No. 09-658

IN THE SUPREME COURT
OF THE UNITED STATES

BRIAN BELLEQUE, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

RANDY JOSEPH MOORE,

Respondent.

MOTION FOR LEAVE

TO PROCEED *IN FORMA PAUPERIS*

The respondent, Randy Joseph Moore, requests leave to file the attached brief in opposition to petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed *in forma pauperis* pursuant to Rule 39.1 of this Court and 18 U.S.C. §3006A(d)(7). The Respondent was represented by counsel appointed under the Criminal Justice

Act in the District of Oregon and on appeal in the Ninth Circuit Court of Appeals, and, therefore, no affidavit is required.

RESPECTFULLY SUBMITTED this 6th day of January, 2010.

Steven T. Wax
Attorney for Respondent

No. 09-658

IN THE SUPREME COURT
OF THE UNITED STATES

BRIAN BELLEQUE, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

RANDY JOSEPH MOORE,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
for The Ninth Circuit

Brief for Randy Joseph Moore in Opposition to Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether this case involves an ordinary application of *Hill v. Lockhart*, by the Court of Appeals in its conclusion, consistent with Mr. Moore's testimony in state post-conviction proceedings, that he would not have entered a plea of no contest if his attorney had filed a meritorious motion to suppress statements.

2. Whether this case involves an ordinary application of *Strickland v. Washington*, *Hill v. Lockhart,* and *Kimmelman v. Morrison* by the Court of Appeals in its discussion of *Arizona v. Fulminante*, as the substantive law relevant to its conclusion that Mr. Moore was prejudiced by his attorney's failure to seek suppression of a tape-recorded statement that was taken involuntarily and in violation of the assertion of the right to counsel.

3. Whether the State includes arguments in its Petition that the Court of Appeals properly found were waived and improperly seeks to retreat from what the Court of Appeals properly treated as a concession that the statement in issue was inadmissible.

4. Whether the State is seeking unwarranted error correction, contrary to this Court's Rules and in the absence of any error.

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The Opinion of the United States Court of Appeals is reported at 574 F.3d 1092 (9th Cir. 2009), and at page 1 of the Appendix. The Findings and Recommendation and Order in the district court are unreported and commence at pages 172 and 194 of the Appendix respectively.

JURISDICTION

This Court has jurisdiction to review the judgment of the court below by writ of certiorari pursuant to 28 U.S.C. §1254(1). The petition appears to have been timely filed, although it was not docketed until approximately two weeks after the filing deadline.

STATEMENT

The Petition for a Writ of Certiorari makes several assertions regarding factual development and rulings on the case below that require correction and response. Of primary importance, the Petition is based on the assertion that Mr. Moore never presented evidence that he would have rejected the plea offer or gone to trial if his attorney had successfully moved to suppress the tape-recorded statement taken by the police. Pet. at 8. To the contrary, Mr. Moore explicitly testified in the deposition taken during the state post-conviction proceedings that he wanted to withdraw his plea for multiple reasons related to his attorney's

failings, including the "Brightline rule" regarding questioning after the assertion of the right to counsel. Supp. App. at 23.

Throughout, the Petition distorts the opinion of the Court of Appeals. Contrary to the State's assertions, the Court of Appeals clearly relied on and analyzed the admissibility of the tape-recorded statement and the prejudice arising from Mr. Moore's counsel's failings under *Strickland v. Washington*, 466 U.S. 668 (1984), and *Hill v. Lockhart,* 474 U.S. 52 (1985). The Court of Appeals' analysis under *Arizona v. Fulminante*, 499 U.S. 279 (1991), was dictated by the holdings in *Strickland* and *Hill* and was secondary to its reliance on those cases.

Moreover, the Petition underplays or ignores several procedural issues that make a grant of certiorari in this case inappropriate. Specifically, the Petition underplays the finding that a motion to suppress the tape-recorded statement would have been granted and the State's failure to challenge that conclusion. The Petition also fails to advise this Court that it includes arguments that the Circuit properly held were waived.

Turning to the relevant facts, the record reflects that Mr. Moore made three statements about the crime, one to one of his brothers, one to a female friend (his co-defendant and half-brother's girlfriend, Debbie Ziegler), and the third, a detailed and tape-recorded statement that police took from him through improper

coercion and after he had asserted his right to counsel.[1] Both Mr. Moore's brother, Raymond, and Ms. Ziegler were allowed by the police to be present during their prolonged interrogation of Mr. Moore.[2] Contrary to the State's assertions, the information each knew before that time was far more limited than what was derived from the police interrogation. As Ms. Ziegler told the police, "I still don't know the actual thing." Supp. App. at 35. As Raymond Moore told the post-conviction court, "I'm not sure of all the exact details because this is basically hearsay." What he did know was what he had heard "in court" and "what they had basically told me after the incident, too, before I took them in, or on the way in." Supp. App. at 40.

Consistent with his belief that the death was accidental, Mr. Moore refused to plead guilty, but rather entered a plea of no contest. That no contest plea was induced by his attorney's failure, *inter alia*, to recognize that the taped statement that Mr. Moore gave to police that placed him at the scene and described his role

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[1]The presence of Raymond Moore and Ms. Ziegler during the taking of the involuntary tape-recorded statement may well render their testimony about any statements from Mr. Moore inadmissible as fruit of the poisonous tree. At the least, the State would be required to establish what each was told prior to the recorded statement.

[2]The co-defendant and Mr. Moore's half-brother, Lonnie Woolhiser, was also present during the interview.

in the offense, was taken not only in violation of his constitutional right to counsel, but was involuntarily given and inadmissible at trial for all purposes. Counsel's failing is particularly disturbing because the inadmissibility of the statement is so clear that the State did not contest the issue following the determination of the district court that the statement was inadmissible. The statement in the Petition that the State did not do so for strategic reasons is disingenuous and self-serving. Pet. at 31-32 n. 14.

In state post-conviction and federal habeas corpus proceedings, Mr. Moore asserted that he was deprived of his constitutional right to the effective assistance of counsel when his lawyer failed to recognize that a motion to suppress should have been filed. Supp. App. at 13-14, 17-18. Mr. Moore testified that his plea was induced by his lawyer's mistakes. Supp. App. at 23.

In responding to Mr. Moore's claims in the state post-conviction and federal habeas proceedings, the State made only one argument – that counsel's failing was not prejudicial because Mr. Moore had also made inculpatory statements to his brother and friend. The State asserted no other facts, sought to present no other evidence, and made no other arguments. For that reason, the Court of Appeals' decision necessarily involved a discussion of this Court's jurisprudence on harmlessness in *Fulminante*.

REASONS FOR DENYING THE PETITION

The Petition for a Writ of Certiorari should be rejected for four reasons. First, the Court of Appeals applied the clearly established law of this Court, as set out in *Hill*, in holding that Mr. Moore was prejudiced by his attorney's failings because there is a reasonable likelihood that he would not have entered a no contest plea if his attorney had filed the meritorious motion to suppress. Second, the court below broke no new ground. The Court of Appeals properly relied on *Strickland* and *Hill,* and its discussion of *Fulminante* was proper under the dictates of those cases and *Kimmelman v. Morrison*, 477 U.S. 365 (1986). Third, the Petition ignores several procedural issues and includes arguments that the Court of Appeals properly held were waived by the State that render the case an inappropriate one for review by this Court. Fourth, the State's argument is essentially a call for error correction, contrary to this Court's rules and in the absence of any error.

I. The United States Court Of Appeals Followed And Properly Applied The Clearly Established Precedents Of This Court – *Strickland* And *Hill* – In Holding That There Is A Reasonable Probability That Mr. Moore Would Not Have Entered A No Contest Plea If His Attorney Had Filed The Meritorious Motion To Dismiss.

When a habeas petitioner alleges that his conviction is infirm because his lawyer was ineffective, a two-step analysis is required. First, did counsel's

performance fall below an objective standard of reasonableness? Second, was the petitioner prejudiced by his attorney's failings? *Strickland*, 466 U.S. at 687. Under *Hill*, in a case involving a plea, the question of prejudice is resolved by determining whether there is a reasonable probability that the petitioner would have gone to trial in the absence of his counsel's failings. 474 U.S. at 58-59.

The Court of Appeals understood and followed *Strickland* and *Hill*. At the outset of its discussion, the court stated: "The substantive federal law guiding our inquiry is supplied by *Strickland* . . ." App. at 18. The court then articulated the *Hill* standard for prejudice in a plea case. App. at 19. After stating the proper standard, the Court of Appeals reviewed the record and concluded in several places, "[t]here is at least a reasonable probability that, had his confession to the police been suppressed, Moore would have insisted on going to trial rather than pleading to the offense to which he did . . ." App. at 51. *See also* App. at 46, 52 n. 26.

A. Mr. Moore Testified That He Wanted To Withdraw His Plea Based On His Attorney's Erroneous Advice Regarding The Motion To Suppress.

The record fully supports the Court of Appeals' conclusion that counsel's failing on the motion to suppress was an important factor in Mr. Moore's decision to plead no contest. Mr. Moore testified in his deposition in the post-conviction

court that he wanted to withdraw his no contest plea because of the failings of his attorney, including his lawyer's failure to properly advise him about the "Brightline rule" requiring suppression of statements when a person has requested an attorney. The State references Mr. Moore's testimony in its Petition (Pet. at 8 n. 5) but, inexplicably, states simply that Mr. Moore only complained about life post-prison supervision. The full transcript reveals that Mr. Moore discussed his attorney's advice on post-prison supervision in the same breath as he discussed the motion to suppress:

Q: Why did you want to withdraw your no contest plea?

A: Because I was worried about the life post-prison supervision, and at this time I'd started going - - by that time I had started going to the legal library in the county and *we were reading Brightline rule* and stuff like that.

Q: *And what is the Brightline rule?*

A: The State said *once you ask for an attorney, all questioning must cease.*

Q: And I guess now we're getting into the indictment question. You're saying you didn't voluntarily waive your right to an indictment?

A: Not under all the information that the lawyer had given me at the time - -

Q: Did you - -

A: - - incorrect.

Q: But at the time immediately prior to your plea, you wanted to enter a plea; isn't that correct?

A: Immediately prior to my - - yes, under the information that I had been provided at the time by my attorney, I did. Under his advice.

Supp. App. at 23 (emphasis added). This testimony fully supports the finding that Mr. Moore, if properly advised regarding suppression, would not have entered the no contest plea.

B. The Full Record Supports The Court of Appeals' Decision On Prejudice.

In reviewing ineffective assistance of counsel claims in plea cases, scrutiny of the entire record is required to determine whether a person would have taken the plea he seeks to set aside in the absence of counsel's errors. While courts properly examine the petitioner's statements and formal allegations, the crux of the inquiry is broader and more penetrating. To assess whether the petitioner would have insisted on trial, courts examine the circumstances surrounding the plea. *See, e.g., Berkey v. United States* 318 F.3d 768, 772 -73 (7th Cir. 2003)("[a] mere allegation by the defendant that he would have insisted on going to trial is insufficient to establish prejudice. Berkey must establish through objective evidence that a reasonable probability exists that he would have gone to trial.") (internal citations omitted). Review of the full record supports the Court of

Appeals' careful analysis of the facts and circumstances and finding of a reasonable probability that Mr. Moore would not have pled no contest to murder had his lawyer recognized the inadmissability of the taped statement.

1. Mr. Moore did not admit guilt and sought to withdraw his plea when he became aware of his attorney's failings.

This record contains at least four distinct factors supporting Mr. Moore's testimony in the post-conviction deposition and the conclusion of the Court of Appeals. First, Mr. Moore has maintained throughout that the death of his friend was the result of an accidental shooting. Second, this case was not resolved on a traditional plea of guilty, but, rather, on a no contest plea, which supports the likelihood he would have proceeded to trial had he been properly advised. *Compare United States v. Peppers*, No. 06-1810, 2008 WL 934053, at **3 (3rd Cir. Apr. 8, 2008) (finding no likelihood that but for counsel's errors, petitioner would not have pleaded guilty, in that he "was emphatic at the plea hearing that he did not want to go through another trial."). Third, once Mr. Moore learned of his attorney's failings, he filed timely pleadings in the state and, later, the federal, courts to have his conviction set aside.

Finally, the facts show a viable defense to murder and reasons for declining the plea offer that led to the no contest plea. The State, through the dissenters

from the Court of Appeals' decision not to conduct *en banc* review, engages in a great deal of speculation about the facts. The record, however, demonstrates why Mr. Moore was wise in his reluctance to enter a plea to murder.

As the Court of Appeals pointed out, the plea offer made to Mr. Moore yielded the same conviction and sentence as received by the co-defendant, Salyer, who went to trial. App. at 32-33. There was, thus, little incentive given him to enter a plea. Moreover, another co-defendant, Mr. Woolhiser, was permitted to plead to manslaughter, a charge that carried a lesser sentence, and the charge that Mr. Moore believed more appropriately described his conduct. Supp. App. at 22, 41. As stated by Woolhiser's attorney at sentencing, all of the statements from all of the participants were to the effect that the shooting was accidental. Supp. App. at 6. As described by the prosecutor, the men were climbing a hill and, initially, Woolhiser had the gun. App. at 226. The victim slipped at least twice and fell; and the muzzle hit his temple and the gun discharged. App. at 227.

These facts fully support the Court of Appeals' conclusion.

2. The Court of Appeals' analysis does not create a new burden-shifting approach.

The State's arguments regarding burden-shifting and the absence of evidence from Mr. Moore that he would have proceeded to trial had counsel filed

the motion to suppress (Pet. at 28, 30) ignore both the facts of this case as discussed above and the settled law throughout the country. As stated above, settled law requires courts considering the question of prejudice under *Hill* to analyze the facts of the case in precisely the manner followed by the Court of Appeals in resolving Mr. Moore's case. The Court of Appeals placed no new burden on the State in reviewing the record.

The State's arguments also confuse the reasons why counsel did not file the motion to suppress with the reasons why his attorney believed a plea was advantageous in this case. As articulated by the Court of Appeals, counsel's advice on the merits of plea versus trial were fatally infected by his failure to recognize that the tape-recorded statement was not admissible for any purpose. App. at 33-34. The lawyer's advice was further tainted by his failure to recognize the substantial difference in probative value between a tape-recorded statement that allows a jury to hear a defendant's own voice as contrasted with the oral testimony of lay witnesses. App. at 44. The Court of Appeals' assessment of these issues is precisely the type of review of the record required by *Hill*.

II. The Court of Appeals Followed The Dictates Of *Strickland*, *Hill*, And *Kimmelman* In Discussing *Fulminante* As The Relevant Substantive Law.

A. Contrary To The Assertions In The Petition, The Decision Of The Court of Appeals Followed The Proper Precedents Of This Court.

The State's Petition distorts the opinion of the Court of Appeals. While recognizing that the Court of Appeals began its analysis with *Strickland* and *Hill*, the State then, incorrectly, asserts that the court identified *Fulminante*, rather than *Hill*, as the controlling authority for analyzing prejudice. Pet. at 12, App. at 18-19. That statement ignores several facts.

First, the State ignores the fact that *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. In cases involving the failure to file a motion, this Court has long held that the question of ineffectiveness cannot be addressed without considering the substantive merits of the motion that was not filed. *Kimmelman*, 477 U.S. at 375; App. at 21. While the habeas petition in *Kimmelman* followed a trial, the same type of analysis governs a habeas challenge to a guilty or no contest plea. *Hill*, 474 U.S. at 59.

After citing *Strickland*, the Court of Appeals engaged in the required assessment of the relevant law on the admissibility of statements.[3] App. at 23-38. It could not properly have done so in the circumstances of this case without analyzing the viability of a motion to suppress under established precedent. The Court of Appeals concluded that the statement was inadmissible both because it was involuntary, as found by the district court, and because it was taken in violation of Mr. Moore's right to counsel. App. at 24-25. After reaching that conclusion, the Court of Appeals turned to the question of prejudice.

The State's next mistake is ignoring the directive in *Hill* that analysis of prejudice requires the courts to assess the effects of the substantive error, *i.e.*, predict whether the error would have changed the outcome had there been a trial. *Hill*, 474 U.S. at 59. On the facts of this case, *Fulminante* is essential to *Hill*'s prejudice inquiry.

The State not only ignores the fact that *Hill* requires analysis under *Fulminante* on the facts of this case, but also the fact that, when the Court of Appeals turned to the question of prejudice under *Strickland*, it reiterated the

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[3]As noted by the Court of Appeals, where the State claims that "filing a motion to suppress, even if meritorious, would have served no useful purpose" because of other evidence, the analysis of substandard performance and prejudice substantially overlap. App. at 21 n. 7.

Strickland/Hill standard, and then applied it. App. at 38. Under that standard, the Court of Appeals was required to assess the extent of the harm from the failure to file the meritorious suppression motion. Pages 38-51 of the Appendix set out that analysis. Finally, the State ignores the fact that, at the conclusion of the required analysis of the substantive law, the Court of Appeals properly turned back to *Strickland/Hill* and held

> There is at least a reasonable probability that, had his confession to the police been suppressed, Moore would have insisted on going to trial rather than pleading to the offense to which he did . . . In light of these considerations, the only reasonable conclusion is that Moore has established *Strickland* prejudice.

App. at 51-52.

In this context, the State's assertion that "the court expressly identified *Arizona v. Fulminante* as the applicable 'clearly established' federal law that the state court failed to apply when reviewing Moore's claim of ineffective assistance of counsel" (Pet. at 12, 18, 19), makes the same mistakes as described above. The Court of Appeals was required to analyze the record under *Fulminante* because it governs the substantive law in issue, *i.e.*, it is the "clearly established" law on the harmfulness of a statement in the circumstances of this case. Moreover, the State ignores the Court of Appeals' recognition that consideration of *Fulminante* was

only one part of the required prejudice analysis. App. 38, 41, 46, 47, 51, 52, 58, 59.

The State's arguments regarding a difference in the standard to be applied in reviewing ineffective assistance of counsel in plea as opposed to trial cases reflect either a misunderstanding of *Hill* or simple disagreement with *Hill*. Pet. at 19-20. While there are differences between review in the two types of cases, there are no "fundamental differences" as the State suggests. Pet. at 19. Rather, as this Court holds, the prejudice inquiry will be very similar in both types of cases. *Hill*, 474 U.S. at 59. While the ultimate inquiry under *Hill* is whether the petitioner would likely have gone to trial, the habeas court cannot make that decision without assessing the alleged error of counsel to make a "prediction whether the evidence likely would have changed the outcome of a trial." *Id.*

None of the cases cited by the State limit *Hill* in any way. *United States v. Ruiz*, 536 U.S. 622 (2002), did not involve a challenge to the effectiveness of counsel. The only question addressed was whether the Constitution required the disclosure of impeaching information in a plea case. *Ruiz*, 536 U.S. at 625. Nor was any question of effectiveness of counsel raised in *United States v. Broce*, 488 U.S. 563 (1989), which involved the availability of a double jeopardy claim after entry of a plea of guilty. Finally, *Tollett v. Henderson*, 411 U.S. 258 (1973),

predated *Hill*, but reached a similar conclusion regarding the relevant inquiry: when counsel's effectiveness is challenged in a plea case, the courts are to ask whether counsel's advice fell "'outside the range of competence demanded of attorneys in criminal cases.'" 411 U.S. at 268.

When the State turns to the question of the applicable "clearly established Federal law" (Pet. at 21), it again misreads the decision of the Court of Appeals and the holdings of this Court. Because *Fulminante* explains how lower courts must determine whether admission of a confession was prejudicial, the Court of Appeals was required to apply it on the substantive issue regarding counsel's actions. That is what the Circuit did. It then applied the *Strickland/Hill* analysis to resolve the question of prejudice to Mr. Moore.

The State also ignores the arguments it made in the state post-conviction and federal habeas trial courts. In both, the State explicitly engaged in harmless error analysis that focused on the existence of the multiple statements. Its argument that Mr. Moore was not prejudiced was based on its view that the availability of the statements made to his brother and female friend rendered the failure to challenge the taped statement to police, a statement whose inadmissibility the State did not contest, harmless. That is the precise analysis required by *Fulminante*.

The Court of Appeals understood that this Court's holdings require it to assess the substantive law governing the area of counsel's performance that is alleged to be deficient and to assess the seriousness of the deficiency. Thus, in order to assess both competence and prejudice in a case in which the alleged error of counsel is the failure to file a motion to suppress, when the State alleges that the failure was not harmful, the relevant law must be applied. This Court set out the mode of analysis on this issue in *Fulminante*. 499 U.S. at 297-301. The Court of Appeals followed this Court's directive when it analyzed, under *Fulminante*, the error and resulting harm from admitting the tape-recorded statement the police had taken from Mr. Moore.

B. The Decision Of The Court of Appeals Follows The Same Analytic Approach Taken By The Other Circuits.

The analytic approach taken by the Court of Appeals in Mr. Moore's case is not only not in conflict with the approach taken by the other circuits (Pet. at 23), it is entirely consistent with their decisions. Review of cases from other circuits reveals the same analytic approach. The only difference is that the State generally prevails on ineffective assistance claims in plea cases.

The Seventh Circuit's decision in *Gilbert v. Merchant*, 488 F.3d 780 (7th Cir. 2007), is illustrative. *Gilbert* involved a juvenile who had pled guilty to first-

degree murder in Illinois. After exhausting state court remedies, he petitioned for a writ of federal habeas corpus "contending that his trial counsel was ineffective in failing to seek the suppression of his post-arrest statement, which acknowledged his involvement in the crime." *Id.* at 783.

In denying relief, the Seventh Circuit set forth its analysis. Applying both prongs of *Strickland* and *Hill*, the Court explained that "given that he was convicted based on his own plea, Gilbert was obliged to complete the demonstration of prejudice by showing that had his confession been suppressed, it is reasonably likely that he would have gone to trial rather than plead guilty." *Id.* at 791. The Court then wrote: "We turn first to the voluntariness of Gilbert's confession." In so doing, the Court cited, *inter alia*, several of this Court's decisions on voluntariness and confessions, particularly those pertaining to juveniles. It then applied the criteria enunciated in those cases to the facts of Gilbert's case, and held that the Illinois appellate court did not act "unreasonably in proceeding to assess the voluntariness of Gilbert's confession [.]" *Id.* at 792. In a passage highly germane to this case, the Court concluded:

> Gilbert's case for prejudice presumes that his confession would have been suppressed on his counsel's motion and that this would have so weakened the State's case that he likely would not have pleaded guilty. The Illinois Appellate Court's reasonable determination that

his confession was voluntary precludes him from establishing prejudice in this way.

Id. at 795 (citation omitted).

Other circuits adhere to the same analytical approach. *See Iron Wing v. United States*, 34 F.3d 662, 664-65 (8th Cir. 1994) (rejecting ineffective assistance challenge to guilty plea, and holding that counsel's failure to move to suppress rifle was not ineffective; as part of its *Hill* analysis, Court applies Fourth Amendment consent principle of *Illinois v. Rodriquez*, 497 U.S. 177 (1990)); *Savino v. Murray*, 82 F.3d 593, 599-600 (4th Cir. 1996) (rejecting ineffective assistance challenge to guilty plea, and holding that trial counsel's advice that motion to suppress confession "was unlikely to succeed" was reasonable; Court applies, *inter alia*, *Edwards v. Arizona*, 451 U.S. 477 (1981), and its progeny, and concludes: "Applying the existing law to these facts, we find that it was reasonable for Savino's attorneys to conclude that their client had voluntarily reinitiated contact with the police."); *Ward v. Dretke*, 420 F.3d 479, 486-89 (5th Cir. 2005) (holding that counsel was not ineffective "in failing to challenge the search and seizure of [petitioner's] computer files prior to his guilty plea"; in analyzing claim under *Hill*, Court applies, *inter alia, Wong Sun v. United States*, 371 U.S. 471 (1963)).

C. The State's Argument That The Court of Appeals Decision Will Affect A Significant Number Of Decisions Is Incorrect.

The response to the State's argument that the Court of Appeals' approach will significantly alter the manner in which post-conviction proceedings are held starts and ends with the decision in *Hill*. There, this Court made clear that the lower courts must analyze the available facts to determine whether prejudice exists. What the State complains about as "repeated speculation" (Pet. at 27-28), is, rather, the analysis required by *Hill*. There is no burden shifting.

III. The Petition Underplays Or Ignores Several Procedural Issues That Militate Against Granting Certiorari.

In its Petition, the State suggests that the inadmissibility of the statement at issue may be in question. Pet. at 31, n 14. The Court of Appeals explicitly found, however, that the State's failure to contest the finding of the district court on the question of voluntariness was a concession. App. at 23-24, 33. The State should not be permitted to take a contrary position at this stage. *See United States v. Galletti*, 541 U.S. 114, 120 n. 2 (2004) (holding respondents forfeited argument in Supreme Court by failing to raise it in courts below); *Muhammad v. Close*, 540 U.S. 749, 755 (2004) (same); *United States v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005) (holding issues not raised by party in brief are waived); *Whaley v.*

Belleque, 520 F.3d 997, 1002 (9th Cir. 2008) (criticizing state for taking inconsistent positions).

A second procedural issue arises from the fact that in the lower courts, the State's sole argument on prejudice was that Mr. Moore was not prejudiced because he had made confessions to two people in addition to his taped confession to the police. App. at 39. As noted by the Court of Appeals in its opinion, the State at no point argued anything about other evidence in the State's possession "that would have caused Moore to accept the plea rather than go to trial." App. at 40. This was true in the federal litigation as well as the state litigation.

The Court of Appeals found the State's failure to argue other facts or theories constituted a waiver. The court stated, "the state's failure to raise below the argument that counsel's failure to move to suppress the taped confession was harmless for reasons other than the existence of the two informal confessions precludes us from considering that argument on this appeal." App. at 55-56. That holding is consistent with this Court's holding and the long standing view of the Court of Appeals. *See Galletti*, *supra; Kama*, *supra*. In this context, it is inappropriate for the State to now argue for the first time in this Court, based on the speculations of the dissenters from *en banc* review, that there is a wealth of

other information that would have informed Mr. Moore's decision to plead guilty or no contest regardless.

IV. This Court Does Not Sit As An Error Correcting Court And, In Any Event, The Court of Appeals Did Not Err.

A. Error Correction Is Not An Appropriate Reason To Seek Or Grant Certiorari.

The essence of the second question presented by the State is that it disagrees with the Court of Appeals' view of the harm befalling Mr. Moore from the failings of his attorney. Rule 10 of the Supreme Court Rules describes the "character of the reasons" the Court considers when acting on a petition for certiorari. The Rule concludes that "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The State's disagreement with the Court of Appeals' application of *Hill* is not a basis on which certiorari should be granted.

B. The State's Description Of The Underlying Facts Of This Case Distorts The Record.

The State's Petition inaccurately presents the Court of Appeals' analysis of the relevant legal issues as set out above. It also distorts the record of the underlying facts.

This case is best described by the trial judge who sentenced Mr. Moore as one that "has got several tragedies within it . . . the tragedy here is this was a person that was apparently a friend of yours . . . you have been able to live in the community pretty much crime free . . . the thing just got out of hand." Supp. App. at 8-9.

Mr. Moore has always denied his culpability for murder in the death of Kenneth Rogers. Mr. Moore was part of a group of friends who had been drinking and then decided to scare one of their buddies who had burglarized one of the other men's homes. App. at 222-23. While admitting his participation in Rogers' kidnapping, Mr. Moore has maintained from the outset that the death was accidental. Even the prosecutor's words at the time of the plea suggest an accident. App. at 227. As the prosecutor stated at Mr. Moore's sentencing, "they were going to take [Mr. Rogers] out into the woods, release him and let him walk home, basically to put the fear of God in him at least." Supp. App. at 4.

Mr. Moore made three statements: to his brother, a friend, and the police. The statement taken by the police was detailed and tape-recorded. It was inadmissible because it was involuntary and also because it was taken after Mr. Moore asserted his right to counsel. Mr. Moore's lawyer failed to recognize that a viable motion to suppress should have been filed and the distinction among the

three statements. Mr. Moore reluctantly entered a plea of no contest because his attorney failed to properly advise and advocate for him. The state post-conviction court unreasonably determined that the tape-recorded statement was admissible.

The district court concluded that the statement was involuntarily taken. The Court of Appeals properly applied *Strickland*, *Hill*, *Kimmelman*, and *Fulminante* in concluding that Mr. Moore was prejudiced by his attorneys failure to move to suppress the inadmissible statement. There is no error to correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted this 6 day of January, 2010.

Steven T. Wax
Counsel for Respondent

SUPPLEMENTAL APPENDIX

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF JOSEPHINE

* * *

STATE OF OREGON,
Plaintiff,
vs.
RANDY JOSEPH MOORE,
Defendant.

Case No. 96-CR-0118
CA No. A93317

BE IT REMEMBERED that the above-entitled cause came on for Motion to Strike and Sentencing on May 1, 1996, in the Circuit Court of the State of Oregon, for the County of Josephine, at the County Courthouse, Grants Pass, Oregon, before the Honorable Gerald C. Neufeld, Circuit Judge, Presiding.

APPEARANCES

Mr. Scott K. Titzler, Deputy District Attorney for Josephine County, Oregon, for the Plaintiff.

Mr. Kim Jordan, Attorney at Law, Grants Pass, Oregon, for the Defendant.

MOTION TO STRIKE & SENTENCING

MAY 1, 1996

MR. JORDAN: No, thank you. Mr. Moore does not desire to make a statement, Your Honor.

THE COURT: You had nothing, Mr. --

(The Court's microphone is barely audible.)

MR. TITZLER: No, Judge.

THE COURT: All right. Then Mr. Titzler I think we're down to the time of sentencing. Do you have some comments you'd like to make regarding that?

MR. TITZLER: Thank you, Judge. Does Your Honor wish a recap of the facts or do you recall them from the time of plea.

THE COURT: I think it would be safe to say that I recall them generally. And that doesn't help you very much. It -- you know, we're not really pressed for time here so it probably wouldn't hurt to go over the facts.

MR. TITZLER: Judge, on the day of the incident, December 7 of 1995, the -- a -- Mr. Woolhiser and Mr. Moore, Mr. Salyer and Mr. Rogers, the victim and decedent in the case, were, if not related, at least friends on a social basis, perhaps closer in some situations.

On that particular date, or prior to that date, the decedent Mr. Rogers was suspected of having burglarized the home of Story Gulch -- actually a cabin of

Story Gulch that Mr. Salyer lived in and also poked the tires of Mr. Salyer's car.

Early in the morning of December 7, Mr. Woolhiser, Mr. Moore and Mr. Salyer were all together in Mr. Woolhiser's house. There was discussion about Mr. Rogers having done this vandalism to the cabin and the car and it was decided that the three of them; Moore, Woolhiser, and Salyer, would go to Mr. Rogers' trailer where he lived, it was actually an RV, and confront him about this vandalism of the cabin.

On the way to Mr. Rogers' house, at least with regards to Mr. Salyer's statement, they stopped the car, the license plates were covered up with duck tape, and there's some evidence that clothing was removed from the trunk of the car, a basket of clothing, and put in the back seat.

They got to Mr. Rogers' residence and at this point the statements of all three Defendants were to the effect that they were in the range of a five on a scale of one to ten, one being stone cold sober and ten being falling down drunk.

Mr. Woolhiser went into the trailer. Mr. Rogers was there. He struck Mr. Rogers several times in the face with his fist. Mr. Woolhiser brought a gun, a 22 revolver with him, chrome plated or nickel plated. That gun

was taken out and at least brandished in the direction of the face of Mr. Rogers in the trailer.

At some point Mr. Rogers ended up face down on the trailer floor with his hands behind his back. Mr. Salyer got the duck tape from the car that they had driven to the scene. The hands of Mr. Rogers were taped behind his back very tightly.

Mr. Rogers was then taken out of the trailer and half carried or half walked to the trunk of the car. Salyer opens the trunk of the car. Several of the Defendants get Mr. Rogers into the trunk of the car. The trunk is closed. They get in the car.

Mr. Salyer drives to Hayes Hill. They take the old Hayes Hill cutoff. And the intent at this point was to rough up Mr. Rogers, teach him a lesson about treating friends or family in the manner that he treated Roy Salyer's cabin. They were going to take him out into the woods, release him and let him walk home, basically, to put the fear of God in him at least.

They got to a pullout on the old Hayes Hill highway. They got out -- all three got out of the car. They got Mr. Rogers out of the trunk of the car. The gun was still at this point in the possession of Mr. Woolhiser. Mr. Rogers fell at this point, hands still taped behind his back, did a head plant off the side of the road, he got back

got accompanying cases for Woolhiser and Moore, both of which will be dismissed on sentencing. The -- there's a contempt of Court arising out of the wood products case 93-0855M for Mr. Woolhiser and then 96-0283M for Mr. Moore, theft of rented property. And I have dismissals for the "F" cases also.

THE COURT: Ms. Browne.

MS. BROWNE: Judge, I think the majority of the information that we wanted to present to the Court we have done so through an offer of proof. The Court has before it my client's record. And under the sentencing guidelines my client of course would be serving a much less sentence assuming Your Honor followed the guidelines and sentenced my client as such.

The -- under Measure 11 of course he would not be eligible for good time and there are a number of programs that he will be prevented from participating in. It's a difficult situation I guess at this point because defense counsel always feels as though they should be arguing the mitigating circumstances and because of the circumvention of -- created by Measure 11 that's not possible.

We would ask, however, that the Court take into consideration the rendition of facts given by Mr. Titzler both this time and at the earlier time when the plea

was entered.

The shooting here as all of the statements have indicated -- that we've received, have indicated that the shooting was an accidental one. The situation has been a very difficult one for my client to accept, to acknowledge and to step forward and speak to the police about, and also to step forward and to take the plea offer to -- to enter the agreement that's been presented to the Court.

And it's been a hard thing for him to understand, and I think for all of the family to understand as well; the concept of felony murder and how it could apply in a situation where at least the majority of the information would indicate that it was an accidental shooting.

We would ask that the Court take into consideration all of the information that's been adduced here for the Court and as well the fact that my client has virtually no record at all. The -- believe it was the Larceny occurred when my client was 17. And the other, the wood -- wood products was a dispute over -- over firewood. Other than that there is no record. So the penalty that -- that would be exacted by Measure 11 is -- well, don't argue it, right?

We would ask that the Court take all of that into consideration and I guess other than that we have

nothing to add. My client again does not wish to address the Court at this point as he feels that there would be no effective right of allocution as the Court has no ability to consider mitigation.

THE COURT: Mr. Jordan, anything you'd like to say on behalf of your client, Mr. Moore?

MR. JORDAN: No, I think not, Your Honor, other than to say that it was very difficult for Mr. Moore to accept the fact the felony murder could occur under these circumstances because he -- he too, in all of his statements made to the police and to me, indicated that the shooting of Kenny Rogers was just a -- a pure accident. And I think that Mr. Moore has throughout -- at all of this, once he came to the realization that that's what the law really said and that's what it really meant, has been accepting of that.

And his concern has very largely been for his brother and for other members of the family -- than himself. He's -- his position has always been that he knew what had happened was wrong and he was going to have to pay for it. He's been very dismayed at the Measure 11 -- the harshness of Measure 11, but he has never attempted to sidestep the notion that he's done wrong and he was going to have to pay for it. And his -- as I say his concern has been largely for his brother and his family.

With that comment I would say we're ready to

be sentenced.

THE COURT: All right. Let me start with the sentencing of Mr. Woolhiser first. And I guess your attorney has stated Mr. Woolhiser that you did not at this point wish to address the Court. I just want to hear those words from you.

THE DEFENDANT: That's true.

THE COURT: I'd guess I'd like to just say something to Ray Moore. I don't remember saying what I said to you. It sounds like something I probably would say and I'm glad you made me eat my words.

MR. MOORE: I'm glad that I was able to do that. Sorry about that, by the way, Your Honor.

THE COURT: This case, and I don't have to tell you folks this -- this case has got several tragedies within it.

The first tragedy of course is I think anytime we see a loss of life like this, it's a tragedy. And what makes it even more tragic is this was an unnecessary loss of life. You know if you're in a car accident and your number's kind of up, that's a tragedy and sometimes those things just can't be avoided.

The tragedy here is this was a person that apparently was a friend of yours. He was treated kind of like a member of the family and winds up dying. And then

there's the tragedy I guess that -- I guess that the impact that this has on you. The two of you have been able to live in the community, for the most part no serious problems, pretty much crime free; and here you're looking at spending really the prime of your life in prison for something that I think you've probably thought about a hundred times, all of which could have been avoided. It just didn't need to happened, and here we are. The thing just got out of hand.

And then we have thrown into the mix of all this the effect of Measure 11. And the consequences are extremely serious. And you know I -- I guess the word for it is it's tragic and from your point of view it was stupidity, absolute stupidity, and I'm sure you've thought about that a hundred times. There's probably fifty or sixty times along the way that the course of events that happened here could have been changed. And the thing went to its ultimate conclusion and that conclusion was this.

Count-1 on Mr. Woolhiser is Manslaughter in the first degree. The Court will sentence per Measure 11 and 137.700 to the 120 months.

Per the agreement the Count-2, which is the Kidnapping in the first degree with a firearm, the sentence would be 90 months. That would be a consecutive sentence. Again that's per the stipulation of the parties. There would be with Count-2 the firearm minimum, 161.610, of 5 years

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

RANDY JOSEPH MOORE,

Petitioner,

vs.

MITCH MORROW, Acting Superintendent, Oregon State Penitentiary,

Defendant.

No. 98C-150.

COPY

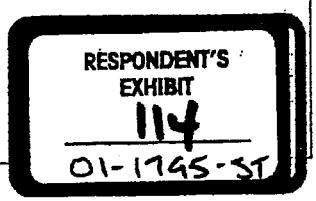
DEPOSITION OF RANDY JOSEPH MOORE

BE IT REMEMBERED that the deposition of Randy Joseph Moore was taken for the defendant, pursuant to stipulation hereinafter set out, before Martin Hauge, Certified Court Reporter for the State of Oregon, on October 28, 1999, beginning at the hour of 2:30 p.m. at the Oregon State Penitentiary, 2605 State Street, Salem, Oregon.

APPEARANCES

Steven H. Gorham, Attorney at Law, representing the Petitioner;

Stephanie Andrus, Assistant Attorney General, representing the Defendant.



STIPULATION

(At said time and place the following stipulation was entered into between the attorneys present in behalf of the respective parties:)

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, through their respective attorneys, that the deposition of Randy Joseph Moore may be taken before Martin Hauge, a Certified Shorthand Reporter for Oregon, at this time and place, on oral interrogatories, direct and cross, to be propounded to said witness as by law provided.

IT IS FURTHER STIPULATED AND AGREED that all irregularities as to notice of time and place and manner of taking said deposition are hereby waived, each party reserving the right to object at the time of trial to any question or answer as to the competency, relevancy or materiality thereof, but that objections as to the form of the questions and responsiveness of answers must be made at the time of taking said deposition or shall be deemed to be waived.

IT IS FURTHER STIPULATED that the reading and signing of said deposition by the witness are hereby expressly waived.

RANDY JOSEPH MOORE

was thereupon called as a witness, and having been first duly sworn by the Court Reporter, was examined and testified as follows:

EXAMINATION

BY MS. ANDRUS:

Q. Mr. Moore, I'm from the Department of Justice. I'm here to take your deposition regarding the petition for post-conviction relief that you filed challenging your conviction from Josephine County. If I'm correct, you're complaining about your attorney Kimmie Jordan?

A. Yes.

Q. All right. What I'm going to do is go through your petition, essentially through the allegations that you have made and ask you to explain them so I can understand them. But before we start, I will ask if you're taking any medicine that might impair your ability to understand my questions?

A. No.

Q. Okay. I'm actually going to start with your second claim which is that your counsel failed to conduct an adequate and reasonable

investigation. And what do you think he should have investigated?

A. All the evidence as to the tire tracks.

Q. Do you dispute that you were not in the car?

A. No.

Q. You do not dispute that?

A. No.

Q. Do you dispute that Mr. Woolhiser -- and who was your other co-defendant, Mr. Salyer?

A. Mr. Salyer.

Q. Do you dispute that you kidnapped the victim?

A. No, not now.

Q. So what would investigation of the tire tracks have done?

A. It would have shown that they didn't have evidence to prove that we were there.

Q. I guess that goes back to your first question. Your first one, you're saying that your confession to the crime should have been thrown out?

A. Uh-huh (affirmative).

Q. Well, if you had confessed the crime, why would your counsel go investigating for evidence

that would establish that you weren't there?

A. He didn't investigate anything, even our statements. He didn't even know of what we said in our statements.

Q. Were they transcribed?

A. Yes, they were.

Q. And you're saying he didn't get a transcribed copy?

A. I'm saying that when I asked him about them, he said he hadn't had time to go over them.

Q. When was that?

A. After the sentencing.

Q. Okay. I'm going to go back to your first claim. You're saying that you asked for an attorney?

A. Yes.

Q. Can you point out in the transcript where you asked for an attorney?

A. On page 2 of the deposition I believe it is.

Q. Page 2 of the transcript?

A. Of the transcript.

MR. GORHAM: Do you have one?

MS. ANDRUS: Yes.

Q. (BY MS. ANDRUS) Page 2?

A. I believe it's page 2.

Q. Why don't you point out to me where you think you asked for an attorney.

A. Which one is this? Is this the first one or the second? Is that the first or the second one? They have two sets. Actually there was one meeting and they divided it up into two transcripts.

Q. This is on December 20th, 1995.

A. What time?

Q. At 3:10 in the afternoon.

A. 3:10? Okay, that should be the first one.

Q. So there's one before that?

A. No, that's the first one.

Q. So there should be a second transcript?

A. Yeah, they say another meeting, but it's the first meeting where I asked for an attorney.

I don't see it here. I don't see it on page 2.

Q. Okay.

A. Let's see here. This has -- he has in the petition, the copy that he gave me shows it. In the memorandum that you got it shows me the page number and.....

MR. GORHAM: I don't have it with me, but suffice it to say, Mr. Moore, you told and you believe it's in the transcripts someplace.

THE WITNESS: Yes, it's in the transcripts.

MR. GORHAM: Whether you're accurate whether it's page 2 or 20 or whatever.

THE WITNESS: It's in the first few pages because the first -- they have 1 through 14 is one meeting and then they start all over again. It's the second meeting --

Q. (BY MS. ANDRUS) I'm sorry to interrupt you. And you're saying it's in the second one?

A. It's in the 1 through 14, the first meeting around 3:00.

Q. What if I give you page 1 through 14 and you tell me where it is, which is the first meeting at 3:10. This is the first meeting, 1 through 14.

A. On page 3.

Q. On page 3 where you say. . .

A. Right down by your finger.

Q. Okay. All right.

MR. GORHAM: Why don't you read it for the record.

MS. ANDRUS: I think I would have to read

it in context. It would be about page 2, it would be about 2 pages.

MR. GORHAM: Okay.

Q. (BY MS. ANDRUS) So now let's move to your claim again. You asked about your investigation. You're saying your counsel should have investigated. You started by saying he should have investigated tire tracks to show that you weren't there?

A. Yeah, to show that they didn't have evidence to prove that we were there.

Q. What else should he have investigated?

A. The photo lineup.

Q. What photo lineup is that?

A. Where he showed -- the detective showed our photographs to -- I can't remember the lady's name where she identified me where he showed her three photographs of me, my brother, Ron E. Woolhiser and Roy Salyer after our pictures had been in the paper and on T.V.

Q. And was this woman a woman who is standing next to the victim's R.V.?

A. She was in a car, I guess. I never seen her.

Q. What else should he have investigated?

A. Our statements.

Q. To see if there was some basis to suppress?

A. Yeah. And he did not file no motions for omnibus hearings or nothing.

Q. Is there anything else?

A. 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 make sure 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.

Q. Which detective was that?

A. Whitehead and Carol Huffman.

Q. And what else should he have investigated?

A. Basically that's about all I can think of right now.

Q. You allege that your counsel failed to ensure that your no contest plea was freely and voluntarily given. Why do you think it was not?

A. Because he informed me that I was possibility of the death penalty on an accidental

death which was not possible. And that if I did take the deal, that they would reduce the charges on my brother; but if I didn't, they would go after the death penalty, possibly aggravated murder, possibly the death penalty on me, my brother, and my co-defendant Roy.

Q. So when you entered your plea, you thought you were entering your plea to escape the imposition of the death penalty?

A. Uh-huh (affirmative). And aggravated murder.

Q. So that's the primary reason why you feel it was not knowing?

A. Yeah, that.

Q. Did you understand when you entered your plea that you would not have a trial?

A. Yes, I understood that.

Q. But essentially you just thought that you might get the death penalty?

A. Yeah, I was faced with aggravated murder according to my attorney.

Q. You allege your counsel failed to adequately advise you regarding the ramifications of your plea. What did you not know about?

A. That after I was -- entered a plea of no

contest, they could force me to testify.

Q. You believe that if you entered a no contest plea --

A. I would not have to testify against my brother or my co-defendant.

Q. Did you testify against your co-defendant?

A. They attempted to make me testify and I refused and the D.A. dropped the charges. Well, the Judge wanted to give me contempt.

Q. But you didn't receive contempt; isn't that correct?

A. No, because the D.A. dropped the charges, dropped it.

Q. So, in fact, you were not forced to testify against your brother; is that correct?

A. No, I was not.

Q. Is there any other consequence of your no contest plea that you think that you were not advised of?

A. Well, my Denny Smith.

Q. You were not aware of Denny Smith?

A. I was not aware that I was even eligible for it. As a matter of fact, I was told I was not eligible for it.

Q. But you got it?

A. But they gave it to me anyhow, and my attorney didn't object to that.

MR. GORHAM: And he's probably not legally eligible for it.

THE WITNESS: And then my life in prison, life post-prison supervision, I was worried about that. And my attorney informed me that after three years I could have it dismissed.

Q. (BY MS. ANDRUS) And now you have life. Any other consequence you were not aware of?

A. That's about all for now.

Q. Did you discuss with your counsel specifically the post-prison supervision?

A. Yes, and it's even in the sentencing transcripts where I was hesitant and the Judge, the D.A. and my counsel talked me into taking the deal, saying that it was not a life sentence.

Q. You're saying that you wouldn't have taken the deal if you had known that?

A. If I would have known I could be stuck with it the rest of my life, yes, when I took the deal.

Q. What's this about your brother? Was your brother charged with any crime?

A. He was the co-defendant, Ron Woolhiser is my brother.

Q. And he was charged with felony murder; is that correct?

A. They reduced it when I took the deal to manslaughter and kidnapping.

Q. What was he charged with originally?

A. Originally we were held on manslaughter, kidnapping and assault.

Q. And then you were reindicted for felony murder?

A. I guess at the sentencing, at the plea hearing I was reindicted just for that alone.

Q. So you're saying your counsel advised you that if you didn't take the plea, then your brother wouldn't be able to get manslaughter, he would get something higher?

A. The D.A. would go for possibly aggravated murder on all three of us.

Q. And that's what your counsel told you?

A. Yes. He told me 25 years was a good deal.

Q. So you believe that what you did had some consequence on your brother?

A. Yes.

Q. Why did you want to withdraw your no contest plea?

A. Because I was worried about the life post-prison supervision, and at this time I'd started going -- by that time I had started going to the legal library in the county and we were reading Brightline rule and stuff like that.

Q. And what is the Brightline rule?

A. The State said once you ask for an attorney, all questioning must cease.

Q. And I guess now we're getting into the indictment question. You're saying you didn't voluntarily waive your right to an indictment?

A. Not under all the information that the lawyer had given me at the time --

Q. Did you --

A. -- incorrect.

Q. But at the time immediately prior to your plea, you wanted to enter a plea; isn't that correct?

A. Immediately prior to my -- yes, under the information that I had been provided at the time by my attorney, I did. Under his advice.

MS. ANDRUS: I have no further questions.

MR. GORHAM: I think I will. I'm going

to take a short break.

(Recess.)

EXAMINATION

BY MR. GORHAM:

Q. You had another brother other than the brother you were accused of doing this crime with; is that correct?

A. Yes.

Q. What was his name?

A. Ray Moore. He was in the -- present at the interrogation.

Q. And was he involved in some sort of crime before the crime that we're talking about?

A. Yeah, in '83 he was involved in a shooting where two people died and another person was shot in the neck and wounded.

Q. And at that time or at some point was he an informant for the police?

A. Yes, he was.

Q. And at some point during the crime that he was involved with, not this crime but the crime that he was involved with, did he get some sort of deal?

A. Yes, from Dutch Whitehead and Carol

Huffman, they had a warrant out for his arrest to shoot on sight, dangerous because of the killings. But when he made a statement to them and turned it in, they dropped all charges.

Q. And how did that affect your interrogation?

A. Well, the night -- prior to this interrogation when they took us to county jail in the police car, we invoked our Fifth Amendment rights. They said, well, they'd release us that night if we'd promise to go see our brother Ray in the morning and come in with him the following day.

Q. Did you do that?

A. Yes, we were supposed be in at 1:00, but we couldn't find an attorney in Medford to take our case. So we called them at 1:00 to tell them we'd be in later, and they said if we were not there at 3:00, that they would come and get us and we would not like the way they came and got us. So at 3:00 we came in with our brother Ray.

Q. Did they make some statement to you to get you to talk while your brother Ray was there?

A. Yes, they said if it was an accident like we talked the previous night, they would go to bat for me like they went to bat for my brother Ray.

Q. And did that influence your deciding to talk?

A. Oh, yeah, it did because, you know, that's what I wanted to hear to let them know, okay, they're going to help me out here, you know.

Q. And did they?

A. No, they did not.

MR. GORHAM: That's all the questions I have.

MS. ANDRUS: I have no further questions.

(Deposition Concluded)

Certificate

STATE OF OREGON)
) ss.
County of Marion)

I, Martin Hauge, a Certified Shorthand Reporter for Oregon, certify that, pursuant to stipulation for counsel for the respective parties hereinafter set forth, Randy Joseph Moore personally appeared before me at the time and place set forth in the caption hereof; that at said time and place I reported in stenotype all testimony adduced and other oral proceedings had in the foregoing matter; that thereafter my notes were reduced to typewriting by me, and the foregoing reporter's transcript, consisting of 17 consecutive pages, constitutes a full, true and accurate record of such testimony adduced and oral proceedings had and of the whole thereof.

Witness my hand at Salem, Oregon, this 8th day of November, 1999.

Martin Hauge

Martin Hauge, Court Reporter
CSR No. 90-0089

CERTIFIED SHORTHAND REPORTER
CSR
90-0089
Martin Hauge

INTERVIEW WITH RAY MOORE, RANDY MOORE, RONNY WOOLHISER, AND DEBBIE ZIEGLER.
by Det. Sgt Ron Goodpasture, Det. Dutch Whitehead, and Det. Carroll Huffman
December 20, 1995

RAY - RAY MOORE
RM - RANDY MOORE
RW - RONNY WOOLHISER
DZ - DEBBIE ZIEGLER
DW - DET. DUTCH WHITEHEAD
RG - DET. SGT. RON GOODPASTURE
CH - DET. CARROLL HUFFMAN

RG: Okay, let's start. Today is December 20. I'm Ron Goodpasture, it's 3:10 in the afternoon. This conversation is being tape recorded. In the room is ah Det. Whitehead, Det. Huffman, myself, Ray Moore, Randy Moore, Lonnie Woolhiser, and Debbie Ziegler. Ah, we're here to ah discuss this matter of the murder of Kenneth Rogers, and everybody here is fully aware that the conversation is being tape recorded. Let the record reflect everybody is nodding their head yes. (Laugh) So anyway, ah you guys had some questions for us?

LW: Well yeah we want to know, we just want to know what we are being charge with and...

RG: Well, you haven't been charged with anything yet. When and if we arrest you, then you'll be charged. And we've told you I think that probably the charge will be ah murder. ??? one time ??? something close to that.

RAY: Was the other person involved or, or allegedly involved, uh, charged?

RG: I don't know if you guys want to address that issue or not.

ATTACHMENT

INTERVIEW WITH RAY MOORE, RANDY MOORE, RONNY WOOLHISER, AND DEBBIE ZIEGLER.
by Det. Sgt Ron Goodpasture, Det. Dutch Whitehead, and Det. Carroll Huffman
December 20, 1995

DW Well, it doesn't matter, it doesn't matter, why you, you'll find out, yes, he's charged, he's in jail.

LW: I knew that last night, more or less.

RAY: Yeah, that's what we surmised.

RAY: Yeah, um, I can't really speak for my brothers, but I knew there are things that they would like to discuss, that they're worried their welfare and the manner in which, what they'd like to discuss would reflect on them and that is the purpose that they, they've showed me interest in an attorney, 'cause they're, they're kinda scared.

DW: Oh, I can understand that and as far as...

CH: _____ understandable.

DW: ...yeah, and as far as what the concerns are for your welfare, okay? We don't know if we can help you until we find out what they are.

RM: Well I think you have a pretty good idea.

DW: What?

RM: I mean as far as the comments you made last night, I think you have a pretty good idea ___? of what really happened _____??

DW: Yeah...

RM: You see....

RM .....until I, I have to be able to talk to somebody that's on my side, you know, for me, to be able to go tell nobody, _____? I don't trust my judgement right now.

CH: You seem pretty upset, that's understandable.

RAY 'Cause the individual involved was a friend of his

CH: We uh, we understand that, you know.

INTERVIEW WITH RAY MOORE, RANDY MOORE, RONNY WOOLHISER, AND DEBBIE ZIEGLER.
by Det. Sgt Ron Goodpasture, Det. Dutch Whitehead, and Det. Carroll Huffman
December 20, 1995

RAY: And uh, you know like they, they know that, that there's something that's going to come out of this, okay, something has to. They, you know, people have made beds that have to be slept in, you know.

DW: That's very true.

RAY: And, uh...

DW: Sometimes when people make a bed that they sleep in, it doesn't hurt to take that bed and straighten it up once in a while.

RAY: That's exactly right.

DW: And the only people that can straighten up their own bed are, of course, is the person that just slept in it, they can come back and straighten their bed up some, and sometimes it makes the bed look better.

RAY: Exactly. I agree completely. You know, um,

CH: Even if you get, really in a lot _____? wait until we can sit down with you and..

KW: You know, we'd just like to talk to somebody, you know

CH: Yeah.

RM: As quick as possible, talk to a lawyer, so

CH: I know.

RM: I believe he's going to say what I want him to????

RAY: If there was some way we could maybe get an attorney in here for a consultation..

DW: Well.

RAY: ...real quickly..

DW: There's, there's only two ways that you're going to be able to ....

DW: One is to charge him and you go to arraignments and you get formally charged and if you don't have the money to afford an attorney, which I think you, that's already been discussed, then one will be appointed to represent you.

INTERVIEW WITH RAY MOORE, RANDY MOORE, RONNY WOOLHISER, AND DEBBIE ZIEGLER.
by Det. Sgt Ron Goodpasture, Det. Dutch Whitehead, and Det. Carroll Huffman
December 20, 1995

??: Alright.

DW: Okay. That's it. The other way is, and I think that's already been brought up prior to the recording being turned on, you said that, they wanted too doggone much money and none of you have that kind of money.

RAY: Yeah, and that's their concern, to be honest, is the money. You know, with the attorneys and our concern is having justice served properly.

CH: And,.....???

DW: That's our concern.

CH: _____ is the fact that _____

DW: I think that between these gentlemen here and the other people we've talked to, all we've ever told anybody all we want is the truth.

CH: Yeah, and like I said, you know, like you're aware, you know you think that we know what the story is and stuff and you know, things get out of hand ___?

DW: And as, as you, as you well know, when we talked with you guys, we told you that we would go to bat for you as long as we got the truth.

RM: See that's what I want to hear.

DW: Okay.

??: _____?

DW: And that's understandable, we understand that also, okay?

RAY: I know in my, this is for myself, saying, there was once an officer, and I said hey, look, I want out, I did something and been doing something. I want out of this, I want a chance. And this officer said, okay, Ray, I'll go to bat for you. And that officer's your captain, laughs.

CH: But he did go to bat for you _____???

RAY: That's exactly right.

INTERVIEW WITH RAY MOORE, RANDY MOORE, RONNY WOOLHISER, AND DEBBIE ZIEGLER.
by Det. Sgt Ron Goodpasture, Det. Dutch Whitehead, and Det. Carroll Huffman
December 20, 1995

DW: You knew what it took...

RAY: I talked to him and he stood behind his word one hundred percent and he's probably one of the best friends I have in the world.

CH: And it's the same with us, we can't go to bat for you, I mean we can't do our best for you until we can sit down and lay up, lay all, lay the cards out, and.

DW: It's be like, it'd be like us getting up to bat in the world series without a bat in our hands.

RAY: Or know what team you're batting against.

CH: So, you know that's, I mean , _____?? we can, decision's got to be made, I guess, I know.

RAY: Decision's here. If you guys want to wait for an attorney, then do it. If, if this guy ???? tells you to wait for an attorney, then do it. Do you think that you can....

RM: I think I can straighten it up by just worrying about getting him hurt, too much.

RAY: Well, you're not going...

LW: That's neither here nor there, I know.

CH: You're not going to hurt _____?? You got to take care of yourself, first, okay, and Lonnie, Lonnie understands that. Lonnie's got to take care of himself.

DW: You know last night we talked we could see the real closeness, okay, and that is a rare commodity nowadays in this world, lot of people don't have the closeness you guys have got.

CH: Take a man to do what you guys are doing.

DW: I agree with that. The thing is, you said you'd like to straighten this thing out, and you can do so but you don't want to get Lonnie hurt.

RM: Uh-huh.

DW: Okay. Not until we can turn around and take what you're going to say to straighten things out, got to the D.A.'s office, and ask about Lonnie's behalf. The same thing goes with Lonnie, whatever he says, if he doesn't want to get you hurt, he turns around and tells us,

we got things that we know that we can corroborate what you're telling us is the truth, we'd go to the D.A. for Lonnie on your behalf. Okay? Carroll and I both told both of you guys that the other night, we would go to bat for you as long as we got the truth.

CH: I mean we can't do that until we know...

RM: Well, should I...

LW: Might as well.

CH: ?????

DW: Hold on a second. You've already, you've already said that you wanted an attorney. Here and on this tape recorder your changing your mind and you're willing to talk with us.

RM: Yes.

DW: 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. I want him to tell me right now on the phone that you can change your mind and he will accept it. So there's no jammin' down the road, okay?

RM: Okay.

DW: So give me a minute and let me go call him.

CH: Get some slips too out your..

DW: Okay.

CH: You okay with this?

??: ???

CH: Hey, we respect you guys for coming in. And you know, we believed you last night. Take a man to admit that he made a mistake.

??: _____??

CH: Hard thing to do. But, once you make that step then life starts over for you.

??: _____??

CH Do you know where Bo and Vicky went?

RM No

DZ No

RM No I have no idea

DZ No

LW They just said they were gettin cuz

RM He he pretty well guessed what's went on and he didn't want to be here for no questions or nothing

RM He said he was wanted

DZ I just figured they they were

RM I understand that you know cuz he was (unreadable/covered)

DZ (unreadable) hadn't known em long. I didn't think anything of it

DW We understand that while everyone is down at the ranch for the barbeque there was a beer run made Saturday night and then I believe it was Ed and Roy that made the beer run and when they came back they brought a newspaper with them because the lady at the store had said that you know that uh it was in the paper about Ken

LW Uh hum

DW K? When that newspaper was brought back to the ranch and that article was read and everybody knew that Ken's body'd been found, was there any discussion about it at all

LW Well everybody we just kind of you know played it (unreadable)

? Yep

LW We didn't know nothin about it

LW We didn't even know nothing about it and

LW it was a shame and all that kind of stuff you know an

DW OK

RM Didn't want to get anybody else in trouble, you know, enough people

DZ I didn't know until we'd read the paper and I still didn't know the actual thing

RM Yea but everybody's basically guessing but nobody ever got (unreadable/covered) by it

DZ (at same time as above line) everybody was just talking about how he and Kenny and reminiscing and we you know

RM Loose lips sink ships

DZ how could it you know

RM I was scared (unreadable) hoping like I said I was hoping you'd look the other way but I I knew he (unreadable/covered) but I wasn't going to run

DZ (same time as above line) how could it happen (unreadable) cuz he hitchhiked all the time, he drank all the time

DW That was the general conversation then?

DZ Yea nothing you know

DW OK. You got anything else Carroll?

CH No. Do you have anything you wanta say Lonnie?

LW Uh, other than the fact that it was an accident man, it wasn't it wasn't planned it was

CH How do you feel about what happened?

LW Feel like shit

CH Randy, you want anything you want to say

RM It will never be the same

CH Lonnie was just getting into a nice relationship with a lady

DW OK. I um I don't have any anything else at this point that I want to ask, um uh I'm sure there's gonna be a other questions that will come up on you know for you guys, there'll be

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

RANDY JOSEPH MOORE, Petitioner, v. JOAN PALMATEER, Superintendent, Oregon State Penitentiary, Defendant.	No. 98C-15019

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED That, pursuant to notice duly given to all parties in interest, the above-entitled cause came on regularly for trial in the Circuit Court of the State of Oregon for the County of Marion, at Salem, on the 23rd day of July, 2000, the Honorable Terry Ann Leggert presiding.

APPEARANCES

Mr. Steven H. Gorham, Attorney at Law, appeared on behalf of the Petitioner

Mr. Ward Douglas Marshall, Assistant Attorney General, appeared on behalf of the Defendant.

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response, we'll give you two weeks to do that. Just let us know if you are actually going to respond to it. Okay?

MR. MARSHALL: Okay. Thank you, Your Honor.

THE COURT: Thank you. All right. With that, are you ready to proceed?

MS. SAGER-KOTTRE: Yes, we are, Your Honor.

THE COURT: Okay.

MS. SAGER-KOTTRE: We would call Raymond Moore.

THE COURT: Mr. Moore, if you'd stand forward. Come all the way up here, please, and raise your right hand.

RAYMOND MOORE,

was thereupon produced as a witness and having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

THE CLERK: Please be seated and when you're seated, state your name and spell your last name for the record, please.

THE WITNESS: My name is Raymond Leon

I had no idea what. When I did show up over there -- because I dropped everything and got off work and headed right over and I talked to them at Lonnie's house at which time they basically ran down to me the scenario that had occurred and asked me what they should do.

Q And what did you tell them?

A I told them that we had three options. One option, they run and which at some point they would be caught and the odds are that they would be killed. Number two, they try playing it off and, you know, hope that they didn't get caught.

THE COURT: What do you mean, playing it off?

THE WITNESS: Play it off like they didn't have anything to do with it, you know, they didn't know anything about it. Knowing my brother Randy, that was impossible. Randy has -- he's got a conscience that's just --

THE COURT: I'm just still trying to figure out what the term is. So what you mean is just act like you didn't know anything about it?

THE WITNESS: Yeah. Act like you didn't know anything, you know, deny everything.

THE COURT: Okay. And would they have told you they did know something about it so you couldn't

play it off?

THE WITNESS: Not really at that time. They just told me what -- that the police officers had picked them up the day before in regards to a murder and that they let them go until they talked to me because they wanted some advice from someone.

THE COURT: Okay. Go ahead. I just -- I need to understand your terminology.

THE WITNESS: Oh, you bet. Yeah.

THE COURT: Okay. Go ahead. And then the third option. You said --

THE WITNESS: And then the third option was to stand up like men and be accountable. If it was an accident like they had told me, then they would have nothing to worry about. The police department had worked well with me and I believed that they would do the same with them if they had told them.

BY MS. SAGER-KOTTRE: (Continuing)

Q What was your -- what is your relationship with Lonnie Wilhiser, just to clarify?

A Lonnie Wilhiser -- it's hard for me to say. He's my stepbrother. In my family we don't have steps, okay. My father adopted him, he's my brother. Okay. Lonnie more or less has idolized me in a sense for -- since his childhood. I was a motorcycle ride and ornery

discharged. I'm not sure of all the exact details because this is basically hearsay. It's what was stated in court and it's what they had basically told me after the incident, too, before I took them in, or on the way in. Had it not been the way it was -- I mean, Randy's not violent at all. I haven't even known Randy to get into fights, you know. Had it been Lonnie, I might have had another thought, just like had it been me, I may have had other thoughts on it, you know. And I love them both dearly, okay, but I have a bad temper and Lonnie has a similar, but with Randy, there's no way I could believe anything else.

BY MR. MARSHALL: (Continuing)

Q It's correct, isn't it, sir, that they actually beat up Mr. Rogers before they put him in the trunk?

A Yes, they did. I heard that they did beat him up up there at the -- his RV when they first got there with this third party, Roy, I believe.

Q And then they duct taped him and shoved him in the trunk?

A Yes, to my understanding.

Q And took him out on the country road?

A Yes. This country road they're talking about runs beside a main highway, kind of -- it's the old Highway 99 is what it is, and it's maybe five miles long,

Honor.

THE COURT: Okay.

MS. SAGER-KOTTRE: Just one question.

THE COURT: Okay.

REDIRECT EXAMINATION

BY MS. SAGER-KOTTRE:

Q In your mind, what -- what charge is an accident death? What crime is that?

A Manslaughter, Criminal Negligent Homicide.

MS. SAGER-KOTTRE: Nothing further, Your Honor.

THE COURT: Thank you. You may step down. Okay. I just want to clarify one thing in the briefing. I guess there's -- occasionally the Petitioners use 137.165 and there's 137.635 -- I think it's 137.635 that we're operating on -- on that error in terms of --

MR. GORHAM: Yes, Your Honor. If you were reading the draft memo, I know we put it in two different ways and that's one of the things I'm going to make sure is corrected.

THE COURT: Good. The respondent has just said he, assuming for the purpose of briefing, is that you were operating under 137.635 so I just wanted to clarify that too.