No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

RICKY MALLORY, BRAHEEM LEWIS, and HAKIM LEWIS,
Respondents

On Petition for Writ of Certiorari to the
Pennsylvania Supreme Court

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

RONALD EISENBERG
Deputy District Attorney
(*counsel of record*)
HUGH J. BURNS, Jr.
Chief, Appeals Unit
ARNOLD GORDON
1st Asst. District Attorney
LYNNE ABRAHAM
District Attorney

Philadelphia District Attorney's Office
3 South Penn Square
Philadelphia, PA 19107

Question Presented

Respondents, criminal defendants convicted of an attempted murder plot, alleged in post-conviction proceedings that their trial lawyers were ineffective for urging them to accept a bench trial rather than a jury trial.

The Pennsylvania Supreme Court, relying on *Hill v. Lockhart*, held that the requirement of proving prejudice in the "proceeding" does not apply to the result of the trial; rather it applies only to the particular stage of the trial at which the ineffectiveness occurred. Therefore, respondents were entitled to relief merely by asserting that, but for their lawyers' actions, they would not have agreed to a bench trial.

The following question is presented:

Can a criminal defendant establish ineffective assistance of counsel for failing to ensure a valid jury trial waiver, without showing that the alleged ineffectiveness had any effect on the verdict or sentence?

Table of Contents

Table of Citations

Federal Cases

State Cases

Federal Statute

Order and Opinion Below

The order below is the ruling of the highest state court, the Pennsylvania Supreme Court. The order vacated the denial of post-conviction relief by the Pennsylvania Superior Court, and remanded for appropriate disposition of respondents' claim of ineffective assistance of counsel concerning waiver of the right to a jury trial. The opinion of the Pennsylvania Supreme Court is reported at 941 A.2d 686, and is reprinted in the Appendix at App. 1-44.

Statement of Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the judgment of the Pennsylvania Supreme Court construing the Sixth Amendment to the United States Constitution.

Constitutional Provision Involved

The Sixth Amendment to the United States Constitution, which provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

Statement of the Case

Respondents were associates charged with shooting a former drug partner. Respondents retained private attorneys and signed detailed written colloquies waiving their right to a jury. After a three-day bench trial, they were convicted of attempted murder and related offenses. On post-conviction review, respondents alleged that their lawyers were guilty of ineffective assistance of counsel for allowing the jury waiver against respondents' true will. The Pennsylvania Supreme Court, overturning the denial of relief, ruled below that such ineffectiveness allegations require no showing of prejudice in relation to the verdict or sentence, and remanded for disposition of the claim.

The events in question began in late 1995. Respondents Braheem and Hakim Lewis pooled several thousand dollars with the victim, Dante Hunter, to begin a cocaine-selling operation. After several months, some of the proceeds and drugs turned up missing from a safehouse. The partners quarreled and ended the relationship (N.T. 9/15/98, 12-24).

On the morning of August 27, 1996, a cohort of the Lewis's arranged a meeting with the victim to discuss their dispute. When the victim drove up in his car, the three respondents opened fire from

opposite sides of the street. The victim tried to speed away, crashed, and then fled on foot. One of the bullets hit him in the face, knocking out his teeth. Thirty-seven fired cartridge cases were recovered from the scene. (N.T. 9/15/98, 45-60; 9/16/98, 81).

When the scheduled trial day arrived, each of the respondents filled out four-page, 39-question jury waiver colloquy forms. The forms explained in detail the rights associated with trial by jury. Respondents also initialed each page and signed declarations certifying that they had discussed the matter with their lawyer and understood the information in the colloquy. The lawyers and the prosecutor also signed the forms. The trial judge confirmed in open court that the forms had been completed. Although there was no oral colloquy, neither respondents nor their retained counsel expressed any objection to the procedure. App. 5-7.

On September 17, 1998, the trial judge returned verdicts of guilty. Respondents appealed. One was represented by trial counsel on appeal, while the others retained new counsel. None of the respondents raised any claim on appeal concerning the jury waiver. App. 7-9.

The Pennsylvania Superior Court (the intermediate appellate court) affirmed the judgments of sentence on direct appeal, and the

Pennsylvania Supreme Court denied discretionary review. App.8-9.

Respondents then filed petitions in Philadelphia Common Pleas court under the Pennsylvania Post-Conviction Relief Act. Respondent Mallory was appointed new counsel; the others retained new counsel. In their petitions, respondents alleged, for the first time, that they had not really wanted a non-jury trial, and that their trial counsel were ineffective for not ensuring a voluntary waiver. App. 9.[1]

A new judge was assigned to the case and post-conviction hearings were conducted. Respondents testified that they were rushed into the jury waiver at the last minute, and thought they had to go along with counsel's advice. Counsel testified that they had originally planned on a jury trial, but that all the attorneys became convinced by the day of trial that a non-jury proceeding had a better chance of a favorable result. While they acknowledged advocating that strategy to their clients, they did not attempt to coerce a waiver (N.T. 11/24/03, Mallory hearing, 7-13, 25-26, 30-32; N.T. 11/24/03, Lewis hearing, 9, 18, 29-35, 43-44; N.T. 12/4/03, 6-7, 16-18, 21, 23-26).

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[1]Respondents also claimed that direct appeal counsel were ineffective for not raising the issue.

Following the hearings, the post-conviction court ruled that, in the absence of an oral colloquy, respondents did not fully understand their rights; thus the waivers were involuntary and counsel were ineffective for failing to raise the issue. The court granted respondents a new trial, and dismissed their remaining post-conviction claims as moot. App. 12-14, 73-79, 82-88, 91-97.

The Commonwealth appealed, arguing, *inter alia*, that respondents had failed to establish the necessary actual prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). Respondents answered that prejudice should be presumed. The Pennsylvania Superior Court rejected that argument, holding that respondents could not establish ineffective assistance of counsel, because they had not shown a reasonable probability that they would have achieved a more favorable result with a jury trial than with a non-jury trial. The court therefore vacated the new trial grant and remanded for consideration of respondents' remaining post-conviction claims. The court subsequently denied respondents' petition for reargument. App. 14-15, 67-70.

After granting discretionary review, the Pennsylvania Supreme Court reversed. The Court observed that written jury waivers are not per se invalid, and – nominally, at least – declined to "presume" prejudice in the jury waiver ineffective assistance context. App. 22-23, 36-38.

Nonetheless, the Court held that, in such cases, the defendant need not make any showing that he would have secured a better result with a jury. Instead, the defendant need only establish that, but for his attorney's actions, there is a reasonable probability that he would have made a different decision about waiver. App. 38-42.

Having therefore effectively disposed of the prejudice component of respondents' ineffectiveness claim, the court relinquished jurisdiction and remanded to allow the post-conviction hearing judge to enter a finding on the only remaining issue: whether, under all the circumstances, counsel performed deficiently by relying on the written jury waiver forms rather than insisting on oral colloquies. App. 42-44.

Because the hearing judge has already indicated his views on that question, and because the Pennsylvania Supreme Court's ruling establishes an incorrect standard for the assessment of Sixth Amendment claims in all similar cases, petitioner seeks this Court's review.

Reasons for Granting the Petition

I. The proper prejudice standard to be applied to jury waiver ineffectiveness claims presents an important question of constitutional law.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court set the legal test for judging claims by a criminal defendant that his lawyer provided such poor representation as to deprive him of the right to counsel under the Sixth Amendment. The defendant is required to demonstrate not only that counsel's performance was deficient, but also that it prejudiced the defense. *Id.* at 687. To establish such prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, *the result of the proceeding* would have been different." *Id.* at 694 (emphasis supplied).

Although *Strickland* was decided 24 years ago, the Court has not yet determined the precise contours of the phrase, "result of the proceeding." In particular, does this language pertain to the result of the trial as a whole, or to some piece of it? This case illustrates the importance of that unresolved question.

The Pennsylvania Supreme Court held here that a defendant alleging ineffective assistance in regard to a decision to waive a jury trial need not show that his attorney's actions had any effect on the verdict or sentence; rather, it is sufficient to establish that, but for counsel's conduct, the defendant would not have agreed to a non-jury trial. The rationale for this ruling is that *Strickland*'s prejudice requirement – that the outcome of the "proceeding" would have been different – refers not to the outcome of the trial, but only to *the specific stage of the trial* at which the ineffectiveness allegedly occurred. App. 38-42.

This issue has significant ramifications both within and well beyond the jury waiver context.

Since *Strickland*, innumerable defendants in the state and federal courts have raised claims alleging that their lawyers provided ineffective assistance concerning the decision to go to trial without a jury. The correct standard to be applied in assessing *Strickland*'s prejudice component, obviously, affects results in these cases at the appellate and post-conviction levels.

Moreover, to the extent that the burden of proving prejudice is lessened or essentially eliminated for jury waiver ineffectiveness claims, there is also an effect at the pre-trial level. Such claims typically involve events that are outside the power of judges to control completely during the

jury waiver process itself. But courts are not required to allow jury waivers at all; there is no constitutional right to a non-jury trial. *Singer v. United States*, 380 U.S. 24 (1965). Judges must therefore choose between permitting jury waivers, and risking possible reversal and retrial, or prohibiting jury waivers, and risking possible overload of already strained judicial resources.

Even more important, however, are the implications of this open question for ineffectiveness claims generally. If the trial process may be subdivided for purposes of assessing prejudice, then the prejudice requirement becomes virtually meaningless. How is it possible to ascertain prejudice from, for example, the manner in which counsel conducts *voir dire*, or the election to make an opening or closing argument, or the decision whether to present a defense case at all? At least, how is it possible without regard to the effect of these actions on the verdict or the sentence? If the prejudice inquiry is confined to the particular stage of trial – in other words, if the only question is whether the "result" of that specific "proceeding" would have been different but for counsel's actions – then the answer is automatic.

This case provides an appropriate opportunity to enunciate whether *Strickland* prejudice must be measured in whole (as an effect on the verdict or sentence), or in part (in relation only to the particular stage at which the

ineffectiveness allegedly occurred). And while *Strickland* itself did not explicitly answer that question, it provides considerable guidance for determining the proper standard.

Throughout the *Strickland* opinion, the Court's language makes clear that the prejudice component is concerned with overall outcomes, not particular acts.

> In giving meaning to the requirement [of effective assistance], we must take its purpose – to ensure a fair trial – as the guide. The 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 just result

466 U.S. at 686. Indeed the very first sentence of the Court's discussion of prejudice declares that alleged incompetence does not warrant relief "if the error had no effect on the *judgment*." 466 U.S at 691 (emphasis supplied).

The facts of the case also support this broad view of prejudice. *Strickland* addressed a claim of ineffective assistance arising from a capital sentencing proceeding. The Court observed that such a proceeding is akin to a trial in its own right, due to its format and standards for decision. 466

U.S. at 686. But the specific structure of a capital sentencing proceeding is less important than the simple fact that its result constituted the very judgment the defendant sought to set aside.

That is not the case with the "stage of trial" approach employed by the Pennsyvlania Supreme Court, and by other courts (*see infra*). A defendant alleging jury waiver ineffectiveness, for example, does not just want to set aside his jury waiver. The only way to do so would be to vacate the judgment of sentence and award a new trial. That is the real goal of such a claim.

Accordingly, the extent of the prejudice inquiry should correspond to the extent of the relief sought. If the defendant seeks a new trial, then allegations of prejudicial counsel error must be measured in relation to their effect on the overall verdict. The same must be true for a challenge to the sentence. In no case, however, is a Sixth Amendment violation properly established where the defendant alleges merely that a specific stage of the proceedings would have been different had counsel not erred.

This Court should grant review, or issue summary relief, in order to clarify the law.

II. The circuits, and state courts, are in conflict on the nature of the prejudice required for jury waiver ineffectiveness claims.

Jury waiver ineffectiveness claims provide a compelling example of the unsettled application of *Strickland*'s "result of the proceeding" language. There is a sharp conflict between courts that assess prejudice from such claims in relation to the verdict or sentence, and those that do not. The point of distinction is whether the "proceeding" is seen as the trial in its entirety, or whether instead the jury waiver determination is treated as a discrete stage within the trial process.

The leading authority for the latter view is the 8th Circuit. In *McGurk v. Stenberg*, 163 F.3d 470 (8th Cir. 1998), the court of appeals held that the attorney's failure to advise the defendant properly constituted a constructive denial of counsel as to the right to a jury trial. Relying on *United States v. Cronic*, 466 U.S. 648 (1984), the court held that the denial of effective assistance at the jury selection stage called for a presumption of prejudice, and thus the award of a new trial without regard to any effect on the verdict or sentence. *Accord Miller v. Dormire*, 310 F.3d 600 (8th Cir. 2003) (attorney waived jury without explaining rights to defendant, who was present;

state court acted unreasonably in not presuming *Strickland* prejudice).

Although no other federal courts of appeal have followed the 8th Circuit position, several states have done so:

Florida: *Abrams v. State*, 777 So. 2d 1205 (Fla. Dist. Ct. App. 2001) (citing *McGurk*).

Indiana: *Stevens v. State*, 689 N.E.2d 487, 490 (Ind. Ct. App. 1997) ("in certain circumstances, prejudice from defense counsel's performance will be presumed for purposes of ineffective assistance of counsel claims"; citing *Cronic*).

Iowa: *State v. Stallings*, 658 N.W.2d 106 (Iowa 2003) (citing *McGurk*).

Kansas: *City of Wichita v. Bannon*, 154 P.3d 1170, 1174-75 (Kan. Ct. App. 2007) (citing *McGurk*).

In contrast, several circuits have held that, where a defendant claims that his lawyer's ineffectiveness deprived him of a jury trial, he must show that the result of a jury trial would likely have been more favorable than the non-jury trial he actually had:

4th Circuit: *Correll v. Thompson*, 63 F.3d 1279, 1292 (4th Cir. 1995) ("[T]he evidence against Correll was overwhelming, and we have no doubt that had

the case been presented to a jury the same result would have obtained").

5th Circuit: *Green v. Lynaugh*, 868 F.2d 176, 178 (5th Cir. 1989) ("Aside from the speculation by the magistrate that a jury might have deadlocked over the evidence presented, there is nothing in the record to indicate that, in the absence of defense counsel's errors, a *different* fact finder (i.e. a jury) would have been reasonably likely to arrive at a different outcome").

6th Circuit: *Willis v. Smith*, 351 F.3d 741, 746 (6th Cir. 2003) ("Even if Willis's counsel performed in an objectively unreasonable manner, Willis cannot show 'reasonable probability' that 'the result of the proceeding would have been different' but for his counsel's errors. *Strickland*, 466 U.S. at 694. Willis has presented no evidence that the judge's rulings were biased in any way or that the trial was otherwise unfair. Moreover, Willis's conviction was fully supported by the overwhelming evidence presented by the government"); *Spytma v. Howes*, 313 F.3d 363, 372 (6th Cir. 2002) ("If . . . petitioner had received a jury trial . . ., it is likely that he would have been found guilty, given the overwhelming evidence of guilt").[2]

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[2]*See also*:

9th Circuit: *Robinson v. United States*, 1991 U.S. App.

(continued...)

Pennsylvania has tried to straddle the divide between these two lines of authority – unsuccessfully. The Pennsylvania Supreme Court claimed here that its approach was neither to presume prejudice, as in the Eighth Circuit cases, nor to demand a showing that the verdict or sentence would have been different. Rather, the court said, the defendant could prevail merely by demonstrating that ineffectiveness by counsel changed the result *of the jury waiver proceeding*. In other words, the defendant's burden is only to establish that counsel's actions caused him to

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[2](...continued)
LEXIS 131166 (9th Cir. 1991) (unpublished) (rejecting ineffective assistance claim based on counsel's advise to waive jury; "[n]or has she shown that trial by judge, as opposed to jury, constitutes prejudice"); *United States v. Craig*, 1992 U.S. App. LEXIS 14179 (9th Cir. 1992) (unpublished) (rejecting alleged ineffectiveness based on waiver of right to jury trial; under circumstances, defendant was "not prejudiced as the result of having a bench trial rather than a jury trial")

Illinois: *People v. Williams*, 576 N.E.2d 68, 76 (Ill. App. Ct. 1991) (no prejudice under *Strickland* from counsel's decision to waive jury trial)

Ohio: *State v. Emch*, 2002 Ohio 3861, ¶38 (Ohio Ct. App. 2002) (applying *Strickland* standard; "[a]ppellant also failed to demonstrate prejudice based on his jury waiver. Appellant presented no evidence, or even arguments, that had the trial been conducted before a jury rather than a judge, the result would have been different").

choose a non-jury trial when, left to his own devices, he would have elected a jury trial.

The Pennsylvania Supreme Court insisted that this diminished showing still amounted to "actual prejudice," but it was no such thing. What the court called actual prejudice was actually just causation. Prerequisite to any kind of prejudice claim – presumed or actual – is a showing that the thing the defendant lost was in fact the product of the thing the lawyer did. *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000) (distinguishing between actual and presumed prejudice, but requiring in either case "that counsel's deficient performance must actually cause" the prejudice alleged).

Thus the Eighth Circuit, which unabashedly presumes prejudice for ineffective assistance claims concerning jury trial waivers, nevertheless requires the defendant to establish "that he would have insisted on a jury trial" but for counsel's alleged poor advice. *Nelson v. Hvass*, 392 F.3d 320, 324 (8th Cir. 2004). The bottom line is that the Pennsylvania ruling is consistent with the Eighth Circuit line of cases: if a defendant followed improper advice to waive the right to a jury trial, the court must presume the trial was unfair and must grant a new one.

This Court has made clear that *United States v. Cronic*, allowing a presumption of prejudice in certain ineffective assistance of counsel cases,

recognized only "a narrow exception to *Strickland*'s holding" requiring actual prejudice. The Court has emphasized "just how infrequently the surrounding circumstances will justify a presumption of ineffectiveness." *Florida v. Nixon*, 543 U.S. 175, 190 (2004). Yet the temptation of at least some courts to dispense with concrete prejudice – an effect on the verdict or sentence – in the jury waiver ineffectiveness context suggests that the line between *Strickland*'s actual prejudice and *Cronic*'s presumed prejudice remains unclear. The Court should grant review to resolve the conflicting views of the lower courts.

III. This Court's decision in the related context of guilty plea ineffectiveness claims, *Hill v. Lockhart*, has created uncertainty and should be clarified.

The Pennsylvania Supreme Court did not come to its narrow approach to *Strickland* prejudice simply by considering other cases concerning jury waiver ineffectiveness. Rather, the court looked to this Court's decision in *Hill v. Lockhart*, 474 U.S. 52 (1985), which addressed a claim by a defendant who pleaded guilty, allegedly as a result of his lawyer's bad advice. The Pennsylvania court understood *Hill* to establish that the "proceeding" for which prejudice must be assessed is not the trial as such; instead, the relevant "proceeding" can be

any distinct step in the criminal process that has its own result. App. 39-40.

On this point, however, *Hill* sent mixed signals, which have caused conflicting rulings in the lower courts. On the one hand, *Hill* contains language indicating that prejudice is just the likelihood of a different plea decision, not a different verdict or sentence. "The . . . 'prejudice' requirement . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. . . . [T]he defendant must show 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.

On the other hand, the *Hill* Court instructed lower courts to resolve prejudice claims – at least "[i]n many guilty plea cases" – by examining the impact of the alleged ineffectiveness on the conviction, not just on the plea decision. The necessary prejudice assessment "will depend in large part" on whether better performance by plea counsel "likely would have changed the outcome of a trial." *Id.* Indeed *Hill* explicitly relied, *id.* at 59 & n.*, on two circuit court decisions that required such prejudice in the plea context.[3]

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[3]*Mitchell v. Scully*, 746 F.2d 951, 954-55 (2nd Cir. 1984) (Friendly, J.) (in guilty plea cases, as in cases of trial to verdict, defendant claiming ineffective assistance of counsel

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Furthermore, later in that same Term the *Hill* Court also decided the case of *Kimmelman v. Morrison*, 477 U.S. 365 (1986), addressing ineffective assistance in the context of a suppression hearing. Certainly a suppression hearing, like the guilty plea process, could be characterized as a separate "proceeding" with an independent "result" addressing an important constitutional right. Yet the Court in *Kimmelman*, after reiterating that *Strickland* prejudice requires a showing that "the result of the proceeding would have been different," specifically held that the defendant must "prove that his Fourth Amendment claim is meritorious *and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to*

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[3](...continued)
must show that result of proceeding would have been not just different, but *more favorable to him*; "[h]ere there was exceedingly little likelihood that presentation of [a] . . . defense would have succeeded with respect to the first degree robbery charge to which Mitchell pleaded guilty. . . . Even in the unlikely event that Mitchell had succeeded in defeating the first degree robbery . . ., his own testimony . . . would have convicted him of second degree robbery, on which he could have been subject to ... the same . . . sentence he actually received"); *Evans v. Meyers*, 742 F.2d 371, 374-75 (7th Cir. 1984) (Posner, J.) (prejudice standard no different for guilty plea ineffectiveness claims than for trial ineffectiveness claims; inconceivable that defendant would have gone to trial, "or that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received").

demonstrate actual prejudice." *Id.* at 375 (emphasis supplied).

The resulting uncertainty on *Hill*'s meaning has led to significant conflicts in the lower courts, both between and within circuits, and among state courts. Many courts hold that a defendant alleging ineffective assistance in connection to a guilty plea need show only that, but for counsel's conduct, the defendant would not have entered the plea. Other courts, however, maintain that the defendant must demonstrate a reasonable probability that the outcome of a trial would have been more favorable.[4]

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[4]*See, e.g.*:

6th Circuit: *Short v. United States*, 471 F.3d 686, 691 (6th Cir. 2006) (*Hill* "modified *Strickland*'s prejudice prong," requiring showing that plea decision (rather than trial outcome) would have been different).

7th Circuit: *Compare Haase v. United* States, 800 F.2d 123, 128 (7th Cir. 1986) (guilty plea counsel performed deficiently in failing to explore *scienter*, but for charges at issue, lack of such intent "is not a defense. Haase, thus, has not satisfied the second prong of the *Strickland* standard"), *with St. Pierre v. Walls*, 297 F.3d 617, 628 (7th Cir. 2002) ("In the context of guilty pleas, . . . the prejudice requirement is altered"; defendant need only show he would not have pleaded guilty).

10th Circuit: *Compare Miller v. Champion*, 161 F.3d 1249 (10th Cir. 1998) (*Miller I*) ("Although Miller's claim would

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[4](...continued)
necessarily fail without such an allegation [that he would not have pleaded guilty], *see Hill*, . . . this allegation alone is insufficient to demonstrate prejudice. . . . Rather, in order to demonstrate prejudice, Mr. Miller must also show that, had he rejected the State's plea bargain, the outcome of the proceedings likely would have changed. . . . Thus, we must determine whether it is likely that a jury would have acquitted"), *with Miller v. Champion*, 262 F.3d 1066, 1073 (10th Cir. 2001) (disavowing *Miller I*'s "expansive language").

Arizona: *State v. Bowers*, 966 P.2d 1023 (Ariz. Ct. App. 1998) ("We reject an understanding of prejudice in the context of a guilty plea which would require a petitioner to demonstrate a more favorable outcome after trial").

District of Columbia: *Smith v. United States*, 686 A.2d 537 (D.C. App. 1996) ("Since the outcome would have been no different in this case had Smith entered a plea, there is no prejudice. *See Hill v. Lockhart*").

Florida: *Grosvenor v. State*, 874 So. 2d 1176, 1179 (Fla. 2004) (*Hill* "has caused much confusion," but defendant should not be required to allege that trial outcome would have been more favorable than plea)

Indiana: *State v. Van Cleave*, 674 N.E.2d 1293, 1297 (Ind. 1996) (concluding that, while "*Hill* itself is not entirely clear on this point, . . . a claim of ineffective assistance of counsel does entail a showing of reasonable probability of a better result at trial").

Mississippi: *Compare Leatherwood v. State*, 539 So. 2d 1378, 1387 (Miss. 1989) ("the trial court impermissibly
(continued...)

The Pennsylvania Supreme Court, again, tried to straddle this divide – but was again unsuccessful. The court, attempting to reconcile (its understanding of) *Hill* with *Kimmelman*, suggested that its holding would be limited. That is, the court's special form of ineffective assistance prejudice – the kind that requires only a causal

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[4](...continued)
exceeded the proper focus for determining whether Leatherwood has shown prejudice by considering the evidence of guilt, and the ultimate likelihood of an acquittal"), *with Mowdy v. State*, 638 So. 2d 738, 742 (Miss. 1994) (no prejudice from counsel's bad plea advice where defendants failed "to delineate facts which, if proven, would show the likelihood of success at trial")

Wyoming: *Compare Rutti v. State*, 100 P.2d 394, 406-08 (Wyo. 2004) ("it is clear that the *Hill* Court was not lessening the prejudice requirements of *Strickland*. . . . The definitive problem with Rutti's ineffective assistance of counsel claims is that he has not presented any objectively plausible argument supporting the prejudice prong. Rutti does not argue that absent the error, the outcome of a trial would have been more advantageous to the client than the result of his plea. . . . This Court has confidence that the outcome was more than fair to Rutti and that the proper functioning of the adversarial process was not undermined by defense counsels' performances. . . . Rutti suffered no prejudice and actually benefitted from a very advantageous plea agreement"), *with Palmer v. State*, 174 P.3d 1298, 1302 (Wyo. 2008) ("We take this opportunity to clarify *Rutti*"; defendant need not allege that outcome of trial would have been more advantageous than plea).

link, without proof of the possibility of a more favorable verdict or sentence – would apply only to the results of proceedings involving "fundamental rights." Other kinds of court proceedings, like suppression hearings, would still require a showing of prejudice in the form of an effect on the verdict or sentence. App. 39, 41-42 n.18.

Nothing in *Hill*, however, nor in *Kimmelman*, let alone in *Strickland*, indicates that the Pennsylvania court's notion of "fundamental rights" has anything to do with the assessment of prejudice to the defendant from deficient performance by an attorney. To begin with, which rights qualify for the special treatment? It is not clear why suppression claims should be excluded, considering that suppression is perhaps the single best chance a defendant has to achieve a favorable outcome in a criminal trial. Meanwhile the right to testify on one's own behalf, which surely merits a place on any list of "fundamental rights," *see, e.g.*, *Jones v. Barnes*, 463 U.S. 745, 751 (1983), and is frequently the subject of ineffective assistance of counsel claims, is routinely analyzed according to the normal rule of *Strickland* prejudice: whether the defendant's testimony would have helped get a better result at trial.[5] *Kimmelman* itself, moreover,

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[5]*See, e.g.*, *Brown v. Artuz*, 124 F.3d 73 (2nd Cir. 1997) (recognizing that right to testify is fundamental and personal to defendant, and that counsel's failure to advise defendant

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holds that the right to effective assistance of counsel has a separate identity from any underlying right that counsel may have jeopardized, and that the elements of proving one do not govern the elements of proving the other. 477 U.S. at 374-75.

Despite the efforts of the court below to coin a coherent rule, the difficulty appears to rest with *Hill* itself. The inescapable fact is that, if *Hill* requires *no more than* proof that counsel's deficient performance caused the decision to plead guilty (or, by extension to this case, the decision to waive trial by jury), then it permits simply a causation element, not a true prejudice element. *See Roe v. Flores-Ortega*, 528 U.S. at 484. If it is enough to show that the result of a specific "proceeding" –

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[5](...continued)
on right is deficient performance, but holding that defendant could not establish prejudice under *Strickland*: "[e]ven if Brown had made such statements on the stand, however, there is no reasonable probability that the verdict would have been different"); *United States v. Kimler*,119 Fed. Appx. 213 (10th Cir. 2004) ("there was no reasonable probability that Defendant's testimony would have changed the result in the case"); *Franklin v. United States*, 227 Fed. Appx. 856 (11th Cir. 2007) (rejecting argument that prejudice should be presumed); *United States v. Michael*, 100 F.3d 995 (D.C. Cir. 1996) (declining to presume prejudice; "[w]e conclude that given the facts of the case even the defendant's own testimony would not have influenced the outcome of his trial").

guilty plea colloquy; jury waiver colloquy; waiver-of-testimony colloquy; etc. – would have been different, then the judgment of sentence is effectively deemed unfair, and must be vacated in favor of a new trial. Once, in other words, a court dispenses with the requirement of proving a reasonable probability of a more favorable verdict or sentence, what is left is a presumption of prejudice, not actual prejudice.

To the extent such a sweeping result might be read from the opinion in *Hill*, it is dictum. The defendant there did not establish, or even allege, that he would have pleaded not guilty but for counsel's supposedly inadequate advice. 474 at 60. Absent this threshold showing, it was unnecessary for the Court to decide whether actual prejudice was required to establish a violation of the right to effective representation in relation to plea decisions.

To be sure, some later support for a presumption of prejudice might be gleaned from the opinion in *Roe v. Flores-Ortega*. There the Court cited *Hill*, apparently analogizing the guilty plea decision to an attorney's act in forfeiting the opportunity to appeal, against the wishes of his client. 528 U.S. at 483. In reality, the two are not the same. A plea bargain does not unilaterally forfeit an entire judicial proceeding; rather, it represents an alternative form of disposition, entered into mutually in order to provide a benefit

to both sides. The correct analogy is not to the kind of forfeiture alleged in *Roe*, but to negotiations for a settlement at the appellate stage. A challenge to counsel's guidance in relation to such a process, whether at the appeal stage or at the plea stage, is really a challenge to the fairness of the end result.

To presume prejudice in such circumstances would be flatly inconsistent with the whole course of the Court's development of the law in this area: from its focus in *Strickland*, 466 U.S. at 687, on "a fair trial, a trial whose result is reliable," through its caveat in *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993), that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective," to its emphasis in *Florida v. Nixon*, 543 U.S. at 190, that a presumption of prejudice is an exceedingly narrow exception to the general rule.[6] Guilty pleas

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[6]*See also United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006):

> Having derived the right to effective representation from the purpose of ensuring a fair trial, we have, logically enough, also derived the limits of that right from that same purpose. . . . The requirement that a defendant show prejudice in effective representation cases arises from the very nature of the specific element of the right to counsel at issue there – *effective* (not mistake-free) representation. Counsel

(continued...)

and bench trials make up the vast majority of criminal dispositions in this country. If prejudice is to be presumed whenever counsel's performance is challenged in relation to either decision, then the relationship between *Strickland* and *Cronic* will have been turned on its head.

Accordingly, it is appropriate for the Court to clarify the meaning of *Hill v. Lockhart*. Is prejudice indeed to be presumed for guilty plea ineffectiveness claims? And if so, does such a rule extend to jury waiver ineffectiveness claims as well? In the latter case, after all, the defendant did in fact have a full trial in every sense, albeit with a different – but no less inherently fair – finder of fact. *See Strickland*, 466 U.S. at 685, 695 ("a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal"; prejudice "should not depend on the idiosyncracies of the particular decision maker).

The case presents a question worthy of review. Certiorari should be granted.

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[6](...continued)
cannot be "ineffective" unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Thus, a violation of the Sixth Amendment right to *effective* representation is not "complete" until the defendant is prejudiced.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that this Court grant the petition for writ of *certiorari*.

Respectfully submitted,

RONALD EISENBERG
Deputy District Attorney
(*counsel of record*)
HUGH J. BURNS, Jr.
Chief, Appeals Unit
ARNOLD GORDON
1st Asst. District Attorney
LYNNE ABRAHAM
District Attorney

Philadelphia District Attorney's Office
3 South Penn Square
Philadelphia, PA 19107

[J-134-2006]
IN THE SUPREME COURT
OF PENNSYLVANIA
EASTERN DISTRICT

CAPPY, C.J., CASTILLE, NEWMAN, SAYLOR, EAKIN, BAER, BALDWIN, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 28 EAP 2006
	:	Appeal from the
Appellee	:	Order of the Superior
	:	Court entered on
	:	November 15, 2005 at
	:	No. 869 EDA 2004,
	:	vacating and remand-
v.	:	ing the Order of the
	:	Court of Common
	:	Pleas of Philadelphia
	:	County entered on
	:	March 2, 2004 at No.
	:	9802-0065 1/1
RICKY MALLORY,	:	
	:	888 A.2d 854 (Pa.
Appellant	:	Super. 2005)
	:	
	:	ARGUED: October 18,
	:	2006