No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT A. WAGNER,

Petitioner,

v.

JEFF PREMO,

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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QUESTIONS PRESENTED

1. Whether the Ninth Circuit's ruling denying a certificate of appealability conflicts with the "debatable" standard from *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003), when, in violation of long-standing principles of effective representation, Mr. Wagner's attorney failed to consult with an eyewitness identification expert prior to deciding that one was not necessary in Mr. Wagner's murder trial, because the attorney misunderstood the science behind eyewitness identifications and the potential scope of the expert's testimony.

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The petitioner, Robert A. Wagner, respectfully requests that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) filed on March 15, 2019. Appendix (App.) at 1.

OPINIONS BELOW

On September 18, 2018, a United States Magistrate Judge in the District of Oregon issued her Findings and Recommendation in Mr. Wagner's case. App. at 5-22. The magistrate judge recommended that Mr. Wagner's petition be denied and the case dismissed. App. at 22. She also recommended the denial of a certificate of appealabilty. App. at 22. On October 24, 2018, the United States District Court for the District of Oregon (district court) adopted the magistrate judge's findings and recommendation, and denied Mr. Wagner's petition for writ of habeas corpus in an unpublished order. App. at 3-4. The district court also denied a certificate of appealability. App. at 2. On appeal, the Ninth Circuit also denied a certificate of appealability. App. at 1.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review this petition for writ of certiorari under 28 U.S.C. § 1254(1) (2012). The Ninth Circuit filed its order sought to be reviewed on March 15, 2019. App. at 1.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. VI. provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

28 U.S.C. § 2253(c)(1) (2012) provides:

> Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court...

28 U.S.C. § 2253(c)(2) (2012) provides:

> A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

A. State Court Trial Proceedings[1]

In May 2004, Mr. Wagner was charged in Multnomah County Circuit Court with Murder with a Firearm. The charge was based on the allegation that Mr. Wagner shot and killed Lavelle Matthews in the early morning hours of March 23, 2004.

Mr. Matthews and Mr. Wagner had grown up together and their families were good friends. Earlier in the evening, Mr. Matthews had

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[1] The facts in this case are taken from the record filed in the district court case of *Wagner v. Premo,* 6:15-cv-01612-YY, and are fully cited in Mr. Wagner's brief. ECF No. 49.

been at the Paragon Club, a bar in North Portland. Mr. Wagner was also at the Paragon Club that night. The bartender reported that Mr. Wagner had been wearing a white jacket and had braided hair. Mr. Wagner and Mr. Matthews were seen together in a group of people, and the atmosphere was described as "as if they were old friends and had been getting together" and were "very amiable" and "friendly." Mr. Matthews was seen leaving the club by himself before Mr. Wagner left.

1. Eyewitness testimony of Richard Robinson

At trial, the state primarily relied on the eyewitness account of Richard Robinson. Mr. Robinson had an extensive history of criminal convictions, and had been using crack cocaine for approximately 20 years. Around 1:00 a.m. on the night of the murder, Mr. Robinson had been picked up by the police and cited for violating a drug-free exclusion order. At trial, Mr. Robinson could not recall being picked up by the police, claiming he was so frequently picked up he couldn't remember if he had been that night.

Mr. Robinson testified that he arrived at the Paragon Club around 2:00 or 2:15 a.m., right before closing time. He had been at another bar

earlier, trying to win money for crack cocaine by playing video poker. When arriving at the Paragon, Mr. Robinson met Mr. Matthews and Che-riee Mercer, an acquaintance, outside the club. He saw Mr. Wagner leave the club wearing a white jacket with dragons on the sleeves. Mr. Wagner had his hair in braids. Mr. Robinson had seen Mr. Wagner wearing the same jacket "hundreds of times." A woman pulled up in a Cadillac, and Mr. Robinson pointed her out to Mr. Wagner as someone who wanted to buy drugs. Mr. Wagner got in the woman's car and drove off. Mr. Robinson, Ms. Mercer, and Mr. Matthews then began walking south on Albina Street.

As the group approached Webster Street, Mr. Matthews told Mr. Robinson and Ms. Mercer to "wait here" outside a house on Albina Street. Mr. Matthews approached a man leaning on a van on Webster Street. The van was parked near a telephone pole. When the man said "What's up cuz?" Mr. Robinson recognized the voice as belonging to Mr. Wagner. Mr. Robinson said Mr. Matthews and the shooter were "real close" to one another. Mr. Robinson heard a gunshot, and Mr. Matthews's body fell to the ground. Mr. Robinson then saw the shooter bend down over Mr. Matthews's body and recognized the

shooter as Mr. Wagner because of his hair, jacket, and face. Mr. Robinson immediately fled the scene.

At trial, Mr. Robinson identified the location from which he allegedly witnessed the shooting. He identified the sidewalk just past the entrance of 5515 N. Albina, and testified that he was standing somewhere between the second and third fencepost. Defense investigator Randy Lapp measured the distance as approximately 100 feet from where Mr. Robinson was and where the shooting took place. From that vantage point, Mr. Robinson's view of the crime scene would have been somewhat obstructed by trees. Webster Street was very dark at night and the only street lamp near the scene was on the other side of Albina Street. Due to a delay in detectives being called to the scene, it was never established which porch lights were on at the time of the shooting.

Mr. Wagner quickly became a suspect in Mr. Matthews's shooting. While executing a search warrant at the house of Mr. Wagner's stepmother, Linda Wagner, police found mail addressed to Mr. Wagner, his social security card, his cellphone, and a white leather jacket with dragons on the sleeves. The jacket was a size large, and was found in a

closet. James Carr, Linda Wagner's boyfriend, testified the jacket belonged to him, and that Linda Wagner had bought three of the same jackets, one each for Mr. Carr, her son Marcus, and her grandson. Mr. Carr had never seen Mr. Wagner wearing any of the jackets.

2. Discrediting Mr. Robinson's account of events

The defense theory was that Mr. Wagner did not shoot Mr. Matthews, and that Mr. Robinson was mistaken in his identification. That theory was supported through cross-examination of Mr. Robinson and other witnesses, introduction of Dr. Larsen's testimony about the effects of long-term drug use on memory and perception, and Mr. Lapp's video and testimony about his investigation at the scene.

Dr. Larsen testified generally regarding the effects of long-term crack cocaine use on sight and memory, but did not testify about the case specifically. Mr. Lapp testified to the general lighting conditions at night on Webster Street. A videotape of the scene made by Mr. Lapp was also submitted into evidence; however, the video was made a year after the shooting and at a different time of night. Prosecution witnesses also challenged whether the video could accurately depict

what was visible to the human eye, given the differences in functioning between eyes and the camera.

To discredit Mr. Robinson's statement that the shooter and Mr. Matthews had been "real close," counsel relied on his cross-examination of the State's medical examiner, Dr. Gunson. Although counsel had consulted with Dr. Ray Grimsbo, he did not call Dr. Grimsbo as a witness at trial. Dr. Grimsbo, a ballistics expert, would have testified that he would expect to see gunpowder residue or stippling on a victim who had been shot from less than three feet away. Instead, counsel relied on his cross-examination of Dr. Gunson, who admitted that if the gun was shot within 2.5 feet of Mr. Matthews, residue "could" be found on Mr. Matthews.

3. Incriminating statements made to State witnesses with cooperation agreements

Besides the testimony of Richard Robinson, the State also relied on testimony from three informants (Barry Sanders, Adonis Thompson, and Marvin Holliday) who claimed Mr. Wagner had made incriminating statements to them. All three witnesses had entered into cooperation agreements with the state, reducing their previously existing sentences

in exchange for their testimony. Here, the defense relied upon cross-examination of the witnesses to expose bias and inconsistencies in their testimony.

4. Verdict and sentencing

The jury convicted Mr. Wagner of Murder. He was sentenced to the statutorily required sentence of life imprisonment with the possibility of parole after 25 years imprisonment.

B. Post-Conviction Proceedings

Thereafter, Mr. Wagner pursued post-conviction relief. As relevant to this case, he claimed that counsel was ineffective when Mr. Wagner then filed a petition for post-conviction relief. As relevant to this habeas corpus case, his amended petition claimed that he was denied effective assistance of trial counsel in violation of his rights under the United States Constitution when counsel failed to consult with and call an expert on eyewitness identification.

In support of the claim, Mr. Wagner submitted an affidavit from eyewitness identification expert Dr. Daniel Reisberg, explaining what he would have testified to if called at trial. At the post-conviction hearing, he called an attorney expert who testified that an expert on

eyewitness identification is critical because jurors give great weight to eyewitness testimony without fully understanding that it is "notoriously unreliable."

The post-conviction court denied Mr. Wagner's request for relief. The court made an introductory comment that:

> All this talk about, you know, the eyewitness at the scene and stippling and experts on eyewitness and whatnot, you know, my sense is when we get all done everybody's sort of lost track of the fact that that wasn't the only evidence in this case that identified the defendant.
>
> And if this had been a case where you didn't have the jailhouse snitches, and other testimony around, you know, I might be more I guess amenable to some of the arguments that have been made here, but this case wasn't tied in a vacuum, this wasn't the only thing, and so I – you know when you take this all in context, I think we're sort of overly narrowly focused here.

The court characterized the failure to call the eyewitness expert as the "most interesting issue," and went on to decide that

> all he's doing, you know, is trying to quantify common sense, and finally comes down to say, 'Well, there's a 75 percent chance he couldn't have identified this guy,' as I recall what he said, and the fact is that tells us nothing.
>
> I mean the jurors have their common sense to know it was dark, it was blah, blah, blah, it was on a street corner or they were away, but there's also the voice and the facial recog – all that sort of stuff. Jurors know how to do that.

> I don't – I just don't see that if this is what an expert would have testified to, and that's what we have here being offered as Reisberg saying that, I can't for the life of me see how that was an error that -- you know, that shows that trial counsel didn't meet the standard. Despite what Mr. Wolf says, I don't believe it.
>
> I just -- I think this stuff is just – you know, everybody's too excited about it, quite frankly, and if what Reisberg had -- and that's what I have before me, and Reisberg's just quantifying common sense as far as I'm concerned so I don't think that thing gets us anywhere.

The court then entered a judgment denying relief for the reasons stated on the record. The Oregon appellate courts affirmed the denial of relief.

C. Federal Habeas Proceedings

Mr. Wagner pursued his claim in federal court, but the magistrate judge recommended the denial of his petition. The magistrate judge found that the post-conviction court was not unreasonable when it denied relief. App. at 19. The magistrate judge based her ruling on the facts that (1) "Robinson had known Petitioner for 10 to 12 years, and was familiar with his appearance, voice, and distinctive leather jacket"; (2) "trial counsel went to some lengths to cast doubt on Robinson's identification through other means;" and (3) "eyewitness testimony was

not the only evidence against Petitioner," there was also the testimony from the jailhouse snitches. App. at 19.

The district court adopted the findings and recommendation, and denied Mr. Wagner's request for habeas relief. App. at 2-4. The district court also denied a certificate of appealability. App. at 2-4. Thereafter, the Ninth Circuit denied a certificate of appealability. App. at 1.

REASONS FOR GRANTING THE PETITION

This Court has established a low bar for certificates of appealability in habeas cases. The petitioner does not have to demonstrate that he is entitled to relief; rather, the issue must only be debatable among reasonable jurists. Before the district court, Mr. Wagner argued that he received ineffective assistance of counsel when his attorney failed to consult with an eyewitness identification expert prior to deciding that one was not necessary in Mr. Wagner's murder trial. The attorney knew eyewitness testimony was critical in the case, but failed to consult the expert because he misunderstood the science behind eyewitness identifications, and the potential scope of the expert's testimony. Had the jurors heard from the eyewitness identification expert, there is a reasonable probability that they would

have rejected the sole eyewitness's version of events, and acquitted Mr. Wagner.

That Sixth Amendment claim was supported by the record, and this Court's caselaw on counsel's investigation duties. Such a claim was at a minimum, debatable. To deny a certificate of appealability, therefore, the Ninth Circuit implicitly held Mr. Wagner to a higher standard that conflicted with this Court's controlling precedent.

A. The Ninth Circuit's Denial Of A Certificate Of Appealability Conflicts With This Court's Holding in *Miller-El* That The Issues Need Only Be Debatable Among Jurists Of Reason.

To obtain a certificate of appealability, a habeas petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the petitioner need not demonstrate that he would prevail on the merits. Rather, he "must [s]how reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot*

v. Estelle, 463 U.S. 880, 893 n.4 (1983)) (some internal quotation marks omitted)).

"[A] [certificate of appealability] does not require a showing that the appeal will succeed." *Id.* at 337. As this Court wrote: "We do not require petitioner to prove, before the issuance of a [certificate of appealability], that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the [certificate of appealability] has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. As explained below, the district court's opinion raised debatable issues; accordingly, Mr. Wagner's Sixth Amendment claim meets the standard set by § 2253(c). The Ninth Circuit's decision to deny a certificate of appealability thus conflicts with this Court's precedent.

1. Counsel failed to consult with an expert prior to deciding that one was not needed, in violation of long-standing principles of effective representation.

Strickland outlines the test courts must employ when addressing ineffective assistance of counsel claims: (1) was counsel's performance

deficient, and (2) if so, did this performance prejudice the defendant? 466 U.S. at 692. If both questions are answered in the affirmative, a defendant's Sixth Amendment right to effective assistance of counsel has been violated. *Id.*

Part of counsel's duty to provide effective representation includes the need to introduce available evidence that supports the client's claim of innocence. *See, e.g., Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999). Sometimes that evidence will be straightforward, like an alibi witness, or a document that undermines the credibility of the state's case. But sometimes the evidence is not so simple for a jury to assess, and further explanation by an expert is necessary. Accordingly, failure to consult with experts or to introduce expert testimony can be ineffective. *See, e.g., Showers v. Beard*, 635 F.3d 625, 631-33 (3rd Cir. 2011) (recognizing that "the specific circumstances of the case" can lead to a need for counsel to consult an expert, and in some cases a second expert, and a need to introduce expert testimony on scientific issues). Although this was such a case in which expert testimony was needed on eyewitness identifications, counsel failed to call one.

The primary reason that an eyewitness identification expert was necessary is that science shows that people's basic assumptions about identifications are incorrect. Thus, when the jury analyzed Mr. Robinson's testimony based on their "common sense" they were likely mistaken in the weight and importance they gave to it.

For example, Mr. Robinson appeared certain that he had an exceptional recall for voices, had a clear view of the shooting, and had great eyesight. But Dr. Reisberg explained that "there is a considerable body of research that suggests eyewitnesses are relatively poor at recalling their view of a crime – that is, in recalling how close they were or the duration of their view, or whether their view was unobstructed."

Mr. Robinson was confident that he identified Mr. Wagner which likely carried great weight with the jury. As the Oregon Supreme Court recognized:

> juries rely most heavily on the certainty of the witness in the identification. Witness certainty, although a poor indicator of identification accuracy in most cases, nevertheless has substantial potential to influence jurors. Studies show that eyewitness confidence is the single most influential factor in juror determinations regarding the accuracy of an eyewitness identification. Jurors, however, tend to be unaware of the generally weak relationship between confidence and accuracy, and are also unaware of how susceptible witness

> certainty is to manipulation by suggestive procedures or conforming feedback. As a result, jurors consistently tend to overvalue the effect of the certainty variable in determining the accuracy of eyewitness identifications.

State v. Lawson, 291 P.3d 673, 704-05 (Or. 2012) (en banc). In short, in contrast to common sense, certainty does not relate to accuracy.

An eyewitness expert would also have been able to explain the phenomena of "confirming feedback" mentioned in *Lawson*, *supra*, and its effect on identifications. Conforming feedback occurs after an identification when the witness is given indications that his identification is correct. This can come in the form of communication from law enforcement, other witnesses, or outside information. The danger in conforming feedback is that it "falsely inflate[s] witness confidence in the reports they tender regarding many of the factors commonly used by courts and jurors to gauge eyewitnesses reliability" and creates a "tendency to increase the appearance of reliability without increasing reliability itself." *Lawson*, 291 P.3d at 710. In addition, "[c]onforming feedback may inflate confidences to a greater degree in mistaken identifications than in correct identifications." *Id.* at 704-05 (citing studies in support).

In addition, this was a traumatic event for Mr. Robinson. The prosecutor argued that that made Mr. Robinson's testimony more reliable, telling the jury in closing argument that

> as you evaluate whether or not Mr. Robinson is correct, this is a traumatic event. This isn't a scene (indiscernible). This isn't Carson walking in the door. This is watching your friend die. This is watching one friend shoot another friend.
> Those images don't go away. Those are images that burn into your mind. Those aren't images that you [get] wrong. Those are images that you dream about for the rest of your life and they haunt you. So rely on your common sense and experience and ask yourself about traumatic events, how detailed that picture is in your mind, and what it means to recognize somebody.
> However, the science behind eyewitness identifications indicates

that a traumatic experience does not increase accuracy, and frequently decreases it. *Lawson*, 291 P.3d at 700-01 (recognizing that "high levels of stress or fear can have a negative effect on a witness's ability to make accurate identifications" and citing studies in support."). Moreover, although most people believe that memories work like photographs or a video recording, that is not true. *See id.* at 701 (citing studies to conclude that "[i]t is a common misperception that a person's memory operates like a videotape, recording an exact copy of everything the

person sees" and recognizing that "a person's capacity for processing information is finite").

There were several other factors that suggest Mr. Robinson's identification of Mr. Wagner was unreliable. First, it was around 2:30 a.m. and it was dark. There was no direct lighting over the scene; the closest streetlight was 165 feet away, and it was unclear whether there was a porch light on at a nearby house. Mr. Robinson stood between 75-100 feet away from Mr. Matthews and the shooter and viewed the events through trees and bushes. Even though Detective Kanzler testified that she could recognize a fellow police officer under similar conditions, the lack of lighting and the distance increased the chances that Mr. Robinson's identification was unreliable. Dr. Reisberg explained that accuracy in identification falls, even with a familiar face, the farther away a person is from the face. In support, he cited a study in which people were asked to identify celebrities and other famous people – in other words, familiar faces. The indemnifications fell to 75 percent correct at 34 feet away and to only 25 percent correct at 77 feet.

Mr. Robinson was a 44-year-old man who had a 22-year drug habit. As Dr. Larsen testified, long term use of cocaine can impair

memory and perception. And although Mr. Robinson claimed he was not under the influence of drugs or alcohol at the time he saw the shooting, he admitted that had smoked crack earlier that night. He was also focused on Mr. Matthews's attempts to obtain crack cocaine.

Mr. Robinson made his identification primarily on hearing a voice he believed was Mr. Wagner's and seeing a man wearing a white jacket. By the time he saw the face of the shooter, he had already decided it was Mr. Wagner. Dr. Reisberg noted that someone with a distinctive appearance can allow a more accurate identification. However, he specifically noted the circularity involved in the assessment: "[w]e are potentially accepting Robinson's claim that he saw Wagner because he claims he saw Wagner."

And even though the jacket presented as Mr. Wagner's had a dragon logo on the back and arms, perception and memory is not infallible, even for unusual or distinctive facts. For example, in a well-known experiment, one-half of the participants who were asked to watch a video and count basketball passes failed to see the person dressed in a gorilla costume walking through the game. *See* Christopher Chabris and Daniel Simons, *The Invisible Gorilla: and*

other ways our intuitions deceive us, 5-6 (Random House 2009). If 50% of Harvard University students can miss a giant gorilla in the middle of a basketball game, one older, crack-cocaine addict focused on the fact that his friend was about to obtain drugs for him could also misperceive a jacket he viewed at night from 100 feet away.

In conclusion, based on the science of eyewitness identifications as identified by Dr. Reisberg and caselaw, counsel's understanding of the value of an eyewitness expert was incorrectly narrow.

Counsel's explanation for his inaction is unsupported by law or facts. In *Strickland*, 466 U.S. at 690-91, this Court established that counsel has a duty to investigate issues, or to make reasonable judgments that investigation is unnecessary. Counsel determined that he would not call an eyewitness expert because he believed using Dr. Larsen to opine about the effects of crack cocaine use on memory and perception, and Randy Lapp, who created a nighttime video of the scene, were sufficient. Curiously, counsel opined that a "witness on eyewitness identification would likely have testified that due to Mr. Robinson's familiarity with Mr. Wagner and his voice, and because of Mr. Wagner's distinctive braids and jacket, his recognition of

Mr. Wagner would likely have been more accurate than someone who was not familiar with Mr. Wagner." But counsel never consulted with an eyewitness expert, so he had no way of knowing what such an expert would say. And although Dr. Reiseberg did indicate that familiarity could lead to more accurate identifications that would not have been the extent of his testimony. In fact, Dr. Reisberg specifically noted that any increase in accuracy with familiarity could be offset by other variables.

For those reasons, numerous other cases have analyzed the science behind eyewitness experts and concluded that expert testimony on the topic is proper and sometimes needed. *See State v. Guilbert*, 49 A.3d 705, 720 n.8 (Conn. 2012) (collecting federal and state cases). Counsel's failure to consult with the expert prior to deciding not to call him thus fell below the Sixth Amendment standard of reasonable representation.

2. But for that failure, there was a reasonable probability of a different trial outcome.

To demonstrate prejudice, a petitioner must show a reasonable probability of a different outcome. *Strickland*, 466 U.S. at 694. Here, the record contains evidence of that probability. As explained above,

Mr. Robinson's identification had significant reliability problems, but many of those were not apparent to the jury because they contradicted common sense. Had the jury understood that eyewitness identification is not common sense, and in some cases runs counter to it, they would have viewed Mr. Robinson's identification with more skepticism. Dr. Reisberg's testimony would have thus created reasonable doubt as to whether Mr. Robinson really did see Mr. Wagner shoot Mr. Matthews.

3. Because the claim was debatable, the Ninth Circuit ruled contrary to *Miller-El* when it denied Mr. Wagner a certificate of appealability.

As explained above, in a case in which identity was the key issue, counsel decided against calling an expert in eyewitness identification without doing the necessary investigation to find out what that expert's testimony would be. This Court has established that counsel must investigate before making strategic trial decisions, or make a reasonable decision that investigation is unnecessary. *E.g.*, *Wiggins v. Smith*, 539 U.S. 510 (2003). Here, counsel's proffered explanation for failing to investigate was not reasonable – it was based on his own misunderstanding of eyewitness evidence and the scope of an expert's

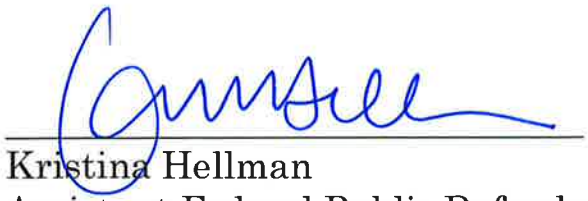
testimony. Had that expert provided testimony to the jury, there is a reasonable probability of a different outcome for Mr. Wagner.

Thus, under this Court's precedent on certificates of appealabily it is – at a minimum – debatable as to whether Mr. Wagner received effective assistance of counsel. Accordingly, the Ninth Circuit's ruling which denied a certificate of appealability implicitly held Mr. Wagner to a higher standard and thus conflicts with this Court's precedent.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari, summarily reverse, and remand the case to the Ninth Circuit with instructions that it grant a certificate of appealability on Mr. Wagner's claim of ineffective assistance of counsel under the Sixth Amendment to the United States Constitution.

Respectfully submitted on June 13, 2019.



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