No. 08-1263

In the Supreme Court of the United States

ROBERT WONG, WARDEN FOR THE CALIFORNIA STATE PRISON AT SAN QUENTIN, *Petitioner,*

v.

FERNANDO BELMONTES, JR., *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert Wong, Warden, California State Prison at San Quentin, by and through his attorneys, hereby replies to Respondent Fernando Belmontes' Opposition to the Petition for Writ of Certiorari as follows:

In opposing the certiorari petition, Belmontes accuses the State of a "contrived effort to recharacterize" the panel majority's finding of ineffective assistance of counsel. (Opp. 1.) He insists that the panel majority's opinion has nothing to do with trial counsel's failure to present evidence supporting an alternative defense theory at the penalty trial but instead rests entirely on the "unremarkable finding" that counsel had failed to investigate possible "mental state mitigation evidence." (Opp. 1-3.)

But the majority's decision does not rest on counsel's alleged failure to investigate Belmontes' "mental state." Belmontes ignores the panel's unrelenting criticism that trial counsel should have presented additional evidence to support a theory that, despite Belmontes' difficult childhood, he had been well adjusted until a brief period of adolescent illness and isolation led him to drug abuse and ultimately to violent criminal conduct. Counsel's "failure" to present that defense theory is the only reason advanced by the panel majority as to how Belmontes might have been prejudiced. Belmontes in his opposition brief does not now explain how any additional "mental state investigation" might have been helpful unless it was used to support the panel majority's newfound penalty-phase theory that the circumstances of Belmontes' background somehow

explained his transformation into the person responsible for Steacy McConnell's brutal murder.

More important, Belmontes conspicuously omits any discussion of the crippling consequences that likely would have resulted from presenting such "mental state" evidence. As explained in the State's certiorari petition, and as the panel majority in effect acknowledged, the theory that Belmontes' background had led him to become a violent criminal could not have been presented effectively, if at all, without the aid of expert witnesses; and presenting such expert testimony likely would have resulted in the jury learning of devastating information about Belmontes past—most seriously, his personal responsibility for the execution-style murder of Jerry Howard.[1/] As demonstrated in the certiorari petition, the trial judge here had expressly ruled that *any questioning* about Belmontes' character for violence would open the door to the Howard murder.

In another apparent attempt to sidestep the risk the Howard murder posed to the defense's penalty-phase case, Belmontes argues that the State is somehow precluded from objecting to the panel majority's finding that defense counsel Schick's performance was incompetent. This is so, according

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1. As noted in the State's certiorari petition, Belmontes' asserted grounds supporting his claim of ineffective assistance of counsel differed significantly from those set forth in the panel majority's most recent opinion. In Belmontes' various briefs in the Ninth Circuit, he claimed only that experts should have been presented to opine that his crime was a mere aberration from his otherwise good character and that, based on the particular makeup of his allegedly good character, he was likely to adjust well to a life in prison. The State argued that expert opinion testimony on these matters likewise would have opened the door to evidence of the Howard murder and other instances of Belmontes' violent conduct.

to Belmontes, because none of the dissenting circuit judges expressly refuted the majority's finding of incompetence but instead found that Belmontes was not prejudiced. But Belmontes' interpretation of the dissenting opinions cannot be squared with logic. In their dissenting opinions, Judges O'Scannlain and Callahan both emphasized that any attempt to introduce the alleged mitigating evidence cited by the majority would have jeopardized Schick's successful exclusion of evidence of the Howard murder. In other words, the dissenting judges' conclusion that Belmontes was not prejudiced was premised on Schick's success in shielding the jury from information about the Howard murder that would have devastated Belmontes' defense. Just as the panel majority's opinion cannot be defended on simple grounds of alleged "failure to investigate," the dissenting opinions cannot logically be minimized as resting on a simple finding of no "prejudice." This case implicates both prongs of *Strickland* v. *Washington*, 466 U.S. 668 (1984), because the reasons why Schick's representation was reasonable and the reasons why Belmontes was not prejudiced are the same.

It is nonsensical to conclude, as the panel majority necessarily did, that a defense lawyer may be condemned as ineffective for failing to present additional evidence that bore the serious risk of backfiring terribly. See *Burger* v. *Kemp*, 483 U.S. 776, 794 (1987). Belmontes' attempt to portray this case as one involving a simple disagreement among circuit judges regarding the proper application of *Strickland* to a given set of facts cannot mask the majority's dangerous interpretation of the fundamental *Strickland* standard to produce such an anomalous result. As expressed in Judge Callahan's

dissenting opinion, eight judges of the Ninth Circuit rightly fear that the panel majority's decision "has created a standard for effective assistance of counsel in death penalty cases that, in effect, guarantees a defendant a second penalty stage trial." (App. 123a.)

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: June 25, 2009

Respectfully submitted

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