEENER: -- may well be --

2 JUSTICE BREYER: But, now, you've read these  
3 cases, and now we're right on what I think is the point,  
4 because we've both defined a possible constitutional  
5 right, but there's a practical problem. All right?  
6 Now, the States and others have dealt with this on your  
7 side --

8 MR. QUEENER: Yes.

9 JUSTICE BREYER: -- for the last 30 years.  
10 And, presumably, you, but not me, have read a lot more  
11 cases.

12 Now, have they developed -- as you look  
13 across those cases, are there some States or places that  
14 have developed reasonably tough standards in respect to  
15 what counts as ineffective assistance and in respect to  
16 whether it made a difference that would help to  
17 alleviate the concern that this would turn into a great  
18 mess? Which it hasn't, apparently.

19 MR. QUEENER: As I understand these -- these  
20 cases, the -- the standards being applied are the  
21 Strickland standard. It's the high bar of deficient  
22 performance and prejudice under Strickland. And --

23 CHIEF JUSTICE ROBERTS: Well, we get a lot  
24 of Strickland cases, and the lower courts do, too.

25 MR. QUEENER: Correct.

1 CHIEF JUSTICE ROBERTS: That's not much  
2 comfort in terms of what the consequences of a decision  
3 in your favor would be.

4 MR. QUEENER: I mean, that -- that's  
5 certainly true. I mean, we -- we have --

6 JUSTICE ALITO: Well, in the case -- where  
7 the case goes to trial, prejudice isn't going to be very  
8 hard to prove. The person turned down a 5-year deal and  
9 gets -- and after trial is sentenced to 20 years. So,  
10 you've got -- you're got prejudice right there, right?

11 MR. QUEENER: Right.

12 JUSTICE ALITO: So, there's always going to  
13 be a very good argument for prejudice where a person  
14 turns down a favorable deal and then gets slammed after  
15 a trial.

16 MR. QUEENER: I'm -- I'm going to qualify my  
17 answer a little bit because I think where -- what the  
18 Court has to -- to keep in mind is the rational decision  
19 requirement that I think was reiterated in -- in  
20 Padilla. You're going to have to look at whether or not  
21 the defendant was making a rational decision in that  
22 choice. It's not simply that there was another offer  
23 out there. It -- was the decision rational on the part  
24 of the defendant to accept or reject that offer that was  
25 there?

1 CHIEF JUSTICE ROBERTS: Counsel --

2 JUSTICE ALITO: No, but the point is just  
3 that -- I'm sorry.

4 CHIEF JUSTICE ROBERTS: No, go ahead.

5 JUSTICE ALITO: The point is just that  
6 prejudice isn't going to be very tough to show, is it?  
7 You turned down a 1-year deal, and then later when that  
8 was off the table, you accepted a 5-year deal.

9 MR. QUEENER: That may well be the --

10 JUSTICE ALITO: There's prejudice --

11 MR. QUEENER: That may well be the easier  
12 part of the -- of the equation. But there's still going  
13 to --

14 JUSTICE BREYER: Why? Because you have to  
15 show a causal connection. So, you'd have to show --  
16 show in the causal connection that he would have taken  
17 that deal.

18 MR. QUEENER: That's -- yes.

19 JUSTICE BREYER: And if -- if you're going  
20 to use the words "reasonable probability" that he would  
21 have taken it, it might be fairly easy to show. And  
22 that's where in the back of my mind I'm thinking that  
23 maybe we want something tougher than reasonable  
24 probability, that you have to show that it really would  
25 have made a difference.

1           MR. QUEENER: I -- I think reasonable  
2 probability is a -- is a workable standard that we've  
3 used for many years.

4           JUSTICE GINSBURG: But you are -- you are  
5 leaving out of the picture the prosecutor's prerogative  
6 to withdraw his plea. That you said that the court --  
7 said it lacked authority to order the State to offer any  
8 bargain, but also the court said, I'm not going to  
9 require the prosecutor to renew an earlier offer.

10           One thing is clear in this case: The  
11 prosecutor did nothing wrong. The wrong was on the part  
12 of defense counsel. So, why should the judge disarm the  
13 prosecutor, take away the prosecutor's right to change  
14 his mind?

15           MR. QUEENER: The -- this is a remedy for a  
16 Sixth Amendment violation, and that is to put the  
17 defendant back into the position as nearly as possible  
18 as he would have been in at the time and at the time the  
19 offer was open. This is not a situation where the  
20 prosecutor is being ordered initially or the first  
21 instance to make an offer; it -- this is being viewed as  
22 the offer that was originally made is still available  
23 and open to the defendant.

24           JUSTICE SCALIA: Yes, but at the time, that  
25 offer could have been withdrawn by the prosecutor. And

1 you're saying now it can't be withdrawn. So, you're  
2 really not putting him back in the situation he was in.

3 MR. QUEENER: There's -- there's never going  
4 to be a perfect remedy for any of these violations, I  
5 don't believe.

6 JUSTICE SCALIA: I think that's right.

7 MR. QUEENER: Right.

8 JUSTICE SCALIA: And that's one of the  
9 things that causes us to be suspicious of whether  
10 there's a constitutional violation --

11 MR. QUEENER: Well --

12 JUSTICE SCALIA: -- because there really  
13 isn't any perfect remedy.

14 MR. QUEENER: There can't be a perfect --

15 JUSTICE SCALIA: In some cases, not even a  
16 close to perfect remedy.

17 MR. QUEENER: I think this is close to  
18 perfect, as close to perfect as we can get, which is  
19 what is required for Sixth Amendment remedies, that it  
20 mitigate it to the extent possible. And in those  
21 circumstances where one party -- the interests of one  
22 party may be infringed upon, if that happens -- they  
23 can't be infringed upon unnecessarily. This is a  
24 necessary infringement. The State bears the burden of  
25 ineffective assistance of counsel, and if that's in a --

1 an erroneous sentencing, then the State has to bear the  
2 burden for the erroneous sentencing.

3 CHIEF JUSTICE ROBERTS: Counsel --

4 JUSTICE ALITO: On the issue of --

5 CHIEF JUSTICE ROBERTS: I'll go this time.

6 Counsel, on page 24 of your brief, you quote  
7 Alford for the proposition that a valid plea must be a  
8 voluntary and intelligent choice among the alternative  
9 courses of action open to the defendant.

10 MR. QUEENER: Yes.

11 CHIEF JUSTICE ROBERTS: On the next page,  
12 you say when Frye entered his guilty plea before the  
13 trial court, he was completely unaware that counsel's  
14 ineffective delay had forever foreclosed those options.

15 Now, I put the two of those together and  
16 find you saying that this was a valid plea.

17 MR. QUEENER: No, it was --

18 CHIEF JUSTICE ROBERTS: The question of  
19 validity is whether it's an intelligent choice, as you  
20 quote, among the alternative choices of action open to  
21 the defendant. The next page you say these options have  
22 forever been foreclosed. So, they weren't open to the  
23 defendant.

24 MR. QUEENER: Well, those were foreclosed  
25 simply as a result of trial counsel's ineffectiveness,

1 which -- which caused him to be unaware that they had  
2 been ever available to him, so that -- that how the plea  
3 becomes involuntary is not that he's aware of what the  
4 situation is at the time that he's entering the plea,  
5 because there are many other circumstances that go into  
6 his decision of whether or not to enter a plea. Those  
7 alternatives were only no longer available to him as a  
8 result of counsel's failure to perform his duty  
9 professionally and communicate the offer.

10 JUSTICE ALITO: On the issue of remedy, as  
11 the Respondent are you not limited to the remedies that  
12 were provided in the judgment of the State court?

13 MR. QUEENER: No, I don't believe so,  
14 because the State court, the court of appeals, simply  
15 thought it was not empowered to put him back in the  
16 position that he was in, and I think that is the remedy  
17 under the Sixth Amendment for that violation.

18 JUSTICE ALITO: Well, you didn't file a  
19 cross-petition, and there wasn't one granted. So,  
20 aren't -- aren't you limited to defending the judgment  
21 below? Can you ask for a modification of the judgment  
22 below in your favor?

23 MR. QUEENER: With the -- the second point  
24 in the -- in this case is, what is the appropriate  
25 remedy? And --

1 JUSTICE GINSBURG: And that's -- is that the  
2 question that the Court raised?

3 MR. QUEENER: Yes. Yes.

4 JUSTICE GINSBURG: So, the Court was  
5 expecting you to address it.

6 MR. QUEENER: But we did file the petition  
7 challenging the -- the finding of the -- or the relief  
8 provided by the court below.

9 JUSTICE ALITO: You think that because we  
10 added a question, that acts as the functional equivalent  
11 of a granted cross-petition that would permit  
12 modification of the judgment in your favor?

13 MR. QUEENER: No, but the last I -- the last  
14 I recall, that cert petition was still pending. I may  
15 be wrong about that, I'm not sure, that it was just into  
16 this case.

17 JUSTICE GINSBURG: Are -- are you  
18 recognizing that the remedy that the Missouri Supreme  
19 Court did give was a futile remedy? That is, to plead  
20 guilty, to have another open plea or trial, because this  
21 defendant apparently doesn't want to go to trial.

22 MR. QUEENER: I think both of those are  
23 futile remedies, and that's why it's really obvious that  
24 the remedy has to be something else. This is not a  
25 situation where he does have a very -- a very good

1 likelihood of succeeding at trial. That's not going to  
2 do him any good. That won't get him a misdemeanor where  
3 he'll be sentenced to 90 days. The open plea is  
4 basically the same -- the very same thing that's causing  
5 him the prejudice in this case. So, the remedy being  
6 provided by Missouri Court of Appeals is essentially no  
7 remedy at all for the prejudice that he suffered.

8 JUSTICE GINSBURG: But why should -- now  
9 that we know what the judge's sentence was, and part of  
10 the plea offer was remade, the part about -- what was  
11 it -- 3 years with 10 days in jail?

12 MR. QUEENER: Yes.

13 JUSTICE GINSBURG: And the judge said, no,  
14 I'm not going to give him just 10 days; I'm going to put  
15 him in jail for the whole 3 years. Now, if that's --  
16 this is the sentence that the judge gave, he rejected  
17 the -- half of the plea bargain, so surely he would have  
18 rejected the more generous one.

19 MR. QUEENER: I -- I'm not sure that's  
20 entirely the only answer we can draw from this record.  
21 At the time that this -- or this guilty plea was being  
22 entered and the sentence was handed down, this was an  
23 open plea, it was not an agreement. If they had gone to  
24 court on a plea agreement between the prosecutor and the  
25 defense, and that was up for a -- an amendment down to a

1 misdemeanor and a reduced charge -- you know, that is  
2 something more definitive. Then the judge would be  
3 looking at what the parties had agreed to at that point.

4 JUSTICE SCALIA: I'm not sure I understand  
5 the difference between an open plea and a plea  
6 agreement. He just comes to the judge and says I'm  
7 willing to plead to this without the prosecution having  
8 offered it?

9 MR. QUEENER: The open plea basically means  
10 there is not an agreement between the parties. Now,  
11 they may each know what either party is going to argue  
12 for or recommend, but there's not an agreement between  
13 the parties.

14 JUSTICE SCALIA: Okay.

15 MR. QUEENER: And I think that -- would  
16 leave the court with a little more flexibility than --  
17 than he might otherwise exercise if they came to him  
18 with an agreement.

19 JUSTICE SOTOMAYOR: I'm sorry. Just to make  
20 sure. I thought the earlier, the November 15th letter  
21 agreement --

22 MR. QUEENER: Yes.

23 JUSTICE SOTOMAYOR: -- always left it up to  
24 the judge whether to accept either the felony with shock  
25 treatment or the misdemeanor with 90 days. So, the

1 judge was always free to reject either of those two?

2 MR. QUEENER: I think the deference to the  
3 trial court on probation was in that first one, the 3  
4 years with defer to the court on probation. If they had  
5 agreed on the 90 days in the misdemeanor, that would  
6 have been a plea agreement between the two parties.  
7 That would have been a definitive --

8 JUSTICE SCALIA: Well, he could still --

9 JUSTICE SOTOMAYOR: Binding the judge?

10 JUSTICE SCALIA: He could still --

11 MR. QUEENER: Not binding the judge. No,  
12 that would not bind the judge. It never would. The  
13 judge would have the opportunity, at that point -- the  
14 only time -- the only thing the judge would have  
15 discretion over at that point would be the actual amount  
16 of sentence. If the prosecutor reduced that from a  
17 felony to a misdemeanor, the judge couldn't reject that.

18 JUSTICE SOTOMAYOR: He would have had to  
19 accept it.

20 MR. QUEENER: He would have had to --

21 JUSTICE SOTOMAYOR: But he would not have  
22 had to accept the 90 days.

23 MR. QUEENER: He would not have had to  
24 accept the 90 days.

25 JUSTICE SCALIA: But you're --

1 JUSTICE SOTOMAYOR: What proof -- I'm sorry.  
2 What proof did you have in the record that the judge  
3 would have accepted the 90 days?

4 MR. QUEENER: I don't have proof in the  
5 record that he would have. What I have in the record --  
6 there is nothing in the record to suggest that that  
7 would not have happened. The appellate court found --  
8 in fact by making the determination that Mr. Frye was  
9 prejudiced, necessarily made the conclusion that that  
10 plea would have gone forward. The motion court said  
11 nothing to refute that. There was nothing in the  
12 court's findings that the court would not have accepted  
13 that agreement had the parties come before it with that.

14 If there are no further questions --

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 General Koster, you have 2 minutes  
17 remaining.

18 REBUTTAL ARGUMENT OF CHRIS KOSTER

19 ON BEHALF OF THE PETITIONER

20 MR. KOSTER: Thank you, Your Honor.

21 Two of the Justices questions raised the  
22 concept of sentencing equivalency. And certainly  
23 sentencing equivalency is an important goal, both at the  
24 Federal system and we've tried at the State system. But  
25 sentencing equivalency is not an avenue that the Sixth

1 Amendment is intending to reach. The essential question  
2 here, to Justice Breyer's earlier question that I think  
3 I didn't answer properly, is should we begin unwinding  
4 these convictions in search of lost plea opportunities?

5 I think that we should not. It undermines  
6 the -- there were long discussions in both Hill and  
7 Premo about the importance of the finality of these and  
8 our being able to rely on the finality of these  
9 decisions. There's mutual reliance. There's State  
10 reliance as well because, when these offers are made,  
11 the State does not interview witnesses, the State does  
12 not send evidence to the lab, the State does not, you  
13 know -- sometimes even get to the point where the  
14 charges are made. So, there's State reliance and --  
15 which is synonymous with a reliance of justice on the  
16 finality of these agreements as well.

17 And also, the search for these lost  
18 opportunities that Mr. Frye is asking this Court to lead  
19 us toward takes a point of representation beyond the  
20 limited scope of the Sixth Amendment in Gonzalez --  
21 Gonzalez-Lopez and other courts, the limited -- the  
22 limitation of the Sixth Amendment that this Court has  
23 always appropriately articulated.

24 For this and other reasons stated in our  
25 briefing, the Missouri Court of Appeals should be

1 reversed. Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you counsel.

3 The case is submitted.

4 (Whereupon, at 12:00 p.m., the case in the  
5 above-entitled matter was submitted.)

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