IN THE SUPREME COURT OF THE UNITED STATES

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JEFF PREMO, SUPERINTENDENT, :

OREGON STATE PENITENTIARY, :

Petitioner : No. 09-658

v. :

RANDY JOSEPH MOORE :

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Washington, D.C.

Tuesday, October 12, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

JOHN R. KROGER, ESQ., Attorney General, Salem, Oregon; on behalf of Petitioner.

STEVEN T. WAX, ESQ., Federal Public Defender, Portland, Oregon; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next this morning in Case 09-658, Premo v. Moore.

Mr. Kroger.

ORAL ARGUMENT OF GENERAL JOHN R. KROGER

ON BEHALF OF THE PETITIONER

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

The court of appeals held that Arizona v. Fulminante was the clearly established Federal law to control and govern the outcome of this case. This was an error, because this Court has never applied Fulminante's direct appeal harmless error standard, which places the burden of proof on the government, to a collateral ineffective assistance of counsel claim, where the burden of proof is on the inmate.

In Boyer, unlike Fulminante, there is no trial transcript to review because the defendant pleaded no contest or guilty before trial. The court of appeals' decision conflicts with both Strickland v. Washington and Hill v. Lockhart and will have grave negative consequences for our criminal justice system.

JUSTICE GINSBURG: But isn't -- isn't Fulminante relevant as -- just for the proposition that a defendant's own confession carries heavy weight, leaving the rest of it -- the statement that -- in Fulminante that when a defendant confesses to the crime, that carries heavy weight?

MR. KROGER: Yes, Your Honor, I think it's relevant to that extent, that a confession from a defendant is significant evidence. However, it certainly does not imply, as the court of appeals proceeded to do here, that it controls the prejudice prong of Strickland, that it sets a new standard of review of harmlessness, that it shifts the burden of proof onto the government, or that it limits the prejudice analysis to that question of the potential impact of the confession at trial.

And so for all those reasons, I -- I think the -- the court of appeals has gone well beyond any potential relevance of the Fulminante decision.

JUSTICE SOTOMAYOR: Is it -- if I am understanding your argument, it is that the Court erred in assuming that if the confession had been suppressed -- which you're not arguing for or against. I'm assuming you are not taking your amicus's position that we have to get to the question of what would have

happened in a motion to suppress -- but that under all circumstances, if there's a suppressible confession, a defendant should never plead guilty.

You are saying that that conclusion is what the Ninth Circuit drew and that was wrong?

MR. KROGER: Your Honor, we're -- we are suggesting that the court was wrong both in stating Fulminante provided the standard of review, as well as holding that you can, in effect, assume prejudice simply because defense counsel failed to file a motion which defense counsel believed was not --

JUSTICE SOTOMAYOR: So it's another way of saying what I said, which is, no defendant should plead guilty if it's a suppressible confession?

MR. KROGER: That is correct, Your Honor. That is correct, Your Honor.

JUSTICE SOTOMAYOR: All right. So now, what is the other information that would have made a plain guilty in this case inevitable? However, that's a higher standard than you need to meet, but --

MR. KROGER: As -- as Your Honor noted, that is a much higher standard than we have to meet under Hill v. Lockhart. There were very good reasons why defense counsel's advice that this defendant plead guilty was sound and reasonable advice.

First of all, the defendant faced a very strong government case, even at that stage of the investigation.

Second, there was a potential charge of aggravated murder that could be brought if the case were taken to the grand jury.

Third, the plea offer that was extended to the defendant and which the defendant took was very favorable to the defendant, both in terms of -- of capping the amount of time that the defendant would serve, as well as dismissing two additional mandatory minimum charges of assault and kidnapping. So --

JUSTICE SOTOMAYOR: Were those higher than the minimum he pled to? Were those mandatory minimums higher?

MR. KROGER: No, Your Honor, but they could have been run consecutive rather than concurrent.

I -- I think more significant is the fact that when the defendant himself testified about the reasons he pled guilty, none of the reasons he provided had anything to do with the strength of the government's case or the failure of counsel to file the motion.

What the defendant said motivated his guilty plea was a concern about an aggravated murder charge, a desire not to have to testify against his brother, which

he believed would be the outcome of a guilty plea. And those factors were in the defendant's mind when he decided to take the guilty plea.

So in this case, even if one were to shift the burden onto the government -- and I do not believe that -- that that is consistent with Strickland -- the government would prevail here.

This case raises, I think, significant consequences for application of Strickland and Hill v. Lockhart. Strickland and Hill clearly place the burden of proof in a collateral proceeding on the inmate.

The court of appeals here shifted the burden of proof, pursuant to Fulminante, onto the government. One can see this in the petition appendix at page 48 where the court states that there is not enough evidence in the record to prove that the defendant would have pled guilty had the confession been denied.

As I stated to Justice Sotomayor, I believe the government actually could meet that burden, but that is certainly not the burden that either Strickland or -- or Hill requires.

Second, the Court's application of Fulminante transforms the Hill v. Lockhart analysis. It narrows it to one degree, because it's focused on one

issue, what the government's evidence would be at trial, rather than looking at the broad array of issues which might motivate a defendant to plead guilty which the courts will look at under -- under Hill v. Lockhart.

For example, under Hill v. Lockhart the court will not only look at the defendant's testimony with respect to the estimate of the strength of the government's case, but also look at the potential for an additional sentence that is higher or additional charges that carry a higher sentence if the defendant proceeds with litigation rather than pleading guilty.

It will look at the investigation risk that additional evidence would be found in, if the case continued rather than terminating in an early plea. And it will look at personal factors such as the ones that were evident in this case that might motivate a guilty plea.

For those reasons, the Hill v. Lockhart standard encompasses a broader array of factors in determining whether there is prejudice than a simple application of Fulminante's direct appeal post-trial standards.

It is also the case that the application of Fulminante will substantially increase the amount of speculation which courts have to engage in compared with

applying the proper Hill v. Lockhart test.

Hill v. Lockhart limits the amount of speculation by focusing on the defendant's motive in pleading guilty and whether the ineffective assistance could have influenced that decision to plead guilty.

JUSTICE GINSBURG: What about Judge Berzon's test, that seems to be simple and a matter of common sense, that if you get rid of the confession, then you have a better chance of getting a good deal in the plea bargain? The confession certainly -- it -- this serves the defendant to get rid of that as well as weight on the prosecution's side.

MR. KROGER: Your Honor, I would say two things: First, the test which is proposed by Judge Berzon in the concurrence has never been recognized or promulgated by this Court. So in a collateral proceeding pursuant to 28 U.S. Code 2254, it would not be clearly established law that the State court was required to follow.

And second, application of that standard, as Judge Bybee noted in his concurrence, would require an immense amount of speculation. In this case, the majority in the Ninth Circuit hypothesized that filing the motion to suppress the confession would strengthen the defendant's position in negotiation vis-à-vis the

Government.

It is also very possible, however, that the Government would respond to filing a motion as opposed to taking an early offer of guilty plea by taking the case to the grand jury, seeking an aggravated murder charge, and thus, putting the defendant in a worse position in the case. And, in fact, as Judge Bybee noted, he questioned whether the courts have the proper tools to be able to speculate years after the guilty plea whether a particular motion may have increased or may have decreased the amount of leverage that a defendant has, or what kind of response that that motion might have drawn from the prosecution.

JUSTICE BREYER: But you have to, don't you? I mean, what's the alternative? I mean, imagine a case where it's clear there was a malpractice or an inadequate assistance, and it happened a long time ago and now you have to decide, well, was it prejudicial or not? It's prejudicial if in the absence of that he would have gone to trial or wouldn't have pleaded guilty, or -- and what's the alternative to trying to figure out whether that's so?

MR. KROGER: Your Honor --

JUSTICE BREYER: It can't be the State always wins and it can't be the defendant always wins.

So -- so what's the alternative?

MR. KROGER: I think the alternative, Your Honor, is application of Hill v. Lockhart, which looks not at speculation about how this could or could not have affected the plea bargaining process, but looks very concretely at the defendant's pretrial decision-making process and examines the record to determine why the defendant pled guilty and whether they can prove with a reasonable probability that he would not have pled guilty --

JUSTICE BREYER: Oh, but that is -- isn't that -- sorry, maybe we are just quibbling. I -- I don't quite see it. That would seem to me to be going into the plea bargaining process. Would he have pleaded guilty, what would have happened?

MR. KROGER: I -- I think the difference, Your Honor, is that when you are applying Hill v. Lockhart, you almost always have at least three very concrete pieces evidence to show the defendant's state of mind. You have the defendant's own testimony or deposition, or in this case both. You have the trial counsel's affidavit for testimony about the decision-making process his client engaged in, and then you have the guilty plea colloquy itself.

So you always have a -- a concrete record

that the court years later can review in order to determine what motivated the -- the decision to plead guilty.

If one were applying Judge Berzon's proposed alternative prejudice finding, one would have to engage in a great deal of speculation. One would, I presume, have defense counsel and the government make claims about what they might have done in response to hypotheticals, which does not seem to be a -- a -- a reasonably judicable standard. As a --

JUSTICE SOTOMAYOR: Without any confession -- forget about the brother or the girlfriend -- assume that there had been no confession, wouldn't it have been a fair conclusion to draw that without any confession whatsoever that the plea bargaining strength of the defendant in this case would have been appreciably higher and that the prosecutor would have had to offer something --

MR. KROGER: Your Honor, if none of -- none of the three confessions --

JUSTICE SOTOMAYOR: None of the three --

MR. KROGER -- had been made.

JUSTICE SOTOMAYOR: -- whatsoever. I mean, if the brother's confession -- or the confession to the brother is a very big piece of why a plea would have

been reasonable in this case. Let's assume no confession.

MR. KROGER: Your Honor, I still think taking, recommending a guilty plea and taking of a guilty plea would be a rational response to the remaining evidence. Even at this early stage in the proceeding, the police had uncovered certainly the body with the direct shot to the temple. It had recovered the -- the murder weapon. It had recovered the car which the defendants had borrowed and which had blood in the trunk where the victim had been locked and transported.

They had four witnesses who were present when the plan to kidnap and assault the victim was hatched. So they would have testified very directly about the forming of the plot.

There was an eyewitness who identified the defendant, Mr. Moore, at the trailer where the victim was abducted. And then, of course, there was a co-conspirator, Mr. Salyer, who was cooperating with the Government prior to the confession and whose -- whose cooperation was known to the defendant.

So, with all of those pieces, even if one stripped the three confessions out of the case, you would still have a situation where the Government 's

case was strong, where there was a very severe risk the Government would go to the grand jury and obtain an aggravated murder charge, and where there was significant advantages to pleading early and locking in a lower sentence to a felony murder charge.

JUSTICE GINSBURG: Mr. Kroger, from -- General Kroger -- from everything you said, and I take it -- from your brief, too, that you are not urging the -- that -- that counsel's assistance was adequate? You are not contesting that the confession was involuntary? You seem to be putting everything on the prejudice issue; is that right?

MR. KROGER: No, Your Honor. We -- we concede and forfeited the issue that the -- the motion to suppress would have been meritorious, but believed the district court got it right when it held that on both prongs of Strickland, both on deficient performance and on prejudice, the defendant has failed to make his -- his -- meet his burden of proof.

I think the -- the prejudice argument here is extraordinarily strong, but I think the deficient performance, even if one concedes that the motion would have been meritorious, the deficient performance prong is strong as well, because the defendant can't meet his burden of proof that defense counsel's representation

was unreasonable, given the strength of the government's case, given the quality of the plea offer that was made, and given the defendant's own reasoning for why he pled guilty.

The case has significant practical consequences for the criminal justice system. One is that if the Ninth Circuit's opinion stands, it will be much easier to challenge guilty pleas years after the fact on collateral challenge, and this will undercut the principle of finality. One would certainly expect to see fewer Government plea offers in cases like this, if the Government believed years later it would have to present all of its trial evidence in a collateral proceeding in order to rebut the presumption under Fulminante that there was prejudice.

Second, it has severe implications for the freedom of defense counsel to exercise its discretion and represent its client using the wide latitude that Strickland recognized was necessary. Strickland itself stated that it's a mistake to hem in defense counsel with strict rules about what should or should not be done, because defense counsel needs that wide latitude. If there is a -- a virtual presumption that motions to suppress must be filed, even where defense counsel reasonably believes it will not resound to the advantage

of his client and may cost the client a chance to plea early, the defense counsel must take that option, it's a severe restriction on the --

JUSTICE BREYER: If -- if he had gone to trial, what's the sentence -- what's the range of sentence he could have gotten?

MR. KROGER: Your Honor, if he had gone to trial on the charges that were pending, and these -- these were not charges from the grand jury, he would have faced at least the mandatory minimum of 25 years that he pled guilty to, plus the potential of additional -- an additional sentence both on that charge perhaps as high as life, given the two other potential mandatory minimum sentences of -- of kidnapping and assault that could be brought.

JUSTICE BREYER: And if they had gone back to the grand jury, as the prosecutor I guess could have done, it could have gone to the grand jury?

MR. KROGER: This case pled guilty before, Your Honor, yes. So --

JUSTICE BREYER: It could have gone to the grand jury. Then what is the maximum he could have gotten?

MR. KROGER: It could have been a capital case, Your Honor. This could have been an aggravated

murder case because the facts involved a very severe beating to the extent perhaps of torture where a Defendant who was very vulnerable who had a protruding hernia that was in a truss was savagely beaten, his nose was broken, he was locked in the trunk of the car, taken to a remote location and shot in the temple with one shot of a revolver.

It is distinctly possible that the state would have come from the Grand Jury as a capital case and at the very least have been an aggravated murder carrying a life sentence, not a 25-year sentence.

JUSTICE GINSBURG: What about his argument that his failure -- the Defendant in the case arising out of this episode, if Salyer did go to trial and he ended up getting that exact same sentence that this Defendant did?

MR. KROGER: Yes, Your Honor. Mr. Salyer did receive the same sentence after he went to trial. His case, though, was very different from that of the Petitioner, because the Petitioner was the individual who cocked the pistol and fired the round into the head of the victim killing him. And so it is very unlikely that the other two co-conspirators would have found themselves charged with an intentional murder based on the facts of this case. But because this pistol could

only be fired if it were cocked and because the round went into the temple, it would have been a reasonably strong aggravated murder case against this Defendant who was the triggerman.

The final point I would like to make to the Court is that this case involves or should involve significant deference to the State court decision. This was not a summary denial by the State court. The State court held a hearing at which it received all testimony that was available. It made very explicit findings of fact about the facts in the case. It made a credibility finding about the evidence that had been submitted by the Petitioner, and it ruled after citing the proper Strickland standard that the Defendant had failed to carry his burden of proof.

JUSTICE KENNEDY: It's a little hard when we take away the finding that the confession was admissible. We have to extract that.

MR. KROGER: Your Honor, even if you --

JUSTICE KENNEDY: I'm not quite sure what to do with the State court's case, assuming we have to presume, because of the posture of the case, that the confession was inadmissible.

MR. KROGER: Your Honor, I would say two things with respect to that. First of all, the State

court's decision, even if it were incorrect in its ruling that the confession would not have been admissible, the State court's conclusion that the motion would not have assisted the Defendant in any way, the finding that it would have been fruitless because of the other confessions, the other two confessions in the case, is a reasonable decision that the Court made and is dispositive and thus under AEDPA should receive deference.

I would also suggest the case is somewhat similar to Yarborough v. Alvarado. There was a custody issue at stake and this Court explicitly held that one might come out one way or the other on the custody issue, that reasonable jurists might split, but that that fact alone rendered the State court's opinion on voluntariness or on custody in that issue as reasonable.

And again, as here, though we are not asserting that this confession was admissible, should the Court consider it, it's clearly a close question on voluntariness and somewhat factually similar to Yarborough where even if the State court were was wrong, it was still a reasonable adjudication of the claims.

If there were no further questions from the Court, Your Honor, I would like to reserve the remainder of my time for rebuttal.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Wax?

ORAL ARGUMENT OF STEVEN T. WAX

ON BEHALF OF THE RESPONDENT

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

Mr. Moore established prejudice under Hill from his attorney's failure to recognize the involuntariness and inadmissibility of the lengthy tape recorded statement obtained from him by the police. The most critical type of evidence that the State can have in any case.

The Ninth Circuit's conclusion to that effect was correct, and was correctly based on this Court's precedence of Strickland, Hill, and Kimmelman.

JUSTICE SOTOMAYOR: I am having a little bit of trouble here with your argument for the following reasons. Assume we suppress the confession. Why is it unreasonable for the defense attorney to have concluded that the evidence showing your client's presence at the shooting, and identification as the shooter, that it was solely that he should have gone to trial on a defense that he wasn't involved in the shooting at all.

Once you put him in this shooting, then the only issue he seems to be confused about is that he

thinks that because it was accidental that that presents a defense to felony murder. And that's clearly an erroneous position on his part.

So what made the case so weak that the Government was never going without the confession to prove felony murder?

MR. WAX: Well, Your Honor, we believe that the case is not as the State would have it, a strong case in the absence of this confession.

We also believe that the proper focus is not solely on the strength of the State's case, and that under Hill it is necessary to look at the totality of the circumstances, and look for the objective factors in this record that inform the decision of what Mr. Moore would have done or would have been likely to have done in the absence of his counsel's mistakes.

JUSTICE ALITO: What does your office do in this situation, all right, a client is indicted in Federal court and you anticipate that there are all sorts of motions that you might make if this case is going to trial, but at an early point the prosecution offers you what looks like a really good plea bargain. Now do you litigate all those motions? If you have, you know, you have a chance of winning, of suppressing some statements that your client made, suppressing physical

evidence, getting certain evidence excluded with a motion in limine, maybe you could win on a severance motion, do you think you litigate all those rather than grabbing a good plea deal when it's offered to you?

MR. WAX: Your Honor, the answer is certainly no, we do not litigate all of the motions.

JUSTICE ALITO: So if you take the deal, then you want it later to be open to the Defendant if he's not, you know, after the Defendant has spent some time in jail, he's not too happy with the deal any more, he can now come back and say, well, the Federal public defender's office was ineffective because they could have moved to suppress my confession and the illegal search, et cetera, et cetera, et cetera, that is all open for relitigation years later?

MR. WAX: No, Your Honor.

JUSTICE ALITO: No?

MR. WAX: And the issue here is not as we have attempted to articulate in our brief solely and in the abstract the failure to file the motion. The problem is that Mr. Moore's attorney did not understand that the statement was suppressible. In the situation that you are putting to me, if I or an assistant in my office says to a client, look, there is a strong motion to suppress the confession, the drugs, what have you,

but here are other factors that we should look at. And at the conclusion and with that proper advice the client decides I will take the deal, then I have performed effectively, and the case is not one that could be subject to a collateral attack as this case is.

JUSTICE SOTOMAYOR: What would have been the defense?

MR. WAX: Excuse me, Your Honor.

JUSTICE SOTOMAYOR: What would have been the defense absent the confession? You have one at trial on the confession, suppressing it, how would he have defend the this case?

MR. WAX: Your Honor, he would have been able to defend this case first by articulating the Government's obligation to prove his guilt beyond a reasonable doubt. You take out the confession and you posit it in your questioning of Attorney General Kroger that the strength of his brother's confession is a given. We respectfully disagree. The brother Raymond is a police --

JUSTICE SOTOMAYOR: What motive would his brother have had to put him at the scene of this shooting as the accidental killer? That's all his brother would have had to say. He was at the scene, he accidentally -- this gun went accidentally off.

MR. WAX: The brother is a police informant. The brother describes himself in the deposition.

JUSTICE SOTOMAYOR: His brother had no pending charges against him at the time.

MR. WAX: That is true, Your Honor, but the police had used them as their agent.

JUSTICE SOTOMAYOR: So what does that have to do with what interest does his brother have when he has no pending charges against him at the time, he's going to use this as a future chip in case he does something wrong?

MR. WAX: Your Honor, the point is that he --

JUSTICE SOTOMAYOR: To put his brother into jail for 25 years? This is illogical, counsel.

MR. WAX: If he were to appear and testify, which is one of the points that I believe the Ninth Circuit properly pointed out, that Mr. Moore knowing his brother might have had every confidence --

JUSTICE BREYER: Might. See, that's the trouble. We have a lot of evidence, I think, here, at least by first glance, that -- a lot of evidence he shot the guy. A lot of evidence he carried -- kidnapped him. All right? And now the -- now, maybe it was accidental, but if it was accidental, it's still felony murder; and

he received through the plea bargaining the minimum sentence he could get for that.

You started out by saying that the -- the State court's conclusion that this was not prejudicial was clearly wrong. All right. If it's clearly wrong, what is it so clear, that he could get off if he went to trial?

MR. WAX: Your Honor, I will respond to the second part but I believe there is a premise in which you said, that we reject. There is no State court finding under Hill. And there is no deference --

JUSTICE BREYER: There is no -- there is no State court finding that this was not prejudicial?

MR. WAX: The court never reached the Hill question.

JUSTICE BREYER: I'm not talking about Hill. I don't know the names of the cases associated. I thought that the court in the State court said -- but I might be wrong; I'd like to know -- made a finding that one, this was not ineffective assistance of counsel and two, it was not prejudicial.

MR. WAX: The State --

JUSTICE BREYER: Now I haven't read this very thoroughly, so -- so you -- yet -- so you tell me if I'm wrong about that.

MR. WAX: At pages 205 and 206 in the appendix in the findings of fact and conclusions of law, there are 11 findings of fact. In one of those findings of fact, in findings of fact 8 and 9, the State court used the word fruitless in describing the motion to suppress. In the conclusions of law the State court solely addressed Strickland. And nowhere in the analysis is there any reference to the question of what Mr. Moore would have done.

JUSTICE BREYER: Doesn't Strickland require that it be prejudicial?

MR. WAX: Yes, of course. However, the analysis that was undertaken here never reached the question of what Mr. Moore would have done.

JUSTICE BREYER: If I assume that the word "fruitless" and the reference to Strickland were a finding, that this is not prejudicial -- if I assume that for the sake of argument for the moment, what is it that you can show that shows it was prejudicial?

MR. WAX: Your Honor, I think --

JUSTICE BREYER: That was the same question I think Justice -- Justice Sotomayor started with.

MR. WAX: Your Honor, there is no question that the evidence with respect to the strength of the State's case includes the facts that the attorney

general has identified. There is also as we perceive it no question but that the objective record showed that the brother's testimony would have been highly impeachable based on his prior work as an informant, his description of himself --

JUSTICE SOTOMAYOR: Impeachable how? What motive did he have to implicate his brother? You still haven't answered that question. All you keep saying is, he was a past cooperator, he had no pending charges, and now he has a motive to do this against his brother because of that?

MR. WAX: Your Honor, I cannot point in the record to a motive. What I can point to is the fact that there is in the record his self-description of himself as the golden boy for the police, his working with the same detective who interrogated his brother years before when he completely avoided a murder charge.

And as a defense attorney, in a case involving a group of men who are not necessarily as socialized and well educated as some other group, that his testimony would have been subject to impeachment.

JUSTICE ALITO: Even without his testimony, isn't there a very strong case of kidnapping? Let's just take it step-by-step. What would have been the defense to the kidnapping charge?

MR. WAX: The defense to the kidnapping charge in the absence of the confessions could well have been a mere presence defense, that Mr. Moore did not participate in the kidnapping. He had every right to put the State to his -- to its burden of proof.

JUSTICE ALITO: He didn't -- that he didn't go to the -- to the victim's RV with the other men? That would have been the defense?

MR. WAX: He could certainly have argued that he did not participate in the kidnapping. He's there, he's in the car, and he had no participation in it. But what I believe is being missed in this discussion, if I may, is the focus on the question required to be analyzed in Hill. Would Mr. Moore have gone to trial? Would he have accepted the plea?

JUSTICE GINSBURG: On this --

MR. WAX: And on that there are highly --

JUSTICE GINSBURG: Mr. Wax, just to clear out some of the underbrush, the Ninth Circuit did say that Fulminante was really established law controlling this case. I take it that you are not defending that?

MR. WAX: That is correct. The clearly established law that governs here is Strickland, Hill and Kimmelman.

JUSTICE BREYER: Okay. I've got on the

other -- I've got -- the other reason I asked the question, to be clear about it, is that -- is that he wouldn't have gone to trial in my mind unless he had a pretty good chance of getting a better deal. And what he -- like getting off. And what he got was the minimum. Okay?

One thing I've written down is that the State would not have the confession. That's correct. Number two is he could say his brother is not a very good brother. Moreover he's a rather dubious character there, and bring all that -- stuff. Was there anything else?

MR. WAX: Yes, Your Honor.

JUSTICE BREYER: I don't want to miss anything.

MR. WAX: Yes, Your Honor. What we have in this record is highly unusual combination of four facts appearing at three different stages in the proceeding. First, from his attorney, who articulated this in the sentencing -- it's in the supplemental appendix at page 7: Mr. Moore had a very difficult time accepting the fact that this was a felony murder charge, or a felony murder offer. That leads directly to the fact that Mr. Moore did not plead guilty.

This is only a nolo plea. And while in some

circumstances the court will equate a nolo plea with a plea of guilty, in these circumstances the fact that he entered a nolo plea only is highly significant on the question of whether or not he would have rolled the dice.

JUSTICE SOTOMAYOR: And a competent -- and a competent counsel is supposed to accept their irrational client, who doesn't want to understand the law, and let him risk getting an aggravated felony charge brought against him, or a capital murder charge brought against him, and not -- and just go ahead? And try the case because he's not going to recommend to the client, go to trial, take the plea, because you're irrational?

MR. WAX: Your Honor --

JUSTICE SOTOMAYOR: That's really what you are saying, that a competent attorney would not recommend to his client take the plea, and that his client wouldn't ultimately accept the plea, because the objective reality is his upside horrible and his downside is almost a given.

MR. WAX: Your Honor, a competent counsel might advise his counsel to accept a plea. The question of the irrational client is however one with which I regrettably deal on a regular basis. Clients do not always accept my advice, and for whatever it is worth in

the footnote toward the end of his opinion, Judge Reinhardt responds to Judge Bybee by saying: Look, he may not be better off by pursuing this habeas corpus action; it is, however, his choice.

JUSTICE SCALIA: Yes, but Judge Reinhardt and the court of appeals did not in fact apply the test of Hill, which you are asserting. The test is whether he would have gone to trial. I -- I didn't read the opinion as ever saying that he would have gone to trial. The opinion says he could have gotten a better deal.

That's quite a different -- quite a different question, and I -- I'm not prepared to make that the test.

MR. WAX: Your Honor --

JUSTICE SCALIA: But it's not the test that -- that Hill prescribed.

MR. WAX: I am not advocating for the test articulated by Judge Berzon; I believe that it is a sound approach but it is not what we are advocating for here. We believe that this record shows that Mr. Moore would have gone to trial.

JUSTICE GINSBURG: Did he say that? Is there a statement in the record that Moore said he would have insisted on going to trial had he been advised that the suppression motion had merit?

MR. WAX: There is -- there is no direct statement to that effect. In all the cases where we have found where there is such a direct statement, the courts almost always discount them. What we have here, we submit, is something more significant, and that is he did not want to enter a plea. He did not enter a plea, and then at the first opportunity that he learned that his attorney had been ineffective, he moved to undo the conviction. And we submit that the decision in Roe v. Flores-Ortega, in which this Court found it highly significant that Flores-Ortega moved to initiate an appeal at the first opportunity that he learned that the appeal had been lost, is applicable here.

That is an objective fact that this Court has found relevant -- and --

JUSTICE BREYER: That is an irrelevant question. I don't see how we could go back to a possibly irrational state of mind. I mean, don't -- when you're trying to figure out what a defendant would have done in the absence of an error in respect to a plea, don't you have to ask a question: What would a rational person have done.

I mean, I would say that's a good question. I don't know the answer, but if we are trying to figure out he might have been totally irrational and would have

gone to trial even though he was likely to end up in jail for life as opposed to 25 years, we should then reverse it and give him a trial? I'm rather disturbed by that.

MR. WAX: Your Honor, I am not suggesting that the --

JUSTICE BREYER: What do you actually think about this?

MR. WAX: I believe that Mr. Moore was making a reasoned judgment. His codefendant brother who brought the gun to the scene, who by the confessions, is the one who pistol-whipped the victim, received the 10-year manslaughter sentence that Mr. Moore believed he should have obtained. Mr. Salyer, who went to trial, received the same sentence that Mr. Moore received.

Mr. Moore's judgment that this should be viewed as an accident and that it was a highly mitigated situation --

JUSTICE GINSBURG: I think you -- I think General Kroger brought up that Moore carried the gun. It was cocked, and he shot -- who was it? Roger.

MR. WAX: Your Honor, the gun is brought to the scene -- and this is in the record -- by the codefendant, Lonnie Woolhiser. He has the gun when he goes into the trailer and assaults Mr. Rogers.

What the district attorney said, the prosecutor on the scene who understood what was happening, the prosecutor's description at pages 227 and 228 of the appendix is: This is an accident. The prosecutors states: They had no intent to kill. The sole intent here was to put the fear of God into Mr. Rogers for his having ripped off his friend Mr. Salyer.

The prosecutor describes the incident on the hill as follows: That Mr. Woolhiser, with the gun, is pushing Mr. Rogers up the hill. This is a wet and muddy Oregon day and a wet and muddy Oregon hill. And Mr. Rogers and Mr. Woolhiser go down --

JUSTICE ALITO: Excuse me. Where was the citation for this?

MR. WAX: Pages 227 and 228 in the appendix. And he also reiterates the fact in the sentencing, which I believe is at -- at page 3 and 4, the sentencing proceeding in the --

JUSTICE BREYER: They believe it. The jury believes it was an accident. Now, how does that get him a lighter sentence?

MR. WAX: If he goes to trial, the likelihood, first, of a death penalty needs to be put off the table.

JUSTICE BREYER: No. The sentence is 25 years mandatory for felony murder. Now, the jury believes just as you said. It believes it was an accident; he never intended to pull the trigger.

How does that get him a lighter sentence? That's my question.

MR. WAX: If he is convicted solely of the kidnapping, if he is convicted of an assault, he can receive a lighter sentence. If he is convicted of the felony murder, to be sure the mandatory --

JUSTICE BREYER: Isn't kidnapping a felony?

MR. WAX: Yes. But if he --

JUSTICE BREYER: Well, then, if he is kidnapped -- if he is convicted of the kidnapping and there was an accidental murder that took place, I believe that that would be felony murder.

MR. WAX: If the jury finds him guilty of that, his sentence will --

JUSTICE BREYER: Yes. And the defense to kidnapping was what?

MR. WAX: Mere presence. He could have argued a mere presence defense. In the absence --

JUSTICE SOTOMAYOR: But four witnesses put him at the scene to kidnap this guy and scare him to death. Or scare him.

MR. WAX: Well, Your Honor, the record shows there was one witness who put him at the scene. The record shows that one of the issues that was previously raised, and that in our winnowing of the issues is not currently before this Court, is a challenge to the admissibility of the eyewitness identification at the Rogers trailer.

One witness there only, and that would be subject to challenge, and does not put him into the trailer or participating in the kidnapping or the assault.

JUSTICE SCALIA: Mr. Wax, as far as the confession is concerned and its excludability, what effect do you think we ought to give to this passage in the -- in the defendant's agreement to the plea: "I understand that any admissions, statements, or confessions which I may have made or any evidence obtained by virtue of the search and seizure of my property may well be inadmissible against me in evidence, unless my constitutional rights have been safeguarded. I understand that if I would like to speak to an attorney concerning my constitutional rights, that the Court will grant me time for that purpose."

MR. WAX: I believe you should give no credit to that, because that statement by Mr. Moore is

based on the incorrect advice of his attorney. And we believe that the record here --

JUSTICE SCALIA: Well, wait. Wait. This is not the attorney speaking. I mean, this is what he said. He said, "I understand that any admissions, statements or confessions which I have made may well be" -- "may well be inadmissible against me in evidence."

MR. WAX: Your Honor, he had previously been told by his attorney that they were not. And when he was questioned in the post-conviction proceeding before the point of the prejudice under Hill, he says: I acted and entered this nolo plea on the advice of counsel.

Now, to be sure there is a boilerplate statement to the contrary.

JUSTICE SCALIA: Well, boilerplate -- I mean, the man signed it. How can a prosecutor ever protect himself against the person who signs a plea agreement later -- later coming in and saying: Oh, my attorney misadvised me.

I don't care what your attorney advised you. The plea agreement itself advises you that this stuff may be inadmissible.

MR. WAX: Your Honor, what Mr. Moore has said is: I enter this plea on the advice of my

attorney. That advice is conceded by the State to have been incorrect, and the full record of the case includes that plea petition document. It includes the State's concession that the advice provided was incorrect.

And while a plea petition form is standard in many State courts, as it is in the Federal court, the reality is that those forms often include statements that are not consistent with the facts that have been presented or that have occurred previously.

JUSTICE ALITO: Could I just clarify something?

Is it your position that the prosecutor, in making his offer of proof at the plea on 227 to 228, affirmatively said that this was an accident or did not -- did not allege that it was intentional?

MR. WAX: He affirmatively states that there was no intent to kill.

JUSTICE ALITO: Where is that? I --

MR. WAX: I believe it's on page 228, where he comes back in and says one more thing.

It is on 228. And just something that I missed early on: "The indicated intent of the defendant was to instill fear to the point that the victim would not again rip them off. " The description --

JUSTICE ALITO: You read that as a -- as a

claim that there was no intent to kill?

MR. WAX: Yes, sir. And I believe it is also consistent with the statement of the judge at the sentencing, who described this as a case involving two tragedies. Everyone who participated -- the lawyers for the defendants, the prosecutor, and the judge -- recognized this was an accident.

This was a tragedy. The judge saying, Mr. Moore, the person who had led a good, law-abiding life, a person who had been a productive member of --

JUSTICE ALITO: I have to say, I think that's a very aggressive reading of what was said here. It was not necessary for the plea to this offense to prove an intent to kill, and the statement that the intent that was necessary, which is lesser intent but sufficient to support this plea, was present is not a statement that a greater mens rea was absent.

And I thought you argued to us that the prosecutor said this was not intentional. It was an accident.

MR. WAX: Well, I believe, Your Honor, that is the portion to the record to which I am referring at page 228. He also described at the sentencing the facts of the case as facts involving and consistent with the slip and the fall.

His description of the incident is a description of Mr. Rogers falling back into the gun. He did that both at the plea, which I believe is on page 227, and he did it again at the sentencing. And then he is followed by the judge, who articulates the circumstances of this case as involving two tragedies: To be sure, the death of Mr. Rogers, but also the tragedy of Mr. Moore having accidentally killed his friend.

If there are no further questions, I thank the Court.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

General Kroger, you have eight minutes remaining.

REBUTTAL ARGUMENT OF GENERAL JOHN R. KROGER
ON BEHALF OF THE PETITIONER

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

The Court of Appeals here did not apply clearly established Federal law, but applied, for the first time in a way that is non-mandated by the decisions of this Court, Fulminante to a collateral proceeding.

The State court's adjudication of this claim was eminently reasonable on both prongs of Strickland.

Accordingly, we would ask this Court to reverse the judgment of the Ninth Circuit and to affirm the judgment of the district court.

I would be happy to answer any additional questions that the Court may have.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Counsel, the case is submitted.

(Whereupon, at 11:54 a.m., the case in the above-entitled matter was submitted.)