No. 09-658

In the Supreme Court of the United States

JEFF PREMO, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

RANDY JOSEPH MOORE,

Respondent.

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

REPLY BRIEF

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INTRODUCTION

Although Moore tries to downplay the Ninth Circuit's reliance on *Arizona v. Fulminante,* 499 U.S. 279 (1991), he nonetheless argues that *Fulminante* directly supports his claim for relief, and that the state post-conviction court erred by failing to consider *Fulminante*'s "teachings." This Court should conclude, however, that *Fulminante*'s holding is inapplicable to this case. Because Moore pleaded no contest, the direct-review harmless-error inquiry in *Fulminante* is neither factually similar nor analytically analogous to the ineffective-assistance prejudice inquiry that applies here. Those inquiries are fundamentally and indisputably different.

If this Court concludes—as it should—that *Fulminante* does not apply to the prejudice inquiry in a case like this, it follows that Moore is not entitled to relief under 28 U.S.C. § 2254(d)(1). Because *Fulminante* is inapplicable, *Fulminante* cannot qualify as "clearly established Federal law" for purposes of this case, the state post-conviction court's ruling cannot be deemed "contrary to" it, and any state court "failure" to apply *Fulminante* cannot reflect an "unreasonable" application of *Strickland v. Washington*, 466 U.S. 668 (1984).

This Court should reject Moore's other arguments as well. Moore claims that *de novo* review

of the state court's legal and factual determinations is appropriate because it did not address whether, under *Hill v. Lockhart,* 474 U.S. 52 (1985), counsel's purported misconduct affected Moore's decision to plead no contest. Nothing, however, required the state court to refer to *Hill*. *Hill* is a subset of *Strickland*'s general prejudice standard, and the state court expressly cited and applied *Strickland*. Moreover, the state court based its ruling not just on *Strickland*'s "deficiency" prong, but on its prejudice prong as well. Because the court adjudicated the merits of Moore's prejudice claim, § 2254(d) requires deferential review of the state court's legal and factual determinations.

In turn, deference to the state court's factual determinations under § 2254(d)(2) disposes of Moore's claim that the evidentiary record entitles him to relief. Nothing required the state post-conviction court to draw the factual inferences that Moore's claim for relief depends on. Instead, the record entitled the state court to find that even a successful suppression motion would not have affected Moore's decision to plead no contest.

ARGUMENT

A. In relying on *Arizona v. Fulminante*, the Ninth Circuit relied on a holding that is inapplicable to this case.

1. The record belies Moore's suggestion that the Ninth Circuit placed no undue weight on *Fulminante*.

As a preliminary matter, this Court should reject Moore's attempts to downplay the extent to which the Ninth Circuit relied on *Fulminante*. According to Moore, the Ninth Circuit's "determination that the state court's findings were 'contrary to clearly established federal law as set forth in *Fulminante*' was in the context of the full [*Strickland*] prejudice analysis," and the Ninth Circuit "recogni[zed] that consideration of *Fulminante* was only one part of the required prejudice analysis." Resp. Br. 20. Moore suggests that the Ninth Circuit invoked *Fulminante* merely to inform its assessment of the potential significance of Moore's tape-recorded confession to police, but did not treat *Fulminante* as a holding that directly controls this case.

In fact, the Ninth Circuit treated *Fulminante* as the *preeminent* part of the prejudice analysis. The Ninth Circuit responded to the proposition that Moore's confessions to his brother and to Debbie Ziegler could have incriminated him at a trial, and that counsel thus did not prejudice

Moore by not moving to suppress Moore's confession to police, by stating that "the Supreme Court squarely rejected a markedly similar argument in *Arizona v. Fulminante*," a "case that is, *a fortiori*, controlling here." App. 41 (footnote omitted). The Ninth Circuit described *Fulminante* as directly "govern[ing]" any case in which an attorney acts unreasonably by failing to move to suppress a confession. *See* App. 19 ("[b]ecause Moore's claim involves the failure to suppress a confession, the prejudice question is governed by *Fulminante*"). And the Ninth Circuit held that the state court—in rejecting Moore's prejudice claim on the ground that Moore's other confessions would have made a motion to suppress "fruitless"—acted "contrary to clearly established federal law as set forth in *Fulminante*." App. 46 (footnote omitted). The Ninth Circuit treated *Fulminante*'s holding as dispositive, and as far more than a mere "part" of the prejudice analysis.

2. Because the inquiry in *Fulminante* is fundamentally different from the inquiry required in this case, *Fulminante*'s holding is inapplicable.

Fulminante was a direct-review harmless-error case, in which the dispositive inquiry was whether the state had shown that evidentiary error—at an already concluded trial—was harmless beyond a reasonable doubt. 499 U.S. at 297. In contrast, this is a collateral-review case, in which

Moore bore the burden of proving that counsel's purportedly deficient conduct affected Moore's *pretrial* decision to plead no contest. *See* Or. Rev. Stat. § 138.620(2) (requiring Oregon post-conviction petitioners to establish facts alleged in a petition by a preponderance of the evidence); *Wong v. Belmontes,* 558 U.S. ___, 130 S. Ct. 383, 390-91 (2009) ("*Strickland* places the burden on the [criminal] defendant, not the State, to show a 'reasonable probability' that the result would have been different"). Because those two inquiries are fundamentally different, *Fulminante* can play no meaningful role in a case like this. This Court should reject Moore's assertions to the contrary. *See, e.g.,* Resp. Br. 20 (asserting that the state post-conviction court failed to "take into account the teachings of *Fulminante*" and therefore made an unreasonable decision).

In holding that an erroneously admitted confession was not harmless, *Fulminante* necessarily focused on how its admission influenced the jury's assessment—during an already completed trial—of the state's properly admitted evidence. The Court emphasized that, although Fulminante's confession to Donna Sarivola correctly was admitted, "the jurors might have found Donna Sarivola's story unbelievable" had the confession to Anthony Sarivola been excluded; that is, jurors might have relied on the inadmissible confession as "corroborat[ion]" of the admissible

confession. 499 U.S. at 298-99. The Court also noted that, had the confession to Anthony Sarivola been excluded, the state would have been unable to admit additional prejudicial evidence that it used to explain why Fulminante "would have been motivated to confess to [Anthony] Sarivola." 499 U.S. at 300. Emphasis on those factors—that is, analysis of the relationship at trial between inadmissible and other evidence—makes sense only if a court is conducting a *post*-trial harmless-error inquiry.

Those factors cannot meaningfully be invoked in a case like this, in which courts must assess whether a suppression ruling affected a defendant's *pretrial* decision to accept a plea offer and to forgo trial altogether. Unlike the focus in *Fulminante,* the focus in this case is on the pretrial decision-making process that Moore and counsel would have gone through, not on evidence that was presented at trial. Each factor discussed below is critical to the *Strickland* prejudice analysis in this case, but none would be relevant to a *Fulminante* harmless-error analysis.

First, in deciding whether to accept the state's plea offer, and in choosing to do so before litigating any suppression motions, Moore needed to assess whether the state would have difficulty proving felony murder based on evidence that did *not* include his confession to police.

Second, Moore's pretrial decision required him to recognize that the state was still in the process of investigating the victim's death. He needed to recognize that, if he rejected the plea offer, not only might the state charge him with additional crimes (including aggravated murder), but it might—in the meantime—uncover additional evidence that would make it even easier to prove its case.

Third, Moore needed to assess the severity of the sentences that he might receive (including the possibility of consecutive sentences)[1] if he went to trial and failed to earn an acquittal. In addition, he needed to consider any other factors that were personally important to him in assessing the risks of a jury trial. *See, e.g.,* App. 75 (counsel's affidavit, noting that Moore "felt very strongly" that Lonnie Woolhiser "was much less culpable than he was himself," and that Moore "was very interested in the offer the State was making to his brother").

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[1] Under Oregon law, a trial court may impose consecutive sentences for offenses arising out of "a continuous and uninterrupted course of conduct" if it finds that each offense indicates a "defendant's willingness to commit more than one criminal offense," or that each offense "created a risk of causing greater or qualitatively different loss, injury or harm to the victim." Or. Rev. Stat. §§ 137.123(5)(a) and (b).

None of those factors could play a role in a *Fulminante* harmless-error inquiry. Instead, *Fulminante* assessed the manner in which the erroneous admission of a confession—at an already completed trial—might have influenced the jury's evaluation of other evidence. That assessment is not directly transferable to a defendant's pretrial decision to forgo trial altogether. *Fulminante* does not apply to this case.[2]

3. If *Fulminante* controls this case, the practical effect will be to reduce a defense attorney's ability to make strategic choices on a client's behalf.

If the Ninth Circuit is correct, a defense attorney who believes that the state possesses overwhelming and admissible evidence of a client's guilt will have little incentive to advise a client to

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[2] Ultimately, the Ninth Circuit appears to have made the analytical error of treating *Strickland*'s ineffective-assistance prejudice inquiry and *Fulminante*'s harmless-error inquiry as if they were alternative ways of expressing the same standard. By writing that the state court's "determination that the taped confession was *harmless* was contrary to clearly established Supreme Court law as set forth in *Fulminante*," App. 60 (emphasis added), the Ninth Circuit suggested that the *Strickland* prejudice test and *Fulminante*'s harmless-error test are interchangeable.

accept a favorable plea offer early in a case. The Ninth Circuit's decision suggests that an attorney, to best protect his or her professional interests, should instead urge a client to reject any and all plea offers until motions to exclude prosecution evidence have been fully litigated. The decision reduces a defense attorney's flexibility to make strategic choices, and ignores the "wide latitude" and independence that criminal defense attorneys are entitled to. *See Strickland,* 466 U.S. at 688-89 ("[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant," and "[a]ny such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions").

Restricting the options available to defense attorneys ultimately will undermine their clients' interests. As Judge Bybee's dissent noted, "[a] requirement that defense counsel file any potentially meritorious pretrial motions or risk being found incompetent on collateral review will skew plea negotiations where the considerations promoting negotiation include whether the defendant will file a motion to suppress." App. 113-14. "If, in response to the majority's new rule, counsel must file all motions, defense counsel loses a bar-

gaining chip and will almost certainly face a much less cooperative prosecutor." App. 114.

B. Because *Fulminante* does not directly apply to the inquiry in a case like this, it necessarily follows that Moore cannot obtain relief under 28 U.S.C. § 2254(d)(1).

Federal habeas relief is appropriate under 28 U.S.C. § 2254(d)(1) if a state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law." The Ninth Circuit held that the state post-conviction court's decision was contrary to "clearly established" law announced in *Fulminante,* and that the state court unreasonably applied *Strickland*'s prejudice standard. App. 46, 20. But if this Court concludes—as it should—that *Fulminante* can play no meaningful role in a case like this, relief under § 2254(d)(1) necessarily is unavailable. Because *Fulminante* is inapplicable, *Fulminante* cannot be "clearly established Federal law" for purposes of this case, and the state court could not have acted "contrary to" it in rejecting Moore's prejudice claim. And if *Fulminante* is inapplicable, the state court cannot be deemed "unreasonable" for not applying *Fulminante* to *Strickland*'s prejudice analysis.

C. This Court should reject Moore's assertion that the only deference required on review is deference to the Ninth Circuit.

1. Despite Moore's assertion that the Ninth Circuit was entitled to engage in *de novo* review, 28 U.S.C. § 2254 required deference to the state-court ruling.

Moore asserts that, under *Porter v. McCollum*, ___ U.S. ___, 130 S. Ct. 447, 451 (2009), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005), "no § 2254(d) deference is extended to those aspects of the *Strickland*/*Hill* claim that were not adjudicated on the merits in state court." Resp. Br. 31. He argues that because the state post-conviction court did not cite *Hill* or expressly address "whether [he] would have gone to trial in the absence of his counsel's failings," it failed to adjudicate his prejudice claim, and the Ninth Circuit was free to apply *de novo* review. Resp. Br. 29-30. But because the state court did adjudicate the merits of Moore's prejudice claim, it was entitled to deference under 28 U.S.C. § 2254(d)(1) and (2).

Porter, Wiggins, and *Rompilla* do not extend as far as Moore suggests. In those cases, a state court rejected an ineffective-assistance claim after addressing only one of *Strickland*'s two prongs. *See Porter*, 130 S. Ct. at 452 (state court

addressed "prejudice" prong only); *Wiggins,* 539 U.S. at 534 (state court addressed "deficiency" prong only); *Rompilla,* 545 U.S. at 390 (same). Because each state court failed to adjudicate the merits of the petitioner's claim under *Strickland*'s remaining prong, this Court analyzed the remaining prong "*de novo*," without assessing whether the state court decision was "contrary to, or an unreasonable application of, clearly established Federal law." *See Wiggins,* 539 U.S. at 534 ("our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis"); *Porter,* 130 S. Ct. at 452 ("[b]ecause the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's *Strickland* claim *de novo*"); *Rompilla*, 545 U.S. at 390 ("[b]ecause the state courts . . . never reached the issue of prejudice," "we examine this [other] element of the *Strickland* claim *de novo*").

Here, however, the state post-conviction court did address *Strickland*'s prejudice prong. The court concluded that Moore "did not prove any of his claims" and "was not denied the right to assistance of counsel...articulated by...*Strickland v. Washington*." App. 206-07. Further, the state court denied Moore's claim not merely because it believed that a suppression motion would have been denied (and that counsel thus acted rea-

sonably by not filing it) but because a motion, even if successful, "would have been fruitless" in light of the state's other evidence. The state court noted that trial counsel's affidavit "offered *two* reasons for not filing the motion." App. 204 (emphasis added). The first reason was that "there was no [legal] basis for filing a motion." The second was that, because Moore "had previously confessed" to Raymond Moore and "another friend," "[a] motion to suppress would have been fruitless." App. 205. In rejecting Moore's claim on those grounds, the state court necessarily ruled that any failure to file a suppression motion would not have prejudiced Moore, even if the motion would have been granted, due to other evidence that the state possessed. In short, the state court did adjudicate Moore's prejudice claim under *Strickland*.

The state post-conviction court did not cite *Hill*. But to "adjudicate" the merits of Moore's prejudice claim for purposes of § 2254(d), the court did not need to cite *Hill* or otherwise refer to it. *Hill*, as this Court has explained, is merely a subset of *Strickland*'s general prejudice standard. *See Hill*, 474 U.S. at 58-59 ("the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel," and *Strickland*'s "'prejudice' requirement" requires a defendant to show "a reasonable probability that, but for counsel's errors,

he would not have pleaded guilty and would have insisted on going to trial"; footnote omitted). The *Hill* Court—rather than creating a prejudice standard that is separate from the *Strickland* standard—itself applied the *Strickland* prejudice standard. *See Hill,* 474 U.S. at 60 ("petitioner's allegations are insufficient to satisfy the *Strickland v. Washington* requirement of 'prejudice'").

Although the state post-conviction court did not expressly refer to *Hill*, it undoubtedly addressed—and rejected—Moore's claim that he established prejudice under *Strickland*. For that reason, and because nothing in the state-court ruling contradicts *Strickland* or *Hill,* that ruling warrants deference under § 2254(d). *See Early v. Packer,* 537 U.S. 3, 8 (2002) (§ 2254(d)(1) "does not require citation of our cases [by the state court]" and "does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them"; emphasis in original).[3]

[3] *See also Bell v. Cone,* 543 U.S. 447, 455 (2005) ("[f]ederal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation").

2. The Ninth Circuit's factual determinations do not warrant deference.

Because the state post-conviction court adjudicated the merits of Moore's prejudice claim, deference applies not just to its legal determinations under 28 U.S.C. § 2254(d)(1) but to its factual determinations as well. Under § 2254(d)(2), habeas relief "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication . . . resulted in a decision that was based on an *unreasonable* determination of the facts in light of the evidence presented in the State court proceeding." (Emphasis added.) [4]

Nonetheless, Moore suggests that this Court should defer to any factual determinations made by the Ninth Circuit. According to Moore, affirmance is required because the record "supports the [Ninth Circuit's] finding of a reasonable probability" that, had counsel filed a suppression motion, Moore would have gone to trial. Resp. Br. 33. Moore thereby suggests that this Court must defer to any prejudice "findings" that the Ninth Circuit purported to make, so long as the record

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[4] *See also* 28 U.S.C. § 2254(e)(1) ("a determination of a factual issue made by a State court shall be presumed to be correct," and a habeas "applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence").

contains evidence that can be read as supporting those findings. But because the state post-conviction court adjudicated Moore's prejudice claim, it is *that court* whose factual determinations warrant deference, so long as its factual determinations were "reasonable." Deference to any putative Ninth Circuit findings is neither required nor appropriate.

3. Under § 2254(d)(2), Moore can prevail only if the state court was "required" to draw the factual inferences that Moore's claim depends on.

Moore claims that it is reasonably likely that, had counsel filed a suppression motion, he would have gone to trial. Resp. Br. 36. In rejecting Moore's prejudice claim, the state post-conviction court necessarily found that Moore failed to establish that likelihood. Because the state court adjudicated the merits of the prejudice claim, § 2254(d)(2) authorizes relief only if the adjudication "resulted in a decision that was based on an *unreasonable* determination of the facts." (Emphasis added.) If the factual inference that Moore urges is not the *only* reasonable inference permitted by the record, the state court was entitled to reject it, and the state court's factual determinations (and any resulting rejection of Moore's prejudice claim) can provide no basis for relief.

Although Moore claims that AEDPA's "deferential review standard does not go that far," Resp. Br. 32,[5] the reasoning described above is absolutely consistent with § 2254(d)(2)'s text. It also is consistent with this Court's construction of § 2254(d)(1)'s similarly worded "reasonableness" standard, which provides that a petitioner may obtain relief by showing that a state court "unreasonabl[y]" applied clearly established law. *See Yarborough v. Alvarado,* 541 U.S. 652, 664-65 (2004) (because some facts supported conclusion that interrogated person was in custody, and because others supported opposite conclusion, the "state court's application of our custody standard

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[5] Moore somewhat misstates the state's argument. According to Moore, the state argued that "nothing in the record 'required' the result achieved by the Court of Appeals." Resp. Br. 32. In fact, the state—rather than asserting that the record did not require the *Ninth Circuit* to rule as it did—argued that "[n]othing required the *state court* to infer from Moore's deposition testimony that Moore likely would have gone to trial had counsel filed a motion to suppress." Pet. Br. 44 (emphasis added; bold omitted). The state further argued that, "[u]nless the only reasonable inference that the record permits, with respect to Moore's deposition testimony, is the inference urged by Moore, the state court was free to reject that inference." Pet. Br. 44 (emphasis omitted).

was reasonable" for purposes of § 2254(d)(1)); *Carey v. Musladin,* 549 U.S. 70, 77 (2006) (because "[n]o holding of this Court *required* the California Court of Appeal to apply the test of *Williams* and *Flynn* to the spectator's conduct," state court decision was not "unreasonable" under § 2254(d)(1); emphasis added).

4. Although *Strickland*'s prejudice test permits a limited role for "speculation," speculation alone cannot assist Moore at this stage of his habeas case.

Moore acknowledges that he "did not explicitly testify in the post-conviction trial that he would have gone to trial" had counsel moved to suppress his confession to police. Resp. Br. 35. Perhaps as a result, he invokes *Sears v. Upton,* ___ U.S. ___, 130 S. Ct. 3259 (2010), to suggest that courts, in assessing prejudice under *Strickland,* "routinely" engage in "speculation." Resp. Br. 39; *see Sears,* 130 S. Ct. at 3266-67 (to assess whether an attorney's failure to present additional mitigation evidence at a penalty-phase trial prejudiced petitioner, courts "'speculate' as to the effect of the new evidence—regardless of how much or how little mitigation evidence was presented during the initial penalty phase"). Use of the word "speculate" in *Sears*, however, does not suggest that Moore could establish *Strickland* prejudice by showing a mere *possibility* that a suppression motion would have affected his decision to plead

no contest, or by showing that a motion "conceivably" could have affected his decision. Instead, this Court has described the *Strickland* prejudice standard as rigorous. In *Williams v. Taylor,* 529 U.S. 362, 394-95 (2000), the Court described the following formulation as the "correct standard":

> *[I]t is insufficient to show only that the errors [by counsel] had some conceivable effect on the outcome of the proceeding*, because virtually every act or omission of counsel would meet that test . . . *The petitioner bears the highly demanding and heavy burden in establishing actual prejudice.*

(Emphasis added; internal quotes omitted.)

It also must be remembered that, once a state court has adjudicated and rejected a prejudice claim under *Strickland,* a petitioner can challenge that adjudication only by clearing a second and independent "demanding" hurdle—the highly deferential standard that AEDPA created. *See Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 240 (2005) (§ 2254 creates a "demanding" standard for obtaining relief). At this point in the collateral-review process, "speculation" alone cannot entitle Moore to relief.

D. Nothing required the state post-conviction court to find a reasonable probability that Moore would have gone to trial had counsel filed a suppression motion.

1. The "distinct factors" that Moore identifies did not compel a finding that counsel's conduct prejudiced him.

Moore claims that "three distinct factors" support the Ninth Circuit's "finding of a reasonable probability that [Moore] would not have pled no contest to murder had his lawyer recognized the inadmissibility of the taped confession." Resp. Br. 33. Moore mistakenly frames the issue as whether the record contains evidence that could support a *de novo* determination by the Ninth Circuit. Furthermore, Moore exaggerates the import of the factors in question.

First, Moore notes that he "has maintained throughout" that the victim's death resulted from an "accidental shooting," and he notes that his "understanding was that an accidental death meant manslaughter." Resp. Br. 33. Second, Moore cites Supp. App. 6 as evidence that he "was reluctant to plead guilty," and he describes that as "significant evidence that even a small change in the calculus would have altered [his] decision making." Resp. Br. 34; *see* Supp. App. 6 (containing counsel's statement at sentencing

that it was "very difficult" for Moore "to take the plea offer"). But whether or not counsel moved to suppress Moore's confession to police, Moore's belief that the shooting was accidental, his general reluctance to plead guilty to a murder charge, and any philosophical differences he had with the concept of felony murder presumably would not have changed.[6] Nothing about the first two factors that Moore identifies suggests that a suppression motion would have altered the "calculus" in which Moore engaged, or would have altered the result of that calculus.

Third, Moore notes that "once [he] learned of his attorney's failings, he filed timely pleadings in the state, and later the federal, court to have his conviction set aside." Resp. Br. 35. Moore, however, bore the burden of proving his claim for state post-conviction relief with *evidence*. *See* Or. Rev. Stat. § 138.620(2) (state post-conviction petitioner must prove "facts alleged in the petition" by a preponderance "of the evidence"). Nothing in

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[6] In any event, the record suggests that Moore's lawyer ultimately convinced him—correctly—that Oregon law treats accidental shootings as murder when they occur in the course of a felony, and when the victim dies as a result. *See* Supp. App. 6 (containing counsel's statement at sentencing that "it's been a hard thing for [Moore] to understand . . . the concept of felony murder and how it could apply in a situation where . . . it was an accidental shooting").

Oregon's statutory scheme for post-conviction proceedings, nothing in the federal habeas statutes, and nothing in this Court's case law, suggests that filing a timely petition for relief—in either state or federal court—constitutes *evidence* supporting relief.

2. The state court was not required to find that Moore had "little incentive . . . to enter a plea."

Moore admits that, had he not pleaded guilty to felony murder, "there was certainly evidence that could have supported a conviction," and he admits that "possibly a more onerous sentence" would have resulted "had [he] gone to trial." Resp. Br. 36. Nonetheless, he claims he had "little incentive . . . to enter a plea" because "[a]t worst, his sentence would likely have been the same as the one he received upon his plea," and because "a capital prosecution was a very remote possibility, given that [he] did not participate in the [victim's] beating" or bring the murder weapon to the scene of the crime. Resp. Br. 36-37.

Moore does not dispute that he entered his plea because he agreed with counsel that—with or without evidence of the confession to police—a felony murder conviction was a near certainty, and an aggravated murder charge and conviction were possibilities. The record—as discussed below—suggests that a successful suppression mo-

tion would *not* have altered counsel's advice about Moore's prospects at a trial, would not have affected the accuracy of that advice, and would not have affected Moore's decision.

Even without evidence of Moore's confession to police, the state still would have possessed evidence that Moore had made a "full confession" to Raymond Moore and to Debbie Ziegler. *See* App. 70 (trial counsel's affidavit). Although Moore may not have beaten the victim or made the decision to bring the murder weapon to the scene of the crime, his confessions established that he alone—and not his co-defendants—personally killed the victim by firing the fatal bullet. He thus was potentially liable under Oregon law not only for felony murder, but for aggravated murder.[7]

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[7] According to Moore, "that Raymond Moore and Ms. Ziegler were present during the interrogation when the confession was unlawfully obtained would have necessitated a taint hearing to determine what they had previously heard concerning the crime and to ensure that they did not testify to what they had learned during the interrogation." Resp. Br. 4 n. 2. Moore has never previously alleged, however, that trial counsel possessed any basis for moving to suppress Moore's confession to Raymond Moore or to Debbie Ziegler, or that counsel provided ineffective assistance by not moving to suppress those confessions. In any event, trial counsel's affidavit described Moore's confession to his brother and to Ziegler as

And even without the additional full confessions, the state still would have possessed powerful evidence of Moore's guilt, and both Moore and his attorney would have been aware of that fact. Trial counsel attached excerpts from a police re-

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"full," and the record contains evidence that Moore confessed to those two *before* he confessed to police. *See* Pet. Br. 40-43 (recounting evidence). The state court was entitled to read the record in that fashion, and to conclude that the confession to police did not somehow taint the prior confessions to Raymond Moore and to Ziegler.

Moore also notes that Ziegler told police, during the recorded interrogation, that "I still don't know the actual thing," and that Raymond Moore testified at the state post-conviction hearing that "I'm not sure of all the exact details because this is basically hearsay." Resp. Br. 5 (quoting J.A. 130 and 158). Moore thereby suggests that neither Ziegler nor Raymond Moore heard a "full" confession from Moore prior to the recorded confession that he made to police. But the state post-conviction court was not required to read the record as Moore does. Instead, it reasonably could infer that the quoted statements by Ziegler and Raymond Moore were nothing more than acknowledgements that, because they were not physically present when Moore killed the victim, they were forced to rely on others' accounts of the victim's death.

port to his affidavit. Ex. 120, Affidavit, Att. 3.[8] Those excerpts show that Moore—the day *before* his tape-recorded confession to police—made a number of extremely damaging admissions to police. *Id.* (report at 40-41). Moore admitted that, the day before the victim's body was discovered, he accompanied his co-defendants to the victim's home. *Id.* Moore admitted that they journeyed there for the purpose of confronting the victim about property he had taken from one of the co-defendants. *Id.* (report at 40). Moore also informed police that others were present when he and his co-defendants made their plan to confront the victim, and that others were present when Moore and the co-defendants arrived at the victim's home. *Id.* In addition, according to the same police report, Roy Salyer had already informed police that the murder weapon—a gun that Lonnie Woolhiser had purchased from the victim (App. 227)—likely was in a particular clump of blackberry bushes. Although officers had not yet found the gun when Moore made his tape-recorded confession, their discovery of the gun was inevitable. Ex. 120, Jordan Affidavit, Att. 3 (report at 39, 43).[9]

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[8] The cited attachment constitutes the final five pages of the affidavit's attachments.

[9] Officers called off their initial search of the bushes that contained the gun due to darkness. Ex.

Moore thus knew, when he decided to plead no contest, that his own admissions to police—admissions made prior to his tape-recorded confession—placed him at the victim's home the day before the victim's body was discovered, and established his motive to harm the victim. Moore also knew, when he pleaded no contest, that the state had discovered the victim's body and the murder weapon. And Moore had every reason to think that officers had talked to, or were in the process of interviewing, witnesses who saw him at the victim's house the day the victim disappeared, and witnesses who had heard Moore and his co-defendants plan to confront the victim.

Moore had no reason to believe that a successful motion to suppress his tape-recorded confession to police would have hampered the state's efforts to prosecute him for either felony murder or aggravated murder.[10] The state post-conviction

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120, Jordan Affidavit, Att. 3 (report at 39). They recovered the gun from those bushes when they resumed their search in Moore's company, following Moore's tape-recorded confession. Ex. 120, Jordan Affidavit, Att. 3 (report at 43).

[10] Indeed, co-defendant Roy Salyer (who went to trial) was convicted of murder, kidnapping, burglary, and assault, and—although Moore alone fired the fatal bullet—received the same total sentence that Moore received. App. 129 and n. 19.

court was not required to find that a suppression motion would have affected Moore's decision to plead no contest to felony murder.

3. Any mistake by counsel in assessing a suppression motion's merits did not "infect" his assessment of the state's other evidence.

Moore argues that "counsel's advice with respect to the plea question was infected and rendered incompetent by his mistaken assessment of the confession" to police. Resp. Br. 42-43. Moore may mean to suggest that the state post-conviction court, in rejecting Moore's prejudice claim, should not have relied on counsel's affidavit, or relied on counsel's belief that even a successful suppression motion would have been "unavailing." This Court should reject that suggestion.

As counsel's affidavit demonstrates, his advice about Moore's prospects at trial was not based exclusively on his opinion that a suppression motion would be denied. Instead, counsel articulated an additional and independent reason—aside from the motion's legal merits—for believing a motion would be futile. Even if a motion to suppress was granted, counsel believed that the state would possess overwhelming evidence that Moore had committed, at the least, felony murder. *See* App. 70 (containing counsel's statements that,

"[i]n addition" to believing that a motion would be denied, "Moore and I . . . concluded that [a motion] would be unavailing" because "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"). As the record demonstrates, counsel's assessment of the state's remaining evidence was accurate. Nothing suggests that counsel's assessment was at all affected, much less "infected," by his assessment of a suppression motion's legal merits.[11]

CONCLUSION

Fulminante's direct-review harmless-error holding does not apply to the *Strickland* prejudice inquiry in a case like this. It simply provides no

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[11] Moore notes that the state did not appeal the federal district court's conclusion that Moore's confession to police was unconstitutionally obtained, and that the Ninth Circuit described the state as "conce[ding]" the confession's inadmissibility. Resp. Br. 1. Admittedly, the state did not appeal the admissibility issue, and it has not asked this Court to address the admissibility of Moore's confession to police. The state notes, however, that its tactical decision to proceed exclusively with a "no prejudice" argument should not be read as an "agreement" that the confession to police was inadmissible.

meaningful guidance when a federal habeas petitioner claims that counsel's failure to file a suppression motion affected his decision to forgo a trial and plead no contest. As a result, *Fulminante* provides no basis for concluding that the state post-conviction court—by rejecting Moore's prejudice claim—acted "contrary to," or unreasonably applied, "clearly established Federal law."

This Court should reverse the Ninth Circuit's judgment, and should hold that Moore is not entitled to federal habeas relief.

Respectfully submitted,

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