No. 10-34

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS
Petitioner,

VS.

FRED LAWRENCE ROBINSON,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a state prisoner fairly presents his federal claim when he changes the legal theory of the federal claim he presented in state court?

2. Did the Ninth Circuit ignore this Court's precedent and create a new requirement that triers of fact in capital cases must give weight to any proffered mitigation?

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STATEMENT OF JURISDICTION

The Ninth Circuit filed its decision on February 22, 2010. The court denied Petitioner's petition for rehearing en banc on April 1, 2010. Petitioner timely filed this petition for writ of certiorari within 90 days of that date. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

A. *Fair Presentation.*

The Ninth Circuit granted habeas relief based on a legal theory that was never advanced in state court. Robinson unsuccessfully argued in state court that the "cruel, heinous, or depraved" aggravator should be set aside based on an alleged lack of evidence that the victim actually suffered. In federal court, he raised an entirely different argument—that the actions of his co-defendants should not be attributed to him and were "unforeseeable" because Robinson was not present at the scene of the murder.

In 1987 Robinson had a long and stormy relationship with Susan Hill, his common-law wife, in which they had separated on numerous occasions because Robinson was verbally and physically abusive. Pet. App. D at 2. During their separations, Robinson had on three occasions tracked Susan down, threatened her, and forced her to return. Pet. App. D at 2–4. In February 1987, Robinson allowed Susan to visit her father and step-mother in Yuma, Arizona.

Pet. App. D at 3–4. While there, Susan informed Robinson that her step-mother, Sterleen, had obtained a peace bond against Robinson and stated he should not enter their property. Pet. App. D at 4.

On June 8, 1987, Robinson was seen with his co-defendants, Theodore Washington and Jimmy Lee Mathers, loading guns into the trunk of Robinson's vehicle. *Id.* Robinson informed his son that he was "going to Arizona to take care of some business." *Id.* He also told his son that he was going to Arizona to see if Susan was there. *Id.*

That night, two intruders entered Susan's parents home, forced them into their bedroom, made them lie face down on the floor, bound their hands and feet, and shot them. Pet. App. D at 5. Prior to the shooting, Sterleen was heard asking that her feet be covered. *Id.* She died as a result of her gunshot wounds. Pet. App. D at 6.

Responding to a 911 call, a sheriff's deputy saw Robinson's vehicle in the vicinity of the Hills' home. Pet. App. D at 5–6. Robinson fled when the officer activated his emergency lights. Pet. App. D at 6. Robinson was eventually apprehended and police found among other items an empty box of shotgun shells and a red bandana identified by the Hill's son as the one worn by one of the intruders. *Id.*

Robinson was sentenced to death after a Yuma County, Arizona, jury convicted him of first-degree murder, attempted first-degree murder, two counts of aggravated assault, first-degree burglary, and armed robbery.

On direct appeal to the Arizona Supreme Court, Robinson argued that the "cruel, heinous, and depraved" aggravating factor was arbitrarily applied

because there was no evidence that the victim actually suffered pain or mental distress. The Arizona Supreme Court addressed Robinson's argument regarding the cruelty factor in the context he had presented it and denied his claim. *Robinson*, 796 P.2d at 862–63.

In his habeas petition, however, Robinson changed the legal theory upon which he challenged the cruelty aggravating factor. Robinson argued that, because no evidence existed that he intended or should have reasonably foreseen that the victim would suffer, the state court's cruelty finding under the statutory aggravating factor was arbitrary, in violation of his rights under the Eighth and Fourteenth Amendments. (Pet. App. B.) The district court concluded that Robinson's claim was "substantially different" from the issue he raised on direct appeal in state court and found the claim procedurally defaulted because Robinson failed to fairly present his claim in state court. (Pet. App. B.)

The Ninth Circuit disagreed with the district court's disposition of this claim. The court of appeals characterized Robinson's argument in federal court as a more detailed elaboration of those made in state court. Pet. App. A at 26–29. The court found that Robinson was not required to present his arguments in the same detail to the state and federal court. *Id.* The court held that Robinson raised the constitutional issue by arguing in his opening brief that "'the imposition of the death penalty was in violation . . . the Constitution of the United States because the especially cruel, heinous, or depraved aggravating factor was applied in an arbitrary manner." *Id.*

The court of appeals also found that Robinson's citation to *Jeffers v. Ricketts*, 832 F.2d 476 (9th Cir.

1987, *rev'd sub nom. Lewis v. Jeffers*, 497 U.S.764 (1990)—a case that did not address a claim of foreseeability—placed the Arizona Supreme Court on notice of Robinson's claim.

In dissent, however, Judge Rawlinson found Robinson's citation to *Jeffers* unpersuasive and underscored his emphasis on the lack of evidence that the victim suffered—not on his later theory that there was a lack of evidence that he intended or reasonably foresaw that the victim would suffer. Pet. App. A at 59 (Rawlinson, J., dissenting). The dissent also found that Robinson's argument in state court that he was not in the residence when the murders took place did not exhaust his claim that the cruelty factor was arbitrarily applied:

> More importantly, Robinson's reference to the fact that he was not inside the residence was made in conjunction with his discussion of the heinous prong of the statutory aggravating factors, not as part of his challenge to application of the cruelty prong of the statutory aggravating factors. Fairly read, Robinson's brief to the Arizona Supreme Court simply did not raise the issue he now argues, i.e., whether the evidence adequately established that Robinson had the intent to inflict pain upon the victim, or reasonably foresaw that the victim would suffer pain.
>
> . . .
>
> Because the existence of facts supporting application of the cruelty prong of the statutory aggravating factors would be adequate to sustain the death sentence imposed, I would end my analysis of Robinson's sentencing challenge with that conclusion.

Pet. App. A at 59–60 (Rawlinson, J., dissenting).

B. *Ineffective Assistance of Counsel.*

In his state post-conviction proceeding, Robinson claimed that his trial counsel was ineffective for failing to investigate and present mitigation evidence. The state post-conviction court, the same Judge who sentenced Robinson to death, held a 2-day evidentiary hearing in which Robinson presented additional mitigating evidence including evidence of his impoverished background, episodes of childhood sexual abuse, potential for rehabilitation, and non-violent nature. In addition, Robinson presented expert psychological testimony that he suffered from low intelligence and borderline personality disorder. The State rebutted this evidence with expert opinion that Robinson suffered from anti-social personality disorder.

After hearing all of Robinson's after-the-fact mitigation, the state court determined that the evidence presented would not have affected the sentence imposed. The state court ruled:

> Mr. Robinson has been examined and found to have no mental [sic] evidence of mental disease per Dr. McCullars and an Axis II suggestion of Borderline Personality Disorder by Dr. Roy. Nothing in the record supports a suggestion that this defendant was unaware of the activities at the Hill home on the evening of the crime and the court now rejects, and would have at sentencing hearings, rejected a suggestion of Borderline Personality Disorder. This court accepts as true that Mr. Robinson has an antisocial personality disorder and is poorly adjusted to living in society, but there is nothing in his makeup now, nor in the opinion

> of the experts was there anything at the time of the offenses, which lessened his ability to differentiate right from wrong or to conform his actions with the law . . . .

See Pet. App. A at 66 (Rawlinson, J., dissenting).

The state court found that Robinson's additional mitigation evidence, particularly evidence of Robinson's childhood, had no connection to his actions years later at the time of the murder, and thus were not mitigating.

The district court concluded that there was no reasonable probability that the additional evidence Robinson presented in his state post-conviction proceeding would have changed the outcome. Pet. App. C at 44-45. While recognizing that Robinson's additional mitigation was not insignificant, the district court concurred with the state court that there was no evidence that Robinson suffered any mental impairment at the time of the murder. (*Id.*, Pet. App. C at 47. Likewise, the court found that Robinson's low intelligence, childhood sexual abuse, and impoverished childhood had no connection to his actions at the time of the crime and would have been accorded little mitigating weight. *Id.*

The Ninth Circuit, however, found that defense counsel should have discovered and presented "classic mitigation evidence" including "Robinson's impoverished background; his unstable and often abusive upbringing; his multiple episodes of childhood sexual abuse; his low intelligence; his personality disorder; his non-violent nature; and his potential for rehabilitation." Pet. App. A at 46–48. Notwithstanding the sentencing judge's post-conviction finding that the "new evidence would not have changed the sentencing decision, the panel

majority granted relief, holding that the state court and district court either "improperly rejected or under-weighted" the mitigation by employing a causal nexus test between the mitigation and the criminal act. Pet. App. A at 53. The majority concluded that its confidence in the state court's imposition of the death sentence was undermined because the state court should not have used the cruelty aggravating factor that the panel majority found had been arbitrarily applied. *Id.*

The dissent, citing this Court's recent decisions in *Bobby v. Van Hook*, 130 S. Ct. 13 (2009), and *Wong v. Belmontes*, 130 S. Ct. 383 (2009), found that those cases "clarify that these asserted failings cannot support a claim under *Strickland*." Pet. App.A at 62–63 (Rawlinson, J., dissenting). The dissent noted:

> Fortuitously, in this case, we do not have to try to determine whether the asserted deficiencies would have made a difference in the sentence imposed. In this case, we know the answer because the same judge who imposed the sentence of death presided over the postconviction review proceedings. After hearing all the mitigation evidence [Robinson] mustered after-the-fact, the sentencing judge declined to entertain the prospect of changing the previously imposed sentence.

Pet. App. A at 63–64.

REASONS FOR GRANTING THE PETITION

A. The panel decision squarely conflicts with this Court's "fair presentation" jurisprudence. This Court has held that 28 U.S.C. § 2254 requires a federal habeas petitioner to provide the state courts with a "fair opportunity" to apply controlling legal principles

to the facts bearing on his constitutional claim. In addition, a habeas petitioner must "fairly present" to the state courts the substance of his federal claim.

The decision of the court of appeals eviscerates the requirement that habeas petitioners fairly present their federal claims to the state court before requesting habeas relief. By allowing habeas petitioners to change the theory upon which they seek relief, the Ninth Circuit ignores well-established principles of comity and eliminates the requirement of 28 U.S.C. § 2254 that the state courts have the first opportunity to correct alleged error. Under the Ninth Circuit's reasoning, state courts will have to divine every possible theory associated with a federal claim in order to have an opportunity to pass upon the alleged error.

The Ninth Circuit ignored this Court's "fair presentation" jurisprudence by holding that Robinson's new legal theory regarding his claim that the cruel, heinous, and depraved aggravating factor was arbitrarily applied was exhausted. The decision below is in substantial tension with the decisions of this Court, which have explained that federal habeas petitioners must fairly present their legal claims to the state courts to allow those courts the first opportunity to correct any alleged error. The court of appeals' decision erases the exhaustion requirement in the habeas context. The decision below would allow a habeas petitioner to present one argument to the state courts, and once that argument is rejected, strategically shift to a new argument in his federal habeas petition without giving the state courts an opportunity to address the claim. This Court's review is thus warranted.

The Ninth Circuit's failure to apply this Court's fair presentation jurisprudence also infected its

analysis of Robinson's ineffective assistance of counsel claim. A reviewing court may only reverse if there is a reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceeding would have been different. The court of appeals rejected the state court's finding that Robinson was not prejudiced under *Strickland* based on its view that the state court improperly considered the cruelty aggravating factor as part of the analysis or whether counsel's alleged ineffectiveness would have changed the sentencing decision.

B. The court of appeals' analysis of the prejudice prong of the *Strickland* analysis directly conflicts with this Court's ruling in *Harris v. Alabama*, 513 U.S. 504, 515 (1995). After erroneously concluding that the state court improperly considered the cruelty aggravating factor, the majority went on to find that the state court and district court improperly "under-weighted" the additional mitigation Robinson presented, thus creating a new requirement that sentencers in capital cases must give particular weight to any proffered mitigation in the sentencing calculus. This new requirement is in direct tension with this Court's holding in *Harris* that the sentencer, after considering mitigation evidence, is not required to ascribe a certain weight to that mitigation evidence.

The dissent correctly recognized that Robinson cannot demonstrate prejudice because the state post-conviction court, the same judge who had sentenced Robinson, considered all of Robinson's mitigation and found it would not have changed the outcome.

I

THE COURT OF APPEALS' FAIR PRESENTATION HOLDING EVISCERATES THE REQUIREMENT THAT HABEAS PETITIONERS FAIRLY PRESENT THEIR CLAIMS TO THE STATE COURTS

A petitioner seeking federal writ of habeas corpus must exhaust all available state court remedies before a federal court may grant him habeas relief. *Duncan v. Henry*, 513 U.S. 364, 365 (1995). This requirement, codified in 28 U.S.C. § 2254, is necessary to give the State the "opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Picard v. Connor*, 404 U.S. 270, 275 (1971). The focus of this doctrine is on the "fair presentation" of the federal claim in state court. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). The state prisoner must describe in the state proceedings both the operative facts and the federal legal theory on which his claim is based. *Anderson v. Harless*, 459 U.S. 4, 6 (1982). Raising a "somewhat similar" claim in state court does not fairly present the claim for purposes of federal habeas review. *See Picard*, 404 U.S. at 277–78.

In his direct appeal in state court, Robinson made various conclusory and general arguments that "imposition of the death penalty was in violation of the statute and of the Constitution of the United States." Pet. App. A at 26. The specific argument Robinson made in state court regarding the cruelty prong of the A.R.S. § 13–703(F)(6) aggravator was focused on the lack of evidence that the victim *actually* suffered pain or mental distress. His complete argument was:

> Cruelty involves the infliction of pain and distress on the victims. The State must show by evidence that the victim *actually* suffered physical or mental pain prior to the death. Cruelty is not shown if the evidence is inconclusive. *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983). The State produced *no* evidence to show that the victim actually suffered pain or distress to the extent necessary to make this finding. Mr. Hill testified that he was not aware of what occurred because he was knocked out, not shot. Mrs. Hill's last words, as heard by Mr. Hill, concerned a desire that her feet be covered up, not a plea for mercy or an expression of fear that she was about to be killed. There is no concrete evidence to support the State's theory that Mr. Hill was shot first but even if he was, Mrs. Hill was shot almost immediately thereafter without waiting a long time to be shot.

Pet. App. A at 56–57; Pet. App. B at 26. The Arizona Supreme Court addressed the cruelty factor in the context that Robinson had presented it. *Robinson*, 796 P.2d at 862-63.

In Claim 6(A) of his habeas petition, however, Robinson argued that, because no evidence existed that he personally intended or should have reasonably foreseen that the victim would suffer, the state courts' cruelty finding under the (F)(6) aggravating circumstance was arbitrary, in violation of his rights under the Eighth a Fourteenth Amendments. Pet. App. B at 26. The district court concluded that this claim was "substantially different" from the cruelty issue raised on direct appeal, thus it was not fairly exhausted. Pet. App. B

at 27.

The panel majority disagreed. Rather than discuss the claim in Robinson's direct appeal brief that concerned his attack on the cruelty finding, the panel majority discussed instead the portions of his brief that generally attacked Arizona's death penalty grounded in the Ninth Circuit's decision in *Jeffers v. Ricketts*, 832 F.2d 476 (9th Cir. 1987) (finding (F)(6) unconstitutional), *rev'd sub nom. Lewis v. Jeffers*, 497 U.S. 764 (1990). Pet. App A at 26–27. It is true that Robinson argued in this general attack on the death penalty that "it must be remembered that Robinson was not even in the house and had no part in the actual shooting." But this statement was unrelated to his claim attacking the trial court's cruelty finding. As "fair presentation," the majority also relied on the closing paragraph after Robinson's attack on the trial court's *heinousness* and *depravity* finding:

> It is noted that the Appellant Robinson did not participate in the killing, did not intend anyone to die and did not exhibit a reckless indifference to the value of human life. He was not involved directly with the shooting. Neither the conduct of the others involved, much less Appellant Robinson's, prove this factor beyond a reasonable doubt.

Pet. App. A at 28. In concluding these statements exhausted his claim, the panel majority stated Robinson "was required only to present to the state court the legal and factual basis of his federal constitutional claim." Pet. App. A at 28–29. The majority is clearly mistaken—Robinson is required to do more. He must *fairly* present the claim so that the reviewing court has an opportunity to understand and address the nature of the federal claim he is

presenting. It is fundamentally unfair for a court to cobble together a new legal theory from unrelated claims years later as a basis for finding that the claim has been "fairly presented" to the state court. *See Keating v. Hood*, 133 F.3d 1240, 1241-42 (9th Cir. 1998) (although both in state and federal court the claim was based on aiding and abettor liability, the legal theory of the claim was different in state court from the one presented in federal court).

In *Henry*, this Court held that mere similarity in claims is insufficient to exhaust in the habeas context. 513 U.S. at 366 (citing *Picard*, 404 U.S. at 276; *Harless*, 459 U.S. at 6). The claim Robinson made in state and federal court argued the arbitrariness of the cruelty aggravating factor. The theory upon which he argued the arbitrary nature, however, was significantly different. The state court only had the opportunity to pass upon the question Robinson raised—whether there was sufficient evidence that the victim suffered pain to prove cruelty. The state court did not have the opportunity to address Robinson's later allegation that there was insufficient evidence of his intent to inflict pain or reasonably foresee that the victim would suffer pain.

As the dissent noted, the majority's reliance on Robinson's citation to *Jeffers* is unpersuasive. Pet. App. A at 59. In fact, Robinson's citation to *Jeffers* only underscored his argument in state court on the alleged lack of pain to the victim, not his later argument relating to intent or foreseeability.

The majority's vicarious liability discussion is unpersuasive because it is not based on authority from this Court and instead relies on case law from the Arizona Supreme Court decided more than a decade after it decided Robinson's appeal. *See State*

v. Carlson, 48 P.3d 1180 (Ariz. 2002). Moreover, the Arizona Supreme Court's ruling in the *Carlson* case dealt with the heinous and depravity prong of Arizona's (F)(6) aggravating factor, not cruelty.

Because under Arizona law, cruelty alone is sufficient to sustain the (F)(6) aggravator, there is no need to revisit the panel majority's decision concerning the heinous/depravity prong. Nevertheless, the panel majority was also mistaken when it found that application of the heinousness and depravity prong was unconstitutional. The majority agreed that the state court's finding of "senselessness and helpless" did not render their finding arbitrary. Pet. App. A at 40. Rather, the majority concluded that the arbitrariness derives from "the lack of evidence that Robinson was present for, or ordered, the killing of Sterleen." Pet. App. A at 42. But that analysis ignores the overwhelming evidence that Robinson "set the murder in motion." Pet. App. A at 62 (Rawlinson,J., dissenting). Habeas review is not a proceeding where federal courts are permitted to simply substitute their own judgment for the factual conclusions by the state courts. *See Maggio v. Fulford*, 462 U.S. 111, 113 (1983) (*per curiam*).

Finally, the court of appeals' improper fair presentation analysis affected not only its finding regarding the (F)(6) aggravating circumstance, but also its ruling regarding Robinson's ineffective assistance of counsel claim. As set forth in the next argument, the court of appeals compounded its erroneous finding that Robinson fairly presented his argument on the cruelty aggravating factor when it found that the state post-conviction court inappropriately relied on this aggravating factor in finding that Robinson failed to demonstrate any prejudice from his counsel's alleged failure to present

mitigation. Pet. App. A at 53.

II

THE NINTH CIRCUIT'S ERRONEOUS *STRICKLAND* PREJUDICE ANALYSIS IGNORED THIS COURT'S PRECEDENT AND CREATED A NEW REQUIREMENT IN CAPITAL CASES WHERE THE SENTENCER MUST GIVE WEIGHT TO PROFFERED MITIGATION EVIDENCE

The court of appeals' decision that the state court and district court under-weighted Robinson's additional mitigation ignored this Court's ruling in *Harris v. Alabama* and essentially holds that the state court must give particular weight to proffered mitigation. In reaching its prejudice decision, the court misconstrued Arizona law in finding that the state court used an unconstitutional nexus test in considering Robinson's additional mitigation.

The Sixth Amendment obligates criminal defense counsel to provide objectively reasonable assistance under prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). The attorney is expected to make reasonable investigations, the reasonableness of which may be "substantially influenced" by his clients statements or actions. *Id.* at 691; *see also Rompilla v. Beard*, 545 U.S. 374, 383 (2005) (reasonable investigation does not mean global searches); *Wiggins v. Smith*, 539 U.S. 510, 533 (2003) (in some cases, mitigating evidence might not be required). Without the "distorting effects of hindsight," if counsel's performance has been so objectively unreasonable and deficient to overcome the "strong presumption" that it was within "the wide range of reasonable

professional assistance," a reviewing court may only reverse if the defendant establishes that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," a probability sufficient to undermine the confidence in the result. *Strickland*, 466 U.S. at 694.

In assessing mitigation evidence, this Court has established that a capital sentencing process that excludes from consideration circumstances of the particular offense or the relevant facets of the character and record of the individual offender violates the Eighth Amendment. *Eddings v. Oklahoma*, 455 U.S. 104, 113–14 (1982); *Lockett v. Ohio*, 438 U.S. 586, 605–06 (1978). The Eighth Amendment requires that the sentencer have the ability to consider and give effect to mitigation evidence. *Smith v. Texas*, 543 U.S. 37, 45 (2004). This Court, however, has never required the sentencer to place particular weight to mitigation evidence. *Harris*, 513 U.S. at 512.

In his state post-conviction proceedings, Robinson claimed that his trial counsel was ineffective for failing to investigate and present mitigation evidence. After a two-day evidentiary hearing in which Robinson presented additional mitigation, the state court post-conviction court—the same judge who sentenced Robinson to death—determined that the new information would not have changed his sentence. The state court found that Robinson's additional mitigation evidence, particularly his mental health and horrific childhood, had little connection or effect on his behavior at the time of the murder. Thus, the court found this mitigation to be of little weight.

The court of appeals found that the trial court improperly found that "Robinson was not prejudiced because Robinson failed to establish a causal connection between the mitigating evidence and the crime." Pet. App. A at 51.

The federal district court, in rejecting Robinson's ineffective assistance claim, noted that Robinson was over the age of forty at the time of the offenses. (Pet. App. C. at 46.) And the district court discussed Arizona law that held during the weighing phase of assessing mitigating impairments unrelated to the crime, such impairments generally are not accorded much "weight." *Id.* at 46-47. The Ninth Circuit majority rejected this analysis, confusing this discussion of weighing with the Supreme Court's proscription against precluding the sentencer from "considering and giving effect" to certain mitigation. *See, e.g., Smith,* 543 U.S.at 47; *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989); *Lockett v. Ohio*, 438 U.S. 586, 605-06 (1978) (plurality opinion). This Court has never told the sentencer (judge or jury) how it must weigh or give effect to mitigation. *Harris,* 513 U.S. 504, 512 (1995). The Ninth Circuit's decision in this regard ignores this precedent and creates a new requirement for sentencers in capital cases.

Moreover, Robinson cannot demonstrate prejudice in light of this Court's decisions in *Wong v. Belmontes*, 558 U.S. ___, 130 S. Ct. 383 (2009) and *Bobby v. Van Hook*, 558 U.S. ___, 130 S. Ct. 13 (2009). The dissent correctly found that "[T]he Supreme Court's rulings in *Van Hook* and *Wong* clarify that these asserted failings [in this case] cannot support a claim under *Strickland*." Pet. App. A at 62–63.

In *Wong v. Belmontes*, for example, this Court

found that, even without the State's rebuttal evidence of a second murder, it was "hard to imagine" how new expert testimony and additional facts about Belmontes' difficult childhood outweighed the state court's determination that Belmontes was convicted of an intentional brutal murder. 130 S. Ct. at 391. Furthermore, as the panel dissent noted in Robinson's case, the panel did not have to determine whether the claimed deficiencies would have made a difference, because the sentencing judge declined to change Robinson's sentence after hearing all the mitigation evidence mustered after-the-fact in the post-conviction evidentiary hearing. Pet. App. A at 64.

In contrast to the dissent's correct reliance on *Belmontes* and *Van Hook*, the Ninth Circuit majority dismissed those cases in a footnote citing to the recent *per curiam* decision, *Porter v. McCollum*, 558 U.S.___, 130 S. Ct. 447 (2009), which the Ninth Circuit found to be "closely similar" to Robinson's case. Pet. App. A at 49. However, that case is markedly different from the instant case. The state prisoner there, George Porter, was "a wounded and decorated" Korean War veteran whose heroic combat service in two major engagements "left him a traumatized, changed man." *Porter*, 130 S. Ct. at 448. "His commanding officer's moving description of those two battles was only a fraction of the mitigating evidence that his counsel failed to discover or present during the penalty phase of his trial in 1988." *Id.* Robinson had no heroic military service, did not fight in any horrific battles, nor suffered any mental or emotion toll because of service for his country. Furthermore, in contrast to *Porter*, here the record revealed how the sentencer actually evaluated the new information. The very judge who sentenced Robinson to death ruled that the new information (found persuasive by the Ninth Circuit) would not have changed the sentencing

decision.

CONCLUSION

This case merits review to settle issues important to habeas review of federal claims raised in state courts. The Ninth Circuit's finding that Robinson fairly presented to the state court his new theory he argued in federal court directly conflicts with this Court's jurisprudence and eviscerates § 2254(b)(1). The Ninth Circuit further compounded its error by finding that the state post-conviction court improperly considered the aggravating factor in its analysis of Robinson's ineffective assistance claim. Finally, the Ninth Circuit's *Strickland* prejudice analysis continues to conflict with this Court's holding in *Harris v. Alabama* and is contrary to this Court's recent decisions foreclosing a finding of prejudice where the additional mitigation presented would not have made a difference in the sentencing decision.

Respectfully submitted

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Fred Lawrence Robinson, *Petitioner-Appellant*,	No. 05-99007
v.	D.C. No. CV-96-00669-JAT
Dora B. Schriro, Director, *Respondent-Appellee*.	OPINION

Appeal from the United States District Court
For the District of Arizona
James A. Teilborg, District Judge, Presiding

Argued December 6, 2007
Submitted February 19, 2010
San Francisco, California

Filed February 22, 2010

Before: Betty B. Fletcher, Marsha S. Berzon, and Johnnie B. Rawlinson, Circuit Judges.

Opinion by Judge B. Fletcher;
Dissent by Judge Rawlinson