American Bar Association
www.supremecourtpreview.org

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

BRIEF FOR RESPONDENT

STEVEN T. WAX*
Federal Public Defender
ANTHONY D. BORNSTEIN
Assistant Federal Public Defender
Counsel of Record
Federal Public Defender for the
District of Oregon
101 SW Main Street, Suite 1700
Portland, OR 97204
(503) 326-2123
Steve_Wax@fd.org

LEGAL PRINTERS LLC, Washington DC ● 202-747-2400 ● legalprinters.com

QUESTIONS PRESENTED

This is a federal habeas corpus case in which the petitioner pleaded *nolo contendere* in state court. He challenges his conviction based on his trial attorney's failure to file a meritorious motion to suppress his tape-recorded confession to police. In such cases, the test for ineffectiveness is drawn from *Strickland v. Washington, Hill v. Lockhart*, and *Kimmelman v. Morrison*. The questions presented are:

1. When Mr. Moore's attorney failed to seek suppression of a tape-recorded statement that was induced by a promise of leniency by police, whether this case involves an ordinary application of *Strickland*, *Hill*, and *Kimmelman* by the Court of Appeals in its reliance upon *Arizona v. Fulminante* as substantive law relevant to assessments of whether Mr. Moore's attorney's performance fell below an objective standard of reasonableness and whether Mr. Moore was prejudiced as a result.

2. When the state post-conviction court ruled that Mr. Moore's attorney acted competently because the motion to suppress had no merit and suppression would, in any event, have been fruitless because of the availability of two other confessions, that court neither cited *Hill* nor *Kimmelman*, and the State did not contest the conclusion of the district court that Mr. Moore's confession was unconstitutionally obtained,

whether the Court of Appeals properly focused its analysis of effectiveness and prejudice on the significantly greater value to the prosecution of multiple confessions and tape-recorded confessions to police officers as contrasted with oral confessions to civilians.

3. When the state courts never referenced *Hill* or its analysis, whether the Court of Appeals properly assessed the record and its conclusion that Mr. Moore would not have entered a plea of no contest in the absence of his attorney's failings, is incorrect and should be reversed by this Court.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES vii

STATEMENT OF THE CASE 1

The Facts Of The Crime And Mr. Moore's Plea Of *Nolo Contendere* 2

The State Post-Conviction Proceedings 3

SUMMARY OF ARGUMENT 9

ARGUMENT 12

I. THE COURT OF APPEALS CORRECTLY APPLIED THE AEDPA'S STANDARD OF REVIEW AND THIS COURT'S WELL ESTABLISHED PRECEDENTS OF *STRICKLAND*, *HILL*, AND *KIMMELMAN* IN GRANTING HABEAS CORPUS RELIEF 12

A. In A Plea Case, Under *Strickland*, *Hill,* And *Kimmelman,* Analysis Of Counsel's Alleged Ineffectiveness In Failing To File A Motion Requires Assessment Of The Merits Of The Motion 12

B. The Court of Appeals Properly Applied *Strickland*, *Hill*, And *Kimmelman* 17

C. In Response To The State's Argument That The Mere Existence Of Other Confessions Rendered Counsel's Actions Proper, The Court Of Appeals Properly Relied Upon *Fulminante*'s Discussion Of Multiple Confessions 21

1. Fulminante Weighed The Relationship Between, And Relative Harm Flowing From, Each Confession 21

2. The Court of Appeals Majority Weighed The Relationship Among Mr. Moore's Confessions And The Relative Harm Flowing From Each 22

D. The State Court's Findings And Conclusions That Counsel Performed Competently Are Objectively Unreasonable Because That Court Failed To Consider The Harm A Defendant Suffers From Multiple Confessions Or The Relative Weight Of Confessions To Police Versus Civilians 27

E. Mr. Moore Established Prejudice Under *Hill* 29

1. After Concluding That Counsel Was Not Ineffective Because A Motion To Suppress Was Meritless And Fruitless, The State Court Did Not Engage In Analysis Of Prejudice As Required Under *Hill* 29

2. Because The State Court Did Not Address Prejudice Under *Hill*, The Court of Appeals Was Free To Resolve That Issue *De Novo* 30

a. Under The Court's Precedents, No Deference Was Due Under 28 U.S.C. § 2254(d) On The Question Of Prejudice. 30

b. The AEDPA Does Not Include A Determination Of Whether The Federal Court's Conclusion Was "Required." 31

3. The Court of Appeals Properly Concluded That Mr. Moore Established Prejudice Under *Hill* 32

F. Based On The Settled Method Of Analysis Of Prejudice Under *Hill*, The Court of Appeals' Opinion Neither Shifts The Burden Of Proof Nor Jeopardizes Many Convictions Obtained On Guilty Pleas 38

G. The Ineffectiveness In This Case Lies In Counsel's Failure To File A Motion To Suppress Because He Failed To Understand The Applicable Law And Facts Related To The Motion, Not His Failure To File It In The Abstract 40

CONCLUSION 43

TABLE OF AUTHORITIES

PAGE

Abdul-Kabir v. Quarterman,
550 U.S. 233 (2007) 28

Argersinger v. Hamlin,
407 U.S. 25 (1972) 13

Arizona v. Fulminante,
499 U.S. 279 (1991) . . . . *passim*

Batson v. Kentucky,
476 U.S. 79 (1986) 16, 17

Berkey v. United States,
318 F.3d 768 (7th Cir. 2003) 33

Carey v. Musladin,
549 U.S. 70 (2006) 24, 25, 26

Carter v. Collins,
918 F.2d 1198 (5th Cir. 1990) 13

Clemons v. Mississippi,
494 U.S. 738 (1990) 16

Colorado v. Connelly,
479 U.S. 157 (1986) 16

Cupp v. Naughten,
414 U.S. 141 (1973) 16

Davis v. Sec'y for Dept. of Corrections,
341 F.3d 1310 (11th Cir. 2003) 17

Ford v. Wainwright,
477 U.S. 399 (1986) 24

Gilbert v. Merchant,
488 F.3d 780 (7th Cir. 2007) 14

Glover v. United States,
531 U.S. 198 (2001) 37

Hill v. Lockhart,
474 U.S. 52 (1985) . . . . *passim*

Hudson v. United States,
272 U.S. 451 (1926) 13

Iowa v. Tovar,
541 U.S. 77 (2004) 13

Kimmelman v. Morrison,
477 U.S. 365 (1986) 10, 11, 12, 14, 17, 41

Knowles v. Mirzayance,
129 S. Ct. 1411 (2009) 19, 40, 41

Koper v. Angelone,
961 F. Supp. 916 (W.D. Va. 1997) 39

Lockyer v. Andrade,
538 U.S. 63 (2003) 23, 24

Luchenburg v. Smith,
79 F.3d 388 (4th Cir. 1996) 16

McMann v. Richardson,
397 U.S. 759 (1970) 42

Miller-El v. Cockrell,
537 U.S. 322 (2003) 28

Miller-El v. Dretke,
545 U.S. 231 (2005) 32

Miller v. Webb,
385 F.3d 666 (6th Cir. 2004) 16

Nelson v. Hvass,
392 F.3d 320 (8th Cir. 2004) 39

Norman v. McCotter,
765 F.2d 504 (5th Cir. 1985) 13

Padilla v. Kentucky,
130 S. Ct. 1473 (2010) 13, 39, 42

Panetti v. Quarterman,
551 U.S. 930 (2007) 24

Patriarca v. United States,
402 F.2d 314 (1st Cir. 1969) 23

Porter v. McCollum,
130 S. Ct. 447 (2009) 31

Renico v. Lett,
130 S. Ct. 1855 (2010) 32

Rompilla v. Beard,
545 U.S. 374 (2005) 31

Sears v. Upton,
130 S. Ct. 3259 (2010) 39

Slicker v. Wainwright,
809 F.2d 768 (11th Cir. 1987) 13

State v. Barnett,
789 A.2d 629 (N.H. 2001) 23

Strickland v. Washington,
466 U.S. 668 (1984) . . . . *passim*

United States v. Anagnos,
853 F.2d 1 (1st Cir. 1988) 23

United States v. Cronic,
466 U.S. 648 (1984) 25

Weaver v. Palmateer,
455 F.3d 958 (9th Cir. 2006) 35

White v. Maryland,
373 U.S. 59 (1963) 13

Wiggins v. Smith,
539 U.S. 510 (2003) 30, 31, 41

Williams v. Taylor,
529 U.S. 362 (2000) 15, 16, 23, 24, 28, 41

Williamson v. Ward,
110 F.3d 1508 (10th Cir. 1997) 16

Wood v. Allen,
130 S. Ct. 841 (2010) 32

Wright v. Van Patten,
552 U.S. 120 (2008) 24, 25, 26

Young v. Dretke,
356 F.3d 616 (5th Cir. 2004) 15

FEDERAL STATUTES

28 U.S.C. § 2254 . . . . 25, 27, 28, 30

STATEMENT OF THE CASE

During the investigation of a homicide, police took and tape-recorded a confession from Randy Moore. The federal district court found that the confession was unconstitutionally obtained because it was improperly induced by a police promise of leniency. The State did not appeal that determination, a fact that all three judges of the Court of Appeals considered to be a concession of its inadmissibility. Notwithstanding the clarity of the issue, Mr. Moore's attorney not only failed to seek suppression of the statement, but did not understand the meritorious basis for such a motion.

Mr. Moore was reluctant to plead guilty and, indeed, he did not. Instead, he pled *nolo contendere* to felony murder. JA 9. After sentencing, Mr. Moore independently researched the law related to the admissibility of the confession and discovered that a confession could be suppressed based on a suspect's invocation of the right to counsel, a separate ground on which the Court of Appeals believed that suppression was warranted. App. 25 n.11. He filed for post-conviction relief in an effort to overturn his *nolo* plea.

In the state system and later in federal habeas, the State argued that relief should be denied because the availability of informal confessions to two civilians rendered the inadmissibility of the confession to police irrelevant. In responding to the State's argument, the Court of Appeals relied upon

Arizona v. Fulminante, 499 U.S. 279 (1991), in its assessment of Mr. Moore's attorney's competence and in determining whether failure to file the motion to suppress increased the likelihood that Mr. Moore would have gone to trial in the absence of his attorney's mistake.

The Facts Of The Crime And Mr. Moore's Plea Of *Nolo Contendere*.

Randy Moore killed his friend Kenneth Rogers in a shooting incident on a muddy hillside in Southern Oregon. JA 51, 67, 98 & App. 226-27. As the prosecutor stated at Mr. Moore's sentencing, after Rogers had burglarized the home of a mutual friend, Moore and several other men "were going to take [Rogers] out into the woods, release him and let him walk home, basically, to put the fear of God in him at least." Supp. App. at 4. While walking up the hill, one of the other men fell in the mud. JA 164. Mr. Moore took the gun. JA 52, 78, 164. Shortly after, Rogers slipped and fell into Mr. Moore and the gun discharged, killing Rogers. JA 51-52, 78, 119; App. 227.

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

Two days after the shooting, Mr. Moore went to the police station with his half-brother, Lonnie Woolhiser (the man who fell first on the hill), his brother, Raymond, and his half-brother's girlfriend, Debbie Zeigler. Either on the ride or before, Mr. Moore told Raymond and Zeigler something about the incident. JA 100, 150, 158. When questioned by the police, Mr. Moore placed himself at the scene, admitted his participation in taking Rogers to the hill, and described the shooting accident. JA 51-86. This tape-recorded statement was obtained through promises of leniency and after the police ignored Mr. Moore's request for counsel. JA 29-30; App. 14, 24-25.

Mr. Moore's attorney failed to recognize that the police had unconstitutionally obtained the statement and did not move for its suppression. App. 70.

Shortly after entering his plea of *nolo contendere*. Mr. Moore decided to seek to withdraw it, but was talked out of those efforts. Supp. App. 21.

The State Post-Conviction Proceedings.

Once in prison, Mr. Moore continued to question the wisdom of his plea and sought to have the judgment vacated through the state post-conviction process. As he explained in the deposition he gave for that court, two primary factors motivated his decision to seek relief. Of importance to this proceeding, one was his research on the "bright line"

rule involving confessions and invocation of the right to counsel. Supp. App. 23.

The post-conviction petition filed by Mr. Moore asserted that his attorney had failed him in at least twelve ways. Claims 1 (a) and (b) focused on his attorney's failure to seek suppression of the tape-recorded statement taken from him by the police.[1] The other claims included his attorney's failure to investigate, inadequate advice on the consequences of any plea, and coercion of the plea.

Both parties had ample opportunity to litigate the matter in the state system. The State obtained affidavits from Mr. Moore's trial and appellate attorneys and the prosecutor, deposed Mr. Moore, and was able to question both Mr. Moore and his brother, Raymond Moore, at the post-conviction trial.

The testimony revealed that both Raymond and Ms. Ziegler were allowed by the police to be present during their interrogation of Mr. Moore.[2] JA 23, 159.

---

[1] Mr. Moore's claims were articulated as ten claims in his amended petition with claims 1 and 2 focusing on his attorney's failure to seek suppression. App. 199-200.

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

Mr. Moore's attorney described them as having heard "full confessions" from Mr. Moore, and the state post-conviction court adopted that testimony as a fact. App. 70, 205. Transcripts of the interrogation, deposition, and post-conviction trial testimony do not, however, reveal what each knew before they heard Mr. Moore's confession to the police. As Ms. Ziegler told the police, "I still didn't know the actual thing." JA 130. As Raymond Moore told the post-conviction court, "I'm not sure of all the exact details because this is basically hearsay." JA 158.

In his deposition, Mr. Moore explained his research on the confession and how his attorney's failure to understand or advise him of the law affected his decision to plead *nolo contendere*:

> *Q. Why did you want to withdraw your no contest plea?*
>
> *A. Because* I was worried about the life post-prison supervision, and at this time I'd started going – *by that time I had started going to the legal library in the county and we were reading Brightline rule and stuff like that.*
>
> Q. And what is the Brightline rule?

---

they did not testify to what they had learned during the interrogation.

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

. . .

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

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

Supp. App. 23 (emphasis added).

Mr. Moore's trial attorney separately addressed each of the claims about his performance in his affidavit. In paragraphs 3 and 4, he responded to the claim that he was ineffective when he failed to seek suppression of the tape-recorded statement, explicitly articulating two reasons for his decision: "My reasons for doing this were two-fold." App. 70. They were (1) his belief that the statement was taken lawfully and (2) his belief that a motion to suppress would have been pointless because the State had available the confessions Mr. Moore had made to his brother and his half-brother's girlfriend. App. 70. The affidavit addressed both the assertion of the right to counsel and the voluntariness of the confession. App. 70. The State not only obtained the affidavit from Mr. Moore's counsel, but typed it on its pleading paper.

In its post-conviction trial memorandum, the State responded separately to all of Mr. Moore's claims of ineffectiveness. With respect to the claim related to the failure to file a motion to suppress, the State relied solely on the statements by the attorney, arguing to the post-conviction court that Mr. Moore should not be granted relief because his attorney's statements "rebut petitioner's complaint." JA 139. The State then recited counsel's view of the admissibility of the statement and his belief that a "motion to suppress would have been fruitless" because of the confessions to the two other people. JA 139-40. The State concluded:

> [w]ithout sufficient evidence to establish counsel's alleged error had a tendency to affect the outcome of his case, his request for post-conviction relief should be denied.

JA 140.

The state post-conviction court took the same approach in its Findings of Fact, Conclusions of Law, a document prepared for the court by the State. JA 176. Paragraphs 7 and 8 of the court's findings track paragraphs 3 and 4 of counsel's affidavit and adopt portions of the State's memorandum word-for-word. JA 139-40; App. 70, 204-05. The state court also found Mr. Moore was not in custody when the police took the statement from him so that any assertion of the right to counsel had no impact on the admissibility of the statement. App. 201-02.

The state court denied relief, concluding that Mr. Moore was not denied his right to the assistance of counsel as guaranteed by the United States Constitution and as articulated by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984). App. at 206. Although Mr. Moore's case involved a plea, on the question of prejudice, neither the State nor the post-conviction court cited *Hill v. Lockhart*, 474 U.S. 52 (1985), nor engaged in the analysis it requires on any of the claims raised by Mr. Moore. JA 137-40; App. 198-207.

When Mr. Moore turned to the federal court, he raised the same claims as he had in the state post-conviction proceedings. His attorney narrowed the focus to the claim of ineffectiveness involving the motion to suppress. App. 184. The district court agreed with the state court that Mr. Moore was not in custody so that the failure to honor his request for counsel did not require suppression. App. 188. The court concluded, however, that the police had taken the recorded statement through an improper promise of leniency. App. 189-90. Nonetheless, the court found that the presence of the other statements in the case meant that Mr. Moore was not prejudiced by his attorney's failings. App. 192.

On appeal, the State argued the in-custody issue but did not challenge the conclusion of the district court that the statements were unlawfully induced by a promise of leniency. Resp. Br. at 17-18. When it turned to the prejudice question, the State limited its argument, as it had in the state post-conviction

court, to the assertion that the availability of the statements to Mr. Moore's brother and the half-brother's girlfriend rendered a motion to suppress "fruitless." Resp. Br. at 15-16, 19-20. While the State recited the paragraphs of the affidavit of Mr. Moore's trial counsel that discussed his opinion on the value of the plea offer (Resp. Br. at 15-16), that discussion did not address the defective advice with respect to the inadmissibility of the confession.

SUMMARY OF ARGUMENT

This is the rare case in which the State does not contest the fact that a confession tape-recorded by the police was obtained unconstitutionally. Mr. Moore's lawyer failed to understand that a motion to suppress that confession had merit.

Mr. Moore entered a plea of *nolo contendere* based on the advice of his counsel, including incorrect advice about the admissibility of the tape-recorded statement. After sentencing, when he learned that his attorney had viable grounds on which to seek suppression of the tape-recorded statement, Mr. Moore sought to have his conviction set aside. The facts fully support his contention that he would not have entered a plea of *nolo contendere* if he had been properly advised.

In its response to Mr. Moore's challenge to his conviction in state post-conviction proceedings on the ground that his attorney had failed him when he did not seek suppression of the tape-recorded confession,

the State had ample opportunity to present evidence and argue why the attorney's performance was not deficient. However, the State only presented two arguments: (1) a motion to suppress would have been denied; and (2) even if the motion were granted, filing it would have been "fruitless" because Mr. Moore had also confessed to his brother and his half-brother's girlfriend.

The State similarly limited its argument in the habeas proceedings in the federal courts. On appeal, the State did not contest the conclusion of the district court that the statement was taken in violation of Mr. Moore's constitutional rights.

There is no disagreement in this case that *Strickland* and *Hill* establish the governing standard. The two-prong standard set out in *Strickland* for assessing claims of ineffectiveness of counsel requires a determination of whether counsel's performance fell below an objective standard of reasonableness and, if so, whether the defendant was prejudiced as a result. *Strickland,* 466 U.S. at 687-88. If a case resolves on a plea, the prejudice inquiry turns on whether the defendant would have pleaded guilty in the absence of his counsel's failing. *Hill,* 474 U.S. at 58. When the alleged ineffectiveness involves an attorney's failure to file a motion to suppress, the inquiry on both prongs requires assessment of the substantive merits of the motion. *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986).

The decision of the Court of Appeals followed the dictates of this Court in *Strickland*, *Hill*, and *Kimmelman*. The Court of Appeals began its analysis by setting out the standards articulated in *Strickland* and *Hill*. It then accepted the State's concession regarding the inadmissibility of the confession to the police. It did not conclude that the fact of inadmissibility necessarily rendered counsel's performance constitutionally defective but instead turned to an analysis of counsel's performance. From this point on, the opinion addressed the issues raised by the State.

In its response to the State's assertions, the Court of Appeals properly considered the teaching of *Fulminante*. *Fulminante*'s discussion of the probative value of confessions and the extent of damage from multiple confessions fully supports the Circuit's conclusion that there was a reasonable probability that Mr. Moore would not have entered a plea if he had been properly advised. It was also proper for the Court of Appeals to consider the greater impact a tape-recorded confession taken by police, compared to an oral account to Mr. Moore's brother and friend, would likely have had on a jury.

The federal courts are free to consider the outcome question required by *Hill* without deferring to the state court because that court did not engage in the analysis required by *Hill* in reaching its decision.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY APPLIED THE AEDPA'S STANDARD OF REVIEW AND THIS COURT'S WELL ESTABLISHED PRECEDENTS OF *STRICKLAND*, *HILL*, AND *KIMMELMAN* IN GRANTING HABEAS CORPUS RELIEF.

A. In A Plea Case, Under *Strickland*, *Hill,* And *Kimmelman,* Analysis Of Counsel's Alleged Ineffectiveness In Failing To File A Motion Requires Assessment Of The Merits Of The Motion.

In *Strickland*, the Court established the two-prong standard for assessing claims of ineffectiveness of counsel. First, the courts are required to determine whether counsel's performance fell within the range of reasonable professional assistance. 466 U.S. at 689. Second, if counsel's performance fell below that standard, the courts are to determine whether the defendant was prejudiced as a result, that is, whether there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The ultimate inquiry is whether there "is a probability sufficient to undermine confidence in the outcome." *Id.*

In *Hill*, the Court held that *Strickland* applies to cases in which judgment is entered following a plea

of guilty rather than a trial.[3] Accordingly, Sixth Amendment standards govern counsel's representation during the plea process. *Hill*, 474 U.S. at 57. This past term, the Court reiterated "we have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010); *see also Iowa v. Tovar*, 541 U.S. 77, 81 (2004) ("The entry of a guilty plea . . . ranks as a 'critical stage' at which the right to counsel adheres.") (citing *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972), and *White v. Maryland*, 373 U.S. 59, 60 (1963) (per curiam)).

In plea cases, *Strickland*'s performance inquiry is the same and the prejudice inquiry turns on whether "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. This assessment often requires prediction of potential outcomes at trial based on the evidence that was available to the prosecution and that which might have been discovered had counsel performed effectively. *Id.* at

---

[3] The *Hill* standard applies whether the plea was guilty or *nolo contendere*. *See, e.g., Carter v. Collins,* 918 F.2d 1198, 1200 n.1 (5th Cir. 1990) (citing *Hudson v. United States,* 272 U.S. 451 (1926) and *Norman v. McCotter,* 765 F.2d 504, 509-11 (5th Cir. 1985)); *see also Slicker v. Wainwright*, 809 F.2d 768, 768 (11th Cir. 1987) (remanding "for the district court to apply the teachings of *Hill v. Lockhart* . . . to the appellant' s claim that his *nolo contendere* pleas resulted from incorrect advice from his lawyer").

59-60. As this discussion makes clear, the fact that plea bargaining takes place in the shadow of a trial is inherent in the analysis required under *Hill*.

When an attorney's alleged ineffectiveness involves failure to file a motion to suppress, the inquiry on both prongs requires assessment of the merits of the motion. *Kimmelman*, 477 U.S. at 375. In *Kimmelman*, this Court found that trial counsel performed deficiently when he failed to make a timely and meritorious motion to suppress physical evidence that was seized in violation of his client's rights under the Fourth Amendment.

Although *Kimmelman* arose following a trial, its conclusion that the prejudice inquiry includes assessment of the viability of the motion is equally applicable following a plea. As explained in *Hill*, "the 'prejudice' inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial." *Hill*, 474 U.S. at 59; *see, e.g., Gilbert v. Merchant*, 488 F.3d 780, 795 (7th Cir. 2007) ("Gilbert's case for prejudice presumes that his confession would have been suppressed on his counsel's motion and that this would have so weakened the State's case that he likely would not have pleaded guilty. The [state court's] reasonable determination that his confession was voluntary precludes him from establishing prejudice in this way."). *Kimmelman*'s assessment that a reviewing court cannot determine whether an attorney was ineffective or the effect of his failings without first

assessing the substantive law that is at issue and the facts of the case is consistent with the general body of habeas law.

In assessing an ineffective assistance of counsel claim in habeas corpus, the courts are required to identify the clearly established law for several different purposes. First, it is necessary to identify the relevant law on the question of the attorney's performance. In some cases, for example, whether an attorney's failure to investigate rendered his performance deficient, *Strickland* itself will be the clearly established law. 466 U.S. at 690-91. In other cases, the question of effectiveness may be decided by considering whether an attorney failed to understand the criminal law as defined by the state supreme court. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 395 (2000) (finding trial counsel ineffective in failing to investigate available mitigation evidence from state juvenile records for use in capital sentencing; counsel "incorrectly thought that state law barred access to such records"); *Young v. Dretke*, 356 F.3d 616 (5th Cir. 2004) (finding counsel ineffective based on his failure to move to dismiss untimely indictment on state law grounds). In that type of circumstance, the clearly established federal law is *Strickland*, but the case cannot be decided without reference to the relevant substantive state law.

In other circumstances, the clearly established law may be a combination of *Strickland* and other Supreme Court precedent. For example, if the issue

is whether an attorney was ineffective because he failed to object to racially discriminatory strikes by a prosecutor in voir dire, *Batson v. Kentucky*, 476 U.S. 79 (1986), is part of the *Strickland* analysis.

After identifying the law relevant to the effectiveness of the attorney's performance, the court must apply it to the facts of the case. In this stage, the reviewing court must consider whether counsel should have considered taking, or should have taken, a particular action.

The same analysis is required on the prejudice prong. As a general proposition, the clearly established federal law with respect to prejudice is *Strickland*. In the plea context, it is both *Strickland* and *Hill*. In assessing prejudice, as with the assessment of performance, it may also be necessary to look to other bodies of law. *See, e.g.*, *Williams*, 529 U.S. at 398 (in prejudice analysis, Court, *inter alia*, relied on Eighth Amendment decision in *Clemons v. Mississippi*, 494 U.S. 738, 751-52 (1990)); *Williamson v. Ward*, 110 F.3d 1508, 1520 (10th Cir. 1997) (finding trial counsel ineffective for failing to investigate petitioner's history of mental illness; in prejudice analysis, court cited *Colorado v. Connelly*, 479 U.S. 157, 167 (1986), regarding effect of petitioner's mental illness); *Luchenburg v. Smith*, 79 F.3d 388, 391 (4th Cir. 1996) (counsel ineffective in failing to request a key jury instruction; court cited, *inter alia, Cupp v. Naughten*, 414 U.S. 141, 147 (1973), in determining basis for relief); *Miller v. Webb*, 385 F.3d 666, 676-77 (6th Cir. 2004) (finding

counsel ineffective based on failure to challenge juror for cause; for prejudice, court looked to Sixth Amendment impartial jury cases to find presumption of prejudice); *Davis v. Sec'y for Dept. of Corrections*, 341 F.3d 1310, 1317 (11th Cir. 2003) (counsel ineffective for failing to renew *Batson* claim before accepting jury; for prejudice, court reviewed decisions on the discriminatory exercise of peremptory challenges to find harmless error analysis inapplicable).

B. The Court of Appeals Properly Applied *Strickland*, *Hill*, And *Kimmelman*.

The Court of Appeals understood and followed *Strickland*, *Hill*, and *Kimmelman*. At the outset of its discussion, the court stated: "The substantive federal law guiding our inquiry is supplied by *Strickland* . . . ." App. at 18. The court then articulated the *Hill* standard for prejudice in a plea case. App. at 19; *see also* App. at 46, 52 n.26.

After citing *Strickland* and *Hill*, the Court of Appeals engaged in the required assessment of the relevant law on the admissibility of statements. App. at 23-38. It could not properly have done so in the circumstances of this case without analyzing the merits of the foregone motion to suppress under established precedent. The Court of Appeals concluded that the statement was inadmissible both because, as the State conceded, it was involuntary and because it was taken in violation of Mr. Moore's right to counsel. App. at 24-25.

Once it concluded that the statement was taken in violation of the Constitution, the Court of Appeals considered the reasons offered for counsel's failure to file the motion. App. 26. It then turned to the question of prejudice from counsel's failing under the *Strickland/Hill* standard. App. at 38. Under that standard, the Court of Appeals was required to assess the extent of the harm from the failure to file the meritorious suppression motion and it did. App. 38-51.

At the conclusion of the required analysis of the substantive law, the Court of Appeals properly turned back to *Strickland/Hill* and held:

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

App. at 51-52.

In its analysis, the State ignores several critical points. First, the State ignores the fact that *Strickland*'s ineffectiveness inquiry requires analysis of the substantive law relevant to such a claim. Second, the State ignores the directive in *Hill* that analysis of prejudice will often require the courts to assess the effects of the substantive error on the

facts of the case before turning to a prediction of whether there is a probability that the error would have changed the outcome. *Hill*, 474 U.S. at 59. The State then disregards the fact that the Court of Appeals' discussions of *Fulminante* occurred in the manner dictated by this Court's precedents.

The first full discussion of *Fulminante* appears in the court's analysis of the performance prong of *Strickland*. The court recognized that failure to file a motion is not *per se* ineffectiveness requiring relief. App. 21-22. The courts are, rather, required to determine the importance of counsel's failure to file the motion within the context of the case. It was only because the Court of Appeals found Mr. Moore's taped confession "highly damaging" and counsel's reasons for not filing the motion wanting that the court concluded that the State court's determination that Mr. Moore received the effective assistance of counsel "was contrary to *Fulminante* and an unreasonable application of *Strickland*." App. 22. The majority returned to this point later in the opinion, reiterating that the failure to file the motion fell below an objective standard of reasonableness because counsel had failed to properly assess the damaging nature of the confession under *Fulminante*. App. 27.

The proper use of *Fulminante* in the performance analysis is, again, evident in the court's discussion at App. 34. There, citing *Knowles v. Mirzayance*, 129 S. Ct. 1411 (2009), the court explained that counsel's failure to file the motion

was not "a reasonable decision" because it did not take into account the teachings of *Fulminante*.

The majority continued its application of *Fulminante* when it turned to the question of prejudice. In its *Hill* prejudice analysis, the court was required to determine what impact the failure to file the motion had on Mr. Moore. This required assessment of the harm from availability of the statement as part of *Hill*'s trial versus plea determination. *Fulminante*, thus, informs the *Hill* analysis involving the harm arising from the failure to recognize the importance of the motion. App. 41.

Next, the Court of Appeals' 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 prejudice analysis. App. 46. The State ignores the Court of Appeals' recognition that consideration of *Fulminante* was only one part of the required prejudice analysis. App. 38-56, 58-59.

Finally, the State ignores the Court of Appeals reliance on *Fulminante* in its *Hill* analysis in direct response to the State's claim that "the petitioner would have been in no better position if his inculpatory state-ments to police had been suppressed." Resp. Br. at 8.

The Court of Appeals' reference to *Fulminante* as "controlling" did not substitute *Fulminante* for *Hill* or "engraft[ ]" it onto *Hill* as the State asserts. Pet.

Br. at 24. It was, rather, on the facts here, a correct statement of the law that a reviewing court was required to analyze in determining whether a constitutional violation had occurred and, if so, whether it was harmful.

C. In Response To The State's Argument That The Mere Existence Of Other Confessions Rendered Counsel's Actions Proper, The Court Of Appeals Properly Relied Upon *Fulminante*'s Discussion Of Multiple Confessions.

Fulminante is the established law of this Court regarding the harm that would flow from the use of Mr. Moore's tape-recorded confession to the police. In *Fulminante*, the Court rejected the view previously held that use of an involuntary confession is *per se* prejudicial and held that such use is subject to harmless error analysis. 499 U.S. at 288. The analysis there involved the relationship between the voluntarily and involuntarily obtained confessions and assessment of the relative harm flowing from each. *Id*. at 298-302.

1. Fulminante Weighed The Relationship Between, And Relative Harm Flowing From, Each Confession.

Fulminante had confessed to two people, Sarivola and Sarivola's wife. Sarivola, a former police officer working as a paid informant for the Federal Bureau of Investigation, befriended

Fulminante while in prison. *Fulminante*, 499 U.S. at 283. He ultimately obtained a confession from Fulminante to the murder of his daughter, a confession that the Arizona and federal courts determined had been obtained by coercion. *Id.* at 284, 288. Eight months later, while Fulminante was released from prison, he allegedly confessed to Sarivola's wife. Both confessions were introduced at Fulminante's trial. *Id.* at 284.

The question before the Court was whether introduction of the coerced confession was harmless in light of the second confession. In ruling that use of the first confession was not harmless, the Court analyzed the facts and circumstances of the case and looked at the interrelationship between the two confessions. The Court was concerned with the manner in which the two confessions "reinforced and corroborated each other," and with the facts undermining the reliability of the second confession. *Id.* at 299. The Court was also concerned that the jury "could also have believed" or "might have found" Ms. Sarivola had motives to lie. *Id.* at 300.

2. The Court of Appeals Majority Weighed The Relationship Among Mr. Moore's Confessions And The Relative Harm Flowing From Each.

The Court of Appeals majority weighed the factors that rendered the availability of the tape-recorded confession harmful even in the face of the other confessions. The majority believed that the

difference in impact between a formal tape-recorded confession to police and an informal oral confession to friends was significant. App. 43-44.

It is commonly understood that tape-recorded confessions and confessions testified to by police are highly probative. "Listening to a defendant being inculpated by his or her own voice has a persuasive power unrivaled by contradictory testimonial evidence." *State v. Barnett*, 789 A.2d 629, 632 (N.H. 2001). "[L]aw enforcement officials wear an invisible cloak of credibility by virtue of their position." *United States v. Anagnos*, 853 F.2d 1, 4 (1st Cir. 1988) (quoting *Patriarca v. United States,* 402 F.2d 314, 321 (1st Cir. 1969)). The Court of Appeals properly included the distinction in its *Fulminante* analysis.

The Court of Appeals majority considered the relationships among the confessions and weaknesses in the witness's potential testimony. App. 44-45. This parallels the concerns this Court expressed about the manner in which the jury might have viewed Ms. Sarivola. 499 U.S. at 300.

The Court of Appeals' reliance on *Fulminante* was, therefore, consistent with the holdings of this Court. In *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003), the Court acknowledged that "2254(d)(1) permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." *See also Williams*,

529 U.S. at 407 ("state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply *or unreasonably refuses to extend that principle to a new context where it should apply*") (emphasis added). This point was reiterated in *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007), where this Court stated that the "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." (internal citations omitted). "The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner." *Id*.

In *Panetti*, the Court identified *Ford v. Wainwright*, 477 U.S. 399 (1986), as the controlling legal principle even though the *Ford* standard was stated in general terms and the facts in the case before it were not identical. *Panetti*, 551 U.S. at 953. The Court applied *Ford* to the new factual pattern and concluded that there was no reasonable way to properly apply *Ford*, the clearly established Supreme Court precedent, and reach the State's conclusion. *Id*. at 949, 954.

The State's reliance on *Carey v. Musladin*, 549 U.S. 70 (2006), and *Wright v. Van Patten*, 552 U.S. 120 (2008), is misplaced. Neither undermines the holdings in *Lockyer v. Andrade*, *Williams v. Taylor*, or *Panetti v. Quarterman*. Both cases are readily distinguishable.

In *Musladin*, the Court of Appeals had granted habeas relief based on its belief that the prejudice arising from spectators wearing buttons in the courtroom with a photo of the victim on them violated due process. It relied on this Court's precedents involving prejudicial in-court conduct by state actors. The Court concluded that it had never addressed the question of a potential due process violation arising from the conduct of private citizens, as contrasted with the conduct of state officials. 549 U.S. at 653-54. The Court went on to note that "lower courts have diverged widely in their treatment of defendants' spectator- conduct claims." *Id.* at 654. As a result, the Court concluded that the Court of Appeals had erred when it held that the California courts had acted contrary to or unreasonably applied clearly established federal law. *Id.*

In *Van Patten*, the Court considered the question of whether the participation of an attorney in a plea hearing by speaker phone was presumptively prejudicial under *United States v. Cronic*, 466 U.S. 648 (1984). The Court reviewed situations in which *Cronic*'s presumption of prejudice, as opposed to *Strickland*'s requirement of proof of prejudice, applies, and concluded that the situation that it confronted was "novel." 552 U.S. at 125. The Court concluded that the absence of a clear answer on the issue precluded relief under 28 U.S.C. § 2254(d)(1). *Id.* at 126.

Both *Van Patten* and *Musladin* involved fact situations that differed in kind from fact situations previously addressed by this Court. Van Patten asked the court to apply *Cronic*, not *Strickland*. In contrast, Mr. Moore's case was decided under the correct standard and involves application of a clearly established principle to a set of facts that fall within and draw upon the guiding principles of this Court's rulings.

The Court of Appeals applied *Fulminante*'s analysis to a state argument that ignored the required assessment of the relationship between or among multiple confessions when one was obtained involuntarily. *Fulminante* rebuts the State's attempt to discredit the strong case for ineffectiveness of counsel based upon defense counsel's failure to understand that his client's statement was taken in violation of the Constitution. *Fulminante* illustrates the prejudice that Mr. Moore suffered, the strength of his assertion that his attorney's advice about the confession motivated his decision to enter a plea, and the reasons that proper advice would likely have altered his decision. Accordingly, the Court of Appeals correctly rejected the State's argument that Mr. Moore would have been in no better position had the motion been filed and granted.

D. The State Court's Findings And Conclusions That Counsel Performed Competently Are Objectively Unreasonable Because That Court Failed To Consider The Harm A Defendant Suffers From Multiple Confessions Or The Relative Weight Of Confessions To Police Versus Civilians.

In the state post-conviction proceedings, the State limited its argument on performance on the suppression issue to defense counsel's assertion that he did not move to suppress because he believed (1) he could not prevail on a motion to suppress and (2) suppression would have been fruitless because two other confessions were available. In the Court of Appeals, the State abandoned the argument that Mr. Moore's confession was voluntarily obtained.

The state court's incorrect assessment of the merits of the foregone motion to suppress severely undermines the reasonableness of its conclusion that counsel acted competently. Further, the state court's conclusion that a motion to suppress would have been "fruitless" was based on an incorrect understanding of the law. The court failed to weigh the relative impact of multiple confessions and confessions to the police versus civilians.

While 28 U.S.C. § 2254(d) limits the circumstances in which the federal courts are permitted to grant relief to habeas corpus petitioners whose claims have been adjudicated on the merits by the state courts, it permits the federal courts to

grant relief when the state court's rulings are either contrary to federal law or are objectively unreasonable.

When a state court ignores the "fundamental principles established" by this Court's "most relevant precedents," it is acting "contrary to" or is unreasonably applying the law within the meaning of 28 U.S.C. § 2254(d). *Abdul-Kabir v. Quarterman,* 550 U.S. 233, 258 (2007). If a state court's application of the clearly established law of this Court is objectively unreasonable, a federal court may reject its reasoning and arrive at a contrary conclusion. *Williams*, 529 U.S. at 413 ("Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case."); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief.").

The Court of Appeals' analysis of the harm from the failure to file a motion to suppress followed the directives of the statute and this Court. The Court of Appeals understood what the State no longer contests – that the motion to suppress had merit – and properly concluded that the state court's failure to consider the factors identified in *Fulminante* rendered its decision objectively unreasonable. App. 38-52, 60.

E. Mr. Moore Established Prejudice Under *Hill*.

1. After Concluding That Counsel Was Not Ineffective Because A Motion To Suppress Was Meritless And Fruitless, The State Court Did Not Engage In Analysis Of Prejudice As Required Under Hill.

In its conclusions of law, the state post-conviction court stated that "[b]ased on the findings of fact set forth above . . . petitioner was not denied the right to assistance of counsel, as guaranteed by . . . the United States Constitution and as articulated by the United States Supreme Court in *Strickland v. Washington*." App. 206. Under *Strickland*, "there is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one." 466 U.S. at 697. Thus, a state court may properly deny relief upon finding that a petitioner failed to satisfy *Strickland*'s performance prong, or upon finding that he failed to satisfy *Strickland*'s prejudice prong.

The state post-conviction court erroneously believed that a motion to suppress would have had no merit. Based on that conclusion, it never turned to the question of prejudice under *Hill*. In its eleven findings of fact and four conclusions of law, the state court not only failed to mention *Hill*, but also said nothing about whether Mr. Moore would have gone to trial in the absence of his counsel's failings. The state court's failure to engage in the analysis

required under *Hill* may have been understandable because it was based on its incorrect view of the merits of a motion to suppress. Its failure to do so, however, significantly altered the obligations of the federal courts.

2. *Because The State Court Did Not Address Prejudice Under Hill, The Court of Appeals Was Free To Resolve That Issue De Novo.*

a. *Under The Court's Precedents, No Deference Was Due Under 28 U.S.C. § 2254(d) On The Question Of Prejudice.*

Once the Court of Appeals found that the state court's conclusion that counsel's performance was adequate was an objectively unreasonable application of *Strickland*, it was necessary for it to consider the *Strickland/Hill* prejudice question in deciding whether to grant habeas relief. Because the state court had not addressed the question of whether Mr. Moore would have gone to trial, there was nothing to which the Court of Appeals was required to defer.

Wiggins v. Smith, 539 U.S. 510 (2003), is directly on point. There, the Court found that the state court's conclusion that counsel's investigation satisfied *Strickland* was an objectively unreasonable application of its precedent. *Id.* at 528-29. Because the state court rejected petitioner's claim by only

addressing *Strickland*'s performance prong, when this Court assessed prejudice, its "review [was] not circumscribed by a state court conclusion with respect to prejudice." *Id.* at 534; *accord Rompilla v. Beard*, 545 U.S. 374, 390 (2005).

Similarly, in *Porter v. McCollum*, 130 S. Ct. 447, 451 (2009), the state court disposed of petitioner's *Strickland* claim on the prejudice prong. "Because the state court did not decide whether Porter's counsel was deficient, [the Court] review[ed] this element of Porter's *Strickland* claim *de novo*." *Id.* at 452. Once the Court found counsel's performance deficient, it then applied § 2254(d) deference to the state court's prejudice determination and concluded that the state court's holding that Porter was not prejudiced was unreasonable. *Id.* at 454.

Under *Porter* and *Wiggins*, no § 2254(d) deference is extended to those aspects of the *Strickland/Hill* claim that were not adjudicated on the merits in the state court.

b. The AEDPA Does Not Include A Determination Of Whether The Federal Court's Conclusion Was "Required."

In its argument on deference, the State misstates the standard under the AEDPA, repeatedly asserting that the Court of Appeals failed to give the state court proper deference and that nothing "required" the state court to reach the

conclusion that Mr. Moore likely would have gone to trial. Pet. Br. at 39, 43-48.

The State's argument should be rejected for several reasons. First, as discussed in the preceding section, its analysis of the record ignores the fact that the state court did not cite *Hill*, engage in a *Hill* prejudice analysis, or understand or consider the teachings of *Fulminante*. App. 204-07. Because the state court never performed a *Hill* prejudice analysis, there was nothing for the Court of Appeals to defer to on that point.

Second, the State has incorrectly framed the standard of review. The State repeatedly asserts that nothing in the record "required" the result achieved by the Court of Appeals. This articulation of the standard finds no support in the law. The primary citation offered by the State in support of its argument is the dissenting opinion in *Miller-El v. Dretke*, 545 U.S. 231 (2005). Pet. Br. at 44. That is not surprising because this Court's definition of the deferential review standard under the AEDPA does not go that far. *See, e.g., Renico v. Lett*, 130 S. Ct. 1855, 1865 (2010); *Wood v. Allen*, 130 S. Ct. 841, 849 (2010).

3. The Court of Appeals Properly Concluded That Mr. Moore Established Prejudice Under Hill.

When reviewing ineffective assistance of counsel claims in plea cases, scrutiny of the entire record is

required to determine whether a person would have taken the plea in the absence of counsel's errors. While courts properly examine the petitioner's statements and formal allegations, the complete inquiry is broader and more penetrating. To assess whether a petitioner would have insisted on trial, courts examine the circumstances surrounding the plea. *See, e.g., Berkey v. United States* 318 F.3d 768, 772 -73 (7th Cir. 2003) ("[a] mere allegation by the defendant that he would have insisted on going to trial is insufficient to establish prejudice. Berkey must establish through objective evidence that a reasonable probability exists that he would have gone to trial.") (internal citations omitted). In this case, review of the full record supports the Court of Appeals' careful analysis of the facts and circumstances which resulted in its finding of a reasonable probability that Mr. Moore would not have pled no contest to murder had his lawyer recognized the inadmissability of the taped confession.

This record contains at least three distinct factors supporting the conclusion of the Court of Appeals. First, Mr. Moore has maintained throughout that the death of his friend was the result of an accidental shooting. As he explained in the post-conviction trial, Mr. Moore's understanding was that an accidental death meant manslaughter, the crime to which his half-brother Lonnie Woolhiser was permitted to plead.

> Q. In your mind, what– what charge is an accident death? What crime is that?
>
> A. Manslaughter, Criminal Negligent Homicide.

J.A. 170. While, as the State and *Amici* point out, in Oregon, an accidental death in the course of a kidnapping can be charged as felony murder (Pet. Br. 51; Br. of *Amicus* Criminal Justice Legal found at 7; Br. of *Amicus* Attorneys General at 7), that is not a layman's understanding, nor was it Mr. Moore's.

Second, this case was not resolved on a traditional plea of guilty, but, rather, on a no contest plea. No contest pleas are rare in the criminal justice system.[4] They are often entered to minimize risk by defendants who do not believe they are guilty. The record here shows that Mr. Moore was reluctant to plead guilty. Supp. App. 6. These facts are significant evidence that even a small change in the calculus would have altered Mr. Moore's decision-making process and supports the likelihood that Mr. Moore would have proceeded to trial had he been properly advised.

---

[4] In 2004, the most recent year with statistics separating no contest and guilty pleas, 72,152 federal criminal cases were disposed of pursuant to a plea and only 460, or .64%, of these were no contest. Sourcebook of Criminal Justice Statistics: Disposition Of Cases Terminated In U.S. District Courts (2004), http://www.albany.edu/sourcebook/pdf/t5172004.pdf.

Third, once Mr. Moore learned of his attorney's failings, he filed timely pleadings in the state, and later the federal, court to have his conviction set aside. As the State notes (Pet. Br. at 43), Mr. Moore did not explicitly testify in the post-conviction trial that he would have gone to trial. However, his testimony about the bright line rule and the impact of his attorney's erroneous advice about the confession on his decision to enter a plea (Supp. App. 23), coupled with his actions to set aside his plea, fully support the Court of Appeals' conclusion that the evidence satisfied *Hill*. Had Mr. Moore known there was a strong chance his confession to the police could be suppressed, it is highly likely that this knowledge would have tipped the balance. Mr. Moore's situation stands in stark contrast to that in *Weaver v. Palmateer*, 455 F.3d 958, 968 (9th Cir. 2006), where the court found no likelihood that the petitioner would have rejected the State's plea offer and insisted on trial when, *inter alia*, he "'did not want to put [the victims] through the trauma of trial.'"

The record demonstrates why Mr. Moore was wise in his reluctance to enter a plea to felony murder. As the Court of Appeals pointed out, the plea offer made to Mr. Moore yielded the same conviction and sentence as that received by the co-defendant, Salyer, who went to trial. App. at 32-33. Another co-defendant, Mr. Woolhiser, was permitted to plead to manslaughter, a charge that carried a lesser sentence, and the charge that Mr. Moore believed more appropriately described his conduct.

Supp. App. at 22, 41. There was, thus, little incentive given Mr. Moore to enter a plea. As stated by Woolhiser's attorney at sentencing, all of the statements from all of the participants were to the effect that the shooting was accidental. Supp. App. at 6. As described by the prosecutor, the men were climbing a hill and, initially, Woolhiser had the gun. App. at 226. Indeed, according to the prosecutor, Woolhiser is the person who brought the gun to the scene and went into Mr. Rogers' house and hit him while Mr. Moore remained outside. App 224, 226. The prosecutor's account acknowledged that the victim slipped at least twice on the hill and fell, and the second time the muzzle hit his temple and the gun discharged. App. at 227.

Thus, there is a reasonable likelihood that Mr. Moore would not have been harmed at all had he gone to trial. At worst, his sentence would likely have been the same as the one he received upon his plea. While there was certainly evidence that could have supported a conviction, and possibly a more onerous sentence, had Mr. Moore gone to trial, the full record supports his contention, and the Court of Appeals' conclusion, that he would have taken the risk rather than accept the plea deal that was offered if he had been properly advised.

The analysis of the concurrence reinforces the prejudice Mr. Moore suffered under *Strickland* and *Hill* from his counsel's failure to properly assess the confessions. In the real world of the criminal justice system, with resolution of the overwhelming

majority of cases taking place through the plea process, counsel's failure to develop as compelling a case as possible for use in plea negotiations is often the most damaging mistake an attorney can make.

As stated in *Glover v. United States*, 531 U.S. 198, 203 (2001), "any amount of actual jail time has Sixth Amendment significance." Thus, "if an increased prison term did flow from an error the petitioner has established *Strickland* prejudice." *Id.* at 200. Under *Glover*, if an attorney fails to understand the law and facts of his client's case – as was the case with Mr. Moore's counsel – and does not act to maximize the potential for a beneficial plea bargain, his client has been prejudiced.

Mr. Moore does not disagree with the decision tree set out by Amicus Criminal Justice Legal Foundation. Br. of *Amicus* at 12. The brief, however, ignores the fundamental factual premise of this case – that those involved understood that what occurred was not planned but was, rather, a tragedy or accident. Supp. App. 06-09; App. 227; JA 155-56. While a capital prosecution was a very remote possibility, given that Mr. Moore did not participate in the beating of Mr. Rogers (App 224), that Mr. Woolhiser brought the gun to the scene (App 226), and that Mr. Moore only took possession of the gun after Woolhiser slipped on the hill, it was reasonable for Mr. Moore to believe that the risk of going to trial and receiving a sentence greater than he did on the plea was quite small.

Had a motion to suppress been filed, "there is a reasonable probability that" Mr. Moore "would not have pleaded [no contest] and would have insisted on going to trial." *Hill*, 474 U.S. at 59. The full record supports the Court of Appeals' conclusion.

F. Based On The Settled Method Of Analysis Of Prejudice Under *Hill*, The Court of Appeals' Opinion Neither Shifts The Burden Of Proof Nor Jeopardizes Many Convictions Obtained On Guilty Pleas.

The State and *Amicus* Attorneys General argue that the approach taken by the Court of Appeals is a radical departure from the approved method of analysis of prejudice under *Hill*. Pet. Br. at 32-33; Br. of *Amicus* at 12-14. That is simply not the case. While the result reached by the Court of Appeals – granting relief – is not common, the mode of analysis is precisely what is required under *Hill* and what the federal courts throughout the country have been doing since that case was decided with no adverse impact on state justice systems.

A review of federal cases decided since *Hill* shows that courts regularly apply the analysis employed by the Court of Appeals. In most cases, courts hold that, given the strength of the State's case, the foregone defense or motion would not, in all likelihood, have carried the day. Accordingly, courts generally find no reasonable probability that the petitioner would have rejected the plea offer even if counsel had performed effectively. *See, e.g., Nelson*

v. Hvass, 392 F.3d 320, 322-23 (8th Cir. 2004) (finding that petitioner failed to establish he would have insisted on trial if his attorney had adequately advised him); *Koper v. Angelone,* 961 F.Supp. 916, 922 (W.D. Va. 1997) ("Koper has not demonstrated that a reasonable defendant in his place, but for his counsel's unprofessional errors, would not have pleaded guilty but would have proceeded to trial. The Commonwealth has a strong case for first degree murder.").

The state and federal courts routinely utilize their best judgment when attempting to determine how a particular action or inaction would likely have affected the outcome of a case. This Court recently noted the lack of certainty in conducting *Strickland*'s prejudice inquiry. *Sears v. Upton*, 130 S. Ct. 3259, 3626-27 (2010) (per curiam) (noting the inquiry "will necessarily require a court to '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"). The Court of Appeals followed this approach in exercising its judgment. Even the dissenter recognized the need to assess the merits of the motion counsel had not filed and other evidence in the case in order to determine if the *Hill* standard had been met. App. at 149 & n.26.

Granting relief to Mr. Moore will not open a floodgate to challenges to guilty pleas. As noted in *Padilla*, habeas corpus challenges to guilty pleas are far less common than habeas corpus challenges to convictions obtained after a trial. 130 S. Ct. at 1485.

Few defendants are likely to view themselves in the same position as did Mr. Moore, that is facing little downside if they are successful in having a guilty plea overturned. *Id.* The decision of the Court of Appeals did not make new law or shift the burden of proof. Nor would a decision of this Court affirming the Court of Appeals.

G. The Ineffectiveness In This Case Lies In Counsel's Failure To File A Motion To Suppress Because He Failed To Understand The Applicable Law And Facts Related To The Motion, Not His Failure To File It In The Abstract.

The *Amici* and the dissenter in the Court of Appeals posit that the decision of the Court of Appeals will require defense attorneys to file needless motions to suppress. Br. of *Amicus* Attorneys General at 16; App. at 96, 148. Their arguments misread the majority opinion. Mr. Moore's complaint, and the majority's concern, is not simply that Mr. Moore's attorney did not file a motion. It is also that he failed to understand the applicable law and failed to assess the facts in light of that law before making his decision. Mr. Moore did not receive what the Court in *Knowles* held he was entitled to have: a reasonable assessment of a potential claim. To forego a defense, an attorney "is not required to have a tactical reason- above and beyond a reasonable appraisal of a claim's dismal prospects for success." 129 S. Ct. at 1422.

Unlike the situation in *Knowles*, while Mr. Moore's attorney believed the likelihood of success on a motion to suppress was dismal, his appraisal was not reasonable. He did not understand that the law supported suppression, a point the State did not even contest below. Nor did he understand that the availability of other confessions was not the end of the required analysis. The teaching of *Fulminante* is that suppression of the tape-recorded statement to the police would significantly alter the strength of the State's case.

No claim of ineffective assistance would lie had Mr. Moore's counsel correctly advised Mr. Moore that he had a strong motion to suppress but that other compelling factors in the case militated against filing the motion. Mr. Moore does not take issue with the statements of *Amici* or the dissenter that a competent attorney will often advise a client to forego a motion for strategic reasons. As this Court has repeatedly stated, however, a decision is only "strategic" if made with a sound understanding of the facts and law. *See Kimmelman*, 477 U.S. at 386 (counsel failed to seek suppression without investigating viability of motion); *Williams,* 529 U.S. at 395 (failure to seek mitigation evidence resulted from misunderstanding of state law); *Wiggins*, 539 U.S. at 512 (failure to thoroughly investigate stemmed from counsel's inattention). Accordingly, the failure of Mr. Moore's counsel cannot be deemed strategic.

The State's and *Amicus*' references to *McMann v. Richardson*, 397 U.S. 759 (1970), are inapposite. One of the core aspects of *McMann* was the fact that the claimed ineffectiveness of counsel with respect to the coerced plea involved a situation in which the law changed between the time of plea and the post-conviction proceedings. 397 U.S. at 772-73. Moreover, the Court stated that incompetence of advice with respect to the admissibility of statements could be based on a demonstration of "gross error on the part of counsel when he recommended that defendant plead guilty instead of going to trial and challenging the New York procedures in determining the admissibility of confessions." *Id.* at 772. Because, however, the Court had previously rejected such a challenge, it concluded that "[s]uch showing cannot be made[.]" *Id.* In contrast, Mr. Moore's claim involves reliance on existing law and a gross error – counsel's failure to recognize that the motion to suppress was well-founded.

In addition, the decisions in *Hill* and *Padilla* make clear that *McMann* does not foreclose a petitioner from challenging the effectiveness of the advice he receives from counsel pretrial. Mr. Moore is properly focusing his habeas corpus challenge on the defective advice he received with respect to the motion to suppress and the manner in which he was prejudiced thereby. The State and *Amici* fail to appreciate that counsel's advice with respect to the plea question was infected and rendered

incompetent by his mistaken assessment of the confession.

CONCLUSION

Mr. Moore made three statements: one to his brother, one to a friend, and one to the police. The statement taken by the police was detailed and tape-recorded. It was inadmissible because it was involuntary and also because it was taken after Mr. Moore asserted his right to counsel. Mr. Moore's lawyer failed to recognize both the strength of the potential motion to suppress and the distinction among the three statements. Mr. Moore reluctantly entered a plea of no contest because his attorney failed to properly advise and advocate for him. The state post-conviction court unreasonably determined that the tape-recorded statement was admissible and that even a meritorious motion to suppress would have been fruitless.

The district court concluded that the statement was involuntarily taken. The State does not contest that conclusion. The Court of Appeals properly applied this Court's established precedent in concluding that Mr. Moore was prejudiced by his attorney's failure to move to suppress the

inadmissible statement. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted this 13th day of August, 2010.

____

STEVEN T. WAX*
Federal Public Defender
ANTHONY D. BORNSTEIN
Assistant Federal Public Defender
**Counsel of Record*
Federal Public Defender for the
District of Oregon
101 SW Main Street, Suite 1700
Portland, OR 97204
(503) 326-2123
Steve_Wax@fd.org