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IN THE SUPREME COURT OF THE UNITED STATES

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JEFF PREMO, SUPERINTENDENT, :

OREGON STATE PENITENTIARY, :

Petitioner : No. 09-658

v. :

RANDY JOSEPH MOORE :

- - - - - x

Washington, D.C.

Tuesday, October 12, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

JOHN R. KROGER, ESQ., Attorney General, Salem, Oregon; on behalf of Petitioner.

STEVEN T. WAX, ESQ., Federal Public Defender, Portland, Oregon; on behalf of Respondent.

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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next this morning in Case 09-658, Premo v. Moore.

Mr. Kroger.

ORAL ARGUMENT OF GENERAL JOHN R. KROGER
ON BEHALF OF THE PETITIONER

MR. KROGER: Mr. Chief Justice, and may it please the Court:

The court of appeals held that Arizona v. Fulminante was the clearly established Federal law to control and govern the outcome of this case. This was an error, because this Court has never applied Fulminante's direct appeal harmless error standard, which places the burden of proof on the government, to a collateral ineffective assistance of counsel claim, where the burden of proof is on the inmate.

In Boyer, unlike Fulminante, there is no trial transcript to review because the defendant pleaded no contest or guilty before trial. The court of appeals' decision conflicts with both Strickland v. Washington and Hill v. Lockhart and will have grave negative consequences for our criminal justice system.

1 JUSTICE GINSBURG: But isn't -- isn't
2 Fulminante relevant as -- just for the proposition that
3 a defendant's own confession carries heavy weight,
4 leaving the rest of it -- the statement that -- in
5 Fulminante that when a defendant confesses to the crime,
6 that carries heavy weight?

7 MR. KROGER: Yes, Your Honor, I think it's
8 relevant to that extent, that a confession from a
9 defendant is significant evidence. However, it
10 certainly does not imply, as the court of appeals
11 proceeded to do here, that it controls the prejudice
12 prong of Strickland, that it sets a new standard of
13 review of harmlessness, that it shifts the burden of
14 proof onto the government, or that it limits the
15 prejudice analysis to that question of the potential
16 impact of the confession at trial.

17 And so for all those reasons, I -- I think
18 the -- the court of appeals has gone well beyond any
19 potential relevance of the Fulminante decision.

20 JUSTICE SOTOMAYOR: Is it -- if I am
21 understanding your argument, it is that the Court erred
22 in assuming that if the confession had been
23 suppressed -- which you're not arguing for or against.
24 I'm assuming you are not taking your amicus's position
25 that we have to get to the question of what would have

1 happened in a motion to suppress -- but that under all
2 circumstances, if there's a suppressible confession, a
3 defendant should never plead guilty.

4 You are saying that that conclusion is what
5 the Ninth Circuit drew and that was wrong?

6 MR. KROGER: Your Honor, we're -- we are
7 suggesting that the court was wrong both in stating
8 Fulminante provided the standard of review, as well as
9 holding that you can, in effect, assume prejudice simply
10 because defense counsel failed to file a motion which
11 defense counsel believed was not --

12 JUSTICE SOTOMAYOR: So it's another way of
13 saying what I said, which is, no defendant should plead
14 guilty if it's a suppressible confession?

15 MR. KROGER: That is correct, Your Honor.
16 That is correct, Your Honor.

17 JUSTICE SOTOMAYOR: All right. So now, what
18 is the other information that would have made a plain
19 guilty in this case inevitable? However, that's a
20 higher standard than you need to meet, but --

21 MR. KROGER: As -- as Your Honor noted, that
22 is a much higher standard than we have to meet under
23 Hill v. Lockhart. There were very good reasons why
24 defense counsel's advice that this defendant plead
25 guilty was sound and reasonable advice.

1 First of all, the defendant faced a very
2 strong government case, even at that stage of the
3 investigation.

4 Second, there was a potential charge of
5 aggravated murder that could be brought if the case were
6 taken to the grand jury.

7 Third, the plea offer that was extended to
8 the defendant and which the defendant took was very
9 favorable to the defendant, both in terms of -- of
10 capping the amount of time that the defendant would
11 serve, as well as dismissing two additional mandatory
12 minimum charges of assault and kidnapping. So --

13 JUSTICE SOTOMAYOR: Were those higher than
14 the minimum he pled to? Were those mandatory minimums
15 higher?

16 MR. KROGER: No, Your Honor, but they could
17 have been run consecutive rather than concurrent.

18 I -- I think more significant is the fact
19 that when the defendant himself testified about the
20 reasons he pled guilty, none of the reasons he provided
21 had anything to do with the strength of the government's
22 case or the failure of counsel to file the motion.

23 What the defendant said motivated his guilty
24 plea was a concern about an aggravated murder charge, a
25 desire not to have to testify against his brother, which

1 he believed would be the outcome of a guilty plea. And
2 those factors were in the defendant's mind when he
3 decided to take the guilty plea.

4 So in this case, even if one were to shift
5 the burden onto the government -- and I do not believe
6 that -- that that is consistent with Strickland -- the
7 government would prevail here.

8 This case raises, I think, significant
9 consequences for application of Strickland and
10 Hill v. Lockhart. Strickland and Hill clearly place the
11 burden of proof in a collateral proceeding on the
12 inmate.

13 The court of appeals here shifted the burden
14 of proof, pursuant to Fulminante, onto the government.
15 One can see this in the petition appendix at page 48
16 where the court states that there is not enough evidence
17 in the record to prove that the defendant would have
18 pled guilty had the confession been denied.

19 As I stated to Justice Sotomayor, I believe
20 the government actually could meet that burden, but that
21 is certainly not the burden that either Strickland or --
22 or Hill requires.

23 Second, the Court's application of
24 Fulminante transforms the Hill v. Lockhart analysis. It
25 narrows it to one degree, because it's focused on one

1 issue, what the government's evidence would be at trial,
2 rather than looking at the broad array of issues which
3 might motivate a defendant to plead guilty which the
4 courts will look at under -- under Hill v. Lockhart.

5 For example, under Hill v. Lockhart the
6 court will not only look at the defendant's testimony
7 with respect to the estimate of the strength of the
8 government's case, but also look at the potential for an
9 additional sentence that is higher or additional charges
10 that carry a higher sentence if the defendant proceeds
11 with litigation rather than pleading guilty.

12 It will look at the investigation risk that
13 additional evidence would be found in, if the case
14 continued rather than terminating in an early plea. And
15 it will look at personal factors such as the ones that
16 were evident in this case that might motivate a guilty
17 plea.

18 For those reasons, the Hill v. Lockhart
19 standard encompasses a broader array of factors in
20 determining whether there is prejudice than a simple
21 application of Fulminante's direct appeal post-trial
22 standards.

23 It is also the case that the application of
24 Fulminante will substantially increase the amount of
25 speculation which courts have to engage in compared with

1 applying the proper Hill v. Lockhart test.

2 Hill v. Lockhart limits the amount of
3 speculation by focusing on the defendant's motive in
4 pleading guilty and whether the ineffective assistance
5 could have influenced that decision to plead guilty.

6 JUSTICE GINSBURG: What about Judge Berzon's
7 test, that seems to be simple and a matter of common
8 sense, that if you get rid of the confession, then you
9 have a better chance of getting a good deal in the plea
10 bargain? The confession certainly -- it -- this serves
11 the defendant to get rid of that as well as weight on
12 the prosecution's side.

13 MR. KROGER: Your Honor, I would say two
14 things: First, the test which is proposed by Judge
15 Berzon in the concurrence has never been recognized or
16 promulgated by this Court. So in a collateral
17 proceeding pursuant to 28 U.S. Code 2254, it would not
18 be clearly established law that the State court was
19 required to follow.

20 And second, application of that standard, as
21 Judge Bybee noted in his concurrence, would require an
22 immense amount of speculation. In this case, the
23 majority in the Ninth Circuit hypothesized that filing
24 the motion to suppress the confession would strengthen
25 the defendant's position in negotiation vis-à-vis the

1 Government.

2 It is also very possible, however, that the
3 Government would respond to filing a motion as opposed
4 to taking an early offer of guilty plea by taking the
5 case to the grand jury, seeking an aggravated murder
6 charge, and thus, putting the defendant in a worse
7 position in the case. And, in fact, as Judge Bybee
8 noted, he questioned whether the courts have the proper
9 tools to be able to speculate years after the guilty
10 plea whether a particular motion may have increased or
11 may have decreased the amount of leverage that a
12 defendant has, or what kind of response that that motion
13 might have drawn from the prosecution.

14 JUSTICE BREYER: But you have to, don't you?
15 I mean, what's the alternative? I mean, imagine a case
16 where it's clear there was a malpractice or an
17 inadequate assistance, and it happened a long time ago
18 and now you have to decide, well, was it prejudicial or
19 not? It's prejudicial if in the absence of that he
20 would have gone to trial or wouldn't have pleaded
21 guilty, or -- and what's the alternative to trying to
22 figure out whether that's so?

23 MR. KROGER: Your Honor --

24 JUSTICE BREYER: It can't be the State
25 always wins and it can't be the defendant always wins.

1 So -- so what's the alternative?

2 MR. KROGER: I think the alternative, Your
3 Honor, is application of Hill v. Lockhart, which looks
4 not at speculation about how this could or could not
5 have affected the plea bargaining process, but looks
6 very concretely at the defendant's pretrial
7 decision-making process and examines the record to
8 determine why the defendant pled guilty and whether they
9 can prove with a reasonable probability that he would
10 not have pled guilty --

11 JUSTICE BREYER: Oh, but that is -- isn't
12 that -- sorry, maybe we are just quibbling. I -- I
13 don't quite see it. That would seem to me to be going
14 into the plea bargaining process. Would he have pleaded
15 guilty, what would have happened?

16 MR. KROGER: I -- I think the difference,
17 Your Honor, is that when you are applying
18 Hill v. Lockhart, you almost always have at least three
19 very concrete pieces evidence to show the defendant's
20 state of mind. You have the defendant's own testimony
21 or deposition, or in this case both. You have the trial
22 counsel's affidavit for testimony about the
23 decision-making process his client engaged in, and then
24 you have the guilty plea colloquy itself.

25 So you always have a -- a concrete record

1 that the court years later can review in order to
2 determine what motivated the -- the decision to plead
3 guilty.

4 If one were applying Judge Berzon's proposed
5 alternative prejudice finding, one would have to engage
6 in a great deal of speculation. One would, I presume,
7 have defense counsel and the government make claims
8 about what they might have done in response to
9 hypotheticals, which does not seem to be a -- a -- a
10 reasonably judicable standard. As a --

11 JUSTICE SOTOMAYOR: Without any
12 confession -- forget about the brother or the
13 girlfriend -- assume that there had been no confession,
14 wouldn't it have been a fair conclusion to draw that
15 without any confession whatsoever that the plea
16 bargaining strength of the defendant in this case would
17 have been appreciably higher and that the prosecutor
18 would have had to offer something --

19 MR. KROGER: Your Honor, if none of -- none
20 of the three confessions --

21 JUSTICE SOTOMAYOR: None of the three --

22 MR. KROGER -- had been made.

23 JUSTICE SOTOMAYOR: -- whatsoever. I mean,
24 if the brother's confession -- or the confession to the
25 brother is a very big piece of why a plea would have

1 been reasonable in this case. Let's assume no
2 confession.

3 MR. KROGER: Your Honor, I still think
4 taking, recommending a guilty plea and taking of a
5 guilty plea would be a rational response to the
6 remaining evidence. Even at this early stage in the
7 proceeding, the police had uncovered certainly the body
8 with the direct shot to the temple. It had recovered
9 the -- the murder weapon. It had recovered the car
10 which the defendants had borrowed and which had blood in
11 the trunk where the victim had been locked and
12 transported.

13 They had four witnesses who were present
14 when the plan to kidnap and assault the victim was
15 hatched. So they would have testified very directly
16 about the forming of the plot.

17 There was an eyewitness who identified the
18 defendant, Mr. Moore, at the trailer where the victim
19 was abducted. And then, of course, there was a
20 co-conspirator, Mr. Salyer, who was cooperating with the
21 Government prior to the confession and whose -- whose
22 cooperation was known to the defendant.

23 So, with all of those pieces, even if one
24 stripped the three confessions out of the case, you
25 would still have a situation where the Government 's

1 case was strong, where there was a very severe risk the
2 Government would go to the grand jury and obtain an
3 aggravated murder charge, and where there was
4 significant advantages to pleading early and locking in
5 a lower sentence to a felony murder charge.

6 JUSTICE GINSBURG: Mr. Kroger, from --
7 General Kroger -- from everything you said, and I take
8 it -- from your brief, too, that you are not urging
9 the -- that -- that counsel's assistance was adequate?
10 You are not contesting that the confession was
11 involuntary? You seem to be putting everything on the
12 prejudice issue; is that right?

13 MR. KROGER: No, Your Honor. We -- we
14 concede and forfeited the issue that the -- the motion
15 to suppress would have been meritorious, but believed
16 the district court got it right when it held that on
17 both prongs of Strickland, both on deficient performance
18 and on prejudice, the defendant has failed to make
19 his -- his -- meet his burden of proof.

20 I think the -- the prejudice argument here
21 is extraordinarily strong, but I think the deficient
22 performance, even if one concedes that the motion would
23 have been meritorious, the deficient performance prong
24 is strong as well, because the defendant can't meet his
25 burden of proof that defense counsel's representation

1 was unreasonable, given the strength of the government's
2 case, given the quality of the plea offer that was made,
3 and given the defendant's own reasoning for why he pled
4 guilty.

5 The case has significant practical
6 consequences for the criminal justice system. One is
7 that if the Ninth Circuit's opinion stands, it will be
8 much easier to challenge guilty pleas years after the
9 fact on collateral challenge, and this will undercut the
10 principle of finality. One would certainly expect to
11 see fewer Government plea offers in cases like this, if
12 the Government believed years later it would have to
13 present all of its trial evidence in a collateral
14 proceeding in order to rebut the presumption under
15 *Fulminante* that there was prejudice.

16 Second, it has severe implications for the
17 freedom of defense counsel to exercise its discretion
18 and represent its client using the wide latitude that
19 *Strickland* recognized was necessary. *Strickland* itself
20 stated that it's a mistake to hem in defense counsel
21 with strict rules about what should or should not be
22 done, because defense counsel needs that wide latitude.
23 If there is a -- a virtual presumption that motions to
24 suppress must be filed, even where defense counsel
25 reasonably believes it will not resound to the advantage

1 of his client and may cost the client a chance to plea
2 early, the defense counsel must take that option, it's a
3 severe restriction on the --

4 JUSTICE BREYER: If -- if he had gone to
5 trial, what's the sentence -- what's the range of
6 sentence he could have gotten?

7 MR. KROGER: Your Honor, if he had gone to
8 trial on the charges that were pending, and these --
9 these were not charges from the grand jury, he would
10 have faced at least the mandatory minimum of 25 years
11 that he pled guilty to, plus the potential of
12 additional -- an additional sentence both on that charge
13 perhaps as high as life, given the two other potential
14 mandatory minimum sentences of -- of kidnapping and
15 assault that could be brought.

16 JUSTICE BREYER: And if they had gone back
17 to the grand jury, as the prosecutor I guess could have
18 done, it could have gone to the grand jury?

19 MR. KROGER: This case pled guilty before,
20 Your Honor, yes. So --

21 JUSTICE BREYER: It could have gone to the
22 grand jury. Then what is the maximum he could have
23 gotten?

24 MR. KROGER: It could have been a capital
25 case, Your Honor. This could have been an aggravated

1 murder case because the facts involved a very severe
2 beating to the extent perhaps of torture where a
3 Defendant who was very vulnerable who had a protruding
4 hernia that was in a truss was savagely beaten, his nose
5 was broken, he was locked in the trunk of the car, taken
6 to a remote location and shot in the temple with one
7 shot of a revolver.

8 It is distinctly possible that the state
9 would have come from the Grand Jury as a capital case
10 and at the very least have been an aggravated murder
11 carrying a life sentence, not a 25-year sentence.

12 JUSTICE GINSBURG: What about his argument
13 that his failure -- the Defendant in the case arising
14 out of this episode, if Salyer did go to trial and he
15 ended up getting that exact same sentence that this
16 Defendant did?

17 MR. KROGER: Yes, Your Honor. Mr. Salyer
18 did receive the same sentence after he went to trial.
19 His case, though, was very different from that of the
20 Petitioner, because the Petitioner was the individual
21 who cocked the pistol and fired the round into the head
22 of the victim killing him. And so it is very unlikely
23 that the other two co-conspirators would have found
24 themselves charged with an intentional murder based on
25 the facts of this case. But because this pistol could

1 only be fired if it were cocked and because the round
2 went into the temple, it would have been a reasonably
3 strong aggravated murder case against this Defendant who
4 was the triggerman.

5 The final point I would like to make to the
6 Court is that this case involves or should involve
7 significant deference to the State court decision. This
8 was not a summary denial by the State court. The State
9 court held a hearing at which it received all testimony
10 that was available. It made very explicit findings of
11 fact about the facts in the case. It made a credibility
12 finding about the evidence that had been submitted by
13 the Petitioner, and it ruled after citing the proper
14 Strickland standard that the Defendant had failed to
15 carry his burden of proof.

16 JUSTICE KENNEDY: It's a little hard when we
17 take away the finding that the confession was
18 admissible. We have to extract that.

19 MR. KROGER: Your Honor, even if you --

20 JUSTICE KENNEDY: I'm not quite sure what to
21 do with the State court's case, assuming we have to
22 presume, because of the posture of the case, that the
23 confession was inadmissible.

24 MR. KROGER: Your Honor, I would say two
25 things with respect to that. First of all, the State

1 court's decision, even if it were incorrect in its
2 ruling that the confession would not have been
3 admissible, the State court's conclusion that the motion
4 would not have assisted the Defendant in any way, the
5 finding that it would have been fruitless because of the
6 other confessions, the other two confessions in the
7 case, is a reasonable decision that the Court made and
8 is dispositive and thus under AEDPA should receive
9 deference.

10 I would also suggest the case is somewhat
11 similar to Yarborough v. Alvarado. There was a custody
12 issue at stake and this Court explicitly held that one
13 might come out one way or the other on the custody
14 issue, that reasonable jurists might split, but that
15 that fact alone rendered the State court's opinion on
16 voluntariness or on custody in that issue as reasonable.

17 And again, as here, though we are not
18 asserting that this confession was admissible, should
19 the Court consider it, it's clearly a close question on
20 voluntariness and somewhat factually similar to
21 Yarborough where even if the State court were was wrong,
22 it was still a reasonable adjudication of the claims.

23 If there were no further questions from the
24 Court, Your Honor, I would like to reserve the remainder
25 of my time for rebuttal.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Mr. Wax?

3 ORAL ARGUMENT OF STEVEN T. WAX

4 ON BEHALF OF THE RESPONDENT

5 MR. WAX: Mr. Chief Justice, and may it
6 please the Court:

7 Mr. Moore established prejudice under Hill
8 from his attorney's failure to recognize the
9 involuntariness and inadmissibility of the lengthy tape
10 recorded statement obtained from him by the police. The
11 most critical type of evidence that the State can have
12 in any case.

13 The Ninth Circuit's conclusion to that
14 effect was correct, and was correctly based on this
15 Court's precedence of Strickland, Hill, and Kimmelman.

16 JUSTICE SOTOMAYOR: I am having a little bit
17 of trouble here with your argument for the following
18 reasons. Assume we suppress the confession. Why is it
19 unreasonable for the defense attorney to have concluded
20 that the evidence showing your client's presence at the
21 shooting, and identification as the shooter, that it was
22 solely that he should have gone to trial on a defense
23 that he wasn't involved in the shooting at all.

24 Once you put him in this shooting, then the
25 only issue he seems to be confused about is that he

1 thinks that because it was accidental that that presents
2 a defense to felony murder. And that's clearly an
3 erroneous position on his part.

4 So what made the case so weak that the
5 Government was never going without the confession to
6 prove felony murder?

7 MR. WAX: Well, Your Honor, we believe that
8 the case is not as the State would have it, a strong
9 case in the absence of this confession.

10 We also believe that the proper focus is not
11 solely on the strength of the State's case, and that
12 under Hill it is necessary to look at the totality of
13 the circumstances, and look for the objective factors in
14 this record that inform the decision of what Mr. Moore
15 would have done or would have been likely to have done
16 in the absence of his counsel's mistakes.

17 JUSTICE ALITO: What does your office do in
18 this situation, all right, a client is indicted in
19 Federal court and you anticipate that there are all
20 sorts of motions that you might make if this case is
21 going to trial, but at an early point the prosecution
22 offers you what looks like a really good plea bargain.
23 Now do you litigate all those motions? If you have, you
24 know, you have a chance of winning, of suppressing some
25 statements that your client made, suppressing physical

1 evidence, getting certain evidence excluded with a
2 motion in limine, maybe you could win on a severance
3 motion, do you think you litigate all those rather than
4 grabbing a good plea deal when it's offered to you?

5 MR. WAX: Your Honor, the answer is
6 certainly no, we do not litigate all of the motions.

7 JUSTICE ALITO: So if you take the deal,
8 then you want it later to be open to the Defendant if
9 he's not, you know, after the Defendant has spent some
10 time in jail, he's not too happy with the deal any more,
11 he can now come back and say, well, the Federal public
12 defender's office was ineffective because they could
13 have moved to suppress my confession and the illegal
14 search, et cetera, et cetera, et cetera, that is all
15 open for relitigation years later?

16 MR. WAX: No, Your Honor.

17 JUSTICE ALITO: No?

18 MR. WAX: And the issue here is not as we
19 have attempted to articulate in our brief solely and in
20 the abstract the failure to file the motion. The
21 problem is that Mr. Moore's attorney did not understand
22 that the statement was suppressible. In the situation
23 that you are putting to me, if I or an assistant in my
24 office says to a client, look, there is a strong motion
25 to suppress the confession, the drugs, what have you,

1 but here are other factors that we should look at. And
2 at the conclusion and with that proper advice the client
3 decides I will take the deal, then I have performed
4 effectively, and the case is not one that could be
5 subject to a collateral attack as this case is.

6 JUSTICE SOTOMAYOR: What would have been the
7 defense?

8 MR. WAX: Excuse me, Your Honor.

9 JUSTICE SOTOMAYOR: What would have been the
10 defense absent the confession? You have one at trial on
11 the confession, suppressing it, how would he have defend
12 the this case?

13 MR. WAX: Your Honor, he would have been
14 able to defend this case first by articulating the
15 Government's obligation to prove his guilt beyond a
16 reasonable doubt. You take out the confession and you
17 posit it in your questioning of Attorney General Kroger
18 that the strength of his brother's confession is a
19 given. We respectfully disagree. The brother Raymond
20 is a police --

21 JUSTICE SOTOMAYOR: What motive would his
22 brother have had to put him at the scene of this
23 shooting as the accidental killer? That's all his
24 brother would have had to say. He was at the scene, he
25 accidentally -- this gun went accidentally off.

1 MR. WAX: The brother is a police informant.
2 The brother describes himself in the deposition.

3 JUSTICE SOTOMAYOR: His brother had no
4 pending charges against him at the time.

5 MR. WAX: That is true, Your Honor, but the
6 police had used them as their agent.

7 JUSTICE SOTOMAYOR: So what does that have
8 to do with what interest does his brother have when he
9 has no pending charges against him at the time, he's
10 going to use this as a future chip in case he does
11 something wrong?

12 MR. WAX: Your Honor, the point is that
13 he --

14 JUSTICE SOTOMAYOR: To put his brother into
15 jail for 25 years? This is illogical, counsel.

16 MR. WAX: If he were to appear and testify,
17 which is one of the points that I believe the Ninth
18 Circuit properly pointed out, that Mr. Moore knowing his
19 brother might have had every confidence --

20 JUSTICE BREYER: Might. See, that's the
21 trouble. We have a lot of evidence, I think, here, at
22 least by first glance, that -- a lot of evidence he shot
23 the guy. A lot of evidence he carried -- kidnapped him.
24 All right? And now the -- now, maybe it was accidental,
25 but if it was accidental, it's still felony murder; and

1 he received through the plea bargaining the minimum
2 sentence he could get for that.

3 You started out by saying that the -- the
4 State court's conclusion that this was not prejudicial
5 was clearly wrong. All right. If it's clearly wrong,
6 what is it so clear, that he could get off if he went to
7 trial?

8 MR. WAX: Your Honor, I will respond to the
9 second part but I believe there is a premise in which
10 you said, that we reject. There is no State court
11 finding under Hill. And there is no deference --

12 JUSTICE BREYER: There is no -- there is no
13 State court finding that this was not prejudicial?

14 MR. WAX: The court never reached the Hill
15 question.

16 JUSTICE BREYER: I'm not talking about Hill.
17 I don't know the names of the cases associated. I
18 thought that the court in the State court said -- but I
19 might be wrong; I'd like to know -- made a finding that
20 one, this was not ineffective assistance of counsel and
21 two, it was not prejudicial.

22 MR. WAX: The State --

23 JUSTICE BREYER: Now I haven't read this
24 very thoroughly, so -- so you -- yet -- so you tell me
25 if I'm wrong about that.

1 MR. WAX: At pages 205 and 206 in the
2 appendix in the findings of fact and conclusions of law,
3 there are 11 findings of fact. In one of those findings
4 of fact, in findings of fact 8 and 9, the State court
5 used the word fruitless in describing the motion to
6 suppress. In the conclusions of law the State court
7 solely addressed Strickland. And nowhere in the
8 analysis is there any reference to the question of what
9 Mr. Moore would have done.

10 JUSTICE BREYER: Doesn't Strickland require
11 that it be prejudicial?

12 MR. WAX: Yes, of course. However, the
13 analysis that was undertaken here never reached the
14 question of what Mr. Moore would have done.

15 JUSTICE BREYER: If I assume that the word
16 "fruitless" and the reference to Strickland were a
17 finding, that this is not prejudicial -- if I assume
18 that for the sake of argument for the moment, what is it
19 that you can show that shows it was prejudicial?

20 MR. WAX: Your Honor, I think --

21 JUSTICE BREYER: That was the same question
22 I think Justice -- Justice Sotomayor started with.

23 MR. WAX: Your Honor, there is no question
24 that the evidence with respect to the strength of the
25 State's case includes the facts that the attorney

1 general has identified. There is also as we perceive it
2 no question but that the objective record showed that
3 the brother's testimony would have been highly
4 impeachable based on his prior work as an informant, his
5 description of himself --

6 JUSTICE SOTOMAYOR: Impeachable how? What
7 motive did he have to implicate his brother? You still
8 haven't answered that question. All you keep saying is,
9 he was a past cooperator, he had no pending charges, and
10 now he has a motive to do this against his brother
11 because of that?

12 MR. WAX: Your Honor, I cannot point in the
13 record to a motive. What I can point to is the fact
14 that there is in the record his self-description of
15 himself as the golden boy for the police, his working
16 with the same detective who interrogated his brother
17 years before when he completely avoided a murder charge.

18 And as a defense attorney, in a case
19 involving a group of men who are not necessarily as
20 socialized and well educated as some other group, that
21 his testimony would have been subject to impeachment.

22 JUSTICE ALITO: Even without his testimony,
23 isn't there a very strong case of kidnapping? Let's
24 just take it step-by-step. What would have been the
25 defense to the kidnapping charge?

1 MR. WAX: The defense to the kidnapping
2 charge in the absence of the confessions could well have
3 been a mere presence defense, that Mr. Moore did not
4 participate in the kidnapping. He had every right to
5 put the State to his -- to its burden of proof.

6 JUSTICE ALITO: He didn't -- that he didn't
7 go to the -- to the victim's RV with the other men?
8 That would have been the defense?

9 MR. WAX: He could certainly have argued
10 that he did not participate in the kidnapping. He's
11 there, he's in the car, and he had no participation in
12 it. But what I believe is being missed in this
13 discussion, if I may, is the focus on the question
14 required to be analyzed in Hill. Would Mr. Moore have
15 gone to trial? Would he have accepted the plea?

16 JUSTICE GINSBURG: On this --

17 MR. WAX: And on that there are highly --

18 JUSTICE GINSBURG: Mr. Wax, just to clear
19 out some of the underbrush, the Ninth Circuit did say
20 that Fulminante was really established law controlling
21 this case. I take it that you are not defending that?

22 MR. WAX: That is correct. The clearly
23 established law that governs here is Strickland, Hill
24 and Kimmelman.

25 JUSTICE BREYER: Okay. I've got on the

1 other -- I've got -- the other reason I asked the
2 question, to be clear about it, is that -- is that he
3 wouldn't have gone to trial in my mind unless he had a
4 pretty good chance of getting a better deal. And what
5 he -- like getting off. And what he got was the
6 minimum. Okay?

7 One thing I've written down is that the
8 State would not have the confession. That's correct.
9 Number two is he could say his brother is not a very
10 good brother. Moreover he's a rather dubious character
11 there, and bring all that -- stuff. Was there anything
12 else?

13 MR. WAX: Yes, Your Honor.

14 JUSTICE BREYER: I don't want to miss
15 anything.

16 MR. WAX: Yes, Your Honor. What we have in
17 this record is highly unusual combination of four facts
18 appearing at three different stages in the proceeding.
19 First, from his attorney, who articulated this in the
20 sentencing -- it's in the supplemental appendix at page
21 7: Mr. Moore had a very difficult time accepting the
22 fact that this was a felony murder charge, or a felony
23 murder offer. That leads directly to the fact that Mr.
24 Moore did not plead guilty.

25 This is only a nolo plea. And while in some

1 circumstances the court will equate a nolo plea with a
2 plea of guilty, in these circumstances the fact that he
3 entered a nolo plea only is highly significant on the
4 question of whether or not he would have rolled the
5 dice.

6 JUSTICE SOTOMAYOR: And a competent -- and a
7 competent counsel is supposed to accept their irrational
8 client, who doesn't want to understand the law, and let
9 him risk getting an aggravated felony charge brought
10 against him, or a capital murder charge brought against
11 him, and not -- and just go ahead? And try the case
12 because he's not going to recommend to the client, go to
13 trial, take the plea, because you're irrational?

14 MR. WAX: Your Honor --

15 JUSTICE SOTOMAYOR: That's really what you
16 are saying, that a competent attorney would not
17 recommend to his client take the plea, and that his
18 client wouldn't ultimately accept the plea, because the
19 objective reality is his upside horrible and his
20 downside is almost a given.

21 MR. WAX: Your Honor, a competent counsel
22 might advise his counsel to accept a plea. The question
23 of the irrational client is however one with which I
24 regrettably deal on a regular basis. Clients do not
25 always accept my advice, and for whatever it is worth in

1 the footnote toward the end of his opinion, Judge
2 Reinhardt responds to Judge Bybee by saying: Look, he
3 may not be better off by pursuing this habeas corpus
4 action; it is, however, his choice.

5 JUSTICE SCALIA: Yes, but Judge Reinhardt
6 and the court of appeals did not in fact apply the test
7 of Hill, which you are asserting. The test is whether
8 he would have gone to trial. I -- I didn't read the
9 opinion as ever saying that he would have gone to trial.
10 The opinion says he could have gotten a better deal.

11 That's quite a different -- quite a
12 different question, and I -- I'm not prepared to make
13 that the test.

14 MR. WAX: Your Honor --

15 JUSTICE SCALIA: But it's not the test
16 that -- that Hill prescribed.

17 MR. WAX: I am not advocating for the test
18 articulated by Judge Berzon; I believe that it is a
19 sound approach but it is not what we are advocating for
20 here. We believe that this record shows that Mr. Moore
21 would have gone to trial.

22 JUSTICE GINSBURG: Did he say that? Is
23 there a statement in the record that Moore said he would
24 have insisted on going to trial had he been advised that
25 the suppression motion had merit?

1 MR. WAX: There is -- there is no direct
2 statement to that effect. In all the cases where we
3 have found where there is such a direct statement, the
4 courts almost always discount them. What we have here,
5 we submit, is something more significant, and that is he
6 did not want to enter a plea. He did not enter a plea,
7 and then at the first opportunity that he learned that
8 his attorney had been ineffective, he moved to undo the
9 conviction. And we submit that the decision in
10 Roe v. Flores-Ortega, in which this Court found it
11 highly significant that Flores-Ortega moved to initiate
12 an appeal at the first opportunity that he learned that
13 the appeal had been lost, is applicable here.

14 That is an objective fact that this Court
15 has found relevant -- and --

16 JUSTICE BREYER: That is an irrelevant
17 question. I don't see how we could go back to a
18 possibly irrational state of mind. I mean, don't --
19 when you're trying to figure out what a defendant would
20 have done in the absence of an error in respect to a
21 plea, don't you have to ask a question: What would a
22 rational person have done.

23 I mean, I would say that's a good question.
24 I don't know the answer, but if we are trying to figure
25 out he might have been totally irrational and would have

1 gone to trial even though he was likely to end up in
2 jail for life as opposed to 25 years, we should then
3 reverse it and give him a trial? I'm rather disturbed
4 by that.

5 MR. WAX: Your Honor, I am not suggesting
6 that the --

7 JUSTICE BREYER: What do you actually think
8 about this?

9 MR. WAX: I believe that Mr. Moore was
10 making a reasoned judgment. His codefendant brother who
11 brought the gun to the scene, who by the confessions, is
12 the one who pistol-whipped the victim, received the
13 10-year manslaughter sentence that Mr. Moore believed he
14 should have obtained. Mr. Salyer, who went to trial,
15 received the same sentence that Mr. Moore received.

16 Mr. Moore's judgment that this should be
17 viewed as an accident and that it was a highly mitigated
18 situation --

19 JUSTICE GINSBURG: I think you -- I think
20 General Kroger brought up that Moore carried the gun.
21 It was cocked, and he shot -- who was it? Roger.

22 MR. WAX: Your Honor, the gun is brought to
23 the scene -- and this is in the record -- by the
24 codefendant, Lonnie Woolhiser. He has the gun when he
25 goes into the trailer and assaults Mr. Rogers.

1 What the district attorney said, the
2 prosecutor on the scene who understood what was
3 happening, the prosecutor's description at pages 227 and
4 228 of the appendix is: This is an accident. The
5 prosecutors states: They had no intent to kill. The
6 sole intent here was to put the fear of God into
7 Mr. Rogers for his having ripped off his friend
8 Mr. Salyer.

9 The prosecutor describes the incident on the
10 hill as follows: That Mr. Woolhiser, with the gun, is
11 pushing Mr. Rogers up the hill. This is a wet and muddy
12 Oregon day and a wet and muddy Oregon hill. And
13 Mr. Rogers and Mr. Woolhiser go down --

14 JUSTICE ALITO: Excuse me. Where was the
15 citation for this?

16 MR. WAX: Pages 227 and 228 in the appendix.
17 And he also reiterates the fact in the sentencing, which
18 I believe is at -- at page 3 and 4, the sentencing
19 proceeding in the --

20 JUSTICE BREYER: They believe it. The jury
21 believes it was an accident. Now, how does that get him
22 a lighter sentence?

23 MR. WAX: If he goes to trial, the
24 likelihood, first, of a death penalty needs to be put
25 off the table.

1 JUSTICE BREYER: No. The sentence is
2 25 years mandatory for felony murder. Now, the jury
3 believes just as you said. It believes it was an
4 accident; he never intended to pull the trigger.

5 How does that get him a lighter sentence?
6 That's my question.

7 MR. WAX: If he is convicted solely of the
8 kidnapping, if he is convicted of an assault, he can
9 receive a lighter sentence. If he is convicted of the
10 felony murder, to be sure the mandatory --

11 JUSTICE BREYER: Isn't kidnapping a felony?

12 MR. WAX: Yes. But if he --

13 JUSTICE BREYER: Well, then, if he is
14 kidnapped -- if he is convicted of the kidnapping and
15 there was an accidental murder that took place, I
16 believe that that would be felony murder.

17 MR. WAX: If the jury finds him guilty of
18 that, his sentence will --

19 JUSTICE BREYER: Yes. And the defense to
20 kidnapping was what?

21 MR. WAX: Mere presence. He could have
22 argued a mere presence defense. In the absence --

23 JUSTICE SOTOMAYOR: But four witnesses put
24 him at the scene to kidnap this guy and scare him to
25 death. Or scare him.

1 MR. WAX: Well, Your Honor, the record shows
2 there was one witness who put him at the scene. The
3 record shows that one of the issues that was previously
4 raised, and that in our winnowing of the issues is not
5 currently before this Court, is a challenge to the
6 admissibility of the eyewitness identification at the
7 Rogers trailer.

8 One witness there only, and that would be
9 subject to challenge, and does not put him into the
10 trailer or participating in the kidnapping or the
11 assault.

12 JUSTICE SCALIA: Mr. Wax, as far as the
13 confession is concerned and its excludability, what
14 effect do you think we ought to give to this passage in
15 the -- in the defendant's agreement to the plea: "I
16 understand that any admissions, statements, or
17 confessions which I may have made or any evidence
18 obtained by virtue of the search and seizure of my
19 property may well be inadmissible against me in
20 evidence, unless my constitutional rights have been
21 safeguarded. I understand that if I would like to speak
22 to an attorney concerning my constitutional rights, that
23 the Court will grant me time for that purpose."

24 MR. WAX: I believe you should give no
25 credit to that, because that statement by Mr. Moore is

1 based on the incorrect advice of his attorney. And we
2 believe that the record here --

3 JUSTICE SCALIA: Well, wait. Wait. This is
4 not the attorney speaking. I mean, this is what he
5 said. He said, "I understand that any admissions,
6 statements or confessions which I have made may well
7 be" -- "may well be inadmissible against me in
8 evidence."

9 MR. WAX: Your Honor, he had previously been
10 told by his attorney that they were not. And when he
11 was questioned in the post-conviction proceeding before
12 the point of the prejudice under Hill, he says: I acted
13 and entered this nolo plea on the advice of counsel.

14 Now, to be sure there is a boilerplate
15 statement to the contrary.

16 JUSTICE SCALIA: Well, boilerplate -- I
17 mean, the man signed it. How can a prosecutor ever
18 protect himself against the person who signs a plea
19 agreement later -- later coming in and saying: Oh, my
20 attorney misadvised me.

21 I don't care what your attorney advised you.
22 The plea agreement itself advises you that this stuff
23 may be inadmissible.

24 MR. WAX: Your Honor, what Mr. Moore has
25 said is: I enter this plea on the advice of my

1 attorney. That advice is conceded by the State to have
2 been incorrect, and the full record of the case includes
3 that plea petition document. It includes the State's
4 concession that the advice provided was incorrect.

5 And while a plea petition form is standard
6 in many State courts, as it is in the Federal court, the
7 reality is that those forms often include statements
8 that are not consistent with the facts that have been
9 presented or that have occurred previously.

10 JUSTICE ALITO: Could I just clarify
11 something?

12 Is it your position that the prosecutor, in
13 making his offer of proof at the plea on 227 to 228,
14 affirmatively said that this was an accident or did
15 not -- did not allege that it was intentional?

16 MR. WAX: He affirmatively states that there
17 was no intent to kill.

18 JUSTICE ALITO: Where is that? I --

19 MR. WAX: I believe it's on page 228, where
20 he comes back in and says one more thing.

21 It is on 228. And just something that I
22 missed early on: "The indicated intent of the defendant
23 was to instill fear to the point that the victim would
24 not again rip them off. " The description --

25 JUSTICE ALITO: You read that as a -- as a

1 claim that there was no intent to kill?

2 MR. WAX: Yes, sir. And I believe it is
3 also consistent with the statement of the judge at the
4 sentencing, who described this as a case involving two
5 tragedies. Everyone who participated -- the lawyers for
6 the defendants, the prosecutor, and the judge --
7 recognized this was an accident.

8 This was a tragedy. The judge saying,
9 Mr. Moore, the person who had led a good, law-abiding
10 life, a person who had been a productive member of --

11 JUSTICE ALITO: I have to say, I think
12 that's a very aggressive reading of what was said here.
13 It was not necessary for the plea to this offense to
14 prove an intent to kill, and the statement that the
15 intent that was necessary, which is lesser intent but
16 sufficient to support this plea, was present is not a
17 statement that a greater mens rea was absent.

18 And I thought you argued to us that the
19 prosecutor said this was not intentional. It was an
20 accident.

21 MR. WAX: Well, I believe, Your Honor, that
22 is the portion to the record to which I am referring at
23 page 228. He also described at the sentencing the facts
24 of the case as facts involving and consistent with the
25 slip and the fall.

1 His description of the incident is a
2 description of Mr. Rogers falling back into the gun. He
3 did that both at the plea, which I believe is on page
4 227, and he did it again at the sentencing. And then he
5 is followed by the judge, who articulates the
6 circumstances of this case as involving two tragedies:
7 To be sure, the death of Mr. Rogers, but also the
8 tragedy of Mr. Moore having accidentally killed his
9 friend.

10 If there are no further questions, I thank
11 the Court.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 General Kroger, you have eight minutes
14 remaining.

15 REBUTTAL ARGUMENT OF GENERAL JOHN R. KROGER

16 ON BEHALF OF THE PETITIONER

17 MR. KROGER: Mr. Chief Justice, and may it
18 please the Court:

19 The Court of Appeals here did not apply
20 clearly established Federal law, but applied, for the
21 first time in a way that is non-mandated by the
22 decisions of this Court, Fulminante to a collateral
23 proceeding.

24 The State court's adjudication of this claim
25 was eminently reasonable on both prongs of Strickland.

1 Accordingly, we would ask this Court to reverse the
2 judgment of the Ninth Circuit and to affirm the judgment
3 of the district court.

4 I would be happy to answer any additional
5 questions that the Court may have.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Counsel, the case is submitted.

8 (Whereupon, at 11:54 a.m., the case in the
9 above-entitled matter was submitted.)

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