No. 09-658

In the Supreme Court of the United States

Brian Belleque, 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 OF AMICUS CURIAE SOUTH CAROLINA, ALABAMA, ALASKA, ARIZONA, COLORADO DELAWARE, IDAHO, INDIANA, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MONTANA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, SOUTH DAKOTA, TENNESSEE, TEXAS, VIRGINIA, WISCONSIN AND WYOMING IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a state murder conviction based on a plea agreement may be invalidated on collateral review simply because trial counsel recommended pursuing the plea rather than moving to suppress one of the defendant's multiple confessions.

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INTRODUCTION AND INTERESTS OF AMICI CURIAE

Amici States strongly oppose the Ninth Circuit's effort to dilute the standards for invalidating pleas entered in state court. Because "the vast majority of criminal convictions result from pleas," the "concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas." *United States v. Timmreck*, 441 U.S. 780, 784 (1979). And that concern for finality has even greater force when federal courts reopen convictions issued and affirmed in state court. Finality and comity "demand[] that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). But the Ninth Circuit's decision dispensed with all such deference.

Under the Ninth Circuit's approach, a defense counsel's failure to move to suppress a confession before a defendant enters a plea has committed *per se* ineffective assistance for purposes of federal habeas relief whenever the motion is potentially meritorious regardless of the context, other evidence and strategic considerations. In other words, an attorney who declines to file a motion to suppress one confession in favor of advising his client to take a plea in light of a second confession (or even a third!) has provided guidance that is objectively unreasonable and prejudicial to the defendant, and therefore requires invalidation of the plea as involuntary.

This Court has never articulated such an expansive standard for invalidating pleas in state court. To the contrary, in the context of a plea bargain, the prevailing standard is whether a reasonably competent attorney would have advised the defendant differently in light of the evidence at hand, and, if so, whether that would have led the defendant to pursue a trial rather than a plea agreement. *See Hill v. Lockhart*, 474 U.S. 52, 56-57,

59 (1985); *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

Moreover, if this Court were to now adopt the Ninth Circuit's expansive standard, that ruling would seriously compromise the ability of all the States to negotiate legally-binding plea agreements with defendants. Any uncertainty about the finality of criminal convictions obtained by guilty pleas decreases the value of such a plea in the eyes of the States, resulting in fewer plea bargains and an upsurge in trials. And forcing the state to present its original evidence years after a plea, with all the pitfalls that come from long delays before trial – faded memories, lost physical evidence, missing witnesses – calls into question the value of plea negotiations on which the criminal justice system so heavily depends. At minimum, adoption of the Ninth Circuit's decision would dramatically increase the number of meritless suppression motions filed by fearful attorneys in state criminal proceedings. And all of these adverse practical effects would carry with them a corresponding drain on judicial, prosecutorial and budgetary resources.

For these and other reasons explained below, *amici* urge the Court to reject the Ninth Circuit's approach, and reverse its decision.

STATEMENT OF THE CASE

Habeas petitioner Randy Moore seeks to invalidate his plea of no contest for the assault, kidnapping, and murder of Kenneth Rogers. With the help of two others, Moore beat Rogers; stripped him; bound him with duct tape; placed him in the trunk of a car; drove him to a remote location; blindfolded him; marched him up a hill; and shot him at point blank in the temple. Moore was the triggerman, though he claims the shooting was an accident. *Moore v. Czerniak*, 574 F.3d 1092, 1097, 1137 (9th Cir.

2009). He confessed these facts three times, and he pleaded no contest in exchange for a 25-year sentence. *Id.*

1. Moore first confessed to his brother Raymond, seeking advice and an escort to the police station. During the state court post-conviction evidentiary hearing, Raymond testified that, before driving Moore and Salyer to the police station, or on the way, Moore described how he, Salyer and Woolhiser went to the victim's home to confront him about stealing property from Salyer's residence. *Id.* at 1146. They assaulted, blindfolded and duct taped Rogers, placed him in the trunk of their vehicle and drove to a remote area. *Id.* At that point, they removed him from the trunk and proceeded to walk and push him, blindfolded, up a hill. *Id.* Although they stated that they only intended to frighten the victim, Moore was holding the revolver with his hands on the trigger when the gun discharged and the victim suffered the fatal gunshot wound. Id. In an affidavit the district court found credible, Moore's counsel confirmed that Moore acknowledged having made this confession to his brother Raymond. *Id.* at 1124. The confession was further corroborated by a conversation with police, in which Raymond confirmed that earlier in the day Moore and Salyer told him the full story as recounted to the officers. *Id*. at 1096-1097, 1102. Moore gave a similar full confession to Lonnie's girlfriend, Debbie Ziegler, who accompanied Moore to the police station. And Moore confessed for the third time to the police. Id. at 1124.

2. Subsequent to this third confession, Moore was appointed counsel. Counsel advised him that if he went to trial he could face an aggravated murder charge and a potential death penalty, and at minimum would be charged with murder, kidnapping and assault. In light of his three confessions and other evidence available to police, including the murder weapon, the duct tape and witnesses placing Moore at the scene of the kidnapping and the crime, Moore elected to accept a plea agreement characterized by experienced defense counsel as "the

best we could do under the circumstances." *Id.* at 1094, 1128, 1142. Moore was given twenty-five years imprisonment for the murder of Kenneth Rogers. *Id.* at 1097.

3. Moore unsuccessfully appealed his sentence to both the Oregon Court of Appeals and the Oregon Supreme Court. He then filed a petition for state post-conviction relief, raising a host of issues including that counsel provided constitutionally ineffective assistance by not moving to suppress Moore's confession to police. The Oregon court considered the affidavit testimony by Moore's defense counsel, which explained his reasons for not moving to suppress the third confession. The court determined that suppressing Moore's third confession would have been "fruitless" due to the facts of the case and Moore's two other confessions, and concluded that Moore failed to meet his burden to show that his plea was involuntary due to ineffective assistance of counsel. The Oregon Court of Appeals affirmed and the Oregon Supreme Court denied review. *Id.* at 1097-1098.

4. Moore proceeded to file a federal habeas petition, again alleging, among other things, ineffective assistance of counsel. The district court denied Moore's federal habeas petition, agreeing with the Oregon court's reasoning that even if a suppression motion would have been successful, the confession was redundant in light of Moore's two previous confessions. *Id.* at 1098-1099. In addition, though Moore alleged that his attorney should have moved to suppress his confession to the police, he offered no evidence to suggest that he would have insisted on going to trial if counsel had done so. Brief of Petitioner, p. 10. Moore reiterated his ineffective assistance of counsel argument on direct appeal to the Ninth Circuit. *Id*. at 1099.

In a divided decision, the Ninth Circuit reversed, concluding that the decisions of the Oregon courts were unreasonable under AEDPA. In a majority opinion by Judge

Reinhardt, the court invalidated Moore's no contest plea for ineffective assistance, on the theory that counsel's advice to avoid an aggravated murder charge by pursuing a plea deal for a lesser offense rather than moving to suppress Moore's third confession, was deficient. 574 F.3d 1092. Judge Reinhardt found the ineffective assistance analysis in this case to be governed by *Fulminante* – a decision that did not involve an ineffective assistance claim but rather held that one of two confessions actually introduced at trial was not harmless beyond a reasonable doubt. *Id.* at 1110-1114.

Judge Bybee dissented, explaining that "[t]he net effect of the majority's approach is pernicious." *Id.* at 1144. He identified two principal errors in the majority's reasoning. First, "[i]nstead of deciding whether counsel's conduct fell below an objective standard of reasonableness, the majority asks whether the motion had merit," and finds counsel ineffective in that event. Second, the majority adopted an "unprecedented reading of *Arizona v. Fulminante*," which treated a failure to suppress a second or third confession as necessarily prejudicial under *Strickland*. *Id.* Six judges on the Ninth Circuit dissented from the court's denial of a petition for rehearing en banc. *Id*. at 1162, 1166.

SUMMARY OF ARGUMENT

Surveying the practical consequences of *Strickland* nearly three decades later, this Court recently observed that the "'floodgates' concern" that some had expressed about that decision – the prospect of unsettling the finality of myriad criminal judgments – has not come to pass. *Padilla v. Kentucky*, 130 S.Ct. 1473, 1484 (2010). The principal reason a "flood did not follow" *Strickland* or this Court's application of Strickland to guilty pleas was because "[s]urmounting Strickland's high bar is never an easy task." *Id.* at 1485. If adopted by this Court, however, the Ninth Circuit's approach would fling the floodgates wide open.

As we explain in Part I, the Ninth Circuit dramatically lowered the bar for habeas actions alleging ineffective assistance of counsel. And as we explain in Part II, the Ninth Circuit's lowering of the bar would invite meritless motions, strain the resources of courts and prosecutors, and ultimately redound to the disadvantage of criminal defendants.

ARGUMENT

I. The Ninth Circuit's Approach Effectively And Inappropriately Lowers The Burden Of Proof For Invalidating State Guilty Pleas In Federal Habeas Actions.

For good reason, a habeas petitioner alleging ineffective assistance of counsel faces an unusually high bar when attempting to invalidate a guilty plea voluntarily entered in state court. Specifically, as we explain below, the petitioner's burden contains three separate layers of deference designed to prevent federal courts from unduly interfering with the finality of state-court guilty pleas. But the Ninth Circuit's approach would destroy each layer.

A. Three layers of deference protect the finality of state guilty pleas and erect an unusually high bar for petitioners seeking to invalidate their pleas.

First, a defendant must demonstrate that his counsel's performance "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Because it is "all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence" (*id*. at 689), the "availability of intrusive post-trial inquiry into attorney performance * * * would encourage the proliferation of ineffective-ness challenges" (*id.* at 690). Courts must therefore "indulge a strong presumption that

counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

Second, a defendant must "affirmatively prove prejudice" (*id.* at 693) by showing "a reasonable prob-ability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*id.* at 694). Because courts "should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result" (*id*. at 697), only the most grievous errors will be "sufficiently serious to warrant setting aside the outcome of the proceeding" (*id*. at 693). The prejudice must thus be reasonably probable: "It is not enough for the defendant to show that the errors had some conceivable effect * * *" *Id.*

That burden, moreover, is even higher when a petitioner claims that counsel's advice prejudiced his voluntary decision to enter a guilty plea. In the plea context, the fundamental interest in finality is at its greatest, for "the vast majority of criminal convictions result from such pleas." *United States v. Timmreck*, 441 U.S. at 784 (quotation omitted). At the same time, the interest in reliability of convictions is at its weakest, for "the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea." *Id.* (quotation omitted). Yet the judicial task of ascertaining prejudice is at its most difficult, for pleas are entered in the face of "inherent uncertainty" and determining the effect of counsel's advice or pre-plea activities "is a highly speculative matter in any particular case." *McMann v. Richardson*, 397 U.S. 759, 774 (1970).

For all of these reasons, a defendant who pleads guilty cannot establish prejudice unless he demonstrates "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). In other words, counsel's error

must be the deciding factor in a defendant's decision to take a plea.

Third, even if a defendant can show ineffectiveness and prejudice, he faces an additional burden to prove that his counsel's ineffectiveness was so manifest and the error so prejudicial that no reasonable court could possibly deny his claim. Under AEDPA, a habeas petitioner "must do more than show that he would have satisfied Strickland's test if his claim were being analyzed in the first instance." *Bell v. Cone*, 535 U.S. 685, 698-99 (2002). Rather, he "must show that the [state court] applied Strickland to the facts of his case in an objectively unreasonable manner." *Id.* at 699.

This is a "highly deferential standard" entailing a "substantially higher threshold for obtaining relief than de novo review." *Renico v. Lett*, 130 S.Ct. 1855, 1862 (2010) (quotation omitted). It "demands that state-court decisions be given the benefit of the doubt." *Id.* (quotation omitted). And for good reason: In enacting AEDPA, "Congress intended federal judges to attend with the utmost care to state-court decisions." *Williams v. Taylor*, 529 U.S. 362, 386 (2000).

In sum, courts must use restraint when asked to second-guess the actions of counsel, to unsettle the finality of a plea, and to throw out the work of a state court. Under *Strickland* and AEDPA, this Court has consistently made clear that petitioners face a "high bar." *Padilla*, 130 S.Ct. at 1484.

B. At each level of analysis, the Ninth Circuit failed to exercise the deference this Court requires.

At each step, the Ninth Circuit's approach to Moore's claim dramatically lowered the bar. The Ninth Circuit held that Moore's counsel was ineffective simply because he declined an

opportunity to file a meritorious motion to suppress. The Ninth Circuit further held that counsel's failure to suppress the confession prejudiced Moore's decision to plead guilty, even though two other admissible confessions (and additional evidence) overwhelmingly established Moore's guilt. And on the basis of this reasoning, the Ninth Circuit held that the Oregon courts' denial of Moore's ineffective assistance claim was not only wrong, but unreasonable. Each of those three holdings was both wrong and pernicious.

1. The Ninth Circuit misapplied *Strickland* by deeming counsel ineffective for foregoing an inconsequential motion to suppress simply because the motion would have been granted.

Under *Strickland*, the first issue is whether it was "objectively unreasonable" for Moore's counsel to forgo an opportunity to suppress Moore's third confession before advising Moore to take a plea. Far from heeding the "strong presumption" that counsel's decision was reasonable, the Ninth Circuit applied what amounts to a *per se* rule that forgoing a suppression motion is always unreasonable, so long as the motion has merit. *Strickland*, 466 U.S. at 689.

The relevant facts surrounding counsel's decision were outlined in his affidavit, and are undisputed. Moore's counsel evaluated Moore's third confession in context of the other evidence against him, and concluded that suppressing the confession would have been futile. As counsel explained, 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." The other evidence placed Moore at the scene of the killing, and it placed the weapon in his hand. From counsel's discussions with Moore and his evaluation of the evidence, "there was never the smallest

doubt" in his mind that the shooting "occurred during a kidnap which began with an assault." Moore's only viable defense was to claim that the actual shooting was an accident – hardly a viable defense to felony murder.

Against this mountain of evidence, counsel reasonably estimated that "if we went to trial [Moore] would be found guilty of assault, kidnapping, and [felony] murder." Counsel also estimated that this would have been the likely result if Moore went to trial with two confessions, just as it would have been the likely result if he went to trial with three. Suppressing the third confession was thus "unavailing." It was also premature, as Moore had not yet been indicted. And so, rather than awaiting indictment and then suppressing Moore's third confession, counsel negotiated a plea that was in his judgment "the best we could do under the circumstances."

Counsel's actions were eminently reasonable under the circumstances. But the Ninth Circuit found them unreasonable. This was not because it determined that suppressing the third confession could somehow have made an acquittal likely. Nor was it because suppression would significantly alter the plea negotiations. Rather, the Ninth Circuit found counsel's actions unreasonable principally because "a motion to suppress Moore's confession would have succeeded." 574 F.3d at 1107. Never mind that Moore was all but certain to be convicted at trial; the decisive fact for the Ninth Circuit was that he could have had his motion granted.

The Ninth Circuit's breathtaking willingness to deem counsel ineffective in these circumstances should be firmly rejected. It rests on a corrosive view of effective advocacy that those certain to lose the war must nevertheless wage every battle. And worse still, it treats such scorched-earth tactics as a defining feature of minimal attorney competence.

This Court has cautioned that the ineffective-assistance inquiry not be used to "restrict the wide latitude counsel must have in making tactical decisions." *Strickland*, 466 U.S. at 689. To require that counsel pursue every tactical success, regardless of its strategic importance, would dramatically restrict counsel's latitude. It would effectively impose a "nothing to lose" standard for evaluating *Strickland* claims, whereby every defense must be pressed so long as there is nothing to lose by advancing it. This Court has already rejected such a standard: To forgo a defense, counsel "is not required to have a tactical reason-above and beyond a reasonable appraisal of a claim's dismal prospects for success." *Knowles v. Mirzayance*, 129 S.Ct. 1411, 1422 (2009). That principle should be reaffirmed here.

A motion unlikely to change the outcome of a trial has "dismal prospects" for long-term success even if it is likely to be granted. And a reasonable appraisal of those prospects suffices to constitute effective representation. By treating the ineffectiveness inquiry as turning solely on a suppression motion's merit – rather than its ultimate usefulness – the Ninth Circuit improperly converted reasonable attorney judgment into objectively unreasonable ineffectiveness.

2. The Ninth Circuit misapplied *Strickland* and *Hill* by treating counsel's failure to suppress evidence as necessarily prejudicial to a plea simply because the evidence might have had some possible effect at trial.

Even if counsel's performance were somehow ineffective, Moore also had to prove that it prejudiced his plea. Under *Strickland*'s second prong (as extended by *Hill* to the plea context), the relevant inquiry in this case is whether there is a "reasonable probability" that a motion to suppress Moore's third confession would have so altered the nature of the bargain that he

would have rejected his plea and "insisted on going to trial." *Hill*, 474 U.S. at 59. Here again, the Ninth Circuit effectively replaced the *Strickland* standard with a *per se* rule: that suppressing Moore's third confession would probably have caused him to forgo his plea, simply because the confession would not have been harmless if admitted at trial. Put another way, the Ninth Circuit reasoned that if any evidence could have a possible effect on the trial, it has a probable effect on the plea. This is a startling non-sequitur, and an insidious one.

1. It should have been easy for the Ninth Circuit to see an absence of prejudice in this case. Moore's decision to avoid trial and plead no contest to felony murder was an inevitable consequence of the risks he faced. As explained above, it is undisputed that Moore participated in the events leading up to the shooting; it is undisputed that those events involved beating Rogers and forcing him from his home (bound, in the trunk of a car); and it is undisputed that Rogers ended up dead. Moore claimed only that he did not mean to pull the trigger. In light of the assault and kidnapping, the State's case against Moore for felony murder could hardly have been stronger. And so, the felony murder charge on which Moore was almost certain to be convicted was the charge to which he entered his plea.

Trial, however, could well have been much worse for Moore. He risked conviction for the greater offense of aggravated murder, against which his "accidental shooting" defense was a gamble. After all, Moore used a revolver, which must be cocked before discharging. And he shot Rogers in the temple. 574 F.3d at 1142 n.7 (Bybee, J. dissenting). Moreover, the State could have marshaled extensive evidence against Moore: the murder weapon, which they had recovered; the car, with blood and hair found in the trunk; the testimony of Moore's co-conspirators; the testimony of at least six witnesses to preparatory events preceding the crimes; and not least, Moore's two other confessions. *See id*. at 1145-1149.

Moore thus had a choice: He could plead guilty to felony murder, with a 25-year mandatory minimum, or he could risk conviction for aggravated murder, which carries a sentence of life imprisonment or death. On these facts, it is implausible to conclude that Moore would have gambled on trial if only he knew the evidence against him would include two confessions instead of three. Because there is no "reasonable probability" the third confession was the deciding factor in Moore's plea, counsel's failure to suppress it cannot have caused prejudice.

2. The Ninth Circuit reached a contrary result by effectively changing the law. The Ninth Circuit's approach conflated *Strickland's* prejudice standard with the different prejudice standard applied in *Arizona v. Fulminante*, 499 U.S. 279 (1991), a decision the Ninth Circuit treated as "a fortiori, controlling here." 574 F.3d at 1110. Yet *Fulminante* did not involve an ineffective assistance claim. And it did not involve a plea. Instead, the issue for this Court was whether to reverse a conviction where a coerced confession had been introduced at trial. In reviewing the prejudicial effect of the confession in that context, the Court had to decide whether the erroneously-introduced confession was "harmless beyond a reasonable doubt." 499 U.S. at 295. The Court held that the confession was not harmless, despite a second confession and other evidence introduced at trial.

Far from "controlling," *Fulminante's* conclusion that the second confession was not harmless has little relevance to *Strickland's* prejudice inquiry. To determine that a confession was not harmless beyond a reasonable doubt, a court need only conclude that it had some marginal effect at trial however small. But the fact that Moore's third confession might have had some marginal effect at trial does not answer the relevant question under *Strickland*: whether it was reasonably probable that the confession was the deciding factor in Moore's decision to take the plea. Although *Fulminante* and *Strickland* both use the word

"prejudice," they mean entirely different things by its use. *See United States v. Dominguez Benitez*, 542 U.S. 74, 81-82 & n.7 (2004). To reason from *Fulminante* to *Strickland* is thus to treat the possibility of prejudice as proof that prejudice was probable. This approach is as radical as it is illogical.

The distorting effect of the Ninth Circuit's *Fulminante* standard is even more readily apparent in the plea context. Because much uncertainty surrounds any decision to take a plea and because a plea prevents a trial record from ever being developed, assessing the impact of particular evidence necessarily entails speculation. *Fulminante's* standard, however, burdens the government with showing that evidence was harmless and treats mere uncertainty as reason enough to find prejudice so long as certain facts are "far from clear" or "the record falls far short." 574 F.3d at 1113. The Ninth Circuit's approach thus reverses *Strickland's* burden of proof, which has always required the petitioner to "affirmatively prove prejudice," *Strickland*, 466 U.S. at 693.

There is good reason, moreover, for it to remain more difficult to invalidate a plea than to reverse a conviction based on a confession used at trial. Unlike a conviction based on a coerced confession, "[w]hat is at stake in [the plea] phase of the case is not the integrity of the state convictions obtained on guilty pleas, but whether, years later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting guilt and putting the State to its proof." *McMann v. Richardson*, 397 U.S. at 773.

The net consequence of the Ninth Circuit's approach is to make *Strickland's* "highly demanding" prejudice standard substantially less so. *See Kimmelman v. Morrison,* 477 U.S. 365, 382 (1986). Because nearly ever piece of evidence may have some possible effect if introduced at trial, and thus cannot be

harmless beyond a reasonable doubt, nearly every piece of evidence could give rise to an ineffective assistance claim.

3. The Ninth Circuit violated AEDPA by substituting its own view of the appropriate *Strickland* inquiry for that of the Oregon courts.

Even if it were possible under *Strickland* to reach the result the Ninth Circuit reached in this case, it cannot be that the contrary conclusions of multiple Oregon courts, the federal district court, and many dissenting judges of the Ninth Circuit were all simply "unreasonable under any standard." 574 F.3d at 1115. An "unreasonable application is different from an incorrect one," and AEDPA entitles the Oregon courts to significant deference, above and beyond the deference required by *Strickland*. *Bell*, 535 U.S. at 694.

Further, "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Mirzayance*, 129 S. Ct. at 1420. The conclusion that suppressing Moore's third confession would have no great effect on his fortunes was well within the latitude of the Oregon courts to decide. By treating its own novel view of the *Strickland* analysis as the only reasonable one, the Ninth Circuit usurped Oregon's authority to ensure the fairness and finality of guilty pleas entered in its courts.

II. The Ninth Circuit's Attempt To Relax The Legal Standards For A Finding Of Ineffective Assistance In The Handling Of Confessions Would Have Serious Adverse Consequences For State Courts, Prosecutors And Budgets, With No Offsetting Benefit To Criminal Defendants.

If the decision below stands, moreover, experienced defense attorneys who believe a plea bargain is in the best interest of their clients will be forced to reject the prosecution's offer if they have a colorable motion to suppress some – but not all – of the evidence against their client. This standard would distort the legal advice available to defendants and introduce additional expenses and delays into already overstressed and underfunded state judicial systems right in the middle of a massive budgetary crisis when it is not realistic to hope that states will be able to expand their personnel and facilities to handle the additional demand.

A. The vast majority of criminal actions re-solved in state courts are resolved through confessions and plea agreements, and an increase in meritless suppression motions will drain already tight judicial, prosecutorial and budgetary resources.

Given the importance of plea bargains in our judicial system, such a change in the rules governing when lawyers may recommend them would impose enormous costs. Ninety-four percent of all convictions for state felonies come from guilty pleas, including 61% of all convictions for murder and non-negligent homicide, and "the consequence of what might seem on its face a small percentage change in the rate of guilty pleas can be tremendous." Warren E. Burger, The State of the Judiciary-1970, 59 A.B.A. J. 929, 931 (1970).

Even with this heavy reliance on plea bargaining, court caseloads have been steadily increasing. Between 1987 and 2004 state court caseloads increased 43% in courts of general jurisdiction and 45% in courts of limited jurisdiction. This increase has been driven by the criminal docket, which expanded 67% during that period.

States have struggled to keep up with this expansion, increasing the number of judges by 11% and the available support staff by a higher percentage, but the current economic crisis has put an end to this modest judicial expansion. The National Center for State Courts reports that eleven state court systems have conducted layoffs, twenty-three have instituted hiring freezes, nineteen have furloughed employees, nine have cut salaries, twelve have frozen salaries, and six have actually closed down courts.

If the decision in this case results in more motions to suppress – as the Ninth Circuit's approach surely would – states will not be able to hire additional staff and judges to handle them. Any increase in litigation over evidence prior to plea bargains will have to come directly out of funds and resources that are currently devoted to other elements of the criminal justice system.

B. The Ninth Circuit's approach would not ultimately benefit the affected criminal defendants, but would instead slow and in many cases impede their efforts to resolve their crimes.

For all these reasons, affirming the Ninth Circuit's decision could easily create more, rather than less, ineffective legal representation-by laying additional burdens on appointed attorneys and a legal system already struggling with large caseloads. Such a reduction in the average quality of representation is hardly in the interest of criminal defendants.

1. The Ninth Circuit's approach would also likely reduce the speed with which criminal cases are re-solved. Even before the recent budget cuts, criminal cases were slow affairs. In 2006 the median time between arrest and adjudication for state felons in the nation's largest counties was 92 days, with a median

of 364 days for murder defendants and 228 days for rape defendants.

Plea bargains keep these delays under control. In 2008 the median time between the filing of criminal complaint and its disposition in federal district court was 14.4 months if the defendant had a jury trial but only 6.6 months if he pled guilty. It is striking that the median time for criminal cases as a whole was only 6.8 months, because the overwhelming majority of cases are settled through plea bargains. Those averages would increase dramatically if courts were forced to adjudicate numerous motions before they could accept a deal, or worse, if the cases were brought all the way to trial.

This extra time and expense would not provide better legal advice for defendants. When an experienced defense attorney thinks it is in his client's best interest to accept a plea bargain, it will not help his client to instead force him to bring every potentially meritorious motion which might be available, on pain of being found ineffective. As Chief Justice Burger explained, "No lawyer wants to be called upon to defend the client's charge of incompetence for having failed to exploit all the procedural techniques which we have deliberately made available." Warren Burger, The State of the Judiciary-1970, 59 A.B.A. J. 929, 931 (1970). But "the most experienced defense lawyers know that [the] defendant's best interests may be best served in most cases by disposing of the case on a guilty plea without trial" Id.

2. The state sentencing statistics dramatically illustrate how a plea bargain can offer the defendant a better deal than he would get at trial. The average sentence for a person convicted of a felony at trial in state court in 2006 was 78 months, while the average sentence for a person convicted of a felony on a guilty plea was only 29 months. For someone convicted of murder or non-negligent homicide, the average trial sentence was

267 months (including jail, prison, and probation) while the average plea bargain sentence was 192 months-a difference of more than six years.

Pleading guilty can also help a murder defendant avoid the death penalty or a life sentence. Seven per-cent of people convicted by juries in murder trials in 2006 were sentenced to death, and 41% were sentenced to life in prison. By contrast only 1% of people who pled guilty are typically sentenced to death, and only 12% are sentenced to life in prison.

On the other side of the equation, only 1% of all felony defendants were acquitted at trial, and only 5% of murder defendants. It is not hard to see why an experienced and dedicated attorney might think that accepting a plea bargain in Moore's case was a better deal, even if it might be possible to suppress some of the evidence against his client.

3. A strategy of bringing extra motions before bargaining with the prosecutor's office, moreover, is generally not a good strategy for defendants. As Judge Bybee explains in his dissent, even if the motions succeeds, the "defense counsel loses a bargaining chip and will almost certainly face a less cooperative prosecutor." 574 F.3d at 1144 (J. Bybee, dissenting).

These practical considerations are illustrated in this very case. Moore, who confessed three times to three different sets of witnesses, was offered, and accepted, the shortest possible sentence for felony murder under Oregon law, a much more lenient sentence than he would have faced if he had been convicted of aggravated murder as contemplated by his attorney. *Id.* at 1140. It is hard to imagine that prosecutors would have offered him a better deal if he and his counsel had forced them to bring an indictment, then respond to a suppression motion that, whether or not it was granted, everyone knew would likely have no impact on the outcome at trial.

CONCLUSION

Through legal gymnastics, the decision below conflates the meaning of "prejudice" in the evidentiary error context with the meaning of that term in the very different right-to-counsel context. In so doing, the Ninth Circuit's approach creates a near de novo review of state court-sanctioned guilty pleas under AEDPA, thereby destroying the predictability and finality of negotiated plea resolutions to criminal matters.

Perhaps worst of all, by creating a *per se* rule that competent defense counsel must file meritorious suppression motions regardless of both professional judgment and strategic considerations, the Ninth Circuit's analysis promises to overburden an already encumbered legal system, even as it puts at risk the ability of criminal defendants to efficiently and favorably resolve criminal allegations against them. For all these reasons, the decision below must be reversed.

Respectfully submitted.

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