No. 09-658

In the Supreme Court of the United States

JEFF PREMO, 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

REPLY BRIEF

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REPLY BRIEF

Petitioner, Jeff Premo, Superintendent, Oregon State Penitentiary (the superintendent), has asked this Court to review the Ninth Circuit's announcement that *Arizona v. Fulminante*, 499 U.S. 279 (1991), is clearly established federal law for purposes of determining, in a federal habeas corpus case, whether a trial attorney's failure to move to suppress a confession prejudiced a defendant who pleaded guilty or no contest. In response, Moore argues that the Ninth Circuit simply applied *Strickland v. Washington*, 466 U.S. 668 (1984), and *Hill v. Lockhart*, 474 U.S. 52 (1985), and did nothing out of the ordinary with *Fulminante*. But his response actually highlights both the Ninth Circuit's error and the impact this decision will have on many collateral proceedings.

In addition, Moore makes a number of assertions about what the record proves. This reply will address only some of Moore's claims about the facts, but the superintendent's decision not to argue about all of Moore's factual assertions is not a concession that his description of the evidence, or what that evidence proves, is accurate. The multiple opinions in this case show that there is very little agreement about the facts, and the state court's factual findings, which should have been paramount in this federal habeas corpus case, have been lost in the shuffle. But the

evidence is largely irrelevant for purposes of the main question presented in the superintendent's petition, and disputes over the facts should not preclude granting the superintendent's petition.

A. Moore does not explain how *Fulminante* is relevant to the question of whether a trial attorney's conduct affected a defendant's decision to plead guilty or no contest, nor how a *Fulminante* analysis can be conducted without a trial record to review.

Moore's explanation of the Ninth Circuit's use of *Fulminante* tracks as follows. First, the court recognized *Strickland* and *Hill* as the controlling authorities for assessing whether a petitioner who pleaded guilty or no contest was prejudiced by his attorney's failure to move to suppress a confession. Second, when a petitioner contends that his attorney should have filed a motion to suppress, part of the *Hill* analysis requires the reviewing court to determine the likelihood of success for that motion. (Brief in Opp. 12-16). The superintendent agrees with both of those premises. However, the parties disagree about the final step of Moore's argument and the Ninth Circuit's approach.

Moore argues that *Strickland* and *Hill* required the Ninth Circuit to "assess the extent of the harm from the failure to file the meritorious

suppression motion" and that *Fulminante* "is the 'clearly established' law on the harmfulness of a statement in the circumstances of this case." (Brief in Opp. 14). This is where the Ninth Circuit went astray. The district court had already ruled that Moore's confession to police was involuntary[1] (App. 188-90), and the superintendent did not challenge that part of the district court's ruling on appeal. App. 3. The Ninth Circuit should simply have assumed that the motion to suppress would have succeeded and then determined whether Moore would have insisted on going to trial if counsel had filed the motion. The court should not have conducted its *Fulminante* analysis.

The harmless-error analysis announced in *Fulminante* simply does not apply to a case like

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[1] The district court nonetheless denied relief, ruling that Moore's trial counsel reasonably chose not to file the motion because Moore's two other confessions would have been admissible if he had chosen to go to trial. The court noted both the state post-conviction court's factual findings and the evidence supporting those findings, including evidence that Moore told his brother, Raymond, and Debbie Ziegler the same story he told the police, and that that conversation took place before the police interview. App. 190-92. The court also pointed to evidence that codefendant Roy Salyer was cooperating with the police by the time that Moore made his confession. App. 191.

this, in which a federal habeas petitioner seeks collateral review of convictions that were obtained by a plea of guilty or no contest. As explained in the superintendent's petition, *Fulminante* instructs that, on direct review of a claim that a trial court erroneously admitted a confession, the appellate court "*simply reviews the remainder of the evidence against the defendant* to determine whether the admission of the confession was harmless beyond a reasonable doubt." *Fulminante*, 499 U.S. at 310-11 (emphasis added). When a criminal defendant pleads guilty or no contest, of course, there is no trial and therefore no evidentiary record for later review. Thus, in a collateral review, such as a state post-conviction or federal habeas corpus proceeding, there is no record to use for a proper *Fulminante* analysis.[2]

Moore's response does not grapple with the real-world difficulties of applying *Fulminante* in

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[2] Moore's assertion that the superintendent "ignored" the Ninth Circuit's reliance on *Strickland* and *Hill*, and the requirements set out in those opinions (Brief in Opp. 12-14), is both incorrect and irrelevant. The superintendent acknowledges that the Ninth Circuit began, and ended, its analysis with *Strickland* and *Hill*. The point of the petition, however, is that the Ninth Circuit injected *Fulminante* into the prejudice analysis.

collateral proceedings, as the Ninth Circuit now requires. For example, in this case, because Moore pleaded no contest, the available evidence for a *Fulminante* harmless-error analysis consists only of bits and pieces of testimony that undoubtedly would have been developed further had the case actually gone to trial. Contrary to Moore's assertion that the state offered "the precise analysis required by *Fulminante*" to the state post-conviction court (Brief in Opp. 16), the post-conviction court could not have conducted a *Fulminante* analysis, because no trial took place in the underlying criminal case. Rather, the state argued and the state post-conviction court found—albeit with an unfortunate lack of precision—that the availability of two other witnesses to testify about petitioner's full confession rendered any motion to suppress petitioner's confession to police "fruitless." That finding is separate from the court's ruling that there was "very little chance" that Moore's confession would have been suppressed. *See* App. 205. Thus, while it is unclear exactly what the state court meant by "fruitless," that finding is broad enough to encompass a finding that Moore would not have insisted on going to trial if his counsel had moved to suppress his confession.[3]

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[3] That understanding of the state court's ruling is consistent with its additional finding that Moore's

The portion of Moore's deposition testimony that he identifies as sufficient to demonstrate prejudice under *Hill*—that he wanted to withdraw his no-contest plea because, at some unspecified time, he had been reading about the "Brightline rule," which requires police to stop questioning a person in custody if they ask for an attorney (Supp. App. 14)—falls far short of proving either that he wanted his attorney to move to suppress his confession or that he would have insisted on going to trial if his attorney had filed the motion. If that was what he meant, he easily could have, and should have, said so as the first step toward carrying his burden of proving that he was prejudiced by his attorney's failure to file the motion to suppress.[4]

"claims regarding his lack of understanding of the results and the nature of his plea are unfounded." App. 205. That finding, in turn, is supported by the trial attorney's testimony about his extensive discussions with Moore about the comparative risks and benefits of going to trial or accepting the state's plea offer (App. 69-77) and by the change-of-plea transcript. App. 211-29.

[4] Further, Moore's testimony on this point lacks credibility because, as part of the plea bargain, the state agreed not to present the case to the grand jury. That presentment could easily have led to additional charges (both codefendants were convicted of multiple offenses), and perhaps more-serious charges than the

Although Moore never plainly testified that he would have insisted on going to trial if his attorney had moved to suppress his confession to police, he now contends that four factors support a conclusion that he probably would have rejected the plea offer if his attorney had filed the motion. (Brief in Opp. 9-10). None of them has weight. First, Moore's contention that the shooting was an accident, even if true, still leaves him guilty of exactly the crime to which he pleaded no contest: felony murder. *See* Or. Rev. Stat. § 163.115(1)(b) (murder includes an unintentional killing committed during commission of, or flight from, another felony). Second, that Moore pleaded no contest rather than guilty tells us nothing about whether he would have insisted on going to trial if his attorney had filed the motion. Third, his assertion that he timely sought to challenge his

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single count of felony murder to which Moore pleaded no contest. Evidence, described by the prosecutor at the change-of-plea hearing, that the victim died from a contact wound to his temple, fired from a gun that had to be cocked before it would fire (App. 226-27), could persuade a rational juror that the shooting was intentional, not accidental as Moore claimed. If a jury believed that Moore shot the victim intentionally, he could have been convicted of aggravated felony murder. Or. Rev. Stat. § 163.095(2)(d) (felony murder constitutes aggravated murder if committed personally and intentionally).

conviction proves nothing—unless we are to assume that mere filing proves the allegations. Fourth, although Moore asserts that "the facts show a viable defense to murder," he does not identify any such defense, and the superintendent cannot discern one.

B. Moore has not identified any other circuit decision that applies *Fulminante* in the manner used by the Ninth Circuit in this case.

Moore cites opinions from the Seventh, Eighth, Fourth, and Fifth Circuits to argue that the Ninth Circuit is not alone in the procedure it used in this case. (Brief in Opp. 17-19). The Ninth Circuit used *Fulminante* to conclude that Moore's case would have been harmed if his confession to police had been admitted *if the case had gone to trial* and, therefore, that Moore was prejudiced by his attorney's failure to move to suppress the confession.

None of the opinions cited by Moore uses a process anything like the Ninth Circuit's approach here. For example, in *Ward v. Dretke*, 420 F.3d 479 (5th Cir. 2005), the petitioner failed to prove that his attorney acted unreasonably by not moving to suppress evidence, because the evidence would have been admissible on other grounds. The Fifth Circuit did, as Moore notes, turn to *Wong Sun v. United States*, 371 U.S. 471

(1963), to determine whether the evidence would otherwise have been admissible as "fruit of the poisonous tree." *Id.* at 488. But the court did not—as the Ninth Circuit did here—assess whether admission of the evidence at trial (if the case had gone to trial) would have prejudiced the petitioner.

Gilbert v. Merchant, 488 F.3d 780 (7th Cir. 2007), which Moore discusses most extensively, is similarly unhelpful. In that case, the Illinois Appellate Court had held that the petitioner's confession was voluntary. The Seventh Circuit agreed and, because a motion to suppress the confession would not have succeeded, wrote that the petitioner could not establish prejudice. *Id.* at 795. *See also Id.* at 790-91 (petitioner was required to prove that "had his confession been suppressed, it is reasonably likely that he would have gone to trial rather than plead guilty."). The Seventh Circuit did not attempt to discern the prejudicial impact that the confession might have had *on a trial* if the petitioner had chosen to go to trial, as the Ninth Circuit did here.

In short, in none of the four opinions cited by Moore did the courts use *Fulminante* in the way that the Ninth Circuit did in this case. If, as the Ninth Circuit contends (App. 41), *Fulminante* is the "clearly established" federal law for determining .whether a federal habeas petitioner who pleaded guilty or no contest was prejudiced by his

counsel's failure to file a motion to suppress a confession, Moore has not supported that assertion here. The Ninth Circuit stands alone in the analytic process it announced in this case.

C. The procedural issues raised by Moore do not preclude review by this Court.

Moore argues that this Court should deny the superintendent's petition on two procedural grounds, but there is no impediment to review. First, Moore asserts that a footnote in the petition "suggests that the inadmissibility of the statement at issue may be in question." (Brief in Opp. 20). To be clear, the superintendent is not arguing that Moore's confession would have been admissible. Even assuming that a motion to suppress would have succeeded, however, the Ninth Circuit erroneously injected *Fulminante* into the *Strickland* and *Hill* analysis.

Moore also asserts that the superintendent has waived the right to argue that Moore still would have pleaded no contest even if his attorney had filed the motion to suppress, by not making that argument below. (Brief in Opp. 21-22). As discussed above, neither the superintendent's argument in state court, nor the state court's ruling, were as restricted as Moore contends. In any event, the question of whether the Ninth Circuit inappropriately grafted *Fulminante* analysis onto the *Strickland* and *Hill* standards does not turn

on the evidence in this case. Nor is review precluded by the fact that neither party anticipated—in state court or in federal court—that the Ninth Circuit would announce *sua sponte* that *Fulminante* applies in a federal habeas corpus case when a petitioner attempts to overturn a conviction obtained by a plea of guilty or no contest.[5]

Moore's response does not identify any procedural impediment to review of the Ninth Circuit's use of *Fulminante* to analyze whether a petitioner who pleaded guilty or no contest was prejudiced by his attorney's failure to file a motion to suppress.

D. The superintendent's petition does not ask this court to engage in error correction; but if the superintendent is correct, he also is entitled to relief on the merits.

The superintendent agrees with Moore's assertion that a petition for writ of certiorari is "rarely granted" for mere error correction. (Brief in Opp. 22). But the superintendent seeks more than error correction in a single case. The petition seeks reversal of the Ninth Circuit's engrafting of *Arizona v. Fulminante* onto collateral re-

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[5] As noted by Judge Bybee in dissent, neither party suggested to the Ninth Circuit that *Fulminante* had any role to play in this case. App. 85.

views of convictions that were obtained by plea rather than by trial. If the superintendent is correct about the issue presented, he believes he also is entitled to reversal on the merits, and the petition's second question presented explains why that is so. The petition should not be denied simply because it asks for specific relief that follows from the primary reason for seeking the writ of certiorari.

Respectfully submitted,

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