No. 09-658 DEC 24 2009

In the Supreme Court of the United States

BRIAN BELLEQUE, Superintendent, Oregon State Penitentiary,

Petitioner,

v.

RANDY JOSEPH MOORE,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. This Court established in *Hill v. Lockhart* the standard for assessing, in a collateral challenge to a conviction that was based on a guilty or no-contest plea, whether an attorney's deficient performance requires reversal of a conviction. In *Arizona v. Fulminante*—a direct appellate review case—this Court reviewed all the evidence presented at trial and held that the erroneous admission of a coerced confession at the trial was not harmless.

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

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

2. In Moore's underlying criminal case, he confessed to police that he personally shot the victim. He also confessed to two other people, and he ultimately pleaded no contest to murder. In his collateral challenge to his conviction, he alleged that his attorney should have moved to suppress the confession to police, but he offered no evidence that he would have insisted on going to trial had counsel done so. Did the Ninth Circuit err by granting federal habeas relief on Moore's ineffective-assistance-of-counsel claim?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Brian Belleque, Superintendent of the Oregon State Penitentiary, respectfully petitions this Court for a writ of certiorari to review the Ninth Circuit's decision in *Moore v. Czerniak*, 574 F.3d 1092 (9th Cir. 2009). Review is warranted for the following reasons:

(1) The Ninth Circuit's decision conflicts with this Court's decisions concerning the standards for issuing a writ of habeas corpus. The Ninth Circuit acknowledged that *Strickland v. Washington*, 466 U.S. 668 (1984), applies generally to claims of ineffective assistance of counsel and that *Hill v. Lockhart*, 474 U.S. 52 (1985), governs ineffective-assistance claims if the petitioner waived trial and pleaded guilty. However, the court effectively supplanted those cases with one applicable to direct appeals from trials—*Arizona v. Fulminante*, 499 U.S. 279 (1991). Under *Hill*, a petitioner in a collateral challenge who was convicted by a guilty plea establishes prejudice by proving that, but for counsel's unreasonable error, he would have insisted on going to trial. Notwithstanding *Strickland* and *Hill*, the court in this case held that its analysis of counsel's error and the impact of that error were governed by *Fulminant*—apparently because both *Fulminante* and this case involved a confession.

Yet *Fulminante* involved direct appellate review of a conviction. There, this Court held that the erroneous admission of a confession at trial can be reviewed for harmless error, the same as any other evidentiary error by a trial court, by reviewing the remaining evidence to determine whether the admission of the

confession was harmless beyond a reasonable doubt. 499 U.S. at 310-11. *Fulminante* has no relevance to collateral review of a trial attorney's performance where the criminal case was resolved by a guilty or no-contest plea and consequently there is no other evidentiary record to review for harmless error.

In a related error, the Ninth Circuit declared that *Fulminante* is "clearly established Federal law" under 28 U.S.C. § 2254(d)(1) for purposes of determining whether a petitioner was prejudiced by trial counsel's failure to move to suppress a confession. That holding is contrary to this Court's recent interpretations of section 2254(d)(1)—because this Court has never applied *Fulminante* in the manner the Ninth Circuit did here, *a fortiori Fulminante* cannot be "clearly established Federal law" for conducting the prejudice analysis in a collateral challenge to a conviction.

(2) The Ninth's Circuit's decision creates a split among the circuits, as no other circuit court of appeals has applied *Fulminante* in a collateral challenge to a criminal conviction. In defending a criminal conviction against collateral attack, only states in the Ninth Circuit must now make a record for review as though the underlying criminal case had gone to trial.

(3) Thousands of criminal convictions are in jeopardy as a result of the Ninth Circuit's new approach to federal habeas corpus cases, because the vast majority of criminal cases are resolved by plea agreements, often before any pretrial motions are filed. The Ninth Circuit decision thus affects a significant number of convictions. Further, it affects—in a significant fashion—the manner in which collateral

challenges to those convictions must be litigated. With no trial or hearing in cases where a defendant pleaded guilty, there is no evidentiary record in those cases for a court in a collateral-review proceeding to conduct a *Fulminante*–type harmless-error analysis. Finally, this decision shifts the burden of proof in the collateral review proceeding from the petitioner to the state, by forcing the state to present the evidence of a petitioner's guilt that would have been presented years earlier if the petitioner had not pleaded guilty or no contest.

STATEMENT OF THE CASE

A. Underlying state court criminal proceeding

1. Moore confessed to his brother and a friend, and later to police, that he shot Kenneth Rogers in the course of an assault and kidnapping.

On December 7, 1995, Moore, Lonnie Woolhiser, and Roy Salyer assaulted Kenneth Rogers in his residence, bound him with duct tape, forced him into the trunk of a car, drove him to a remote location, and killed him with a single gunshot to the head from close range. App. 72; App. 173. Before being charged with a crime, Moore confessed to his brother and a friend, and then to police, but he claimed that the shooting was accidental. In addition to those confessions, Moore consistently admitted to his attorney that he shot the victim during a kidnapping and assault. App. 70-71, 74.

2. Pursuant to plea negotiations, Moore pleaded no contest to felony murder; his attorney did not move to suppress Moore's confession to police.

The state initially charged Moore with felony murder, kidnapping, and assault. (C.R. 28, exhibit 112, petition for state post-conviction relief). Pursuant to plea negotiations, however, Moore waived grand jury indictment, and the district attorney submitted an information charging him with one count of murder with a firearm, to which Moore pleaded no contest. App. 81; App 209-10. Before Moore pleaded no contest, the trial court conducted a thorough colloquy with Moore to establish that his plea was knowing, voluntary, and intelligently made. App. 213-22. Moore received the mandatory minimum 300-month sentence of imprisonment with lifetime post-prison supervision. App. 181.

B. In a state collateral review proceeding, the Oregon courts rejected Moore's claim that his trial attorney was ineffective for failing to move to suppress Moore's confession to police.

Moore sought post-conviction relief in state court.[1] He alleged, among other claims, that his trial counsel rendered ineffective assistance, in violation of the

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[1] Oregon's process to collaterally challenge a conviction is known as a post-conviction relief proceeding. *See* Or. Rev. Stat. § 138.510 *et seq*,

Sixth Amendment, by failing to move to suppress his confession to police. App. 198-201.

In an affidavit prepared for the state post-conviction proceeding, Moore's trial attorney recounted his handling of the case, setting out in detail his discussions with Moore. *See generally* App 69-77.[2] Counsel explained that he had decided not to file a motion to suppress Moore's confession to the police in part because, even without that confession, the state could present evidence of two other "full" confessions Moore had made:

> 4. * * * Mr. Moore had previously given a full confession to his brother Raymond Moore and to a woman named Debbie Ziegler. Mr. Moore and I discussed the possibility of filing a Motion to Suppress and concluded that it would be unavailing, because in the first place, he knew he was not in custody at the time he gave the recorded interview and that the statement was voluntary, and in the second place, he had previously made a full confession to his brother and to Ms. Ziegler, either one of whom could have been called as a witness at any time to repeat his confession in full detail.

App. 70. The police were aware of those two earlier confessions when they interviewed Moore (C.R. 28, exhibit 115, p. 50), and Moore has never contended in

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[2] The attorney's complete affidavit is Appendix B to the Ninth Circuit's decision.

any proceeding that those two other confessions could have been suppressed.

Moore's counsel also discussed with Moore the risks of waiting for a grand jury indictment and proceeding to trial versus the benefits of plea bargaining and obtaining early resolution of the case:

> 6. I believe that I reviewed every aspect of the law and the facts regarding this case. I discussed the case at length with Mr. Moore and reviewed the extensive police reports * * *. I do not recollect any material statement of fact in the police report with which Mr. Moore disagreed. Mr. Moore always claimed his actual shooting of the victim was an accident, but there was never the smallest doubt that it occurred during a kidnap which began as an assault. We discussed at length the felony murder rule. * * * I made it very clear to Mr. Moore that he was not charged with aggravated murder and that in fact, the grand jury had not yet considered his case, so that the options were fully open for the district attorney to seek whatever charge or charges the district attorney thought might be justified.[3]

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[3] Moore was charged with felony murder in violation of Or. Rev. Stat. § 163.115(1)(b). If felony murder is committed "personally and intentionally," it is aggravated murder under Or. Rev. Stat. § 163.150(2)(d). Moreover, based on other circumstances of the crime, counsel warned Moore that a charge of aggravated murder was possible. App. 71-72. Aggravated murder carries possible sentences of death,

* * * * *

14. Mr. Moore and I discussed at great length whether it was in his best interest to try to press the case to early resolution or to waive all time constraints for speedy trial and immediate indictment in an attempt to secure the best possible resolution of the case. * * *

* * * * *

16. I never coerced Mr. Moore into doing anything. I have been practicing law since 1967 and have always served exclusively as defense counsel. The negotiated plea which we entered into with the district attorney did not include any charges of Measure 11 assault or Measure 11 kidnapping.[4] I thought that it was the best we could do under the circumstances and I told Mr. Moore this.* * *

17. I informed Mr. Moore that I frankly believed if we went to trial he would be found guilty of assault, kidnapping, and murder (as was his codefendant, Roy Salyer, who chose

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life without parole, or life with parole after 30 years. *See* Or. Rev. Stat. § 163.105(1) (1994).

[4] "Measure 11" refers to certain crimes, including assault and kidnapping, that carry mandatory minimum sentences under Or. Rev. Stat. § 137.700. Those sentences cannot be shortened by "good time" while in prison, and they could conceivably have been imposed consecutively if Moore had been convicted of murder, assault, and kidnapping.

> trial as an option), but I did not presume to tell Mr. Moore what he should do. * * *

App. 71, 75-76.

Moore and his brother, Raymond Moore, testified at the state post-conviction hearing about the circumstances surrounding Moore's confession to police. (C.R. 28, exhibit 122 at 7-32). However, Moore presented no evidence that he would have rejected the plea offer, or that he would have insisted on going to trial, if his attorney had successfully moved to suppress his confession.[5]

The state post-conviction court wrote that it "believe[d] trial counsel's affidavit" (App. 201), and ruled:

> 8. Counsel further explains that he did not move to suppress because petitioner had previously confessed his participation in the crime to his brother (Raymond Moore) and another friend. Both Raymond Moore and the friend could have been called as witnesses to repeat petitioner's confession. (Ex 108, Jordan Aff, p 2). A motion to suppress would have been fruitless.
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> 9. The Court finds that there is very little chance that petitioner's confession would have

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[5] In contrast, Moore testified in a deposition that he would not have pleaded no contest if he had understood that his sentence would include a lifetime term of post-prison supervision. (C.R. 28, exhibit 114 at 12). He did not pursue that claim in this federal habeas action.

> been suppressed. Given petitioner's confession, counsel obtained the best plea offer he could for petitioner and petitioner accepted the offer after careful consideration.

App. 205. The court also ruled that Moore's claims that he did not understand "the results and the nature of his plea" were "unfounded." App. 205. The court ruled that Moore had failed to prove that he was entitled to relief under *Strickland v. Washington,* 466 U.S. 668 (1984) (requiring a petitioner to prove both that counsel's performance was unreasonable and that the petitioner was prejudiced). App. 206. The state appellate courts rejected Moore's appeal of the post-conviction court's judgment. *Moore v. Palmateer*, 174 Or. App. 321, 26 P.3d 191, *rev. denied*, 332 Or. 430, 30 P.3d 1184 (2001).

C. Federal habeas corpus proceedings

1. The district court ruled that Moore's confession was involuntary but that trial counsel reasonably decided not to move to suppress it; the court also ruled that Moore was not prejudiced by counsel's decision, because he would have pleaded no contest regardless.

Moore next sought federal habeas corpus relief and ultimately chose to pursue only one issue: "[W]hether trial counsel was constitutionally ineffective for failing to adequately investigate and move to suppress petitioner's inculpatory statements to police." App. 184. The federal magistrate judge ruled that Moore's confession was involuntary because the

police had given him implied promises of leniency. App. 188-90. Nonetheless, she concluded that Moore's trial counsel reasonably decided not to move to suppress based on the following facts: (1) Moore had confessed to Raymond Moore and to Debbie Ziegler before he spoke to the police; (2) if the case had gone to trial, Raymond Moore and Ziegler "could have been called to testify to the same statements petitioner made to the authorities"; and (3) codefendant Salyer had told police details of the murder before Moore confessed to police. App. 190-92. The magistrate judge concluded that Moore's confession to police would have been "redundant," and that Moore's attorney's performance "did not fall below an objective standard of reasonableness" when he chose not to move to suppress Moore's confession. App. 192.

The magistrate judge further ruled that Moore had not demonstrated that he suffered prejudice "since his decision to enter pleas of no contest would not have changed given his prior confessions to Moore and Ziegler, as well as Salyer's demonstrated willingness to cooperate with the police." App. 192.

The district court adopted the magistrate judge's findings and recommendation in their entirety and denied the petition. App. 194-96.

2. The Ninth Circuit reversed the district court, ruling both that Moore's counsel unreasonably failed to move to suppress the confession and that Moore was prejudiced by that failure.

The Ninth Circuit reversed the district court's denial of habeas relief. *Moore v. Czerniak*, 534 F.3d 1128 (9th Cir. 2008). The superintendent timely filed a petition for rehearing and suggestion for rehearing en banc. The Ninth Circuit denied rehearing en banc, and issued a replacement opinion that largely mirrors the initial opinion. *Moore v. Czerniak*, 574 F.3d 1092 (9th Cir. 2009).[6]

a. The Ninth Circuit ruled that *Arizona v. Fulminante* is the applicable "clearly established" federal law to review claims that trial counsel was constitutionally ineffective for failing to move to suppress a confession.

In an opinion by Judge Reinhardt, the Ninth Circuit first recognized that a claim of ineffective assistance of counsel is governed by *Strickland v. Washington*, 466 U.S. 668 (1984), and that *Strickland* applies "in the plea, as well as the trial, context" under *Hill v. Lockhart*, 474 U.S. 52 (1985). Yet the court then identified *Arizona v. Fulminante*, 499 U.S. 279

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[6] The opinion from the denial of rehearing en banc consists of five separate opinions: the majority, a concurrence, and three dissents.

(1991), rather than *Hill*, as the controlling authority for analyzing whether Moore was prejudiced by his attorney's failure to move to suppress the confession:

> In the context of a plea bargain, we specifically ask whether there is a reasonable probability that, but for counsel's deficient performance, the petitioner would have gone to trial rather than accept the plea bargain offered by the state. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Because Moore's claim involves the failure to suppress a confession, the prejudice question is governed by *Fulminante*, 499 U.S. 279, the guiding Supreme Court precedent on the harmlessness of an erroneously admitted confession.

App. 19.

Applying that newly announced standard, the court ruled that the state post-conviction court's "prejudice determination constituted 'an unreasonable application of[] clearly established Federal law' under 28 U.S.C. § 2254(d)(1)."[7] 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. App. 41.

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[7] 28 U.S.C. § 2254(d)(1) provides that a writ of habeas corpus may be issued only if the state court unreasonably applies "clearly established Federal law, as determined by the Supreme Court of the United States."

b. The dissent concluded that the state courts did not misapply the relevant clearly established federal law—that is, *Strickland v. Washington* and *Hill v. Lockhart*—in rejecting Moore's claim.

In dissent, Judge Bybee wrote that the majority opinion clearly establishes a "dramatic proposition":

> In the process of second-guessing counsel, the Oregon courts, and the district court, the majority clearly establishes a dramatic proposition: After *Kimmelman v. Morrison*, 477 U.S. 365 (1986), *Strickland v. Washington*, 466 U.S. 668 (1984), and *Arizona v. Fulminante*, when a motion to suppress a confession is potentially "meritorious," counsel's failure to file the motion constitutes deficient and prejudicial conduct if there is any possibility that filing the motion would have caused a defendant to choose a trial over the plea. * * * According to the majority, if counsel has any grounds for moving to suppress a confession and there is any possibility the defendant would have gone to trial, the failure to move for suppression satisfies both prongs of *Strickland*. It is, absolutely, error and, absolutely, prejudicial.

App. 96-97.

The dissent would have affirmed the district court's denial of the writ on the ground that the state courts did not misapply the controlling Supreme Court authority. Applying *Strickland*, the dissent

wrote that Moore's counsel reasonably chose not to move to suppress the confession, given the strength of the state's case against Moore and the benefits Moore obtained through an early resolution of the case. App. 97-115. Applying *Hill* (App. 115-31), the dissent wrote that Moore had failed to establish that he was prejudiced by his counsel's decision not to move to suppress the confession: "There is no reason to believe that Moore would have gone to trial." App. 115. The dissent then explained why the majority's reliance on *Fulminante* is wrong. App. 131-39.

The dissent also concluded that the majority's holding "forces defense counsel to file any motions to suppress a confession that a panel of federal judges later might determine to be meritorious[.]" App. 112-13. That requirement, according to the dissent, directly conflicts with *Knowles v. Mirzayance*, 556 U.S. ___, 129 S. Ct. 1411 (2009), which rejected the proposition that an attorney must pursue a strategy if there is "nothing to lose" by following that strategy. App. 100-02. *See also* App. 114, n. 10 (expressing concern about expansion into other areas of pretrial motion practice).

A second dissent, in which Judge Callahan dissented from the order denying rehearing en banc, echoed Judge Bybee's concerns that the majority failed to follow the *Strickland* standard and that the decision conflicts with *Mirzayance*. App. 153-65. And a third dissent, authored by Judge Bea, noted that the panel majority reweighed the evidence, disregarded the state court's factual findings, and shifted the burden of proof from Moore to the defending su-

perintendent, in conflict with *Woodford v. Visciotti*, 537 U.S. 19 (2002). App. 165-71. Judge Bea concluded that "it strains credulity to claim that the state court's decision was contrary to or an unreasonable application of the *Fulminante* decision." App. 170-71.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision conflicts with this Court's authorities in two ways. First, it effectively substitutes *Arizona v. Fulminante* for *Strickland v. Washington* and *Hill v. Lockhart*, by directing courts to use *Fulminante*'s direct-appeal, harmless-error standard of review when conducting collateral reviews of criminal convictions. Second, in a related but slightly different error, the decision identifies *Fulminante* as "clearly established Federal law" for the purpose of determining prejudice in claims of ineffective assistance of counsel where the conviction was obtained by a guilty plea. But *Hill* already identifies the appropriate prejudice standard for those circumstances, and *Strickland* already identifies the appropriate general standard for reviewing claims of ineffective assistance of counsel.

The decision also conflicts with all other circuits, requiring courts in the Ninth Circuit alone to use *Fulminante* when conducting collateral reviews of criminal convictions.

Finally, the decision will affect thousands of cases on collateral review, because the vast majority of criminal cases—approximately 95% of felony convictions according to one study—are resolved by plea agreements. Moreover, the decision not only affects a

significant number of cases, but it significantly will affect the *manner* in which those cases are resolved on collateral review. Indeed, application of the Ninth Circuit's standard will require a complete change in how collateral-review cases are litigated. To conduct a *Fulminante* direct-appeal, harmless-error review in a collateral proceeding, as now required in the Ninth Circuit, the parties will have to make a record for review as though the underlying criminal case had gone to trial. Played out in practical terms, the new test necessarily will shift the burden of proof in the collateral proceeding from the petitioner to the state. That burden-shifting also conflicts with the long-standing requirement that a federal habeas corpus petitioner must prove his claims for relief.

A. The Ninth Circuit effectively substituted the direct-appeal, harmless-error standard announced in *Arizona v. Fulminante* for the collateral review standards this Court announced in *Strickland v. Washington* and *Hill v. Lockhart*.

The "clearly established Federal law" that governs claims of ineffective assistance of counsel is *Strickland v. Washington,* 466 U.S. 668 (1984). *Williams v. Taylor*, 529 U.S. 362, 391 (2000).[8] Under *Strickland*,

[8] 28 U.S.C. § 2254(d)(1) provides that a writ of habeas corpus may be issued only if the state court unreasonably applied "clearly established Federal law, as determined by the Supreme Court of the United States." *See also Lockyer v. Andrade*, 538 U.S. 63, 71 (2003) (a federal habeas court may not issue the writ unless the state court's decision is objectively unreasonable under the governing legal princi-

a petitioner claiming ineffective assistance of trial counsel must show (1) "that counsel's representation fell below an objective standard of reasonableness" and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Bell v. Cone*, 535 U.S. 685, 695 (2002). In other words, the petitioner must prove both that counsel committed an unreasonable error and that the error prejudiced the petitioner. For the last 25 years, this Court has consistently applied that general standard, most recently in *Wong v. Belmontes*, 558 US. ___ (November 16, 2009); *Bobby v. Van Hook*, 558 U.S. ___ (November 9, 2009); *Knowles v. Mirzayance*, 556 U.S. ___, 129 S. Ct. 1411 (2009).

For convictions that were obtained by a guilty plea rather than by a trial, this Court has required petitioners to satisfy *Strickland*'s prejudice prong in a particular manner. A petitioner who pleaded guilty proves prejudice by demonstrating a reasonable probability that, "but for counsel's errors, *he would not have pleaded guilty and would have insisted on going to trial*." *Hill v. Lockhart,* 474 U.S. 52, 59 (1985) (emphasis added).[9]

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ples set forth by the Supreme Court at the time the state court rendered its decision).

[9] Although *Hill* specifically addressed collateral challenges to convictions obtained by guilty plea and although Moore pleaded no contest, *Hill* applies here. That is so because the *Hill* standard derives from a recognition that convictions secured by plea agreements are fundamentally

Here, while ostensibly acknowledging *Strickland* and the more-specific *Hill* standard for determining prejudice in plea cases, the Ninth Circuit effectively supplanted them by identifying *Arizona v. Fulminante* as the applicable "clearly established Federal law" for determining whether Moore was prejudiced by his counsel's failure to move to suppress his confession. Yet *Fulminante* simply does not, and cannot, govern the prejudice analysis for this kind of collateral challenge to a conviction.

In *Fulminante*, this Court held—on direct appellate review of the conviction—that the erroneous admission of an involuntary confession *at trial* may be reviewed for harmless error, and reiterated the pertinent harmless-error standard:

> When reviewing the erroneous admission of an involuntary confession, the appellate court, as it does with the admission of other forms of improperly admitted evidence, *simply reviews the remainder of the evidence against the defendant* to determine whether the admission of the confession was harmless beyond a reasonable doubt.

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different from those secured by trials. *See Hill*, 474 U.S. at 56-57. Those fundamental differences, for purposes of collateral review, exist whether the defendant pleaded guilty or no contest. *Cf. Roe v. Flores-Ortega*, 528 U.S. 470, 485 (2000) (equating the decision to plead guilty with waiver of trial: "the decision whether to plead guilty (*i.e.*, waive trial) rested with the defendant").

499 U.S. at 310-11 (emphasis added). The Court then held—on the particular facts of that case—that the erroneous admission of the defendant's involuntary confession was not harmless. *Id.* at 296-300.

Because the Ninth Circuit's new standard is based on *Fulminante*, it does not focus—as directed by *Hill*—on whether a petitioner "would not have pleaded guilty and would have insisted on going to trial" if his attorney had moved to suppress a confession. Instead, the decision instructs courts to do the following when reviewing a claim that an attorney failed to move to suppress a confession before the petitioner pleaded guilty: (1) determine whether the unlitigated motion would have had merit, and (2) conduct a direct-appeal, harmless-error analysis, as described in *Fulminante*. As explained below, that new standard shifts the burden of proof from the petitioner to the state.

The Ninth Circuit's decision also disregards the fundamental differences between convictions obtained by plea and convictions obtained by a trial. As a result, the decision conflicts with this Court's case law that limits the scope of collateral review for convictions obtained by a guilty or no-contest plea. Even before *Hill* (and as acknowledged in *Hill*), this Court explained that a defendant who pleads guilty is in "a different posture" than a defendant who is convicted following a trial:

> He is convicted on his counseled admission in open court that he committed the crime charged against him. *The prior confession is not the basis for the judgment, has never been*

> *offered in evidence at a trial, and may never be offered in evidence.*

McMann v. Richardson, 397 U.S. 759, 773 (1970) (emphasis added).

Since *McMann*, this Court has continued to recognize, for purposes of collateral review, the fundamental differences between convictions secured by plea agreements versus convictions by trial. *See, e.g., United States v. Ruiz*, 536 U.S. 622, 629 (2002) (a prosecutor is not required to turn over impeachment materials before a defendant decides to plead guilty, because impeachment information "is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary*." (emphasis in original)); *United States v. Broce,* 488 U.S. 563, 569 (1989) (in a collateral challenge to a conviction obtained by a guilty plea, "the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack."); *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (a defendant who pleads guilty upon the advice of counsel may attack the validity of the plea only by showing that counsel's advice "was not within the standards set forth in *McMann*.").

The Ninth Circuit decision, by applying *Fulminante*'s direct-appeal, harmless-error standard to a conviction secured by a no-contest plea, conflicts with this line of cases as well.

B. The Ninth Circuit's identification of *Fulminante* as the applicable "clearly established Federal law" for purposes of determining prejudice conflicts with this Court's recent interpretations of section 2254(d)(1).

This Court recently has addressed the phrase "clearly established Federal law" in 28 U.S.C. § 2254(d)(1). The Ninth Circuit's identification of *Fulminante* as the applicable "clearly established Federal law" for determining whether a petitioner who pleaded guilty or no contest was prejudiced by his attorney's failure to move to suppress a confession conflicts with those decisions. In contrast to the Ninth Circuit's expansive interpretation of the phrase, this Court has moved toward a much narrower interpretation, equating "clearly established Federal law" with federal law that has been explicitly articulated by this Court's holdings.

For example, in *Carey v. Musladin*, 549 U.S. 70, 77 (2006), a habeas petitioner alleged that he was denied the right to a fair trial, because spectators in the courtroom had worn buttons bearing a photograph of the murdered victim. The Ninth Circuit allowed relief, holding that *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986), were the applicable "clearly established Federal law" for purposes of habeas corpus review. This Court disagreed:

> *Given the lack of holdings from this Court* regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here, it cannot be said that the state

> court "unreasonabl[y] appli[ed] clearly established Federal law." § 2254(d)(1). *No holding of this Court required the California Court of Appeal to apply the test of Williams and Flynn to the spectators' conduct here.* Therefore, the state court's decision was not contrary to or an unreasonable application of clearly established federal law.

549 U.S. at 77 (emphasis added).

In *Wright v. Van Patten*, 552 U.S. 120, 128 S. Ct. 743, 744 (2008) (*per curiam*), the Court reiterated that federal law can be deemed "clearly established" only if this Court's case law already provides a "clear answer" to the precise question presented. In *Wright*, the Seventh Circuit granted habeas relief on a petitioner's claim that he had been denied the right to counsel at a plea hearing, because his attorney was present only by speaker phone. The Seventh Circuit ruled that the applicable clearly established federal law was *United States v. Cronic*, 466 U.S. 648 (1984), rather than *Strickland v. Washington*.[10] 128 S. Ct. at 744. This Court reversed because "[n]o decision of this Court, however, squarely addresses the issue in this case * * * or clearly establishes that *Cronic* should replace *Strickland* in this novel factual context." *Id.* at 746. As in *Musladin*, the Court "could not say" that the state court had unreasonably applied clearly es-

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[10] In contrast to *Strickland*'s requirement that a petitioner prove prejudice, *Cronic* holds that, in rare circumstances, reviewing courts will presume that the petitioner was prejudiced. 466 U.S. at 659-60.

tablished federal law because "our cases give no clear answer to the question presented, let alone one in Van Patten's favor." *Id.* at 747.

Here, the Ninth Circuit has made the same error that this Court reversed in *Musladin* and *Van Patten*: It identified an inapposite decision—*Arizona v. Fulminante*—as the clearly established federal law that the state court had been required to apply when it reviewed Moore's claim against his attorney, and then it held that the state court unreasonably applied that inapposite authority. This Court has never held that *Fulminante* applies in a collateral proceeding to determine whether a petitioner was prejudiced by his attorney's failure to move to suppress a confession. The Ninth Circuit's insistence that *Fulminante* nonetheless reflects "clearly established Federal law" for purposes of this case conflicts with this Court's construction of 28 U.S.C. § 2254(d)(1).

C. The Ninth Circuit's decision conflicts with all other circuits.

Only the Ninth Circuit has imported the direct-appeal standard of review set out in *Fulminante* into collateral review of criminal convictions. Thus, all the criminal convictions in the Ninth Circuit that were obtained by plea agreements will be subjected to a different standard of collateral review, compared to convictions obtained by guilty pleas elsewhere in the country. And, as explained in the next section, all the

states in the circuit[11] will carry a heavier burden to defend those convictions than in any other circuit.

D. The Ninth Circuit's decision will affect the collateral review of thousands of convictions that were obtained through plea agreements rather than by trial.

1. The majority of felony convictions are obtained through plea agreements rather than trial.

The overwhelming number of plea agreements that are entered in state courts each year,[12] and the enormous cost of indigent defense in state courts (a total of over $2.8 billion in 2002)[13] demonstrate the critical interest that states and prosecutors have in the finality of convictions. In *Hill* itself, this Court

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[11] The Ninth Circuit encompasses Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and the Territory of Guam.

[12] In 2004, state courts convicted an estimated 1,079,000 adults of a felony, and 95% of those defendants pleaded guilty. Matthew Dunrose and Patrick Lanagan, Felony Sentences in State Courts, 2004, Bureau of Justice Statistics, July 2007 at 1-2, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc04.pdf (last visited November 13, 2009).

[13] The Spangenberg Group, American Bar Association Bar Information Program, State and County Expenditures for Indigent Defense Services in Fiscal Year 2002, at 35 (2003), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/indigentdefexpend2003.pdf (last visited November 20, 2009).

emphasized the importance of finality to convictions generally, and to guilty pleas in particular:

> Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. *The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas.* Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.

474 U.S. at 58, quoting *United States v. Timmreck,* 441 U.S. 780, 784 (1979) (internal citations omitted; emphasis added).

In short, the Ninth Circuit's decision will affect a significant number of convictions. Moreover, it will serve only to undermine—rather than to promote—the finality of convictions obtained by guilty pleas.

2. To apply the Ninth Circuit's new standard, the states will be required to present, in the collateral review proceeding, the case that they would have presented had the petitioner not waived trial in the underlying criminal proceeding.

In addition, the Ninth Circuit decision will significantly transform the manner in which collateral challenges to guilty-plea convictions must be litigated. As set out above, *Fulminante* provides that, to determine

on direct appeal whether the erroneous admission of an involuntary confession was harmless beyond a reasonable doubt, the reviewing court "simply reviews the remainder of the evidence against the defendant[.]" 499 U.S. at 310-11. The Ninth Circuit's new standard requires the reviewing court in a collateral proceeding to conduct that same kind of review. In other words, to address the issues that must be considered under this new standard—*i.e.*, to conduct a *Fulminante*-type, direct-appeal, harmless-error review in a collateral proceeding—the parties must anticipate and litigate what *would have happened if* the case had gone to trial without the petitioner's inadmissible confession.

This Court, albeit in *dicta*, has already disapproved of the very litigation process that the Ninth Circuit's new standard will force the parties and the courts in collateral review proceedings to engage in:

> What is at stake in this phase of the case is not the integrity of the state convictions obtained on guilty pleas, but *whether, years later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting their guilt and putting the State to its proof.* It might be suggested that if *Jackson* [*v. Denno*, 378 U.S. 368 (1964)] had been the law when the pleas in the cases below were made—if the judge had been required to rule on the voluntariness of challenged confessions at a trial—there would have been a better chance of keeping the confessions from the jury and there

> would have been no guilty pleas. But because of inherent uncertainty in guilty-plea advice, this is a highly speculative matter in any particular case and *not an issue promising a meaningful and productive evidentiary hearing long after entry of the guilty plea*. The alternative would be a *per se* constitutional rule invalidating all New York guilty pleas that were motivated by confessions and that were entered prior to *Jackson*.

McMann, 397 U.S. at 773-774 (emphasis added).

The inherent difficulties of implementing the Ninth Circuit's new standard are demonstrated in this very case. To accomplish the goal of granting relief to Moore, the Ninth Circuit repeatedly speculated about the evidence that *might have been offered*, if Moore had chosen to go to trial back in 1996 instead of pleading no contest, and about decisions that Moore or the state *might have made* under different circumstances:

- "Such a formal confession would, without question, be far more persuasive to a jury than Moore's statements to two lay witnesses – statements that [Raymond Moore and Debbie Ziegler] might or might not have been willing to recount, but that would in any event have lacked the flavor, details, specificity, and completeness of the taped confession." App. 44.
- "Without Moore's formal, taped confession, the state's case would have been far weaker." App. 46.

- "It is likely that, without the benefit of Moore's formal, tape-recorded confession to the police officers, the state would not have been able to secure a plea on the basis of the informal confessions." App. 47.
- "[E]ven if the state had subpoenaed Raymond [Moore] to testify, knowing him to be a hostile witness, it is unlikely that it would have been able to elicit much of the information it desired from him." App. 48-49.
- "[I]t is far from clear" what Raymond Moore and Debbie Ziegler "would have said or to what extent their testimony would have been persuasive to a jury, although it is certain that their second-hand reports would not have been nearly as damaging as Moore's own taped confession." App. 47-48.
- "Without Moore's confession and the other evidence it produced, Moore likely would not have been convicted of, or even charged with felony murder, but rather would have faced some lesser charge." App. 51-52.

In a final rejection of well-established authority, the Ninth Circuit's new standard shifts the burden of proof from the petitioner to the state, even though a petitioner always carries the burden of proof in a federal habeas corpus action, and, in this case, Moore had the burden of proof in his state collateral-review challenge. *See Wong v. Belmontes*, 558 US. ___, (November 16, 2009; slip opinion 13) ("*Strickland* places the burden on the defendant, not the State, to show a

"reasonable probability" that the result would have been different."); Or. Rev. Stat. § 138.620(2) (in a post-conviction proceeding, the "burden of proof of facts alleged in the petition shall be upon the petitioner to establish such facts by a preponderance of the evidence.").

Although the Ninth Circuit did not acknowledge this burden-shifting, it necessarily will occur when these cases play out in the collateral review arena. To enable the court in a collateral proceeding to "review the remainder of the evidence against the defendant," as instructed by *Fulminante*, the parties in that proceeding will have to present the evidence that would have been put on if the case originally had gone to trial. If no evidence is presented, petitioner wins—because, after excising the inadmissible involuntary confession, the "remainder of the evidence" will be nothing. Thus, to defend the conviction, the state will be forced to present its trial case, years after the petitioner pleaded guilty and with all the pitfalls that come from long delays before trial is conducted—faded memories, lost physical evidence, missing witnesses.

Again, this very case demonstrates the burden-shifting that will occur under the Ninth Circuit's new standard. For example, Moore submitted no evidence to establish that his confessions to Raymond Moore and Debbie Ziegler were less extensive than his confession to the police, to establish that they were inadmissible, or to establish that he would have insisted on going to trial if those two confessions—but not his confession to police—were available to the

state for trial. Yet the court wrote that Moore was entitled to relief because, in part, "the record falls far short of establishing that the potential testimony of Raymond and Ziegler would have been sufficient to cause Moore to accept so harsh a plea agreement[.]" App. 48. If, in fact, Moore would not have accepted the plea offer, *Hill v. Lockhart* required him to prove that fact in the state post-conviction proceeding. The Ninth Circuit turned *Hill* on its head, requiring the state to prove that, if Moore's attorney had moved to suppress his confession to police, Moore *would have* taken the plea offer, rather than requiring Moore to prove that he *would not have* taken it. By granting relief in the absence of evidence that ordinarily would be relevant under *Strickland* and *Hill*, the Ninth Circuit demonstrated that it had shifted the burden of proof from Moore to the state.

There will be no finality to convictions obtained through plea negotiations if constitutionally valid guilty or no-contest pleas—such as Moore's—can be overturned simply by showing that trial counsel failed to file a meritorious motion to suppress a confession, regardless of other circumstances that existed at the time and even if the petitioner offers no evidence that he would have gone to trial had counsel filed the motion. By sidestepping *Strickland* and *Hill* rather than faithfully applying them, the Ninth Circuit has created confusion and tipped the scales in favor of petitioners who seek to overturn convictions that were obtained through plea agreements.

E. The Ninth Circuit erred by granting relief, because Moore failed to prove either that his counsel unreasonably chose not to move to suppress the confession or that he suffered prejudice as a result.

The district court correctly concluded that Moore's counsel reasonably chose not to move to suppress Moore's confession to police, even if the motion would have been successful. By looking at the *entirety* of counsel's affidavit—as the state court, the district court, and the Ninth Circuit dissenters did—it is readily apparent that counsel's strategic choice to forgo the motion was interwoven with the plea negotiation discussions. *See* App. 112 (J. Bybee, dissenting: the majority "largely ignores the obvious strategic reasons detailed in counsel's affidavit that counsel had to advise Moore to take the plea"). The Ninth Circuit disregarded those "obvious strategic reasons" not to move to suppress only because Moore's attorney did not expressly state that the plea negotiations influenced his decision not to challenge the confession. App. 35-36, n. 16 (*citing only two paragraphs of* the affidavit).[14]

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[14] The majority opinion also repeatedly asserts that the state "conceded" that Moore's confession to the police was unconstitutionally obtained. *See, e.g.*, App. 3 ("Randy Moore's taped confession was obtained by the police at the station house by means that even the state concedes were unconstitutional.") and App. 64 ("Had Moore's counsel filed a motion to suppress on the ground the state concedes is meritorious"). But no such concessions ever were made. Rather, the state made no argument about whether

Reading counsel's affidavit fairly, the only correct legal conclusion to be drawn is that he reasonably focused on the big picture and reasonably chose not to challenge Moore's confession. Moore was not prejudiced by that choice, and he has never made any effort to carry the burden of proof that *Hill* places on him—he has never offered any evidence to prove that he would have insisted on going to trial if counsel had moved to suppress his confession to police.

By ignoring Moore's failure to satisfy that burden, the Ninth Circuit issued a decision that conflicts with this Court's case law, and it did so in a manner that affects a significant number of cases in a significant manner.

CONCLUSION

This Court should grant this petition to clarify that *Hill v. Lockhart* remains the applicable "clearly established Federal law" under 28 U.S.C. § 2254(d)(1) for determining whether a petitioner who pleaded guilty or no contest was prejudiced by unreasonable errors made by counsel before the petitioner enters

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the confession was inadmissible because it was apparent—under all the circumstances of the case—that Moore's trial attorney reasonably chose not to move to suppress that one confession, and that Moore's no-contest plea was constitutionally valid, because it was knowing, voluntary, and intelligently made.

the plea, and to clarify that *Fulminante* does not alter that approach simply because the claim relates to an attorney's failure to move to suppress a confession.

Respectfully submitted,

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