No. 08-1263

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT L. AYERS, WARDEN, PETITIONER

v.

FERNANDO BELMONTES, RESPONDENT

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

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HON. JOHN G. ROBERTS, JR., CHIEF JUSTICE, AND TO THE HON. ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondent Fernando Belmontes, Jr. opposes the Petition for Writ of Certiorari as follows.

Petitioner's "Question Presented" reflects a contrived effort to recharacterize the panel majority's entirely unremarkable finding of deficient performance – trial counsel's failure to conduct <u>any</u> investigation into mental

state mitigation evidence – as the imposition of an unheard of and far-fetched duty on defense counsel on capital cases.

Petitioner's "Question Presented" is framed solely in terms of the deficient performance prong of the Sixth Amendment test of Strickland v. Washington, 466 U.S. 668 (1984). However, the actual deficient performance as found by the District Court and affirmed by the panel majority has nothing to do with any "alternative theory" that is "inconsistent with his client's testimony," or that "would likely open the door to previously excluded evidence…" Rather, the actual deficient performance finding was based on the uncontested failure of trial counsel to conduct any type of penalty phase investigation regarding possible mental state mitigation evidence. The section 2254 record fully supports the panel majority's finding, summarized as follows:

> Although [trial counsel] hired a psychiatrist, Dr. Cavanaugh, to evaluate Belmontes' mental state for purposes of the guilt phase, he did not ask Cavanaugh to comment on any issues relevant to the penalty phase, and did not consult any psychologists or psychiatrists with respect to any possible mental defect, impairment, or condition that might be relevant to sentencing as opposed to guilt… [trial counsel] repeatedly testified that he had no strategy reason for failing to consult with Dr. Cavanaugh or any other psychiatrist or psychologist about the import of such mitigating evidence or its relationship to Belmontes' subsequent behavior. Appendix to Petition, p. 30a (emphasis supplied).

The deficient performance component of this case is solely about a complete failure to conduct any mental state mitigation inquiry, notwithstanding numerous indicia that mental state mitigating evidence likely existed. The panel majority correctly notes that "[t]he district court held that [trial counsel's] performance was deficient and that dissent does not dispute this holding." Pet. App. 44a, fn. 9 (emphasis supplied).

Thus, the panel majority issued a nuts-and-bolts determination of deficient performance that neither the dissenting panel member nor the dissenting en banc judges disputed. Under these circumstances, petitioner's effort to impute to the Ninth Circuit the imposition of a duty to present some kind of "alternate theory" that is "inconsistent with his client's testimony" is a contrived effort to elicit a grant of certiorari based on a characterization of the panel decision that is not supported by the record.

The debates between the panel majority and the dissenting member and between the en banc factions related solely to the prejudice prong of Strickland. Dissenting Judge O'Scannlain wrote, "[t]he majority concludes that Belmontes has showed both deficiency and prejudice, but its analysis deprives the prejudice requirement of any meaning." Pet. App. 90a (emphasis supplied). Judge O'Scannlain did not clearly dispute the deficient performance finding.

Similarly, the en banc dissent written by Judge Callahan rests on the assertion that "Counsel's failure to explore the mitigating evidence was not prejudicial," Pet App. 123a, not that counsel's performance was adequate.

Petitioner has adopted the highly anomalous position of asking this Court to grant certiorari regarding the deficient performance prong of Strickland, on which there was no dispute as to either the appropriate standard or its application to the facts of this case by any federal judge who has considered the issue. Petitioner's contention that the panel majority has tampered with the Strickland standard of deficient performance, like the Seventh Circuit in Wright v. Van Patten, 552 U.S. 120 (2008), is belied by the complete absence of any comparable contention by any of the dissenting judges. Clearly, if any of the dissenting judges had viewed the panel majority's deficient performance finding as incompatible with Strickland, they would have at least noted that in their dissents.

Petitioner has presumably not focused on the prejudice dispute as a basis for seeking certiorari, because there was no dispute among the Ninth Circuit judges as to the standard to be applied. The only actual dispute related to the application of the standard to the specific facts contained in this record. Petitioner must recognize, at least implicitly, that a dispute among Court of

Appeal judges as to the correct application of the familiar Strickland prejudice standard to the specific and idiosyncratic facts of a particular case is not a cert.-worthy subject. As Justice Scalia admonished the state during oral argument in Knowles v. Mirzayance, ___ U.S. ___, 129 S.Ct. 1411 (2009), the court "did not take the case for that (harmless error analysis)" because "it wouldn't be very helpful to bar" if the Court decided that case on the basis of prejudice. Oral Arg. TX, p. 13.

Moreover, petitioner's claim that the Ninth Circuit imposed a rogue duty on defense counsel to present an "alternative" theory that is "inconsistent" with the defendant's position is itself unsupported by the record. Petitioner asserts, incorrectly, that the majority panel "held that Shick had rendered ineffective assistance in failing to present penalty-phase evidence in support of an alternative theory, different from the one presented by defense counsel, that hardships in respondent's youth had psychologically led him to criminality." Pet., p. 2. Petitioner further asserted that the majority opinion "required counsel to present that additional defense theory despite the fact that it contradicted respondent's personal plea to the jurors that he did not want to treat his past as an excuse for his crime." Ibid. This purported contradiction is illusory. In fact, trial counsel did present considerable testimony from lay witnesses as to what

has been characterized by the dissenting panel member as a "wretched childhood," Pet. App. 135a, in a manner not at all inconsistent with Belmontes' allocution. If there was no inconsistency between trial counsel's presentation regarding the wretched childhood and petitioner's acceptance of responsibility during his allocution for his adult acts, notwithstanding those childhood influences, there would not be any untoward inconsistency between the presentation of complementary evidence of mental state factors from petitioner's youth to build upon the foundation presented by the lay witnesses.

Counsel for petitioner may be attempting to evoke an analogy to Schriro v. Landrigan, 550 U.S. 465 (2007), but that reference fails entirely because the record in this case is clear that Belmontes never placed any limitation on trial counsel as far as developing and presenting mitigating evidence.

Wherefore, for the foregoing reasons, respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Dated:

Respectfully submitted,

_____

ERIC S. MULTHAUP, Attorney for
FERNANDO BELMONTES

DECLARATION OF SERVICE

RE: Ayers vs. Fernando Belmontes
No. 08-1263

I, Eric S. Multhaup, am over the age of 18 years, am not a party to the within entitled cause, and maintain my business address at 20 Sunnyside Avenue, Suite A, Mill Valley, California 94941. I served the attached:

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

on the following individuals/entities by placing a true and correct copy of the document in a sealed envelope with postage thereon fully prepared, in the United States mail at Mill Valley, California, addressed as follows:

Attorney General
Attn: Mark A. Johnson, Esq.
1300 I Street
Sacramento, CA 95814

I declare under penalty of perjury that service was effected on June 15, 2009 at Mill Valley, California and that this declaration was executed on June 15, 2009 at Mill Valley, California.

_____
ERIC S. MULTHAUP