No. 09-658

IN THE

Supreme Court of the United States

JEFF PREMO, Superintendent,
Oregon State Penitentiary,

Petitioner,

vs.

RANDY JOSEPH MOORE,

Respondent.

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

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345
briefs@cjlf.org

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

(Intentionally left blank)

QUESTIONS PRESENTED

1. a. If a collateral challenge is based on a defense attorney's decision not to move to suppress a confession prior to a guilty or no contest plea, does the *Arizona* v. *Fulminante* standard apply, even though no record of a trial is available for review?

b. Even if the *Fulminante* standard applies in that context, is it "clearly established Federal law" for purposes of 28 U. S. C. § 2254(d)(1)?

2. Did the Ninth Circuit err by granting federal habeas relief on Moore's ineffective-assistance-of-counsel claim?

(Intentionally left blank)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Statute

Rules of Court

Secondary Sources

IN THE

Supreme Court of the United States

JEFF PREMO, Superintendent,
Oregon State Penitentiary,

Petitioner,

vs.

RANDY JOSEPH MOORE,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

This case involves a collateral attack on a plea-bargained conviction by a defendant who is certainly guilty of the crime of which he was convicted and is probably guilty of a greater degree of that offense. The ground of attack is supposedly ineffective assistance of counsel by an attorney who obtained this favorable plea bargain rather moving to suppress the defendant's confession, in circumstances where it is unlikely the motion would have been granted and unlikely the defendant would have obtained a more favorable result even if it were granted. Further, defendant's claims were reviewed by the state courts and found to be without merit.

The criminal law needs finality to perform its function, and exceptions should be made only in extreme circumstances involving a miscarriage of justice. This defendant received a more than fair disposition of his case. For a federal court of appeals to overturn the reasonable decision of the state courts under the circumstances of this case is contrary to the rights CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The facts of this case are stated in detail in the Brief for Petitioner. We summarize them here to frame the issues discussed in this brief.

> "Randy Moore and others beat Kenneth Rogers until he bled, stripped him, bound him in duct tape, placed him in the trunk of a car, drove him to a remote location, and forced him to march up a hill at gunpoint. While marching Rogers through the woods, Moore shot Rogers—accidentally, he said—through the temple." *Moore* v. *Czerniak*, 574 F. 3d 1092, 1136 (CA9 2009) (Bybee, J., dissenting).

Given the location and direction of the fatal wound, the fact it was a partial or complete contact wound, and the fact that the gun used had to be cocked before it would fire, Moore's claim of accidental shooting is very doubtful. See *id.*, at 1142, n. 7 (dissent); App. to Pet. for Cert. 226-227 (prosecutor's statement of factual basis at plea hearing).

Two weeks later, on December 20, 1995, Moore went to the police station, where he was interviewed while accompanied by his brother Ray Moore, a friend named Debbie Ziegler, and two other suspects in the case, Lonnie Woolhiser and Roy Salyer. See App. to Pet. for Cert. 173-174 (Federal Magistrate Judge's Findings and Recommendation). Moore was expressly told he was not under arrest. Moore stated he wanted an attorney at one point but then decided to proceed with the interview without counsel. See App. to Pet. for Cert. 175.

The detective made a number of statements such as, "Okay, so that you know you're going to get a fair shake from us alright, I want to verify that with our DA that he is not going and turn around and jam you." App. to Pet. for Cert. 175. Moore later stated that he understood the detective's statements to mean, "that if it was an accident, they would go before the D.A. on my behalf and see to it that I was charged with an accident." Supp. App. to Brief in Opposition 18 ("Supp. App.").

Moore was charged with murder. His attorney, Kim Jordan, did not move to suppress his statement but negotiated a plea bargain of no contest to felony murder with a sentence of 25 years in prison followed by parole for life. The information that Moore did not contest stated only that he kidnapped the victim and caused his death. There is no allegation of intent to kill. See App.

to Pet. for Cert. 215. The sentence was summarily affirmed on direct appeal. Brief for Petitioner 4-5.

Moore filed a *pro se* petition for postconviction relief, received by the state court on June 4, 1998. This was followed by an amended petition prepared by counsel on June 4, 1999. The allegations of the counseled petition are quoted in the state postconviction court's findings. See App. to Pet. for Cert.199-200. Both the *pro se* and counseled petitions make numerous allegations against the effectiveness of trial counsel. With regard to the petitioner's confession, both petitions merely allege that counsel failed to file a motion to suppress without specifying the grounds for suppression.

Between the *pro se* and counseled petitions, on February 26, 1999, trial counsel executed an affidavit in response to the allegations of ineffective assistance. The affidavit is reproduced in the Court of Appeals' opinion. 574 F. 3d, at 1122-1129; App. to Pet. for Cert. 69-77. The affidavit responds to the allegation regarding the motion to suppress in two paragraphs. Paragraph 3 is primarily addressed to the *Edwards* v. *Arizona*[2] issue and states that counsel did not believe the motion to suppress would be meritorious because petitioner was not in custody at the time of interview. The paragraph also mentions that counsel believed that Moore's statement was voluntary. In Paragraph 4 of the affidavit, counsel explains that even if he had succeeded in suppressing the confession, it would have been unlikely to produce a better result for the client,

---

2. 451 U. S. 477 (1981). *Edwards* is evidently the issue petitioner referred to in his deposition as the "Brightline rule" he read about in the prison law library. See Supp. App. 23. The problem is that the *Edwards* line is not nearly so bright when custody is disputed. See *Thompson* v. *Keohane*, 516 U. S. 99, 112-114 (1995) (fact-intense inquiry with general standard).

because Moore had also confessed to two other people. On March 1, 2000, over a year after trial counsel's affidavit, postconviction counsel filed a trial memorandum advancing the theory that trial counsel should have moved to suppress on the ground that the statement was involuntary because of a supposedly unlawful inducement offered by the interrogating officers, in addition to the *Edwards* ground.

The state postconviction court denied the petition. The court found that the defendant was not in custody at the time he made his statement, see App. to Pet. for Cert. 201-202, 205, making *Edwards* inapplicable. The court did not expressly address the inducement claim, but it did make a finding "that there is very little chance the petitioner's confession would have been suppressed." See App. to Pet. for Cert. 205. The court also found that "[a] motion to suppress would have been fruitless" because of Moore's confessions to other persons. App. to Pet. for Cert. 205. Applying the standard of *Strickland* v. *Washington*, 466 U. S. 668 (1984), to the facts found, the state court found that Moore had not been denied his right to effective assistance of counsel. The state appellate courts summarily denied review.[3] Brief for Petitioner 13.

On federal habeas, the Magistrate Judge rejected the claim that counsel should have moved to suppress under the *Miranda*/*Edwards* rule, upholding the state court decision that Moore was not in custody. See App. to Pet. for Cert. 187-188. The Magistrate Judge found that the suppression motion would have merit on the

---

3. The "look-through" rule of *Ylst* v. *Nunnemaker*, 501 U. S. 797 (1991), was established in a procedural default case predating the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), but the reasons for the rule, see *id.*, at 803-804, seem equally applicable to the "deference" standard of AEDPA, 28 U. S. C. § 2254(d).

voluntariness ground, although she did not apply § 2254(d) to the state court decision in this point. See App. to Pet. for Cert.188-190. No application of that standard was necessary because Moore's confession to his brother and Ms. Ziegler, along with other evidence available to the prosecution, meant that counsel's performance was adequate and also negated any prejudice. See App. to Pet. for Cert. 190-192. The District Court adopted the recommendation, see App. to Pet. for Cert. 194-196, and Moore appealed.

The District Court's decision was reversed by a divided panel of the Court of Appeals, that court denied rehearing en banc, and this Court granted a writ of certiorari.

SUMMARY OF ARGUMENT

The Court of Appeals made a fundamental error by taking the merits of a suppression motion as given and evaluating counsel's performance on that basis. *Strickland* v. *Washington* is very clear that strategic decisions of defense counsel must be evaluated on the basis of circumstances known at the time. That rule is not altered by the omission of an argument from a brief filed by the state in federal habeas proceedings years later. At the time of trial counsel's decision, he had to assess the probabilities of whether a motion would be granted or denied and whether a grant or denial would significantly improve or significantly worsen the probability of an outcome better than one he was able to obtain through a plea bargain.

The Court of Appeals also erred in placing excessive weight on the cursory statement in trial counsel's affidavit. In particular, the fact that the affidavit does not discuss in detail the various strategic considerations described in the dissenting opinion does not mean that

counsel did not consider them or that a court may not consider them when evaluating counsel's performance. The affidavit was prepared at an early stage in the proceedings, not in response to detailed, fully developed briefing of the case. In any event, it would be dangerous to establish a practice of giving conclusive weight to the statement of the State's erstwhile adversary when the State must defend the adversary in order to defend its judgment.

In the circumstances of this case, the state postconviction court reasonably found, as a fact, that "there is very little chance that petitioner's confession would have been suppressed." The statements of the police during questioning that they would not "jam" Moore if he told the truth are reasonably understood as a promise not to overcharge him, not a promise to undercharge him. Moore himself expressed that he understood that he would be charged with the accidental death of Rogers if he made a statement confessing to accidentally causing Rogers' death. That is exactly what he was charged with. Accidental death during a kidnapping is felony murder in Oregon, and that was the charge. There was no false promise here.

The state court decision was well within the bounds of reasonableness on the performance prong of *Strickland* as well as the prejudice prong. Under 28 U. S. C. § 2254(d), Moore is not entitled to relief.

ARGUMENT

In its petition for certiorari in this matter, the State posed two questions. The first question has to do with the Court of Appeals' invocation of the standard of harmless error on direct review in *Arizona* v. *Fulminante*, 499 U. S. 279 (1991), as the "clearly established" law governing an assessment of whether

trial counsel's failure to make a motion to suppress resulted in "prejudice" within the meaning of *Strickland* v. *Washington*, 466 U. S. 668 (1984). No further briefing on this point is required, as the dissenting opinion in the Court of Appeals and the Brief for Petitioner are more than sufficient. *Amicus* CJLF will therefore not add to the briefing on this point. See Supreme Court Rule 37.1.

The second question asks more broadly, "Did the Ninth Circuit err by granting federal habeas relief on Moore's ineffective-assistance-of-counsel claim?" Even after the *Fulminante* issue is disposed of, there remain significant errors in the Court of Appeals' approach that could cause substantial damage in future cases if not corrected. This brief will therefore address these other issues.

I. Counsel's performance must be judged on probabilities known at the time, not holdings or concessions made years later.

A. The Waiver Issue.

Respondent Moore contends that the merits of the suppression motion, *i.e.*, whether his confession was actually admissible, is not properly before this Court because the State did not make that specific argument in its brief on appeal to the Court of Appeals. See Brief in Opposition 20. This is incorrect for several reasons.

Earlier in the same document, Moore notes, "*Strickland*, *Hill*, and *Kimmelman* require an assessment of the viability of a motion that was not filed in order to determine whether an attorney's performance fell below an objective standard of reasonableness." Brief in Opposition 12. That is correct, as further explained in Part I-B, *infra*. This makes the assessment a " 'pred-

icate to the intelligent resolution of the question presented,' " *Ohio* v. *Robinette*, 519 U. S. 33, 38 (1996), which is whether the *Strickland* claim was reasonably decided by the state court. Indeed, Moore's own statement of the first question before this Court is, "Whether . . . he would not have entered a plea of no contest if his attorney had filed a *meritorious* motion to suppress statements." Brief in Opposition i (emphasis added). Whether the motion would have been meritorious is necessary to the resolution of this question, just as the lawfulness of the continued detention was necessary to the resolution of the question in *Robinette*, whether a *lawfully* detained motorist must be given warnings before consent to search.

A second reason why this question is properly before the Court is that, notwithstanding its waiver holding, the Court of Appeals went ahead and decided the issue in the alternative. See *Moore*, 574 F. 3d, at 1103, n. 10. The requirement is that the issue be raised *or* decided below, in the disjunctive. See *Cohen* v. *Cowles Media Co.*, 501 U. S. 663, 667 (1991); *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 379 (1995); E. Gressman, *et al.*, Supreme Court Practice 464 (9th ed. 2007).

Third, the point that counsel was justified in not making the motion because the motion was unlikely to be granted is an argument in support of the question presented, not a distinct question. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *Escondido*, 503 U. S. 519, 534 (1992).

B. The Probabilities Facing Trial Counsel.

The Court of Appeals approached the question of counsel's performance in a highly artificial way, taking as given that Moore's confession would have been suppressed if counsel had so moved, then effectively collapsing the performance and prejudice prongs of the ineffective assistance inquiry into the single question of whether suppression would have made a difference. See 574 F. 3d, at 1101-1102. The reason for taking the success of the motion as given is that the State did not specifically dispute, on Moore's appeal from denial of federal habeas relief over a decade after the plea bargain, "that a suppression motion would have been meritorious." *Id*., at 1101. One would be hard pressed to find a better example of a holding contrary to the admonition of *Strickland* v. *Washington*, 466 U. S. 668, 689 (1984): "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."

Strickland stated the test for an ineffective assistance claim in its most general form this way:

> "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the

defendant of a fair trial, a trial whose result is reliable." *Id*., at 687.

The merits of a suppression motion in this case, viewed in hindsight, are directly relevant to the second prong, reliability of the result. While the second prong is usually tested by asking if there is a reasonable probability the result would be different, *id*., at 694, there are limits to the applicability of this test. A reasonable possibility of jury nullification cannot supply the needed prejudice. See *id*., at 695. Also, *Lockhart* v. *Fretwell*, 506 U. S. 364, 369-370 (1993), held that if an objection can be seen in hindsight to lack merit, then failure to make it does not constitute prejudice for the purpose of *Strickland*, even if the court at the time would have granted it. Hence, when a habeas petitioner claims counsel should have made a particular motion, the merit of the motion judged in hindsight is a necessary condition for relief, but it is not sufficient.[4]

In the present case, the defendant, on advice of counsel, agreed to a plea bargain to felony murder in a case where he could readily have been charged with aggravated murder, a greater offense. The claim is that counsel should have made a motion to suppress defendant's confession prior to agreeing to the bargain. The advisability of doing so must take into account the probabilities of three unknown events: (1) whether the trial court would have granted or denied the motion; (2)

---

4. Another possible limit on the probability-of-different-result test is Justice Powell's thesis that counsel's failure to suppress reliable but illegally obtained evidence is never *Strickland* "prejudice." See *Kimmelman* v. *Morrison*, 477 U. S. 365, 391 (1986) (concurring opinion); see also *Fretwell*, *supra*, at 372 (citing *Kimmelman* concurrence). In this case, as in *Kimmelman*, *supra*, at 391, the issue has not been raised by the parties or decided below and hence need not be decided by this Court, but it should be reserved for a future case.

whether parties could have reached a bargain after the court's ruling or whether the case would have gone to trial; and (3) what bargain they could have reached or what the outcome of trial and sentencing would have been. These sequential possibilities produce a tree. Simplifying the outcomes somewhat, it would look something like this:

A. The motion is granted.
   (1) The parties are able to reach a bargain.
      (a) Aggravated murder with a life sentence.
      (b) Felony murder with a 25-year sentence.
      (c) Some lesser offense and sentence.
      (d) Dismissal.
   (2) The case goes to trial.
      (a) Aggravated murder with a death sentence.
      (b) Aggravated murder with a life sentence.
      (c) Felony murder with a 25-year sentence.
      (d) Some lesser offense and sentence.
      (e) Acquittal.
B. The motion is denied.
   (1) The parties are able to reach a bargain.
      (a) Aggravated murder with a life sentence.
      (b) Felony murder with a 25-year sentence.
      (c) Some lesser offense and sentence.
   (2) The case goes to trial.
      (a) Aggravated murder with a death sentence.
      (b) Aggravated murder with a life sentence.
      (c) Felony murder with a 25-year sentence.
      (d) Some lesser offense and sentence.
      (e) Acquittal.

Plea bargain with a death sentence has been omitted from the list of possibilities because very few defendants accept a plea bargain with the maximum sentence

available under state law.[5] Dismissal of charges by the prosecution upon grant of the motion is not actually a "bargain," but we include it under that branch for simplicity.

A plea bargain, like any other settlement, gives each party a certain result, avoiding the risk of a worse result at trial and forgoing the possible gain of a better result at trial. See Bibas, Plea Bargaining Outside the Shadow of Trial, 117 Harv. L. Rev. 2463, 2507 (2004); M. Heumann, Plea Bargaining: The Experience of Prosecutors, Judges, and Defense Attorneys 110 (paperback ed. 1981). Whether a plea bargain should be reached before making a motion depends, in large part, on counsel's assessment of the probabilities of the various outcomes. Before the motion is made, neither party knows whether it will be granted. A granted motion to suppress may strengthen the bargaining position of the defense if the evidence is important to the prosecution's case and cannot be replaced. On the other hand, a denied motion may weaken the bargaining position of the defense by removing the uncertainty that the evidence might be suppressed.

The first probability to be assessed, then, is whether the trial judge will grant the motion. If the merit or lack of merit of the motion is clear under established law, this probability may approach 100% for one outcome and 0% for the other, but if the motion falls in the range of reasonable disagreement, counsel must

---

5. That is why in states with no death penalty, plea bargains to life in prison are uncommon. See Scheidegger, The Death Penalty and Plea Bargaining to Life Sentences, CJLF Working Paper 09-01 (Feb. 2009), http://www.cjlf.org/papers/wpaper09-01.pdf; Kuziemko, Does the Threat of the Death Penalty Affect Plea Bargaining in Murder Cases? Evidence from New York's 1995 Reinstatement of Capital Punishment, 8 Am. L. & Econ. Rev. 116 (2006).

weigh the likelihood of each outcome against its consequences. In the present case, success on the motion was not certain by any means, as discussed further in Part III.

If the motion were granted, what would be the likely outcome of the case? In this case, it is unlikely that if the case went to trial without Moore's confession to the police he would have been convicted of an offense less than felony murder. Not only did the prosecution have Moore's statements to two other people, but it also had cases against accomplices in the crime. See App. to Pet. for Cert. 191 (Magistrate Judge notes likely damaging testimony from Salyer). Counsel for the triggerman in a multiple-perpetrator homicide must be aware of the substantial possibility that the prosecution will make a deal with one of the lesser participants in return for testimony against the actual killer. Possibilities A(2)(a) and A(2)(b) in the tree above are quite substantial, and these outcomes are worse for the defendant than the bargain he actually struck, despite the grant of the motion. Possibility A(2)(c) is also large, and it is no better for the defendant than the bargain he actually struck.

What is the probability of outcomes A(2)(d) and A(2)(e), a successful motion to suppress followed by a trial with a verdict of an offense less than felony murder or an outright acquittal? Slim. That would only happen if the evidence the prosecution already possessed plus the evidence it could obtain would be insufficient to prove the elements of felony murder. As the Court of Appeals dissent notes, that is most unlikely. See 574 F. 3d, at 1145-1148.

What is the probability of outcomes A(1)(c) and A(1)(d), a successful motion to suppress followed by dismissal of charges or a plea bargain to an offense less than felony murder? Slim again. From the prosecu-

tor's summary of the evidence at the plea hearing, it is clear that he believes Rogers was tortured, App. to Pet. for Cert. 224, and that Moore killed him intentionally and not accidentally. See App. to Pet. for Cert. 225-226. In other words, he believed Moore was actually guilty of aggravated murder, and he could probably prove that to a jury, with or without Moore's confession. This is a major crime for a small county,[6] the kind a prosecutor is most unlikely to bargain down to an offense well below the one he believes occurred and believes he can prove.

Viewed objectively, from the standpoint of the probabilities a lawyer could estimate at the time, the probability of a more favorable outcome *even if* the motion to suppress were granted is far from certain. This probability must be further discounted by counsel's estimate of the probability that the motion *would* be granted to arrive at a small likelihood of net gain from making the motion.

Is there a downside to making the motion and having it denied? In the tree above, we can write off outcomes B(1)(c), B(2)(d), and B(2)(e) as having essentially zero probability. Moore's confession effectively convicts him of felony murder by itself. A prosecutor would not offer less, and a jury would not find less.

The most important risk of making the motion and having it denied is that the prosecutor might not remain willing to offer a plea to felony murder. He might instead move to the tougher position of insisting on aggravated murder and offering only to agree not to seek the death penalty. Is this is a significant risk?

---

6. The case was sufficiently notorious that the suspects' pictures were in the local newspaper and on television. See Supp. App. 17.

One main reason people settle is to eliminate the risk of an uncertain outcome. See *supra*, at 13. With each significant issue resolved, there is one less risk to worry about and one less reason to bargain away the possibility of a more favorable outcome. For this reason, when the prosecutor believes a motion to suppress has a substantial chance of succeeding, it would be entirely rational to make a more generous offer before the motion is made and harden his position after the motion has failed.

On the other hand, people do not always act rationally. If a prosecutor believes that a motion is patently meritless, a natural emotional reaction is to harden in response to counsel's having made it. Empirical research confirms the existence of this effect. "The 'frivolous' motion and trial, then, call forth a prosecutorial response inconsistent with the mellowing hypothesis. Prosecutors extract penalties from defendants for pursuing this type of an adversary strategy, and the result is a disposition that exceeds the one prosecutors would have settled for had the case been plea bargained at an earlier stage." Heumann, *supra*, at 124.

Another reason people settle is to avoid the cost of litigation. With each battle fought, there is more sunk cost and less cost to be avoided by settling. This factor may not be large if the cost of litigating a motion is small compared to the cost of the trial, but it is cumulative to the other factors.

When we consider the possibilities as they would have appeared to a competent lawyer at the time, as *Strickland* requires, we see a range of possibilities quite different from the stark picture painted by the Court of Appeals majority. A grant of the suppression motion was not certain, a better result was not certain if it was granted, and a worse result was entirely possible whether the motion was granted or denied.

Considering the full range of possibilities, was the lawyer's decision to recommend the plea bargain to felony murder, without first making a motion to suppress, the right choice? Quite possibly, but that is not the question before this Court. Was the decision "within the wide range of reasonable professional assistance" such that it " '*might* be considered sound . . . strategy.' " *Strickland*, 466 U. S., at 689 (emphasis added). Yes, but even that is not the question before this Court. That was the question before the state postconviction court. The question before this Court is whether the state postconviction court's decision on that question is so far beyond the pale as to be an unreasonable application of *Strickland*. See *Knowles* v. *Mirzayance*, 556 U. S. __, 129 S. Ct. 1411, 1420, 173 L. Ed. 2d 251, 262 (2009). The answer to *that* question is clearly no.

II. The Court of Appeals erred in placing excessive weight on the affidavit of trial counsel.

The Court of Appeals majority in this case placed heavy weight on the affidavit of trial counsel.

> "In his affidavit, Moore's trial counsel stated two reasons *and two reasons only* for his decision not to file a motion to suppress (or, as counsel put it, his reasons for not filing a motion were 'two-fold'): First, counsel believed that such a motion 'would be unavailing'—i.e., not meritorious—because Moore 'was not in custody at the time he gave the recorded interview and . . . the statement was voluntary.' Second, counsel believed that, even if a motion to suppress Moore's confession were meritorious, filing it would make little difference because Moore 'had previously made a full confession to his brother and

> to Ms. Ziegler, either one of whom could have been called as a witness at any time to repeat his confession in full detail.' We hold that both of counsel's reasons for not filing the motion—that the motion was not meritorious on either ground, and that, even if it were, it would have served no purpose because of the other confessions—were erroneous." *Moore* v. *Czerniak*, 574 F. 3d 1092, 1102 (CA9 2009) (emphasis added).

Placing excessive weight on the statement of trial counsel is problematic as a general matter and as applied in this case.

Courts considering ineffective assistance claims must constantly bear in mind the difficult position of the State. In most claims attacking a criminal judgment, the State is defending the actions of a state actor: the police, the prosecutor, or the trial judge. When litigating an ineffective assistance claim, the State must defend the actions of its previous adversary. The judgment that the State is trying to protect is frequently one that trial counsel did his best to prevent. Reactions to ineffective assistance claims vary among trial defense attorneys. Some vigorously defend the quality of their representation, while others fall on their swords in a last ditch attempt to benefit their former clients. One attorney/blogger has this attitude:

> "The defendant's conviction depended on finding a new way to get into court, a new error to blame. I offered myself to the effort. In a case like this, a thousand different decisions are made which, in retrospect, could have gone either way. My position is that my representation must, by definition, have been ineffective given the outcome. My client was convicted; my job was to win an acquittal. I did not do my job well enough.

> "Much time and thought went into detailing and cataloguing things that could have changed the trial. It's easy to play Monday morning quarterback, but it's also necessary and proper to do so when it comes to a trial. We're lawyers. We're not perfect. If we've made a mistake, our clients should not have to suffer for it. More to the point, our clients should not have to suffer for our egos, and desire to pretend that our decision-making was perfect, beyond reproach.
>
> "Reproach me. If that can save my client, then call me any name in the book.
>
> "Many times, I've urged lawyers to shove their egos down their throats and take it like a man when a client claims ineffective assistance of counsel. They can't do it. It's partially because they can't admit that they might ever be wrong, and it's partially because they can't stand the thought that their name might appear next to a question of their abilities. Suck it up, children. It's not about you, but the guy who's sitting in a prison cell.
>
> "I help write up the list of things I did wrong." Scott Greenfield, Walking the Walk, Simple Justice: A New York Criminal Defense Blog, http://blog.simplejustice.us/2010/05/26/walking-the-walk.aspx (as visited June 22, 2010).

This post is remarkable in several respects. One is the view that an adverse result plus less than perfect representation are sufficient to establish ineffective assistance. *Strickland* is clearly to the contrary. See 466 U. S., at 693.

More specific to the present issue, this post reflects a view that it is the duty of trial counsel to affirmatively assist the attack on the adequacy of his own representation, even to the point of ridiculing those attorneys who

defend the quality of their own work, calling them "children." While the author's attitude is not universal, it is also not rare, particularly in capital cases.

For this reason, courts have long known to take trial counsel's statements with a pinch of salt. "Self-proclaimed inadequacies on the part of trial counsel in aid of a client on appeal are not persuasive. . . . To hold otherwise would render complaints of inadequate representation 'a "boudoir defense," unchallengeable by the prosecution. . . .' " *People* v. *Beagle*, 6 Cal. 3d 441, 457, 492 P. 2d 1, 11 (1972) (quoting *People* v. *Cuevas*, 250 Cal. App. 2d 901, 907, 59 Cal. Rptr. 866, 11 (1967)) (second ellipsis in original).

The Montana Supreme Court followed *Beagle*'s admonition in *State* v. *Trull*, 332 Mont. 233, 238, 136 P. 3d 551, 556 (2006), a case where trial counsel engaged in a remarkably prompt act of sword-falling, making a new trial motion on the ground that her own failure to ask for a continuance upon learning of new evidence constituted ineffective assistance. The court "review[ed] this claim on direct appeal in light of counsel's post-trial motion and affidavit in which she posits that she had no justifiable reason for not seeking the continuance," and found that proceeding with the trial under the circumstances was indeed "within the wide range of reasonable and professional assistance," *id*., at 239-240, 136 P. 3d, at 557, despite counsel's own declaration to the contrary.

Even when trial counsel is not actively assisting the attack on his own performance, his participation in defending it may be limited. Collateral review may come many years after the trial, after the trial lawyer has moved on to a new stage of his career, and a finding of ineffective assistance in a case from long ago may not have any impact on his reputation or prospects for further advancement.

In the present case, trial counsel did sign one affidavit, evidently prepared very early in the collateral proceedings in this case. The affidavit appears to have been drafted in response to the petition, which merely alleges counsel failed to file a motion to suppress without stating the grounds. See *supra*, at 4. Not surprisingly, the explanation given for not making the motion is perfunctory. See 574 F. 3d, at 1104-1105, n. 12. The Court of Appeals majority's assumptions that the reasons stated in the affidavit are exhaustive and its inference that counsel did not consider anything not stated in the affidavit, see *id*., at 1104-1105, are not logically valid.

The majority opinion says, "At no time did counsel suggest that he did not file the motion to suppress because he was concerned about the effect that doing so would have on Moore's plea deal or for any other 'strategic' reason . . . ." *Ibid*. The opinion evidently considers this omission conclusive on the question of whether such strategic considerations may be considered in the *Strickland* analysis. But counsel's affidavit merely explains the primary reasons why he believed there was very little upside to making the motion and does not discuss the possible downside. It does not follow that there is no downside, that counsel did not consider the downside, or that a proper analysis of the ineffective assistance claim cannot consider the downside.

When describing the method of adjudicating ineffective assistance claims, the *Strickland* Court spoke in objective terms. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." 466 U. S., at 690. This implies that objective conduct, not subjective thought process, is the focus.

This objective focus is consistent with the reason that we allow this unique procedure, where a party can attack the other party's judgment based on the failings of his own attorney, something no other litigant can do. The basic principle of *Strickland* on which all other rules are built is that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's *conduct* so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U. S., at 686 (emphasis added). Conduct itself, not the individual attorney's subjective reason for the conduct, is what makes a trial worthy of reliance or not. When strategic choices are at issue, then, the proper question is whether "the challenged action '*might* be considered sound trial strategy,' " *id.*, at 689 (quoting *Michel* v. *Louisiana*, 350 U. S. 91, 101 (1955)) (emphasis added), not an intrusive examination of what counsel actually considered. See *id.*, at 690 (warning against intrusive examination).

The dissenting judge in the Court of Appeals was entirely correct to weigh in the balance strategic considerations that could legitimately affect an attorney's decision to file a motion to suppress prior to negotiating a plea bargain. Whether the particular attorney in this case actually weighed these considerations would have only minimal relevance even if it were known, and the majority's inference from the affidavit that he did not is unjustified.

III. The state court reasonably found, as a fact, that "there is very little chance that petitioner's confession would have been suppressed."

The so-called "deference" standard for federal habeas review of state criminal judgments, 28 U. S. C. § 2254(d), provides:

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

An "unreasonable application" of law under paragraph (d)(1) necessarily involves the application of law to facts. What facts? When the facts are genuinely disputed, a court must necessarily either determine them, a determination to which paragraph (d)(2) applies, or assume them in favor of the nonprevailing party.

In the present case, the state postconviction court made findings of fact and conclusions of law. See App. to Pet. for Cert. 201-207. The fact/law classifications are not necessarily the same as federal courts would make. For example, the court's determination that Moore was not in custody at the time of his confession comes under the "findings of fact" heading, even

though federal law classifies this holding as "a mixed question of law and fact." *Thompson* v. *Keohane*, 516 U. S. 99, 102 (1995).[7] The headings do not matter, though. Federal courts do not tell state courts how to write their opinions, see *Coleman* v. *Thompson*, 501 U. S. 722, 739 (1991), but they are also not bound by the state court's characterization of the holding. The latter proposition is implicit in *Thompson* v. *Keohane*, which pronounces the fact/law distinction to be "slippery" and then proceeds to decide it for all federal habeas proceedings without reference to the state court's characterization. 516 U. S., at 111.

While the question of whether Moore actually was in "custody" is a mixed question of law and fact, assessment of the probabilities of how another judge would have ruled on that question in response to a motion that was never made is a question of fact. A judge cannot decide a legal issue and assume that another judge would have decided it the same way.[8] The quintessential determination of fact is deciding "what happened." See *Thompson*, 516 U. S., at 111. However, applying *Strickland* sometimes requires assessment of the probabilities of outcomes of a course of action that was not taken. See 466 U. S., at 680-681. In that circumstance, a court must decide the probability that something would have happened, but that determination is not qualitatively different from the "what

---

7. At the time of *Thompson*, that classification meant the question was determined de novo on habeas. See *ibid*. Now it means the determination is reviewed for reasonableness under § 2254(d)(1). The Magistrate Judge was incorrect in applying (e)(1) instead of (d)(1), see App. to Pet. for Cert. 188, but that choice is unlikely to have made a difference in the outcome.

8. If all judges decided legal questions the same way, Supreme Court Rule 10 would make no sense. Indeed, we would need no appellate courts at all.

happened" determination so as to call for a different classification.

The state postconviction court's determination that Moore was not in custody was a mixed question under *Thompson*, and it is reviewed under § 2254(d)(1) on federal habeas. The determination was reasonable. See App. to Pet. for Cert. 188 (Magistrate Judge's recommendation). Under *Lockhart* v. *Fretwell*, 506 U. S. 364 (1993), it follows that Moore was not prejudiced for the purpose of the *Strickland* test by counsel's failure to make a meritless motion.

The state postconviction court's determination that "there is very little chance that petitioner's confession would have been suppressed" by the trial court, App. to Pet. for Cert. 205, is a finding of fact. That determination is also reviewed for reasonableness on federal habeas, although under § 2254(d)(2).[9] This determination is also more than reasonable. It is highly probable that the trial court would have rejected the *Edwards* claim on the ground that Moore was not in custody, for the same reasons the postconviction court and the Federal District Court rejected it. It is also highly probable that the trial court would have rejected an "involuntariness" claim based on how a reasonable person would have interpreted the statements of the police.

Shortly before the crime in this case, the Oregon Court of Appeals summarized the test for determining when a confession would be deemed involuntary on the ground that it was made in response to an inducement. "If a person in the defendant's circumstances reasonably would have believed that the officer was promising

---

9. The relation between (d)(2) and (e)(1) is discussed in CJLF's brief in *Wood* v. *Allen*, No. 08-9156, available at http://www.cjlf.org/briefs/WoodH.pdf.

immunity and reasonably would have relied on that promise in making the confession, then the confession is considered to have been induced by the promise of immunity and *as a matter of law* is involuntary and must be suppressed." *State* v. *Aguilar*, 133 Ore. App. 304, 307-308, 891 P. 2d 668, 670 (1995) (emphasis in original).

This test is not contrary to the clearly established precedents of this Court and may even be more favorable to the defendant. The federal constitutional question is whether "his will has been overborne and his capacity for self-determination critically impaired." *Culombe* v. *Connecticut*, 367 U. S. 568, 602 (1961). That question must be evaluated under the "totality of all the circumstances" and not "the presence or absence of a single controlling criterion." *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 226 (1973). The old statement of *Bram* v. *United States*, 168 U. S. 532, 542 (1897), that " 'any direct or implied promises, however slight' " are sufficient to invalidate a confession, is no longer the law. See *Arizona* v. *Fulminante*, 499 U. S. 279, 285 (1991).

A leading treatise notes a number of cases finding confessions to be involuntary because of promises of leniency but then says, "although in recent years there has been a movement away from treating such promises of leniency as *per se* producing involuntariness, especially in light of *Fulminante*'s reading of *Bram*." 2 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 6.2(c), p. 625 (3d ed. 2007).

Among the authorities cited for this trend is *United States* v. *Flemmi*, 225 F. 3d 78 (CA1 2000), in which the First Circuit held, "The mere fact that an unfulfilled promise was made in exchange for a person's statement does not constitute coercion, rendering the statement involuntary or its fruits inadmissible." *Id*., at 91. In

State v. *Unga*, 165 Wash. 2d 95, 105-106, 196 P. 3d 645, 651 (2008), the court applied a totality of circumstances test for voluntariness, rejecting the concurring opinion's position that the mere fact of a promise was determinative. "The problem for the concurrence is that the rule in *Bram* was jettisoned in *Fulminante*." *Id*., at 113, 196 P. 3d, at 654. Under a totality of circumstances analysis, the fact that Moore was questioned surrounded by his family and friends, not in isolation, would weigh heavily against a finding of involuntariness. Cf. *Miranda* v. *Arizona*, 384 U. S. 436, 449-450 (1966).

The Court of Appeals majority interprets the police officers statements that they would "go to bat" for Moore if he told the truth, along with references to his brother's case in which charges were dropped, as promises to give Moore immunity or at least charge him with something less than murder. See 574 F. 3d, at 1103, n. 10. This interpretation is not credible. In the brother's case, he said the killing was self-defense, not a crime at all, and that statement was apparently believed. See 574 F. 3d, at 1095. In other words, the brother made a statement, the statement was deemed to be true, and he was not charged with anything *more* than he confessed to, which was justifiable homicide and not a crime at all. A reasonable person would not infer by analogy that speaking to the police would result in being charged with *less* than the crime confessed to. Similarly, the police statements that they would "go to bat" for Moore and not "jam" him are reasonably interpreted to be promises not to *over*charge him rather than promises to *under*charge him.

In this case, we also have the habeas petitioner's testimony as to what he thought the officers had promised him. Far from establishing his case of a false promise of leniency, his own testimony refutes it.

> "About where the detectives told me that if it was an accident, they would go before the D.A. on my behalf and see to it that I was charged with an accident. And when he did go to the D.A. to ensure the D.A. didn't jam me for later on down the road, he came back. And then after we told him those statements, they charged us with murder anyhow." Supp. App. to Brief in Opposition 18.

Moore himself unmistakably states that he was not expecting that a truthful statement of what happened would result in his being charged with less than the crime he admitted to. He thought that if he stated that the death of Rogers was accidental, then he would be charged with accidental death. He was not promised leniency, much less immunity. He was promised he would not be overcharged.

So understood, the promise was kept. Moore's statement confessed to all the elements of felony murder, which does not require proof of intent to kill. See Brief for Petitioner 51. He was not "jammed," *i.e.*, charged with any greater offense. Clearly, Moore was greatly surprised to learn that his dubious statement[10] of accidental shooting was actually a confession to murder under Oregon's felony murder rule. However, matters internal to the defendant's mind do not convert proper police conduct into coercion. See *Colorado* v. *Connelly*, 479 U. S. 157, 170 (1986). Moore expected he would be charged with the accidental death of Rogers, and he was. It is the felony murder law, not a breach of promise by the police or prosecutors, that makes this charge "murder anyhow."

---

10. Moore probably did not keep his part of the bargain to tell the truth, as the claim of accidental shooting is probably a fabrication. See *supra*, at 2-3.

While the state postconviction court did not specifically address the merits of the inducement claim, that claim was briefed as part of the motion-to-suppress argument, and the court held that there was "very little chance" the motion would have been granted. See App. to Pet. for Cert. 205. This holding is a reasonable one for the purpose of § 2254(d). Counsel's actions must therefore be judged, as explained in Part I, with a premise of a strong probability the motion would have been denied. Given that probability, counsel's actions were easily within the wide range permitted under *Strickland*. The state postconviction court's "bottom line" holding under *Strickland*, App. to Pet. for Cert. 206, is well within the bounds of reasonableness sufficient to preclude relief under § 2254(d)(1).

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

July, 2010

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation