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PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ERNEST C. ROE, WARDEN, Petitioner v. LUCIO
FLORES-ORTEGA

CASE NO: 98-1441 C

PLACE: Washington, D.C.

DATE: Monday, November 1, 1999

PAGES: 1-60

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UNITED STATES

CAPTION: ERNEST C. ROE; MARLEEN Ferguson v. ERNEST C. ROE
PLAINTIFFS: ERNEST C. ROE
DEFENDANT: MARLEEN Ferguson
COURT: U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
PLACE: Washington, D.C.
DATE: Monday, November 1, 1999
PAGES: 1-90

THE ATTORNEY

NOV 9 1999

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - X

3 ERNEST C. ROE, WARDEN, :
4 Petitioner :
5 v. : No. 98-1441
6 LUCIO FLORES-ORTEGA :
7 - - - - - X
8 Washington, D.C.
9 Monday, November 1, 1999
10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:05 a.m.
13 APPEARANCES:
14 PAUL E. O'CONNOR, ESQ., Deputy Attorney General,
15 Sacramento, California; on behalf of the Petitioner.
16 EDWARD C. DuMONT, ESQ., Assistant to the Solicitor
17 General, Department of Justice, Washington, D.C.; on
18 behalf of the United States, as amicus curiae,
19 supporting the Petitioner.
20 QUIN DENVER, ESQ., Federal Defender, Sacramento,
21 California; on behalf of the Respondent.
22
23
24
25

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PROCEEDINGS

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 98-1441, Ernest Roe v. Lucio Flores-Ortega.

Mr. O'Connor.

ORAL ARGUMENT OF PAUL E. O'CONNOR

ON BEHALF OF THE PETITIONER

MR. O'CONNOR: Thank you, Mr. Chief Justice, and
may it please the Court:

We are here today because the Ninth Circuit has
in the State the per se rule of ineffective
counsel where an attorney declines to file an
appeal and does not obtain a waiver of appeal --

QUESTION: I can't hear you. Could you maybe speak up or put the --

QUESTION: Maybe raise the lectern a little.

QUESTION: Crank up the thing.

QUESTION: No, you're cranking --

MR. O'CONNOR: Okay. Shall I sta-

QUESTION: Yes.

MR O'CONNOR.

QUESTION: Only if you want me to k

ng earlier.

(Langmuir),

ART. 3 CONNEX. All rights. MR. CHIEF JUSTICE,

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1 and may it please the Court:

2 We are here today because the Ninth Circuit has
3 imposed on the State a per se rule of ineffective
4 assistance of counsel where an attorney declines to file a
5 notice of appeal and does not obtain a waiver of appeal
6 rights. This rule applies even where a defendant has
7 pleaded guilty, there has been no request for an appeal
8 despite an appeal rights advisement, and there are no
9 grounds for an appeal.

10 QUESTION: Well, isn't -- shouldn't you also add
11 to your statement of fact that there has in fact been, I
12 guess in this case, a naked plea, and the defendant's
13 claim is that the defendant had been led to expect a
14 sentence perhaps as low as 3-1/2 and instead got a
15 sentence of 15, so that there's a -- at least is a
16 potential claim that the sentence is too high, or in
17 relation the defendant's expectations the plea would not
18 have been entered under those circumstances that the
19 defendant anticipated the sentence. Isn't that also
20 something we should consider?

21 MR. O'CONNOR: Well, Your Honor, that's not an
22 arguable issue, because the defendant was advised on the
23 record at the plea hearing that he would receive a
24 sentence of 15 years to life.

25 QUESTION: Before the plea was entered?

1 MR. O'CONNOR: Yes, Your Honor.

2 QUESTION: So -- I misunderstood this. So this,
3 then, is a case, I guess exactly like a case in which the
4 defendant has a plea agreement and the plea agreement is
5 meticulously followed by the court.

6 MR. O'CONNOR: Yes, Your Honor.

7 QUESTION: I see.

8 MR. O'CONNOR: In addition, affirmance of the
9 Ninth Circuit's rule --

10 QUESTION: You might show us where in the joint
11 appendix that conversation occurred, if you would. Or
12 maybe you can come back to it and your cocounsel can try
13 to find it.

14 MR. O'CONNOR: Thank you.

15 In addition, affirmance would lead to habeas
16 litigation concerning defaulted meritless post plea
17 appeals. In those rare cases where relief is granted,
18 relitigation of the case would be difficult because of the
19 passage of time.

20 The Ninth Circuit rule is simply wrong. There
21 is nothing presumptively ineffective about not filing an
22 appeal after a guilty plea. There are few grounds for
23 challenging the plea and the resulting sentence.

24 QUESTION: Well, do you think that on the facts
25 of this particular case there might be some necessity to

1 go back and review them?

2 I recognize that your position is that a per se
3 rule is not appropriate, but it is somewhat troubling that
4 here the magistrate judge found that Ortega wanted to
5 appeal, was under the impression that his lawyer would
6 file an appeal, and was himself incarcerated and not able
7 to do it, and the lawyer testified that she couldn't
8 remember her discussion about it with the defendant.

9 Now, when you put all those things together,
10 perhaps, although you don't need a per se rule, there
11 might be some reason here to think that an appeal should
12 be given.

13 MR. O'CONNOR: Well, Your Honor, it is our
14 position that, because there was no request for an appeal,
15 and because there were no grounds for appeal that a
16 reasonable attorney would have pursued, that there was no
17 duty under the first prong of Strickland to file an
18 appeal.

19 Also, I found that portion of the transcript
20 where the defendant was advised of the sentence. It's
21 at --

22 QUESTION: Are you reading from the transcript
23 or the joint appendix?

24 MR. O'CONNOR: It's the joint appendix. It's
25 page 25 of the joint appendix. It's the end of page 12 of

1 the transcripts.

2 The court states, and do you understand that the
3 term for second degree murder is 15 years to life? The
4 defendant responds, yes.

5 QUESTION: Uh-huh.

6 MR. O'CONNOR: The court asks again, do you
7 understand that? The defendant repeats, yes.

8 QUESTION: Well, I don't understand that to mean
9 that he's going to get 15 years. I guess it's -- looks to
10 me as though he understands that a potential term.

11 QUESTION: Was probation a possibility?

12 MR. O'CONNOR: Yes, Your Honor, it was a
13 possibility, but under the California Rules of Court
14 probation was only permissible under unusual
15 circumstances, and defense counsel testified at the
16 evidentiary hearing that a claim that the court abused its
17 discretion in denying probation would almost certainly
18 fail.

19 QUESTION: Yes, but the -- there at least was a
20 claim, there was an argument, I guess, that there should
21 have been probation. If there was an argument that there
22 should have been probation, that flies in the face of your
23 suggestion that there was an understanding that he was
24 going to get a 15-year term.

25 MR. O'CONNOR: Well, Your Honor, I think the

1 understanding was that he would receive a 15-year term and
2 that the possibility of probation was highly unlikely.

3 QUESTION: Why don't you go earlier in the
4 questioning?

5 So has anybody made any promises to you beyond
6 what I have just said, namely that counts 2 and 3 will be
7 dismissed, and there would be just the one count. Has
8 anybody made any other promises? And the defendant says,
9 promise?

10 In other words, the district attorney has
11 promised if you plead guilty she's going to dismiss the
12 other counts and the knife enhancement. Were any other
13 promises made to you?

14 The defendant: No.

15 All right. Can you tell me what the term is for
16 second degree murder? And he says he understands that
17 it's 15 years to life.

18 MR. O'CONNOR: Correct, Your Honor.

19 QUESTION: You put all that together, it seems
20 to me he understands he's going to get 15 years to life,
21 and has been promised nothing else.

22 MR. O'CONNOR: That's right, Your Honor.

23 QUESTION: Yes, but you -- what you get is
24 probably a clearly losing claim on appeal, but his
25 argument is, I would like to have -- I think his argument

1 is, I would like to have appealed because the sentence was
2 too long. I didn't have to get 15 years. That was simply
3 the outer limit.

4 And he may very well -- in front of me, I guess,
5 he would certainly lose his argument there, but what he
6 wants --

7 QUESTION: Life was the outer limit, I thought.

8 QUESTION: What he wants is to make the
9 argument.

10 MR. O'CONNOR: Well, Your Honor, actually his
11 argument is that he thought he was going to get 3-1/2
12 years, and there is simply no support for that.

13 QUESTION: Right, and he thought -- maybe there
14 was no support for it, but you don't take this statement
15 as an indication that he was agreeing that he would get 15
16 years.

17 MR. O'CONNOR: Well, Your Honor, I think he did
18 understand that he was going to get 15 years. There was
19 the portion of the transcript, the guilty plea transcript
20 we just referred to. Also, the probation officer stated
21 in the probation report that he would get 15 years to
22 life. The defense attorney went over the probation report
23 with him the day before sentencing, and then when he was
24 sentenced to 15 years to life he expressed no surprise at
25 that.

1 QUESTION: Okay. I think we may just disagree
2 on what the record shows, but let me ask you this
3 question.

4 Let's assume that there is a case in which there
5 is no predetermined term in the -- as a part of the plea
6 agreement. The defendant ends up getting a longer
7 sentence than he wanted to get, a longer sentence than he
8 thought he would get, and he wants to argue that, in fact,
9 that sentence is, for whatever reason, improperly wrong,
10 that it was error, and reversible error to sentence him to
11 that long a sentence.

12 And let's assume, finally, that that kind of a
13 claim is highly unlikely to succeed, maybe because he's
14 just being unreasonable.

15 In that case, do you believe that there is no
16 obligation, following the guilty plea, for counsel to
17 counsel him about appeal and get an affirmative decision
18 from him one way or the other?

19 MR. O'CONNOR: Well, Your Honor, if there are
20 circumstances indicating the defendant might benefit from
21 an appeal, or advice concerning an appeal --

22 QUESTION: Well, take my hypothetical. He
23 doesn't like it, but we all know that he's going to lose
24 if he makes that argument. It's highly unlikely that that
25 will be a successful appeal. Does counsel have an

1 obligation under the Strickland standard to counsel him
2 that he has appeal rights and to get a yes or no answer
3 from him as to whether he wants an appeal?

4 MR. O'CONNOR: Yes, Your Honor, counsel has a
5 duty under the first prong of Strickland to advise
6 concerning appeal rights, even after a guilty plea, if
7 there are circumstances indicating the defendant might
8 benefit from such advice. In other words, there are
9 grounds --

10 QUESTION: No, but in my case the
11 circumstances, the defendant probably isn't going to
12 benefit. He's going to lose the appeal. Does -- is there
13 a Strickland obligation to counsel him and get a decision
14 on my hypothetical?

15 MR. O'CONNOR: Well, even if there are arguable
16 grounds for appeal --

17 QUESTION: Yes or no?

18 MR. O'CONNOR: Yes, Your Honor.

19 QUESTION: If you can answer the question, yes
20 or no.

21 MR. O'CONNOR: Yes, Your Honor. There would be
22 a duty to advise --

23 QUESTION: There is a duty, okay.

24 MR. O'CONNOR: There would be a duty to advise
25 of appeal rights, because there are arguable grounds for

1 appeal, but there would be no duty to file the appeal.

2 QUESTION: Well, is there a duty to get a
3 decision from the defendant, yes or no, as to whether he
4 wants the appeal filed?

5 MR. O'CONNOR: Well, there would be a duty to
6 advise the defendant. There would not be a duty to obtain
7 a waiver of appeal rights.

8 QUESTION: No obligation to file an Afred brief
9 in a case like that?

10 MR. O'CONNOR: An Anders brief?

11 QUESTION: Anders brief, rather.

12 MR. O'CONNOR: No, Your Honor. We're still at
13 trial.

14 QUESTION: You contend that there's no arguable
15 basis for appeal here, don't you?

16 MR. O'CONNOR: That -- well, that's correct,
17 Your Honor.

18 QUESTION: So all of this, we're talking about
19 some other case.

20 MR. O'CONNOR: Well, Your Honor, in the
21 hypothetical posed --

22 QUESTION: Where there is no arguable grounds
23 for appeal, what would he advise the defendant?

24 MR. O'CONNOR: Well, following a guilty plea --

25 QUESTION: He would advise the defendant there

1 are no grounds for appeal.

2 MR. O'CONNOR: That is correct, Your Honor.

3 QUESTION: But in this case --

4 QUESTION: And if the defendant said appeal
5 anyway, he would say, I can't appeal, there are -- you
6 know, there are no grounds --

7 MR. O'CONNOR: Well, yes, Your Honor. The
8 attorney would -- if the client wanted to appeal, and the
9 attorney felt the grounds were frivolous, the attorney
10 does not have an obligation to file the appeal, although
11 the attorney would assist the defendant in filing his own
12 appeal.

13 QUESTION: In other words, it's the guilty plea
14 that relieves him of the Anders obligation?

15 MR. O'CONNOR: Well, Your Honor, again, the
16 Anders obligation is actually an obligation of appellate
17 counsel, to file an Anders brief. It's --

18 QUESTION: Well, I guess the lawyer at that
19 point could say, well, I'm going to withdraw and ask the
20 court to appoint different appellate counsel, if it would,
21 but until the lawyer does withdraw, I suppose the lawyer
22 has got the obligation under Anders, doesn't he?

23 MR. O'CONNOR: Well, if there are arguable
24 grounds for appeal, the trial lawyer would have a duty to
25 advise of appeal rights, but the lawyer would not have a

1 duty to actually file the appeal unless there was either a
2 request for an appeal, nonfrivolous appeal, or there were
3 grounds on which any reasonable attorney would pursue an
4 appeal.

5 QUESTION: So if the defendant simply sits mute
6 and doesn't say, I want you to appeal, or I don't want you
7 to appeal, the obligation is over at that point?

8 MR. O'CONNOR: After a guilty plea, generally
9 speaking, yes.

10 QUESTION: But not after a trial?

11 MR. O'CONNOR: Yes, Your Honor. In a trial
12 situation it can usually be assumed that the defendant
13 does want to continue the litigation.

14 QUESTION: Well, but if the issue following the
15 plea, if the issue upon which the defendant may want to
16 appeal is the sentence, so that the -- and the sentence is
17 not foreclosed by the guilty plea, why isn't the
18 obligation, at least with respect to an appeal of
19 sentence, the same following a plea as the obligation with
20 respect to any issue following a verdict?

21 MR. O'CONNOR: Well, Your Honor, sentencing
22 issues are usually addressed in a plea negotiations, so
23 there usually are not --

24 QUESTION: If we've got a case in which there is
25 no plea agreement about what the sentence will be, and the

1 sentence may be higher than the defendant thinks is
2 proper, so that the defendant would like to appeal it, why
3 isn't the defendant in the same relationship to his
4 counsel with respect to the sentence that any defendant is
5 in relationship to counsel following a verdict and
6 sentence?

7 MR. O'CONNOR: Well, yes, Your Honor, if the
8 issue of sentencing is left completely open --

9 QUESTION: Well, it was open here, wasn't it?

10 MR. O'CONNOR: Well, no, Your Honor. The
11 defendant understood that he would receive a sentence of
12 15 years to life.

13 QUESTION: Well, if -- let's assume we --
14 there's no plea agreement, I take it, in the record or
15 anywhere else, to the effect that he was agreeing in
16 advance to a 15-year sentence, was there?

17 MR. O'CONNOR: Well, Your Honor, a sentence of
18 15 years to life is the only sentence for second degree
19 murder --

20 QUESTION: All he agreed to was that he agreed
21 to plead guilty to second degree murder, which contained a
22 punishment of 15 years to life.

23 MR. O'CONNOR: That's correct, Your Honor,
24 and --

25 QUESTION: Was parole an option? I can't -- I'm

1 not sure of your answer to the --

2 QUESTION: Probation.

3 MR. O'CONNOR: Probation.

4 QUESTION: Probation, I mean.

5 MR. O'CONNOR: Yes, Your Honor, it was an
6 option, but under the California Rules of the Court it
7 could only be granted in unusual circumstances.

8 QUESTION: No, but is it not conceivable --
9 well, I don't know, that the defendant thought, oh yes, if
10 he sentences me it will be 15 years, but I at least have
11 a long shot at probation? Isn't that conceivable?

12 I mean, would this case be different, say, if
13 they didn't -- if this wasn't -- say the sentence could
14 have been anywhere from 1 year to life, and he ends up
15 getting a 20-year sentence, which was a lot more than he
16 expected, the -- you'd make the same arguments I think,
17 wouldn't you?

18 QUESTION: Well --

19 MR. O'CONNOR: Well --

20 QUESTION: Would you, or wouldn't you?

21 QUESTION: Answer Justice Stevens' question.

22 MR. O'CONNOR: Well, if the sentence was much
23 more severe than what the defendant --

24 QUESTION: Yes.

25 MR. O'CONNOR: -- expected?

1 QUESTION: You have the same ambiguity about
2 advice, and whether he really wanted to appeal and all
3 that stuff is the same. The only difference would be,
4 maybe he had some shot at relief on appeal.

5 MR. O'CONNOR: Well, I mean, if he has arguable
6 grounds for an appeal, then there would be a duty to
7 advise of appeal rights, but --

8 QUESTION: Is it at all likely in the California
9 courts that one who pleads guilty to second degree murder
10 and gets a sentence of 15 -- is going to get probation?

11 MR. O'CONNOR: No, Your Honor. I mean, an
12 appeal --

13 QUESTION: If I understand your position, then,
14 you would say in response to Justice Stevens' question
15 that if there are no arguable grounds for appeal, as you
16 say there is not here --

17 MR. O'CONNOR: Yes.

18 QUESTION: -- even if he got 30 years, instead
19 of 15 years, there would be no requirement for the
20 attorney to file an appeal.

21 MR. O'CONNOR: Well, yes, Your Honor. In other
22 words --

23 QUESTION: Your case is made easy by the fact
24 that he got the lowest that was available for that crime.

25 MR. O'CONNOR: Well, Your Honor --

1 QUESTION: Suppose he had gotten 30 years, would
2 you still be making the same argument?

3 MR. O'CONNOR: Well, again, Your Honor, in this
4 case the defendant got the only term he could have gotten
5 for second degree murder. If there's an arguable issue
6 for appeal, then an attorney has a duty to advise of those
7 appeal rights.

8 QUESTION: But if there is no arguable issue to
9 appeal, there is no need to advise.

10 MR. O'CONNOR: No duty to advise.

11 I'd like to reserve the remainder of my time for
12 rebuttal.

13 QUESTION: Very well, Mr. O'Connor.

14 Mr. DuMont, we'll hear from you.

15 ORAL ARGUMENT OF EDWARD C. DuMONT

16 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

17 SUPPORTING THE PETITIONER

18 MR. DuMONT: Thank you, Mr. Chief Justice, and
19 may it please the Court:

20 The situation we have here arises when you have
21 a counseled defendant who has pleaded guilty, has been
22 given notice of the right to appeal, and arrives later on
23 habeas claiming that ineffective assistance, incompetent
24 advice from counsel led to the forfeiture of the right to
25 a direct appeal.

1 Now, that poses a risk both of a serious
2 constitutional deprivation, and a serious risk of abuse,
3 because it comes after a time when all of these issues
4 should initially be raised, and when there's some reliance
5 interest from the State on the fact that no appeal was
6 filed, and the challenge is to craft a rule that minimizes
7 the risk both of the deprivation and of the abuse without
8 unduly burdening the district courts, and we think the
9 Court's cases provide a familiar model for that, which is
10 simply the Strickland analysis.

11 Strickland teaches that there is a strong
12 presumption of competent assistance --

13 QUESTION: Well, Strickland -- Strickland says
14 we're going to approach it on a case-by-case basis. We're
15 going to look at all the circumstances. Right?

16 MR. DuMONT: That's correct.

17 QUESTION: And there's an objectively
18 reasonableness component of the lawyer's performance, and
19 a prejudice component.

20 MR. DuMONT: That's correct.

21 QUESTION: Now, the Ninth Circuit seems to have
22 applied some kind of a per se rule.

23 MR. DuMONT: Well, what the Ninth Circuit has
24 done really is to, in this context, revert to what we
25 would characterize as a knowing waiver or a deliberate

1 bypass standard, and we think that's right, it's
2 completely inconsistent with Strickland. They have
3 completely eliminated the prejudice and even, really, the
4 competence prongs of Strickland, so it's an entirely
5 unrecognizable rule.

6 QUESTION: Well, if we were to agree that the
7 Ninth Circuit's per se rule is invalid, would this case
8 still have to be remanded to have the court below consider
9 the circumstances here, where the magistrate said that
10 Ortega wanted to appeal and thought the attorney was going
11 to file an appeal?

12 MR. DuMONT: Well, all the magistrate said --
13 the magistrate's findings are very ambiguous, and a --

14 QUESTION: -- there's enough that you could
15 characterize them that way.

16 MR. DuMONT: A remand would not be necessarily
17 inappropriate once the Court articulates the rule. We
18 don't think it's necessary here, because we think that if
19 you look at the record as a whole, as the district court
20 ought to do, on an ineffective assistance challenge, what
21 you would find is that there is, a), no reason to think
22 that counsel was incompetent in counseling about appeal,
23 and 2) there's no reason to think that the defendant
24 would -- there's no reasonable probability or significant
25 possibility that the -- that a competently counseled

1 defendant would have chosen to appeal under these
2 circumstances.

3 QUESTION: May I ask just one sort of basic
4 question on that point? Do you think the rule should be
5 different after a trial and conviction on the one hand and
6 after a guilty plea, then an interval, and then sentencing
7 later?

8 MR. DuMONT: We think the rule -- the test is
9 the same, but the result may very well be different in
10 many of the cases, and that's because it's a facts and
11 circumstances test, and the circumstance of a guilty plea
12 is tremendously important, and that's for two reasons,
13 really.

14 The first is that there's very little left to
15 appeal, normally, after a guilty plea, although there's
16 sentencing issues, of course, at least in the Federal
17 system.

18 And the second one -- and the second issue --
19 there's no -- I would like to come back to this. There's
20 really no sentencing issue here, I think.

21 But the second reason is that because -- the
22 presumption is that there is competent counsel, and the
23 presumption is that there will have been competent counsel
24 on the guilty plea as well as on this issue of appeal, and
25 it gets right to this question that you were discussing

1 with my colleague.

2 If you assume competent counsel on the issue of
3 whether or not to plead guilty, then you would assume that
4 the lawyer had discussed with the client what the
5 parameters of sentencing were going to be if he pled to
6 second degree murder.

7 QUESTION: Let me just interrupt with one
8 quick -- why don't you make the same presumption after a
9 trial? You presume competency of counsel in all
10 situations.

11 MR. DuMONT: That's absolutely right. It's
12 simply that the record is much more likely to, considered
13 as a whole -- there are two things.

14 First of all, the record is more likely to
15 reveal issues that are worthy of appeal and, second, there
16 is more reason to assume that the defendant was intent on
17 fighting the conviction, was perhaps maintaining his
18 innocence, and would have wanted to appeal. Both of those
19 change significantly in the guilty plea context.

20 Now, if I can just point out that on this issue
21 of the 3-1/2 years, which I agree, if you look through --

22 QUESTION: This is why there is no sentencing
23 issue.

24 MR. DuMONT: Right.

25 QUESTION: Yes.

1 MR. DuMONT: If you look through the record
2 here -- well, on the issue of the 3-1/2 years, that is an
3 allegation that's made in some of the earlier habeas
4 filings in the State system. It's not made, incidentally,
5 here except by way of a factual statement.

6 I think that's only -- the 3-1/2 years only
7 comes up in the written papers, which there's some reason
8 to wonder whether this defendant was personally
9 responsible for them, because he had assistance and he was
10 in the prison when filing them.

11 When he was testifying at the evidentiary
12 hearing in this proceeding, what he said was -- and this
13 is at page 26 of the transcript of the evidentiary
14 hearing. I'm afraid it's not in the joint appendix.

15 But what he said was, well, she -- meaning his
16 attorney -- all she told me was to go the jail trusting
17 her, that of the 15 years I would only do 7-1/2, and that
18 I would get to work at the jail, I would receive payment,
19 and so on.

20 Now, significant to that, actually, is that as I
21 understand it good time credits, which do come off the 15-
22 year minimum, could, in fact, in California have taken him
23 down to 7-1/2, and that would suggest that what he got was
24 competent counseling about the likely, both legal and
25 practical effects of the sentence.

1 Now, the legal effect is that there's only one
2 sentence --

3 QUESTION: Is that in fact what he got, as a
4 practical matter, in his sentence, what he was describing
5 in the transcript as you read it? Is --

6 MR. DuMONT: My -- my understanding -- I can't
7 represent that firmly, but my understanding from my
8 colleagues from California is that that is realistic, that
9 from a 15-year minimum, under the statutory indeterminate
10 sentencing scheme, with good time you could be eligible
11 for release by the Board of Prison Terms as early as 7-
12 1/2 years.

13 QUESTION: Is it clear from the transcript, and
14 it may be that I wasn't listening carefully when you first
15 started it, but is it clear from the transcript that he
16 was saying that she advised him that he would get a 15-
17 year term which would be subject to the good time credits,
18 or that she was advising him that if he got a 15-year term
19 it would be subject to the good time credits? Is it clear
20 one way or the other?

21 MR. DuMONT: Well, if there was any kind of
22 competent advice at all, the advice would have had to be,
23 the term will be 15 years to life, because that is the
24 only term authorized by statute. It is an indeterminate
25 sentencing scheme in California.

1 QUESTION: So your argument, I take it, is we're
2 not clear, the transcript is not clear on that, but on the
3 assumption that counsel was competent, that's what she
4 would have said?

5 MR. DuMONT: Well, and that there wouldn't be
6 anything to appeal anyway --

7 QUESTION: Okay.

8 MR. DuMONT: -- because there's no other
9 possible result.

10 QUESTION: But I mean, it seems to me that that
11 reconstruction of what presumably went on is perhaps what
12 he would like to test out on appeal.

13 MR. DuMONT: Well, I think -- if you look
14 through the record -- this is what I was starting to say
15 before. If you look through the record and come through
16 it the way a lawyer might, I think it is true you would
17 come up with a couple of things.

18 One is that issue, and one is the issue he
19 raised before the California supreme court, which was, my
20 attorney should have taken me to trial and tried to get
21 manslaughter instead of second degree murder, it was a
22 fight, and this kind of thing.

23 QUESTION: Okay. But let's assume that's --
24 that part is waived. He -- if the plea is a valid plea,
25 that issue was waived, and the only thing that's left is

1 sentence, and it seems to me that on the argument that
2 you've just made there is a very plausible basis for
3 saying that if he had taken an appeal on that issue, he
4 would have lost, clearly.

5 On the other hand, we at least in the Anders
6 situation require counsel to address the issue, and I'm
7 not sure how your position squares with Anders. Can you
8 help me out on that?

9 MR. DuMONT: All the Anders cases, enhancements
10 on all the Anders cases are cases where we are already
11 passed the filing of the notice of appeal, or we are into
12 the appeal process, and so there's a supposition --

13 QUESTION: Okay --

14 MR. DuMONT: -- wanted to go forward.

15 QUESTION: -- but we make an Anders lawyer do
16 what Anders says the lawyer must do, it would be strange
17 if there were somehow a short-circuit to the process as
18 you are arguing. I mean, it just seems odd to me.

19 MR. DuMONT: We agree that there is a
20 constitutional duty to provide adequate representation
21 about the question of whether or not to appeal.

22 The question is, when you come in on habeas ex
23 post and you look back under conditions usually of great
24 uncertainty about what happened, where is the risk of
25 error going to fall, and we think it's inappropriate in

1 those circumstances for it to fall entirely on the State,
2 which is what the Ninth Circuit's rule does here.

3 QUESTION: Mr. DuMont --

4 MR. DuMONT: Instead, what you should look at is
5 whether there is any reason to think that counsel was
6 incompetent, which there is not here, and whether there
7 was any reason to think that a competently counseled
8 defendant would have gone ahead and lodged an appeal, and
9 the answer here is no, because on the sentencing issue
10 there is no --

11 QUESTION: So you're saying in effect you can't
12 have a rule that says as a matter of law competent counsel
13 must instruct on the appeal issue and get a -- an
14 affirmative or a negative response one way or the other.
15 You're saying that that is an improper gloss on
16 Strickland.

17 MR. DuMONT: It is an improper gloss because
18 it --

19 QUESTION: To require --

20 MR. DuMONT: -- would lead to inappropriate
21 results that do not sufficiently respect the State's
22 interest in finality, given the situation in which this
23 will come up, where you will always --

24 QUESTION: But in your opening statement you
25 built into it, and now I'm wondering whether you're taking

1 out of it, you said, in a case where defendant was
2 notified of the right to appeal. Here, the notice came
3 from the court.

4 Suppose we have the same case, except that the
5 court never told defendant anything about his right to
6 appeal. Is your view any different, does anything turn on
7 the court having said, defendant, you have to appeal
8 within so many days, if you want a lawyer and you can't
9 pay for one, we'll appoint one. Suppose the court had not
10 said that.

11 MR. DuMONT: Yes to the following extent, that
12 it is always a facts and circumstances test, and if the
13 defendant doesn't have an independent source of advice --
14 this is really what Pigaro said. If a defendant doesn't
15 have the independent source of advice, then he may very
16 well need it from counsel.

17 QUESTION: Thank you, Mr. DuMont.

18 Mr. Denver, we'll hear from you.

19 ORAL ARGUMENT OF QUIN DENVIR

20 ON BEHALF OF THE RESPONDENT

21 MR. DENVIR: Thank you, Mr. Chief Justice, and
22 may it please the Court:

23 I would like to, if I could, address a couple of
24 matters that came up in questioning, and one of them is
25 this factual question of California law. The -- on page

1 26, that was quoted by the Solicitor General, the
2 statement --

3 QUESTION: 26 of what, Mr. --

4 MR. DENVER: I'm sorry. It's of the
5 supplemental excerpts of record.

6 QUESTION: Those aren't in the --

7 MR. DENVER: They are not in the joint appendix.

8 The parties did not put them -- but it was quoted by
9 Mr. DuMont, about where the client said that of the 15
10 years I would only do 5-1/2. That statement was made
11 after the sentencing. This was not part of the plea
12 bargain. The question --

13 QUESTION: I thought it was 7-1/2 that he said
14 before. Did he say 5-1/2?

15 MR. DENVER: 7-1/2, I'm sorry. Did I say 5-
16 1/2? Here's what was said. Did you tell that prisoner at
17 that sentencing, your attorney did not tell you what the
18 procedures were at the sentencing? Well, all she told me
19 was to go to jail trusting her, that of the 15 years I
20 would only do 7-1/2, so this was not part of -- before the
21 plea bargain. It was after the sentencing.

22 The other thing is that it's incorrect under
23 California law. Under California law, you can only get
24 one-third off of that minimum eligibility of 15 to life,
25 so you cannot be eligible for parole until you have served

1 at least 10 years, and after that you still have to be
2 found suitable for parole, so just as a factual matter
3 that is -- that was incorrect.

4 But -- and there's also this question that
5 Justice Souter had raised about whether there was
6 predetermined sentence in this case. There was not a
7 predetermined sentence in this case. What followed from
8 his plea of second -- to second degree murder was that he
9 would either be sentenced to 15 years to life, or, in an
10 unusual case, he could get probation.

11 That was not ruled out by the plea agreement,
12 and in fact the entire sentencing argument was about that.
13 His lawyer argued at great length that he should be given
14 probation, and it was unusual.

15 QUESTION: How likely would that be on your
16 familiarity with California law, that he pleads guilty to
17 second degree murder? Is it likely that he would get
18 probation?

19 MR. DENVER: It certainly is not common, but
20 it's certainly possible, and --

21 QUESTION: Yes, but I -- my question, is it
22 likely?

23 MR. DENVER: Your Honor, I couldn't say it's
24 likely. I couldn't say that.

25 QUESTION: He was not promised probation though,

1 we know that.

2 MR. DENVER: He was not promised probation; he
3 was not promised 15 years.

4 QUESTION: Is there any chance -- is there any
5 chance on earth that he could have successfully appealed,
6 claiming that it was error not to give him probation?

7 MR. DENVER: Your Honor, the statement has been
8 made over and over again that there were no arguable
9 issues in this appeal. There were two.

10 QUESTION: Just answer that arguable issue.

11 MR. DENVER: Yes.

12 QUESTION: Do you think it was conceivable that
13 for a conviction of second degree murder, where he got the
14 minimum term, 15 years, he could have taken an appeal and
15 said, you know, it was error not to let me go walking off
16 on probation for a second degree murder that I have
17 confessed to?

18 MR. DENVER: I do. I do, and the reason is that
19 there's a California supreme court case called People v.
20 Harvey. People v. Harvey states that when you have a plea
21 bargain with plea to certain counts and dismissal of other
22 counts, the other counts cannot -- the facts underlying
23 them cannot be considered on sentencing on the counts to
24 which were pled.

25 In this case, almost the entire argument against

1 probation was the district attorney talking about the
2 facts underlying the count, so there was a Harvey error
3 that may have been a basis for a reversal of the
4 sentencing and going back again.

5 QUESTION: What were the facts justifying the
6 plea to second degree murder?

7 MR. DENVER: I'm sorry, what were the facts --

8 QUESTION: What were the facts justifying the
9 plea to second degree murder?

10 MR. DENVER: The factual basis was that there
11 was testimony that he had stabbed the victim, who had died
12 as a result of it, and --

13 QUESTION: What are the facts, though -- what --

14 QUESTION: And on those facts -- and had
15 intentionally done so, I assume.

16 MR. DENVER: I assume that's correct.

17 QUESTION: And on those facts you think it was
18 conceivable that when the trial court decided not to give
19 him probation, that trial judge would be reversed on
20 appeal for not having given probation?

21 MR. DENVER: Your Honor, it was available under
22 California law, and --

23 QUESTION: That's not my question. Is it
24 conceivable --

25 MR. DENVER: It is conceivable.

1 QUESTION: To find reversed --
2 QUESTION: If it's conceivable, what are the
3 factors? The recitation by the SG of California law is
4 1203(e)(2) prohibiting probation except in "unusual cases"
5 and then California Rule of Court 413(c), which specifies
6 the factors to be considered in determining whether a case
7 is "unusual." So what are the factors that might make
8 this unusual?

9 MR. DENVER: Well, the factors that could have
10 been affected by this argument of the district --

11 QUESTION: So what are the factors -- my
12 question is, what are the factors that could have made
13 this a "unusual case" as listed, I guess, in this Rule of
14 Court?

15 MR. DENVER: Your Honor, the rule provides that
16 you can get probation if the facts or circumstances giving
17 rise to the limitation on probation is, in this case,
18 substantially less serious than the circumstances
19 typically present, and the defendant has no recent record
20 of committing similar crimes or crimes of violence.

21 QUESTION: Fine, so my question is, what are the
22 circumstances that might have justified it?

23 MR. DENVER: The provocation, the question of
24 the drawing of the gun by the other person, the fact there
25 was a general melee. There was a very good argument that

1 this was either in self-defense, or imperfect self-
2 defense.

3 The problem was that you had to show that you
4 didn't have any prior or similar crimes of violence. The
5 district attorney violated the Harvey rule by using the
6 facts of the dismissed counts to argue that he did have
7 prior crimes of violence and couldn't get probation. Now,
8 that is a very arguable issue that he was deprived of.

9 The second arguable issue that he was deprived
10 of is, he wanted to challenge this conviction. This was a
11 man who had pled guilty under great protest, always saying
12 that he was innocent during this.

13 Now, the Court in North Carolina v. Alford said
14 that that is okay, that you can have a -- you can plead
15 guilty if you in fact -- while also maintaining your
16 innocence, but the Court did say that there are certain
17 things that have to be done in that situation, and one of
18 them is that the judge taking the plea must first make
19 sure there's a factual basis for the plea, and the judge
20 here did that. The preliminary hearing transcript and
21 testimony was sufficient for that.

22 QUESTION: Was this an Alford plea, Mr. Denvir?

23 MR. DENVIR: This was an Alford plea, Your
24 Honor, and the second part is, the Court said in Alford
25 that this kind of plea should not be taken until the judge

1 taking the plea has inquired into and sought to resolve
2 the conflict between the waiver of trial and the claim of
3 innocence. There was no attempt to do that at all, and
4 there was a real claim of innocence here.

5 In the joint appendix, at page 17, at the very
6 beginning of the plea colloquy, the court said to
7 Mr. Flores, you would really like to have your trial,
8 wouldn't you, Mr. Flores? He said, well, I would, but.

9 The court said, all right, then we're going to
10 bring up the panel.

11 The defendant said, but I haven't finished. I
12 haven't finished explaining. I would, but seeing that I
13 am alone, I am with the help of no one, it's better that I
14 plead guilty.

15 Now, that should have triggered an inquiry from
16 the court as to why -- this is a defendant who just
17 previously had asked for a different lawyer, and we
18 believe there would have been an arguable issue under
19 Alford.

20 QUESTION: Okay. So you're saying there were
21 arguable grounds for appeal, but that's not the basis on
22 which the decision below was made, was it?

23 MR. DENVIR: The decision below was made on the
24 basis that there was not a decision by the client to
25 forego the filing of a notice of appeal.

1 QUESTION: Whether or not there were arguable
2 grounds of appeal.

3 MR. DENVER: That's correct. They did not
4 address that question.

5 QUESTION: They did not address the arguable
6 grounds --

7 MR. DENVER: And we do not believe that there
8 should be a requirement that a defendant in this position
9 have arguable grounds.

10 QUESTION: Let's hear you justify that, instead
11 of talking about the arguable grounds --

12 MR. DENVER: Well, what I -- the reason we don't
13 is because basically what was said by -- in Justice
14 O'Connor's concurring opinion in Pigaro last year, that it
15 really puts an unfair burden on a pro se petitioner in the
16 first initial habeas to be able to develop arguable issues
17 without the assistance of --

18 QUESTION: What difference does it make -- what
19 difference does it make if there are no arguable grounds
20 of appeal?

21 MR. DENVER: Well, Your Honor --

22 QUESTION: In retrospect, looking back, were
23 there any arguable grounds of appeal? Answer, no. Why
24 should it be ineffective assistance of counsel?

25 MR. DENVER: Your Honor, the question is, how

1 will that be determined? In this particular case, as I
2 say, the trial counsel thought there were no arguable
3 issues on appeal. I've cited to the Court two very
4 arguable issues on appeal.

5 But I think the key point is that the State
6 focuses strictly on the question of, was there a request
7 for appeal or not? Our belief is, and I think the
8 Solicitor General has joined it, that the first question
9 is, is there a duty to give some advice to the client
10 about an appeal and find out what the client wishes to do
11 in that regard, because the Court held in Jones v. Barnes
12 that this decision whether to appeal or not is one of
13 those fundamental decisions that is decided --

14 QUESTION: What worries me is that there are 85
15 percent of all of these cases settle, I mean, guilty
16 pleas.

17 MR. DENVER: that's correct.

18 QUESTION: And suddenly we're proliferating vast
19 numbers of appeals in the case where there is no ground.
20 If there is a ground, well then, it is ineffective
21 assistance of counsel, but suddenly to proliferate -- you
22 know, I have no idea how many --

23 MR. DENVER: Your Honor --

24 QUESTION: -- in a case where there is no ground
25 is what's worrying me.

1 QUESTION: Why would he say no to an appeal? I
2 mean, you know, counsel tells him, you know, there are
3 really no grounds to appeal. You're going to lose. You
4 want to appeal? This is free counsel. This is being
5 giving to him. Why should he possibly --

6 MR. DENVER: Well, in this case --

7 QUESTION: -- say no? No --

8 MR. DENVER: In this case --

9 QUESTION: -- it's too much trouble.

10 MR. DENVER: In this case he would have
11 certainly appealed, because he said he wanted to keep on
12 fighting the case. He was very unhappy with both the
13 conviction and with the sentence.

14 QUESTION: I'm talking about the rule that
15 you're proposing. Why wouldn't it produce frivolous
16 appeals --

17 MR. DENVER: Because some defendants --

18 QUESTION: -- and Alford briefs endlessly?

19 MR. DENVER: When -- because some clients, some
20 large number of clients, when they are told that there is
21 nothing there, when they realize that the sentence is
22 pretty much what they received, they're not unhappy with
23 the representation that led up to the plea agreement, will
24 decide not to appeal. There are waivers of appeal --

25 QUESTION: Hope does not spring eternal, even

1 when the appeal is free, huh?

2 MR. DENVIR: Well, Your Honor, there are many
3 plea agreements that have a waiver of appeal as part of
4 them, and the client agrees to it. They understand what
5 is going to happen, and they're willing to live with that.

6 QUESTION: That's because there's a quid pro
7 quo. You don't get the plea agreement unless --

8 MR. DENVIR: That's correct.

9 QUESTION: -- you forego the appeal.

10 MR. DENVIR: That's correct.

11 QUESTION: But I'm talking about a client who
12 hasn't done that.

13 MR. DENVIR: And --

14 QUESTION: Why wouldn't he take the appeal?

15 MR. DENVIR: He may very well have received
16 exactly what he expected to get.

17 QUESTION: The lawyer tells him, there's no
18 basis for appeal. Do you want to appeal?

19 MR. DENVIR: He may very well do that, and then,
20 and other people -- the other reason he may not is because
21 there may be adverse consequences that could flow from
22 filing an appeal, as we pointed out, you can actually
23 be -- win on appeal and receive a more severe sentence,
24 and in California you can actually have your -- you can
25 lose on appeal and have your sentence increased in a

1 substantial amount, so there --

2 QUESTION: Mr. Denvir, in this case it does seem
3 that the Ninth Circuit just didn't apply the Strickland
4 standard in judging this --

5 MR. DENVER: Your Honor --

6 QUESTION: -- issue. It seemed to craft some
7 kind of a per se rule here of absolute consent or
8 something.

9 MR. DENVER: I think that the circuit, as the
10 State would view it, did not focus and develop the advice
11 of counsel question, and went merely to the question of
12 whether there was a decision not to appeal, and in terms
13 of the question of prejudice, we believe that the
14 circuit's decision that all you have to show is that -- is
15 the loss of a direct appeal of right with counsel, that is
16 prejudice. That's actual prejudice under Strickland.

17 QUESTION: Well, I'm not sure it is. Don't you
18 think there's a component on the prejudice side of at
19 least having to have arguable grounds to appeal?

20 MR. DENVER: Your Honor, I -- in the cases that
21 the Court has decided --

22 QUESTION: It wouldn't even mesh with Anders.
23 You'd be in an awful mess.

24 MR. DENVER: Well, Your Honor, the problem is
25 that if trial counsel usurps the decision on whether to

1 appeal that is not trial counsel's to make, they will
2 force the client to forfeit the right to an appeal where
3 counsel will address these issues on a full appellate
4 record and determine whether there's an Anders problem or
5 a meritorious --

6 QUESTION: We're assuming -- you've got to take
7 the hypothesis we're giving you. We're assuming that
8 there's no basis for an appeal, that there isn't any.

9 QUESTION: Why spin our wheels?

10 QUESTION: You still -- right. You're -- it's
11 like somebody suing somebody for not giving them a losing
12 lottery ticket.

13 MR. DENVER: Well, Your Honor --

14 QUESTION: Yes, he was deprived of an appeal,
15 but it was worthless. The appeal was worthless.

16 MR. DENVER: I think the problem is, how will
17 the court determine whether or not there were no issues on
18 appeal? That, under the court's jurisprudence, is
19 determined with --

20 QUESTION: The way we're doing it now.

21 MR. DENVER: -- assistance of counsel.

22 QUESTION: The way we're doing it now. After
23 the fact, we're looking back. We don't need counsel. We
24 have better than counsel. We have judges looking at it,

25 MR. DENVER: We --

1 QUESTION: -- and those judges determined there
2 was no reasonable basis for appeal, but you say, even
3 though, you know, the best judges in the land look at it
4 and say there's no reasonable basis for an appeal,
5 nonetheless it was incompetent counsel for not taking this
6 useless appeal.

7 MR. DENVIR: Your Honor, I believe it's Penson,
8 but in one of the Court's appeals decisions, even though
9 the State court had found no meritorious issues, the Court
10 reinstated the appeal because they -- the Court believed
11 that the defendant had a right to counsel with the
12 advocate's view of the case, and that --

13 QUESTION: Penson was --

14 MR. DENVIR: -- should be substituted.

15 QUESTION: Penson was a direct appeal, and here
16 you're on habeas, trying to reconstruct something that
17 happened in the past. I think there's something to what
18 the Government, the Solicitor General says here, that you
19 have to balance the rights that existed at one time
20 against how do we reconstruct as best as possible when the
21 right was given up.

22 MR. DENVIR: Well, Your Honor, I think the
23 difficulty here is, the reason we're on collateral attack
24 is because there was a loss of the right to appeal because
25 of the ineffective assistance of counsel.

1 QUESTION: Well, because the guy didn't file a
2 notice of appeal.

3 MR. DENVER: That's correct.

4 QUESTION: That's what was lost.

5 MR. DENVER: And as a result, the client lost
6 the ability to pursue these issues on direct appeal with
7 counsel, and this counsel never claimed to provide
8 Mr. Flores-Ortega, with his third grade education and his
9 Spanish-speaking ability, any information about the
10 appeal, didn't say that this is your decision, you have a
11 right to appeal, these are the kinds of issues you can
12 raise, you may need to get a certificate of probable cause
13 if you want to attack the guilty plea, all that -- all the
14 information that a client needs to make the personal
15 decision whether to file a notice of appeal or not.

16 QUESTION: But I think you also have, if I
17 understood what you were saying earlier, you have a
18 separate answer to that, and that is, if you don't in
19 effect require or impose kind of a per se obligation on
20 counsel, at least to give counsel and to get a decision,
21 then, in fact, the only way the meritorious claim is ever
22 going to come to light is on habeas. There's no right to
23 have habeas counsel, and you'll simply never find the
24 meritorious cases. Am I characterizing your point right?

25 MR. DENVER: I believe that's correct, Your

1 Honor.

2 QUESTION: So if you don't do it this way, in
3 effect the meritorious cases are probably not going to
4 come to light.

5 MR. DENVER: And I believe that's why the Court
6 has never required that in a comparable situation, and I
7 think that's the reason for the concurring opinion in
8 Pigaro which said that really it's unfair and impractical
9 to expect a counsel-less petitioner to be able to do the
10 legal work to show the court whether there are or not
11 meritorious issues, and instead, if counsel does his or
12 her duty, gives some advice to the client, finds out what
13 the client wants to do, and files a notice of appeal, then
14 things will develop as they should with counsel and an
15 appeal.

16 QUESTION: But why is that so? He can raise it
17 later on habeas, as it's been raised later on habeas here,
18 and then you can get good counsel and scratch up some
19 arguable issues, and if he finds arguable issues, then you
20 go back and look at it and you say, yes, indeed, there was
21 ineffective assistance of counsel. Why is it the end of
22 the world?

23 MR. DENVER: I think it's twofold, Your Honor.
24 One is that as a general matter the standards on
25 collateral attack are higher than they are on direct

1 appeal.

2 QUESTION: Yes, indeed.

3 MR. DENVER: And secondly, there is no right to
4 counsel --

5 QUESTION: All that for --

6 MR. DENVER: -- on collateral attack, so how is
7 this person -- this person has to go out, develop an
8 appellate record on their own, do the legal research on
9 their own, find the legal issues, file the habeas
10 petition, and hope that at that point perhaps they will
11 have counsel appointed to them as a matter of discretion.
12 That's far different than filing a timely notice of appeal
13 and having counsel appointed as a matter of right to
14 pursue that.

15 I think -- and I think that's why the Court, it
16 has not yet --

17 QUESTION: So you have to file frivolous notices
18 of appeal, and then appellant counsel has to file Anders
19 briefs in these frivolous cases.

20 MR. DENVER: Well, Your Honor --

21 QUESTION: It's a wonderful system.

22 MR. DENVER: -- my understanding is that the
23 parties both agree that if there is a request by the
24 client for the filing of a notice of appeal, that in
25 its -- and there is no filing, that in itself meets any

1 requirements under Strickland.

2 Now, the only thing that's different here is
3 whether there is some duty on the part of counsel to talk
4 to the client about an appeal and see whether they want to
5 request an appeal or not. They would say that in a
6 request for an appeal, it is not counsel's duty to say,
7 I'm sorry, I'm not going to honor that because I don't
8 think it's meritorious. They would have to file a notice
9 of appeal to start the appellate process for whatever
10 would come out of it.

11 QUESTION: Counsel can do that, even though
12 counsel believes that there's no basis for it?

13 MR. DENVER: Counsel may be very wrong, as
14 Ms. Kops was in this case, and --

15 QUESTION: So is this called a -- what, an
16 Anders notice of appeal?

17 MR. DENVER: No, Your Honor. You know, what it
18 is, I think it is, I think it's honoring the Court's
19 ruling that the question whether to appeal is a personal
20 decision that is not counsel's to make, it is the client's
21 to make, and it shouldn't be usurped by counsel based on
22 that particular counsel's view of whether there may be
23 issues or not.

24 QUESTION: What does an attorney commit herself
25 to in this case if she files a notice of appeal? I mean,

1 that's a simple enough thing to do, but does she commit
2 herself, at least in the eyes of the court of appeals, to
3 proceed with the appeal?

4 MR. DENVIR: Not under California law. Almost
5 invariably there is a switch from trial counsel to
6 appellate counsel who are experienced appellate counsel
7 under supervision from the appellate projects, as you have
8 heard in the Robbins case. So there is -- there's a bar
9 of appellate counsel that would take this from an
10 appellate counsel's view and undoubtedly would have found
11 the two issues that we've suggested under Alford and under
12 Harvey.

13 QUESTION: What would your position be in a case
14 in which, number 1, as here, there is a guilty plea, and
15 number 2, there was a plea agreement definite as to
16 sentence and that agreement was honored?

17 Would you say that there was still an obligation
18 to -- for counsel to consult with the client and get an
19 affirm --

20 MR. DENVIR: Yes, Your Honor, because --

21 QUESTION: Why? Why?

22 MR. DENVIR: Because I think what you'd have to
23 do -- and this is not unusual. This is dealt with in
24 Federal courts all the time. You would explain, this is
25 the situation, this is the plea agreement, you received

1 this, there are no issues, but if the client said, I want
2 a notice of appeal filed, it would be filed. That's
3 required under Federal law now, I mean, as a matter of the
4 Federal Rules, so -- and the -- and then --

5 QUESTION: But in a case like that, I presume
6 the hypo is such that as a matter of law there could be no
7 relief -- there could be no prejudice because there could
8 be no relief.

9 MR. DENVER: I think in a hypo like that, in
10 most cases, if you have a proper relationship between the
11 client and counsel they will abide by the decision, that
12 they will have received what they thought they were going
13 to receive, that they were told by counsel they would
14 receive, that there were no appellate issues, and they
15 will not request the filing of a notice of appeal.

16 QUESTION: Oh, I'm sure that's so, but you --
17 despite the fact that on the hypo there is, I guess we
18 could say as a matter of law there would be no relief, you
19 would still require the affirmative act of counsel.

20 MR. DENVER: I think, Your Honor, that since it
21 is the client's decision under both the Federal rules,
22 under Jones v. Barnes, counsel has to file the notice of
23 appeal.

24 QUESTION: That goes beyond --

25 MR. DENVER: That would be the Anders procedure

1 I --

2 QUESTION: But that's taking you beyond
3 Strickland. I mean, your argument in this case is, we're
4 not really going beyond Strickland, because the only way
5 in effect to identify the meritorious Strickland cases is
6 to put a gloss on the Strickland reasonable competence
7 standard by saying, counsel has got to do this much as
8 least.

9 But now, in answer to my hypo, I think you're
10 going beyond Strickland, because I think you're saying
11 that even when therein, as a matter of law could be no
12 ultimate prejudice, they've still got to do it, and so
13 that's not Strickland. That seems to me a new Sixth
14 Amendment rule.

15 MR. DENVIR: Your Honor, I don't think it is.
16 It -- certainly the ABA standard is part of what
17 reasonably competent --

18 QUESTION: Well, but we're talking about the
19 Constitution here --

20 MR. DENVIR: I understand.

21 QUESTION: -- not about the ABA standard or --
22 and certainly California isn't bound by the Federal Rules
23 of Evidence, which you're quite right make it as you say,
24 but why should we incorporate those into the Constitution?

25 MR. DENVIR: Your Honor -- Your Honor, the

1 reason I believe is that in Strickland the Court stated
2 that one of the basic duties of counsel is to provide
3 consultation to the client about important decisions.

4 In Jones v. Barnes, the Court said that the
5 decision whether to appeal or not is a fundamental
6 decision which cannot be decided by counsel. It is one of
7 the four that can only be decided by the client, and we
8 think that follows from those lines of cases that the role
9 of counsel is to be assisting this -- the client in making
10 the decision, because the fact is --

11 QUESTION: With decisions within the realm of
12 the possible. The lawyer doesn't have to advise him about
13 how he can levitate himself out of prison.

14 MR. DENVER: No. No, that's correct, Your
15 Honor.

16 QUESTION: If appeal is not available, if
17 there's nothing to be gained from it, counsel doesn't have
18 to advise about that utterly impractical, never-will-
19 happen --

20 MR. DENVER: Well, Your Honor, I --

21 QUESTION: -- it seems to me.

22 MR. DENVER: If appeal is available, then it is
23 not talking about something that's a will-of-the wisp, and
24 the client has a right to pursue that appeal.

25 QUESTION: The issue isn't whether appeal is

1 available. The issue is whether relief is available. If
2 no relief is available, there's nothing to be gained.

3 MR. DENVER: Well, Your Honor, the Court has
4 said, though, that it's not counsel to decide that, and
5 the defendant may, in that situation, want a second
6 opinion. If Mr. Flores-Ortega got a second opinion --

7 QUESTION: It could well be, and we're looking
8 back. Maybe counsel should have told him. The fact is,
9 has there been any harm done? Has there been incompetence
10 of counsel in failing to do that?

11 MR. DENVER: I think in this case, Your Honor,
12 because of incompetence of counsel, he lost his direct
13 appeal of right with new counsel and two arguable issues,
14 and an opportunity perhaps --

15 QUESTION: Leave that out of the case, because
16 that's not the rule that you're asking us to adopt.
17 You're asking us to adopt a rule that applies whether
18 there are arguable issues or not.

19 MR. DENVER: That's correct, Your Honor, but
20 I -- I'm not -- I'm asking the Court -- the Court could
21 have a more limited rule, and I believe that Mr. Flores-
22 Ortega comes within that more limited rule.

23 QUESTION: But your rule goes beyond Strickland.
24 You agree, don't you?

25 MR. DENVER: I don't believe so, Your Honor.

1 QUESTION: How does it -- why does it not go
2 beyond Strickland, at least on the prejudice prong?

3 MR. DENVER: Your Honor, because I don't think
4 the Court has at any point in any of its decisions,
5 Rodriguez, or Penson, or Evitts, any of those, required
6 that an unrepresented defendant prove that there were
7 meritorious issues.

8 The Court has not done that in any case at all,
9 and there was a concurring opinion joined by three
10 justices last year in Pigaro saying that there would be
11 unfair to do, and the reason is the practical reason that
12 you can't expect someone without counsel to play the role
13 of counsel to remedy the absence of counsel.

14 QUESTION: I can understand your argument in a
15 case in which at least it is conceivable -- strike the
16 word conceivable.

17 I can understand your argument in any case in
18 which you don't start with the hypothesis that at the end
19 of the road there can be no relief, and the reason I
20 accept your argument there, at least at this stage of the
21 game, is that there's a problem of administrability, and
22 it's far better simply to let's have the appeal and find
23 out than be speculating in fact about very, very difficult
24 cases.

25 But in the case that I put to you, I at least

1 was calculating my hypothesis in such a way that at the
2 end of the road there could be no possible relief. He had
3 pleaded guilty, he got exactly what the plea agreement
4 called for, so I could conceive of no situation in which
5 he could get relief. That, it seems to me, does go beyond
6 Strickland.

7 MR. DENVIR: Well, Your Honor, if there could be
8 a reliable determination based on whatever would be before
9 the Court that there is no possibility of relief, then I
10 would agree. But I think the problem you have is, the
11 question is, how is that determined by the Court? The
12 Court should only --

13 QUESTION: Why isn't it sound to determine it on
14 the basis of the hypothesis? If the guilty plea is
15 assumed to be a voluntary plea, so you're not attacking
16 the plea itself on the issue of guilt, and the plea
17 agreement has been honored in every jot and tittle, he got
18 exactly what he agreed upon, why isn't that a case that
19 should be accepted from the rule that you want us to apply
20 here?

21 MR. DENVIR: That may be that it should be, Your
22 Honor. If there is no complaint regarding the guilty
23 plea, and there's no complaint regarding the sentence,
24 then -- then I don't know that there would be any showing
25 of prejudice no matter what counsel was involved in it.

1 That's a very rare situation. In those
2 situations, I think you would find that if counsel were to
3 advise the client of the situation, there would be a
4 decision not to appeal, and you wouldn't have this
5 problem.

6 QUESTION: Is it immaterial that the court told
7 the defendant in this case, you have a right to appeal, so
8 many days, we'll appoint a counsel if you can't pay for
9 one? Here, there was no * at least.

10 MR. DENVIR: Well, there was a statement which
11 was not required by State law that -- and it was, you can
12 file an appeal 60 days from today in this court. It
13 didn't say you have the right to appeal. It didn't say
14 you file a notice of appeal. It was -- it didn't explain
15 a lot.

16 But in any case, for someone in Mr. Flores-
17 Ortega's position, with his education and a Spanish-
18 speaking, he needed more information than that. He --

19 QUESTION: He doesn't speak English?

20 MR. DENVIR: No, Your Honor. It was
21 interpreted.

22 QUESTION: Or he does speak Spanish?

23 MR. DENVIR: He speaks Spanish, and certified
24 interpreters were used in all the proceedings. He does
25 not speak any English, or writing --

1 QUESTION: He doesn't speak any, but the court's
2 statement to him was translated to him, you said?

3 MR. DENVER: There was -- absolutely. It was
4 translated.

5 QUESTION: But you say, as a -- you're favoring
6 the Ninth Circuit per se rule, so that it would be
7 immaterial that the court in fact notified the defendant
8 had a right to appeal.

9 MR. DENVER: Your Honor, because I think that
10 what caused the loss of the right to direct appeal was the
11 ineffective assistance of defense counsel, that regardless
12 of any advisement that was given by the court, there was a
13 factual finding that Mr. Flores-Ortega did not understand
14 what an appeal was, therefore there was no movement to
15 exercise the decision to have an appeal.

16 So I think that, although it's salutary to have
17 that type of advice, I don't think it's any substitute for
18 counsel dealing with the client in that manner, trying to
19 decide --

20 QUESTION: In your experience of the, say, 80 to
21 90 percent of the cases that are settled by a guilty plea,
22 of that, what percentage in your experience appeal?

23 MR. DENVER: Your Honor, if it is settled by a
24 guilty plea with a predetermined sentence, almost nobody
25 appeals. If it is under the sentencing guidelines quite

1 often there will be loose ends. There will be agreement
2 on certain things, and other things left open to the
3 court. Quite often there are appeals there, because there
4 are --

5 QUESTION: Do you have any -- can you give me
6 any ball park -- because you defend -- you're aware of it.
7 Maybe you can't. I mean, maybe you can't.

8 MR. DENVIR: I don't think I could give any
9 reliable, but if there is truly a predetermined sentence,
10 then there's almost never an appeal, and if there is not a
11 predetermined sentence, therefore there usually are
12 arguable issues, then there is an appeal and it's pursued.
13 I think that's our experience under the sentencing
14 guidelines, which have all that built into it.

15 QUESTION: Does California have sentencing
16 guidelines the same way the United States does?

17 MR. DENVIR: Your Honor, it has a determined
18 sentencing law, which is very complex. It wasn't
19 applicable in this case, because the homicide murders have
20 these different indeterminate sentencing laws, but
21 California does have a very complex one, with questions of
22 double sentencing and concurrent and consecutive
23 sentencing, and it's a very complicated matter. It
24 generates many appeals, much as the sentencing guidelines
25 do, because of the complexity of it.

1 If the Court has no other questions, thank you.

2 QUESTION: Thank you, Mr. Denvir.

3 Mr. O'Connor, you have 4 minutes left.

4 REBUTTAL ARGUMENT OF PAUL E. O'CONNOR

5 ON BEHALF OF THE PETITIONER

6 MR. O'CONNOR: First, with regard to the Harvey

7 issue, Harvey is a California case which states that a

8 sentencing court cannot rely on facts which are related

9 solely to accounts dismissed pursuant to a plea bargain.

10 However, in this case, the sentencing court

11 relied on facts that were related to the murder. For

12 example, it relied on the fact that the respondent was

13 armed and the victim was not, and that's at J.A. 40, at

14 joint appendix, page 40.

15 Also, with respect to the Harvey issue, opposing

16 counsel mentioned that the prosecutor used -- factually

17 went into the *dismissed counts. Even assuming this is

18 correct, it is irrelevant, because the Harvey standard

19 pertains to the trial court's actions and, again, the

20 trial court didn't rely on any facts solely related to the

21 dismissed counts.

22 With respect to the Alford issue, I'd like to

23 make two points. First of all, Alford involved factual

24 innocence. The defendant claimed he didn't shoot anyone.

25 This is not the same claim in this case. In this case,

1 Mr. Ortega made the claim in his California supreme court
2 petition that he was only guilty of manslaughter. Well
3 then, manslaughter theory should have been pursued.

4 Also, opposing counsel stated that a judge
5 taking the plea under Alford must resolve the conflict
6 between the guilty plea and the claim of innocence.
7 Actually, the trial judge did this in effect because the
8 defense attorney stated why the guilty plea was being
9 entered despite the claim of innocence. This is at J.A.
10 26-27, pages 26-27 of the joint appendix.

11 The court asked, So, counsel, I understand that
12 this plea is made under People v. West, which is
13 California's analogue to Alford. Is that correct?

14 Defense attorney, That is correct, and I did
15 write on the form, the change of plea form, and I went
16 over with Mr. Flores this morning numerous times the
17 explanation that was given for his change of plea, and
18 that is that if he goes to trial there was the risk that
19 he could be found guilty of crimes for which he could
20 receive more severe sentences, and that is the reason that
21 Mr. Flores is pleading guilty.

22 So there's the explanation for why the defendant
23 entered his plea despite his claims of innocence. He
24 wanted to avoid a more severe sentence, and Alford allows
25 that.

1 QUESTION: Mr. O'Connor, do you agree on the
2 basic proposition that a trial counsel or, in this case,
3 plea and sentencing counsel, does have an obligation to
4 explain to the defendant what an appeal is and what his
5 rights are?

6 And then switching from the question of whether
7 a notice has to be filed, is there an obligation to advise
8 the defendant about an appeal?

9 MR. O'CONNOR: Well, Your Honor, there's an
10 obligation under only two circumstances. First, where the
11 defendant inquires about appeal rights, and then secondly
12 where there are circumstances indicating the defendant may
13 benefit from such advice. In other words, there are --

14 QUESTION: So if he doesn't -- defendant in this
15 case, the magistrate found the defendant didn't know
16 anything about an appeal. Doesn't -- but you say he must
17 inquire --

18 MR. O'CONNOR: No.

19 QUESTION: -- and if he doesn't have the
20 knowledge to inquire, it's too bad?

21 MR. O'CONNOR: No, Your Honor. In that
22 circumstance the question would be, are there
23 circumstances indicating the defendant could benefit from
24 appeal advice, and that question boils down to the issue
25 of whether there were grounds, or more specifically

1 arguable grounds for appeal. So in this case, there were
2 no arguable grounds for appeal, so counsel had no duty to
3 advise of appeal rights.

4 QUESTION: And what authority --

5 QUESTION: Has that been determined --

6 QUESTION: What authority do you have for that?

7 MR. O'CONNOR: Well, yes, that's --

8 QUESTION: -- by anybody?

9 MR. O'CONNOR: Well, in part we're relying on a
10 Ninth Circuit case called Marrow, which we cited in our
11 briefs, and a number of other --

12 QUESTION: But in this case I had assumed
13 there's been no determination whether there were arguable
14 grounds.

15 MR. O'CONNOR: Well, that's simply the Warden's
16 position, that there are no arguable grounds.

17 CHIEF JUSTICE REHNQUIST: Thank you,
18 Mr. O'Connor. The case is submitted.

19 (Whereupon, at 12:04 p.m., the case in the
20 above-entitled matter was submitted.)

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ERNEST C. ROE, WARDEN, Petitioner v. LUCIO FLORES-ORTEGA
CASE NO: 98-1441

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BY Donna Marie Federico -----

(REPORTER)