Supreme Court, U.S.
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No.

In the Supreme Court of the United States

ROBERT L. AYERS, Warden for the California State Prison at San Quentin, *Petitioner,*

v.

FERNANDO BELMONTES, JR., *Respondent.*

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

PETITION FOR WRIT OF CERTIORARI

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
MICHAEL P. FARRELL
Senior Assistant Attorney General
WARD A. CAMPBELL
Supervising Deputy Attorney General
MARK A. JOHNSON
Deputy Attorney General
Counsel of Record
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-5437
Fax: (916) 324-2960
Counsel for Petitioner

CAPITAL CASE
QUESTION PRESENTED

Does the Sixth Amendment right to effective counsel in the penalty-phase of a capital trial require counsel to present and explain evidence in support of an alternative theory that is inconsistent with his client's testimony and that would likely open the door to previously excluded evidence that the defendant had personally committed another murder?

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Statutes

Robert Wong, Warden, California State Prison at San Quentin, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND JUDGMENTS BELOW

The opinion of the Ninth Circuit Court of Appeals following this Court's second remand is reported as Belmontes v. *Ayers,* 529 F.3d 834 (9th Cir. 2008) (*Belmontes III*). (App. 1a-115a.) The opinion of the Ninth Circuit following this Court's first remand is reported as *Belmontes* v. *Brown*, 414 F.3d 1094 (9th Cir. 2005) (*Belmontes II*). The initial opinion of the Ninth Circuit is reported as *Belmontes* v. *Woodford*, 350 F.3d 861 (9th Cir. 2003) (*Belmontes I*). The order of the district court is unreported. (App. 140a-191a.) The opinion of the Supreme Court of California in respondent's direct state-court appeal is reported at *People* v. *Belmontes*, 45 Cal.3d 744, 755 P.2d 310 (1988), *cert. denied*, 488 U.S. 1034 (1989). (App. 192a-285a.)

STATEMENT OF JURISDICTION

The Ninth Circuit entered judgment granting habeas corpus relief on June 13, 2008 and denied rehearing en banc on December 30, 2008. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment of the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

INTRODUCTION

In respondent Belmontes' 1982 capital trial for the murder of Steacy McConnell, defense counsel John Schick persuaded the trial judge to exclude evidence that Belmontes had committed yet another murder—the execution style shooting of Jerry Howard. Schick then presented a defense that portrayed respondent sympathetically without risking the benefit of the judge's evidentiary ruling. In 2008—after this Court twice had reversed Ninth Circuit judgments granting respondent habeas corpus relief on instructional-error grounds–the Ninth Circuit Court of Appeals again granted respondent relief from the death penalty. This time, in a 2-to-1 panel opinion, the court held that Schick 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. The panel majority dismissed the risk that presentation of such evidence would have re-opened the door to the damaging revelation that respondent earlier had murdered victim Howard. Further, it 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.

The opinions of the eight federal judges who dissented correctly rejected the panel majority's untenable application of this Court's "highly deferential" *Strickland* v. *Washington* test for ineffective counsel. As this Court recently confirmed in *Knowles* v. *Mirzayance*, No. 07-1315 (March 24, 2008), that deference precludes a federal court from requiring counsel "to raise every available non-frivolous defense" or to pursue evidence

"no matter how unlikely the effort would be to assist the defendant." Under *Strickland* and *Mirzayance*, the Sixth Amendment does not force defense counsel to present an alternative defense despite its predictable deleterious, if not explosive, impact on the defense case. Nor, under *Schriro* v. *Landrigan*, 550 U.S. 465 (2007), does the Constitution require counsel to do so where the evidence is inconsistent with his client's express wishes and testimony.

STATEMENT OF THE CASE

The Murder Of Steacy McConnell

On March 15, 1981, respondent Belmontes armed himself with a metal dumbbell bar and burglarized the home of 19-year-old Steacy McConnell in Victor, California. After entering the house and discovering Steacy at home, Belmontes savagely beat her with the metal bar, fracturing her skull with about 20 blows and causing approximately 15 gaping wounds to the side of her head. After delivering these blows, Belmontes stole Steacy's stereo equipment.

Belmontes explained to his two accomplices who had been waiting outside in a getaway car that he had to "take out a witness." Later that afternoon, Belmontes sold Steacy's stereo for $100, split the money with his accomplices, and used some of it to buy beer.

Meanwhile, Steacy's parents found their daughter lying unconscious in a pool of blood. Steacy died shortly

afterward from cerebral hemorrhaging caused by the blows to her head. (App. 195a-200a.)

The Trial and Appeal

A jury convicted Belmontes of first-degree murder. The jury also found true a statutory "special circumstance" requiring a sentence of death or life imprisonment without parole. See Cal. Penal Code, § 190.2(a). (App. 195a.)

For the penalty phase, the prosecution sought to introduce evidence of the facts underlying Belmontes' 1979 conviction as an accessory to the voluntary manslaughter of Jerry Howard. Specifically, the prosecution was prepared to present evidence that Belmontes personally had committed the execution-style murder of the victim in that case. Defense counsel Schick, however, persuaded the court to disallow such evidence on the ground that the accessory conviction was res judicata. (App. 11a-12a.)

The prosecutor's penalty-phase case in aggravation–which included the circumstances of the charged crime –therefore was limited to five instances of Belmontes' other violent or criminal conduct: his theft of a handgun in early 1979; his carrying the gun during the same time period; the bare fact of his 1979 conviction as an accessory to manslaughter; his commission of aggravated assault and battery against his pregnant girlfriend the month preceding Steacy's murder; and an assault he committed while a ward in a county youth facility. The prosecution also presented aggravating evidence of autopsy photographs depicting the nature

and extent of Steacy' McConnell's fatal injuries. (App. 149a-151a.)

In mitigation, the defense presented "a substantial amount of evidence about [Belmontes'] difficult childhood." *Belmontes II*, 414 F.3d at 1134. This included evidence of Belmontes' impoverished, unstable, and abusive upbringing; his caring and wholesome relationships with a number of decent friends and family members; his good performance during a prior commitment to the California Youth Authority (CYA); and his participation in a church-related sponsorship program provided at CYA. This evidence was offered to show that Belmontes had maintained more good relationships with decent people, that he had undergone a legitimate religious conversion, and that he therefore was a "salvageable" person who would be able to assist other inmates if committed to prison for life. *Belmontes II*, 414 F.3d at 1134; *Belmontes I*, 350 F.3d at 901.

Belmontes also testified and addressed the jurors personally in allocution. Although he acknowledged the hardships of his childhood, he repeatedly implored them not to consider his background as an excuse. Counsel then made an "emotional closing argument." *Belmontes II*, 414 F.3d at 1140; *Belmontes I*, 350 F.3d at 907.

The jurors ultimately returned a verdict of death. (App. 195a.) The California Supreme Court unanimously affirmed the judgment. And this Court denied respondent's petition for certiorari. *Belmontes* v. *California*, 488 U.S. 1034 (1989). Subsequently, the California Supreme Court denied summarily denied respondent's habeas corpus petitions.

Federal Court Proceedings

In 1994, Belmontes filed a petition for writ of habeas corpus in the United States District Court for

the Eastern District of California. His overriding claim was that Schick incompetently had failed to present expert mental testimony in the penalty phase supporting various potential theories. The district court rejected these claims, finding that:

> [W]hile the aggravating evidence actually presented to the jury did not make this a clear-cut case for application of the death penalty, had Schick presented the evidence now offered by petitioner, the prosecutor would most likely have been permitted to rebut the evidence with damning evidence of prior violent acts. Competent counsel would not have done anything to jeopardize the successful exclusion of the [Howard] execution style killing, which would have been the most powerful imaginable aggravating evidence. Thus, the court finds no reasonable probability that, but for counsel's error, the result of the proceeding would have been different.

(App. 183a.)

On appeal to the Ninth Circuit, Belmontes' overriding claim still concerned Schick's "failure" to present an expert-opinion based defense theory. He distilled his ineffective-assistance claim to the following proposition: Schick should have presented experts (1) to explain the psychological significance of various events in Belmontes' background and upbringing and (2) to discuss Belmontes' future prospects for nonviolent institutional adjustment based on his earlier performance in CYA. The Ninth Circuit did not address this primary claim but instead order relief from the death-penalty judgment on a finding of jury-instruction

error. See 2002 WL 3457152 at *19-*51; 2002 WL 34357154 at *17-*19; *Belmontes I*, 350 F.3d 861.

This Court granted certiorari and remanded the case to the Ninth Circuit for further consideration in light of *Brown* v. *Payton*, 544 U.S. 133 (2005). *Brown* v. *Belmontes*, 544 U.S. 945 (2005). However, the Ninth Circuit again granted habeas corpus relief based on the same instructional error it had purported to find in its previous decision. *Belmontes II*, 414 F.3d 1094. This Court reversed on the instruction-error issue and remanded the case to the Ninth Circuit for further proceedings. *Ayers* v. *Belmontes,* 549 U.S. 7 (2006).

On remand, a divided panel again invalidated Belmontes' penalty judgment. Although the panel's prior opinions had characterized the defense case as "substantial," its new opinion now characterized the mitigation case as "insubstantial," "inadequate," and "minimal." (App. 24a, 65a.) Judge Reinhardt's opinion, joined by Judge Paez, held that Schick had rendered ineffective assistance by failing to present available lay witnesses to "humanize" Belmontes and by failing to "explain" the psychological "significance" or "effect" of the evidence actually presented. The opinion observed that a "lay juror" was not trained to understand the psychological and behavioral consequences of Belmontes' youthful experiences. On account of this—and despite characterizing it as an alternative ground for finding counsel's performance deficient on this point—the majority determined that counsel had culpably failed to present a "psychologist or a psychiatrist" to explain to the lay jurors how certain "traumas," such as evidence of a dysfunctional household and respondent's rheumatic fever, had exerted an adverse psychological effect that fundamentally changed respondent and ultimately led him to criminality.

The majority asserted that such evidence would not have "opened the door" to the previously-excluded evidence that Belmontes had also murdered Jerry Howard. Moreover, the majority discounted the potential prejudicial effect of the prior-murder evidence. According to the majority, "[t]he aggravating evidence, *even with the addition of evidence that Belmontes murdered Howard,* is not strong enough, in light of the mitigating evidence that could have been adduced, to rule out a sentence of life in prison." (App. 81a [emphasis added].)

In dissent, Judge O'Scannlain explained that none of the newfound evidence produced in federal court could have altered the outcome. First, under any analysis, Belmontes could not have been prejudiced because the additional evidence cited by the majority would have opened the door to devastating rebuttal evidence concerning Belmontes' criminal background—most importantly, the Howard murder. Second, the newfound evidence added very little to the defense evidence that already had been presented, and it still would have paled in comparison to the overwhelming case in aggravation, particularly the evidence of Belmontes' brutal murder of Staecy McConnell. Judge O'Scannlain questioned the "majority's analysis [that] assumes that the witnesses' testimony requires explanation" and warned that the majority "deprives the prejudice requirement of any meaning." (App. 90a.)

The Ninth Circuit denied rehearing en banc. (App. 116a-139a.) Eight judges dissented from the order denying rehearing. Judge Callahan issued an opinion reiterating the concerns expressed by Judge O'Scannlain and expressing her view that the majority's opinion would require a second penalty-phase trial in virtually all future capital cases. (App. 121a.) She praised Schick for the "minor legal miracle" of excluding the "damning"

evidence that Belmontes had murdered Jerry Howard. (App. 122a, 125a.) And she faulted the "majority's approach" for failing to recognize that the cited mitigation evidence was "unlikely to be meaningful to a jury without—as the majority puts it—'an expert who could make connections between the various themes in the mitigation case and *explain* to the jury how they could have contributed to Belmontes's involvement in criminal activity.'" (App. 129a [emphasis added]; see App. 37a.) But such expert testimony, Judge Callahan explained, would have resulted in the revelation of Belmontes's "execution-style" murder of victim Howard. (App. 129a.)

REASONS FOR GRANTING THE PETITION

THE NINTH CIRCUIT'S OPINION IMPOSES BURDENS ON DEFENSE COUNSEL THAT ARE IRRECONCILABLE WITH THE DEFERENTIAL REVIEW REQUIRED BY *STRICKLAND* AND THAT ANOMALOUSLY WILL FORCE DEFENSE LAWYERS TO PRODUCE EVIDENCE DAMAGING TO THEIR CLIENTS

A. Introduction

In upsetting the death judgment for the third time in Belmontes' case, the Ninth Circuit misinterpreted *Strickland* v. *Washington*, 466 U.S. 668 (1984), in a manner that threatens untoward consequences in countless future cases. The panel's decision neutralized the deference owed to counsel in his choice of defenses. See *Mirzayance* v. *Knowles*, 2009 WL 746274, at * 10; *Strickland*, 466 U.S. at 690-691. And it ignored the respect counsel should pay to his client's wishes when deciding how best to proceed. See *Schriro* v. *Landrigan*, 127 S.Ct. at 1941; *Strickland,* at 690. Most important, the panel's decision flouted the principle that counsel may not be faulted for failing to pursue evidence that

threatens to prove harmful to the defense. See *Wiggins* v. *Smith*, 539 U.S. 510, 535 (2003); *Strickland*, at 699. The harmful effect of the Ninth Circuit's decision threatens to be profound. Indeed, as expressed in Judge Callahan's dissenting opinion, eight judges of the Ninth Circuit 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. 121a.)

B. Under The *Strickland* Standard, it is Not Ineffective Assistance of Counsel When a Defense Lawyer Does not Present Evidence That May Open the Door to Damaging Rebuttal and That Conflicts with the Express Pleas and Testimony of the Defendant

As this Court has noted "'[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel.' Rather, courts must 'judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct,' and '[j]udicial scrutiny of counsel's performance must be highly deferential.'" *Roe* v. *Flores-Ortega,* 528 U.S. 470, 477 (2000) (quoting *Strickland,* 466 U.S. at 688-690.)

It is also settled that a decision not to investigate or present a particular line of evidence cannot be challenged where counsel could "reasonably surmise" that such evidence "would be of little help," *Wiggins* v. *Smith*, 539 U.S. at 525 (quoting *Burger* v. *Kemp*, 483 U.S. 776, 794 (1987)), or might be harmful. *Id.* (quoting *Darden* v. *Wainwright*, 477 U.S. 168, 186 (1986)). As this Court very recently confirmed, "*Strickland* does not require

counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant . . ." *Knowles* v. *Mirzayance*, 2009 WL 746274, at * 10.

The "highly deferential" *Strickland* inquiry also requires a defendant to affirmatively establish prejudice from his attorney's alleged shortcomings. *Strickland,* 466 U.S. at 692. In this respect, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* at 694.

Strickland does not require all reasonable lawyers to present an alternative defense that poses the obvious threat of backfiring and undermining the defendant's own statements to the jury. Here, Schick understood that a successful resolution of Belmontes' penalty-phase trial required him to preempt the centerpiece of the prosecution's intended case in aggravation: that Belmontes earlier had committed an execution-style murder of Jerry Howard, shooting him in the back of the head. The prosecution was prepared to present eyewitness testimony, and also testimony that Belmontes had confessed to the killing after being committed to CYA for the accessory offense. (App. 92a-93a.)

Schick accomplished the "minor legal miracle of persuading the judge to suppress this evidence on the ground that the accessory conviction was res judicata. (App. 125a.) Schick reasonably chose to proceed cautiously to protect his remarkable victory. He realized that opinion testimony about Belmontes' character would likely lead to impeachment regarding the details of his prior acts of violence, including the Howard murder, and that it likely would open the door to rebuttal evidence

regarding these acts. Understandably, it was Schick's strategy to avoid jeopardizing the court's earlier favorable ruling by opening the door to such evidence. (App. 93a.)

The Ninth Circuit, however, treats the Sixth Amendment right-to-counsel guarantee as requiring defense lawyers in Schick's position to run that risk. Although the majority attempted "to avoid the minefield of Belmontes' criminal history" (App. 94a) by purporting to find multiple independent grounds for prejudice, its finding of ineffective assistance logically and inexorably reduces to a single criticism—that Schick incompetently and prejudicially failed to present an alternative defense theme that, the majority believed, could have been supported by available evidence to explain the effects and significance of Belmontes' life experiences. The opinion stressed that Schick should have presented mental-health expert evidence—or somehow should have employed his closing argument as a non-expert substitute for that psychiatric opinion—to explain to "[un]trained" lay jurors how hardships of Belmontes' upbringing resulted in a depressing isolation that changed him from a well-adjusted adolescent to a drug user and criminal. (App. 50a-51a, 55a, 62a-66a, 81a.)

Expert opinion evidence, however, risked informing the jury of Belmontes' prior murder of Jerry Howard.[1/] At the

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1. The majority insisted that petitioner's sole contention on appeal about expert testimony opening the door to the Howard murder concerned impeachment of experts regarding Belmontes' prospects for institutional adjustment; the majority finds that petitioner had waived any claim concerning the use of expert testimony for other reasons. (App. 69a-70a, n.20.) That is incorrect. Petitioner argued that *any expert evidence about Belmontes' character* would have opened the door to the facts of the Howard murder. To the extent petitioner did not *specifically argue* that expert opinion about the hardships of Belmontes' childhood leading to drug abuse and crime

very least, as Judge O'Scannlain noted in dissent, such questioning certainly would have been permitted under California law because it obviously would have been relevant to the weight and credibility of any opinion regarding Belmontes' character development. See Cal. Evid. Code § 721(a). The evidence could also have been admissible as rebuttal. *Id.* § 1102(b); *People* v. *Boyd*, 38 Cal.3d 762, 775, 700 P.2d 782 (1985); *People* v. *Alfaro*, 41 Cal.4th 1277, 1323-26, 163 P.3d 118 (2007); *In re Andrews*, 28 Cal.4th 1234, 1251, 52 P.3d 656 (2002); *People* v. *Hendricks*, 44 Cal.3d 635, 642, 749 P.2d 836 (1988). Equally if not more predictable, producing such defense testimony would have been tantamount to misusing the judge's earlier "res judicata" ruling as a sword rather than a shield and thus would have risked re-opening the ruling in light of the new circumstances. This risk would have been especially dangerous, for the judge's ruling was clearly erroneous under California law. See *People* v. *Koontz*, 27 Cal.4th 1041, 1087, 46 P.3d 335, 365 (2002); *People* v. *Bradford*, 15 Cal.4th 1229, 1375, 939 P.3d 259, 347 (1997). Indeed, Schick was constrained to withdraw a character-related question to a witness because the trial judge ruled that it would "open the door" to evidence of the Howard murder. (App. 92a-93a.)

Belmontes instead might argue—as the Ninth Circuit inconsistently ruled—that Schick himself should have taken on the job of explaining, in the guise of argument to the jury, the psychological impact Belmontes' hardships might have worked on his development as an adult. Absent a need to cross-examine an expert about the basis

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would have exposed the facts of the Howard murder, petitioner cannot be faulted. Petitioner had no opportunity or reason to address this particular argument previously because it was not raised in Belmontes' briefs but instead appeared for the first time in the majority's opinion.

for his opinion, respondent might argue, Schick in this way still might have "synthesized" the psychological evidence while avoiding "opening the door" to the prior-murder information. But a defense lawyer cannot be charged with the task of testifying as a psychiatric expert; indeed, the premise of the Ninth Circuit's own ineffective-counsel analysis is that lay persons, such as jurors, need a psychiatrist or psychologist to explain such things to them. (App. 67a-69a.) Without expert testimony, Schick would have been unable to provide any evidentiary support as to how or why any of the events of Belmontes' background had caused him to use illicit drugs or to become the remorseless criminal who brutally murdered Steacy McConnell.

Counsel, in any event, can hardly be condemned as unconstitutionally ineffective for refraining from offering pseudo-psychiatric opinion testimony in the form of un-cross-examined closing argument.[2/] As Judge Callahan observed, the logic of the majority's reasoning is that Belmontes' "traumatic experiences would not have been meaningful to a jury without the use of expert witnesses (who would have had to have been informed of the Howard murder." (App. 134a-135a.)

Moreover, even if Schick did not employ experts but instead attempted to substantiate such a theory based solely on lay opinion testimony about Belmontes' character, he still would have faced the serious risk of

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2. The Ninth Circuit explained that its cases make clear that counsel has a duty to "explain" the significance of mitigating evidence. (App. 24a-25a, n.3, citing *Mayfield* v. *Woodford*, 270 F.3d 915, 928 (9th Cir. 2001)). This "duty" is traceable to a single conclusory sentence at the end of the plurality opinion in *Williams* v. *Taylor*, 529 U.S. 362, 366 (2000) (Stevens, J.). As Judge O'Scannlain pointed out, the majority "erroneously assumes that the witnesses' testimony required explanation." (App. 114a.)

upsetting the judge's prior ruling regarding the Howard murder. The record demonstrates this. During the penalty phase trial, Schick inadvertently asked a defense witness whether Belmontes was a violent person. During an in limine hearing, the prosecutor argued that such questioning about Belmontes' character would open the door to cross-examination on Belmontes' responsibility for the Howard murder. The judge agreed that such questions by the defense would allow the prosecution to "go into the whole background." Schick was allowed to withdraw the question. (App. 92a-93a.) There is little doubt that any lay opinion testimony, aimed at showing how illness or isolation somehow transformed Belmontes from being a good kid into a drug-abusing, violent criminal, also would have opened the door to cross-examination about Belmontes' violent past, including the Howard murder.

As thoroughly set forth in the dissenting opinions of Judges O'Scannlain and Callahan, Schick was aware of virtually all of the additional potential evidence of Belmontes' hardships as a youth that was cited in the majority opinion. It was reasonable for him to conclude that this additional evidence was unlikely to persuade the jury. See *Mirzayance*, 2009 WL 746274, at *10. More important, much of the additional evidence likely would have led to aggravating rebuttal evidence about Belmontes' background and character. The Ninth Circuit panel failed to recognize Schick's grave concerns over doing anything to jeopardize the court's ruling to exclude evidence of the Howard murder. In this respect, the majority ignored the well-established principle that the relevant inquiry under *Strickland* is not what defense counsel might have pursued, but whether his choices were

reasonable under the circumstances. *Strickland*, 466 U.S. at 691.

In addition, as Judge Callahan further explained, presenting evidence in support of the alternative defense theory proffered by the panel majority would have conflicted with Belmontes' repeated personal pleas to the jury not to use his background as an excuse or "crutch." (App. 136a-147a; see also *People* v. *Belmontes*, 45 Cal.3d at 798-99; *Belmontes I*, 350 F.3d at 901; *Belmontes II*, 414 F.3d at 1134.) Presenting a theme that Belmontes should be pitied because illness and isolation led him to a life of drugs and crime would have constituted precisely the type of excuse that Belmontes personally had implored the jurors not to consider. The panel majority's ruling that Schick should have presented the defense violated *Strickland's* admonition that counsel in capital cases should consider their client's input on how to proceed and to avoid damaging their relationship. *Strickland*, at 690; see *Schriro* v. *Landrigan*, 550 U.S. 465, 127 S.Ct 1933, 1941 (2007); *Florida v. Nixon*, 543 U.S. 175, 187 (2004).[3/]

Schick's performance at the penalty phase proves reasonable under *Strickland* because it preserved the benefit of the judge's pre-trial ruling and kept hidden from the jury the sordid facts of Belmontes' other murder and his drug-related misconduct. See *Darden* v. *Wainwright*, 477 U.S. at 186; *Burger* v. *Kemp*, 483 U.S. 776, 792 (1987); *Strickland*, 466 U.S. at 699, see also *Wiggins*, 539 U.S. 526; cf. *Rompilla* v. *Beard*, 545 U.S.

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3. The Ninth Circuit had implicitly recognized the neutralizing tension between Schick's "substantial evidence" of Belmontes' "difficult childhood" and Belmontes' repeated avowals that he did not want to use his "rough childhood 'as a crutch' or excuse." *Belmontes I*, 350 F.3d at 901; *Belmontes II*, 414 F.3d at 1134. The majority did not acknowledge this tension in its latest opinion.

374, 383 (2005). It also proves reasonable because it avoided contradicting his client's own testimony and pleas to the sentencing jury.

Schick's performance, finally, may not be condemned as ineffective because it manifestly did not cause Belmontes probable prejudice. If Schick had presented the evidence cited by the Ninth Circuit panel, it is reasonably probable, to say the least, that the damaging prior-murder information then would have been placed before the jury too. The additional aggravating evidence of Belmontes' prior criminality—including but not limited to the revelation of his personal responsibility for the Howard murder—would have overwhelmed whatever negligible mitigation might have been gleaned from the alternative defense theme propounded by the Ninth Circuit panel. [4/]

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4. Suggesting that evidence of the Howard murder might not have been particularly damaging, the majority cited several cases where defense counsel's ineffectiveness was found to be prejudicial, despite the fact that the defendant had committed multiple murders. (App. 81a-82a.) This comparison is fallacious. The majority's cited cases all address instances where the jury was given all of the evidence of the defendant's prior crimes and weighed that aggravating evidence against the mitigating evidence that was offered at trial. In this case, the jury found that the death penalty was the appropriate punishment without ever hearing anything about Belmontes' execution-style murder of Jerry Howard. Moreover, the Howard case established that Belmontes was not just a multiple murderer, but a recidivist murderer. Accordingly, the question here is whether the evidence and argument supporting the majority's newfound theme could have been sufficient by itself, not only to overcome the aggravating evidence actually presented, but also to overcome the additional aggravating effect of the jury learning that Belmontes had committed another, previously-undisclosed, execution-style murder. Given the fact that the jury already found in favor of death without the Howard evidence, the answer to the question can be only be a resounding "no." (App. 121a-127a.)

* * *

In sum, in granting Belmontes habeas corpus relief, the Ninth Circuit had elevated the requirements of competent representation in capital cases, and had reduced the requirements for showing prejudice, in a manner never before authorized. Judge Callahan understandably warned that the majority's "particular view of the facts will make it almost impossible for a court in the Ninth Circuit not to grant a capital defendant a new penalty stage trial any time counsel has to balance presenting additional mitigating evidence against any aggravating evidence that would most likely accompany the mitigating evidence." (App. 139a.) This Court's intervention is necessary. [5/]

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5. Similarly, to the extent the Ninth Circuit alluded to Schick's alleged failure to present other evidence of Belmontes' character when young—e.g., overcoming "manipulation" by his grandmother, participating in Little League, being kind and thoughtful—there could have been no ineffectiveness in the *Strickland* sense. It is by no means clear, first of all, that the Ninth Circuit considered this failure—separate from the "failure" to produce the evidence about the psychological effect of Belmontes' childhood "hardships"—as itself justifying the writ of habeas corpus. Further, in light of the aggravating evidence presented by the prosecution, and the mitigation evidence actually produced by the defense, omission of the further evidence cited by the panel could not have been "ineffective." Anyway, as Judges O'Scannlain and Callahan both explained, the cited evidence was of little importance in its own right when compared to the evidence that the prosecution and Schick did introduce. (App. 99a-106a, 127a-137a.)

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: March 30, 2009

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DENIKOLA
Deputy State Solicitor General
MICHAEL P. FARRELL
Senior Assistant Attorney General
WARD A. CAMPBELL
Supervising Deputy Attorney General

MARK A. JOHNSON
Deputy Attorney General
Counsel of Record
Counsel for Petitioner

MAJ/WC:dc
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SA2001XF0003