(ORDER LIST: 558 U.S.)

MONDAY, NOVEMBER 16, 2009

ORDERS IN PENDING CASES

09M46 DANIEL, ROCHELLE V. TRANS UNION CONSUMER REPORTING

The motion to direct the Clerk to file a petition for a writ of certiorari out of time is denied.

09M47 OGEDENGBE, RAFAT S. V. UNITED STATES

The motion for leave to file a petition for a writ of certiorari under seal with redacted copies for the public record is granted.

09M48 AHMED, FAYAD V. GATES, SEC. OF DEFENSE

The motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner is granted.

09M49 JACKSON, MARK C. V. SHINSEKI, SEC. OF VA

The motion for leave to proceed as a veteran is denied.

09M50 OGEDENGBE, WOLE E. V. UNITED STATES

The motion for leave to file a petition for a writ of certiorari under seal with redacted copies for the public record is granted.

08-1569 UNITED STATES V. O'BRIEN, MARTIN, ET AL.

The motion of Arthur Burgess for appointment of counsel is granted. Leslie Feldman-Rumpler, Esq., of Boston, Massachusetts, is appointed to serve as counsel for respondent

Arthur Burgess in this case. The motion of Martin O'Brien for appointment of counsel is granted. Timothy P. O'Connell, Esquire, of Charlestown, Massachusetts, is appointed to serve as counsel for respondent Martin O'Brien in this case.

08-10846 IN RE MICHAEL S. MICHALSKI

08-10886 IN RE CHARLES W. ALPINE

The motions of petitioners for reconsideration of orders denying leave to proceed *in forma pauperis* are denied.

09-1 HOLY SEE V. DOE, JOHN V.

The Solicitor General is invited to file a brief in this case expressing the views of the United States.

09-5078 JERRY, BERNARD V. PENNSYLVANIA

09-5398 JAFFE, SOL V. US AIR AIRWAYS, INC., ET AL.

The motions of petitioners for reconsideration of orders denying leave to proceed *in forma pauperis* are denied.

09-6389 BERAS, ROBERTO V. CARVLIN, STEPHANIE M., ET AL.

The motion of petitioner for leave to proceed *in forma pauperis* is denied. Petitioner is allowed until December 7, 2009, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court. Justice Sotomayor took no part in the consideration or decision of this motion.

09-6610 JOHNSON, JOHN C. V. SHINSEKI, SEC. OF VA

The motion of petitioner for leave to proceed *in forma pauperis* is denied. Petitioner is allowed until December 7, 2009, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

CERTIORARI GRANTED

09-158 MAGWOOD, BILLY J. V. CULLIVER, WARDEN, ET AL.

The petition for a writ of certiorari is granted limited to Question 1 presented by the petition.

CERTIORARI DENIED

08-1378 CHF INDUSTRIES, INC. V. PARK B. SMITH, INC.

08-1564 ACLU OF FL, ET AL. V. MIAMI-DADE CTY. SCH. BD., ET AL.

08-1566 McCOMB, BRITTANY, ET AL. V. CREHAN, GRETCHAN, ET AL.

08-10440 FORD, STEPHANIE L. V. CHRISTIANA CARE HEALTH SYSTEMS

08-10625 KIM, GWANJUN V. DEPT. OF LABOR, ET AL.

09-47 US AVIATION UNDERWRITERS, ET AL. V. UNITED STATES

09-55 PLATONE, STACY V. DEPT. OF LABOR

09-108 DAVIS, LAWRENCE P. V. TARRANT COUNTY, TX, ET AL.

09-187 ELLIOTT, VALINDA J. V. WHITE MOUNTAIN APACHE, ET AL.

09-198 MEDELA AG, ET AL. V. KINETIC CONCEPTS, INC., ET AL.

09-207 J. R. Y., ET AL. V. WOODMEN OF THE WORLD LIFE INS.

09-208 WRINN, EUGENE V. JOHNSON, DAREN, ET AL.

09-220 WHISENHANT, THOMAS W. V. ALLEN, COMM'R, AL DOC

09-265 INDEPENDENCE INSTITUTE V. BUESCHER, CO SEC. OF STATE

09-280 OBIAJULU, RAYMOND V. LOCAL UNION NO. 995, ET AL.

09-303 SMITH, DAVID L. V. USCA 10

09-304 ROTHMAN, LINE, ET AL. V. TARGET CORP., ET AL.

09-307 BROWN, RAY C., ET UX. V. FALCONE, PHILIP A., ET AL.

09-308 U-HAUL CO. OF CA V. BERKELEY, CA, ET AL.

09-317 PATTERSON, CA V. BLDG. IND. ASSOC. C. CA, ET AL.

09-322 GREGORY, CRYSTAL, ET AL. V. DILLARD'S INC.

09-326 HARJO, SUZAN S., ET AL. V. PRO-FOOTBALL, INC.

09-327 SAMPSON, FRANCIS J. V. SUN LIFE ASSURANCE

09-368 JENKINS, WAYNE L. V. ALABAMA

09-372 FORTE, EUGENE V. KNIGHT RIDDER, ET AL.

09-382 CORREA-RUIZ, CARMELO, ET AL. V. FORTUNO, GOV. OF PR, ET AL.

09-407 ABREU-VELEZ, ANA M. V. BD. OF REGENTS, ET AL.

09-421 McCLAREN, JASON L. V. WISCONSIN

09-433 WILLS, KENNETH B. V. POTTER, POSTMASTER GEN.

09-437 SPECHLER, JAY S. V. TOBIN, VICTOR

09-443 BUCK, JAMES A. V. IRS

09-450 KOLOAY, BRYAN R. V. HOLDER, ATT'Y GEN.

09-454 GAHAGAN, DANIEL S. V. UNITED STATES

09-455 CLARKE, PAMELA V. UNITED STATES

09-456 ADAMS, ROBERT K. V. UNITED STATES

09-467 MILLER, TERRY M. V. UNITED STATES

09-5330 GOSSELIN, KEITH V. V. COLORADO

09-5346 POTTER, JOSEPH V. SOUTH COAST PLUMBING, ET AL.

09-5355 MONGANE, NABINTU A. V. HOLDER, ATTY. GEN.

09-5374 LUMSDEN, LARRY E. V. UNITED STATES

09-5388 FRANCIS, REVA V. MILLER, WARDEN, ET AL.

09-5448 RODRIGUEZ, JOSE F. V. QUALITY ENGINEERING PRODUCTS

09-5474 CARTER, ANTHONY T. V. UNITED STATES

09-6004 BUTLER, RAYMOND O. V. CALIFORNIA

09-6367 REED, LEROY C. V. FLORIDA, ET AL.

09-6369 EDMOND, ALBERT V. CASKEY, WARDEN

09-6371 ENRIQUEZ, JUAN V. THALER, DIR., TX DCJ

09-6372 CLERVIL, JOCELYN V. McNEIL, SEC., FL DOC, ET AL.

09-6375 McCARTHY, ROMAN S. V. UNKNOWN

09-6376 D'ANGELO, THOMAS V. RYAN, DIR., AZ DOC, ET AL.

09-6382 ODOM, CHRISTOPHER A. V. OZMINT, DIR., SC DOC, ET AL.

09-6385 PETERSEN, JASON J. V. MI DOC

09-6387 BARKUS, HARRY A. V. RUNNELS, WARDEN

09-6397 CHRISTIAN, ALFREDA V. CALIFORNIA, ET AL.

09-6398 DEL RIO, VICTOR V. TEXAS, ET AL.

09-6402 STATEN, JAMES K. V. PARKER, WARDEN

09-6410 BYNES, TERRY E. V. OKLAHOMA

09-6411 WHIRTY, JOHN R. V. THALER, DIR., TX DCJ

09-6413 ROTH, JOHN W. V. PENNSYLVANIA

09-6419 DUTRA, SARAH E. V. CALIFORNIA

09-6421 DERRINGER, DAVID V. MOORE, JAYME, ET AL.

09-6424 SIMMONS, MICHAEL D. V. BAZZLE, WARDEN

09-6426 SMALL, BRUCE L. V. FLORIDA

09-6428 MOHIUDDIN, AHSAN V. RAYTHEON CO.

09-6431 BABLES, MARILYN M. V. KANSAS CITY MO SCHOOL DIST.

09-6439 McGEE, DWAYNE A. V. FLORIDA

09-6443 McCRAY, DONALD R. V. GLASS, LEE

09-6450 LOMAX, BOBBY A. V. MIZE, SUPT., RECEPTION

09-6451 KITCHEN, JAMES E. V. MICHIGAN, ET AL.

09-6458 TORRES, KAREN V. AMERADA HESS CORP.

09-6463 BROWN, ANTHONY L. V. CALIFORNIA

09-6468 TELFAIR, TOMMIE H. V. TANDY, KAREN P., ET AL.

09-6469 DANIEL, CHARLES V. SCOTT, STEVEN, ET AL.

09-6471 DALY, PAUL W. V. RYAN, DIR., AZ DOC, ET AL.

09-6473 COTTON, RAKEISH V. COLEMAN, SUPT., FAYETTE

09-6474 DAVIS, RICHARD A. V. HARMON, WARDEN, ET AL.

09-6475 COLLIE, LUTHER A. V. McNEIL, SEC., FL DOC, ET AL.

09-6477 DARBY, THOMAS A. V. MOORE, WARDEN

09-6479 DAHL, TED V. THALER, DIR., TX DCJ

09-6480 CHAVARRIA, ARMANDO V. CALIFORNIA

09-6481 TAYLOR, DAVID P. V. MURPHY, COMM'R, CT DOC, ET AL.

09-6483 WHITE, KALA B. V. LUOMA, WARDEN

09-6486 ASANTE, ALBERT A. V. NEW YORK

09-6488 JUDD, KEITH R. V. NEW MEXICO

09-6493 LARSON, HOLLIS J. V. MINNESOTA

09-6500 ANDREWS, KEVIN V. SEATTLE, WA

09-6502 TAYLOR, ERIC, ET UX. V. NATIONAL CITY BANK

09-6505 MEEHAN, DENNIS V. NEW YORK

09-6511 SANCHEZ, CARLOS A. V. McNEIL, SEC., FL DOC, ET AL.

09-6522 EDE, JEFFREY A. V. PENNSYLVANIA

09-6526 AYYAR, RAJAN R. V. CALIFORNIA

09-6532 MARSHALL, AUNDRA V. ALABAMA

09-6533 LaFORGE, ANDREA B. V. IOWA

09-6542 MONACELLI, KATHALINA V. LEE CTY. EDU. ASSN., ET AL.

09-6543 MONACELLI, KATHALINA V. HEARTLAND ED. CONSORTIUM, ET AL.

09-6544 TURNER, CLAYBORN S. V. RUNNELS, WARDEN

09-6545 NUNLEY, PRESTON E. V. MISSISSIPPI

09-6546 MILLER, ROMIE H. V. FRIEL, WARDEN

09-6550 WELLS, RAYNE D. V. WASHINGTON

09-6553 BROOM, ROMELL V. STRICKLAND, GOV. OF OH, ET AL.

09-6556 WATKINS, THEODORE N. V. MASSACHUSETTS

09-6559 DOORBAL, NOEL V. McNEIL, SEC., FL DOC

09-6563 MONACELLI, KATHALINA V. HEARTLAND ED. CONSORTIUM, ET AL.

09-6564 NGUYEN, HUNG V. SUPERIOR COURT OF CA, ET AL.

09-6565 REEVES, JASON M. V. LOUISIANA

09-6569 BURROUGHS, DELORIS V. BROADSPIRE

09-6570 ADAMS, BRIAN V. HONDA ENGINEERING NORTH AMERICA

09-6571 BOWNES, ULYSSES V. EPPS, COMM'R, MS DOC

09-6573 MAXWELL, ROBERT V. TALLEY, RONALD, ET AL.

09-6587 SCOTT, DERRICK V. HANSON, RAY

09-6619 POLONCZYK, KIM A. V. CORPORATE STATE OF AR, ET AL.

09-6639 YEBOAH-SEFAH, DANIEL V. RUSSO, SUPT., SOUZA-BARANOWSKI

09-6642 MUHAMMAD, AKEEM V. SAPP, GEORGE, ET AL.

09-6649 NDONGO, GERMAIN D. V. HOLDER, ATT'Y GEN.,

09-6695 SANG, THON N. V. SCRIBNER, WARDEN

09-6724 VALVERDE, JESUS V. ARIZONA

09-6735 BRAMIT, MICHAEL L. V. CALIFORNIA

09-6756 TATE, ROBERT W. V. WARREN, WARDEN

09-6758 JEANLOUIS, ROOSEVELT V. McNEIL, SEC, FL DOC

09-6761 OWENS, ROSCOE M. V. MICHIGAN

09-6769 STANKO, RUDY V. DAVIS, WARDEN, ET AL.

09-6772 FOBBS, VALERIE M. V. POTTER, POSTMASTER GEN.

09-6793 MARTIN, HENRY W. V. REYNOLDS, WARDEN

09-6870 JAMISON, CLARENCE V. DELAWARE

09-6908 HYDE, WILLIAM V. UNITED STATES

09-6923 MARK, ALBERT M. V. BAUER, HOPE, ET AL.

09-6941 HOLSTICK, ANTHONY F. V. UNITED STATES

09-6958 BECKETT, GEORGE V. GANSLER, ATT'Y GEN. OF MD

09-6963 HADDAD, RAOUF G. V. HERTZ CORP.

09-6978 LEATCH, JASON D. V. UNITED STATES

09-6979 KOLLAR, SCOTT V. UNITED STATES

09-6981 MORGAN, KENDRICK T. V. UNITED STATES

09-6984 DANIELS, JERMAL V. UNITED STATES

09-6989 GARCIA, JAMIE V. UNITED STATES

09-6990 WHITE, ANTHONY G. V. UNITED STATES

09-6996 JEFFERS, MARC A. V. UNITED STATES

09-6999 JONES, MARLIN B. V. PLATTEVIEW APARTMENTS, ET AL.

09-7002 WATTERS, JIMMY J. V. UNITED STATES

09-7005 WISE, GARY V. FLOYD, JUDGE, USDC SC, ET AL.

09-7008 ALLEN, VINCENT L. V. UNITED STATES

09-7010 CAIN, LaANTHONY C. V. UNITED STATES

09-7011 CRUZ-GRAMAJO, GUSTAVO V. UNITED STATES

09-7015 MONTES, GUSTAVO S. V. UNITED STATES

09-7020 KINDSFATHER, WESLEY W. V. UNITED STATES

09-7022 KNIGHT, ROY V. UNITED STATES

09-7024 HERRING, MONROE V. UNITED STATES

09-7025 GABLE, KATHERINE M. V. UNITED STATES

09-7026 HICKS, PAUL V. UNITED STATES

09-7027 HARRIS, LISA V. UNITED STATES

09-7028 PORTER, KENNETH E. V. UNITED STATES

09-7032 WYLIE, AARON L. V. UNITED STATES

09-7034 RODRIGUEZ-MENDIOLA, CONSTANTINO V. UNITED STATES

09-7036 KARIM-PANAHI, PARVIZ V. UNITED STATES

09-7037 SMITH, DEREK A. V. UNITED STATES

09-7038 MUNIZ, MANUEL V. UNITED STATES

09-7039 MORGAN, MICHAEL V. UNITED STATES

09-7041 CALLE-OCHOA, JOHN J. V. UNITED STATES

09-7042 CASTRO-GUEVARRA, JOSE M. V. UNITED STATES

09-7044 ADAMS, STEVEN A. V. UNITED STATES

09-7045 SMITH, CURTIS V. UNITED STATES

09-7046 MACKAY, ROBERT V. UNITED STATES

09-7049 SUAREZ, OCTAVIO H. V. UNITED STATES

09-7052 HERNANDEZ-HERNANDEZ, ALEJANDRO V. UNITED STATES

09-7053 GIBSON, JAMES E. V. VAUGHAN, WARDEN

09-7055 GARCIA, MACK V. UNITED STATES

09-7059 GRESHAM, JAMES H. V. UNITED STATES

09-7061 CANTU, CHRISTOPHER J. V. UNITED STATES

09-7065 LONGSTREET, RAY V. UNITED STATES

09-7067 PONTON, TROY V. UNITED STATES

09-7068 NELSON, NORMAN R. V. UNITED STATES

09-7070 PULLIAM, JOSEPH V. UNITED STATES

09-7075 CAMERON, TAIWAN D. V. UNITED STATES

09-7076 CAREY, JOHN F. V. UNITED STATES

09-7077 ESQUIVEL, JAIME L. V. UNITED STATES

09-7078 DAHLER, DAVID S. V. HOLINKA, WARDEN

09-7080 TORRES-TORRES, EDUARDO V. UNITED STATES

09-7081 WOODBERRY, CHRISTOPHER R. V. UNITED STATES

09-7084 LOERA, JOSE J. V. UNITED STATES

09-7090 POLAK, JEFFRY V. UNITED STATES

09-7091 PUCKETT, CHARLES E. V. UNITED STATES

09-7093 KIDERLEN, STEVEN D. V. UNITED STATES

09-7095 LAURY, KERRY D. V. UNITED STATES

09-7100 TURNER, RICHARD V. UNITED STATES

09-7101 WILLIAMS, MARCUS R. V. UNITED STATES

09-7105 CANIPE, ERNEST W. V. UNITED STATES

09-7107 OSUNA, ELOY V. UNITED STATES

09-7110 STRAHAN, JERRY V. UNITED STATES

09-7111 SCOTT, JAMEY R. V. UNITED STATES

09-7113 AKERS, MONTGOMERY C. V. UNITED STATES

09-7115 ANDERSON, DANIEL V. UNITED STATES

09-7118 BLURTON, JOE R. V. NORTH DAKOTA

09-7122 OBASOHAN, JULIUS V. UNITED STATES

09-7124 MONTOYA, JUNIOR R. V. UNITED STATES

09-7126 MARTINEZ-VASQUEZ, ALEJANDRO V. UNITED STATES

09-7128 WALLACE, TIMI V. UNITED STATES

09-7133 MICHEL, ADELSON V. UNITED STATES

09-7137 NELSON, MILTON A. V. UNITED STATES

09-7138 CASTILLO-HERNANDEZ, MACEDONIO V. UNITED STATES

The petitions for writs of certiorari are denied.

09-174 GLOGOWER, ANDREW D. V. CLARK, SHARON P.

The motion of National Association of Insurance Commissioners for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is denied.

09-217 PETERS, KRISTAN V. SCIVANTAGE, ET AL.

09-360 LEVINE, SAMUEL M. V. McCABE, EDWARD, ET AL.

09-427 GRANT, TONE N. V. UNITED STATES

The petitions for writs of certiorari are denied. Justice Sotomayor took no part in the consideration or decision of these petitions.

09-6447 COHEN, L. C. V. SYME, JAMES J., ET AL.

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8.

09-6459 SPURLOCK, GILBERT V. BANK OF AMERICA, N.A.

09-6554 PLUMMER, WILLIAM P. V. CALIFORNIA

The motions of petitioners for leave to proceed *in forma pauperis* are denied, and the petitions for writs of certiorari are dismissed. See Rule 39.8. As the petitioners have repeatedly abused this Court's process, the Clerk is directed

not to accept any further petitions in noncriminal matters from petitioners unless the docketing fees required by Rule 38(a) are paid and the petitions are submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U.S. 1 (1992) (*per curiam*). Justice Stevens dissents. See *id.*, at 4, and cases cited therein.

09-6586 SMITH, ERIC D. V. KNIGHT, SUPT., PENDLETON

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8.

09-6919 DUNLAP, RAHEEM V. GRAHAM, SUPT., AUBURN

09-6982 PITCHER, RICHARD V. UNITED STATES

09-7003 TOWNSEND, DAMION V. UNITED STATES

09-7064 TAVARES, ULYSSES V. UNITED STATES

09-7072 TYSON, ANTONIA V. UNITED STATES

09-7106 PARRA, CLAUDIO V. UNITED STATES

The petitions for writs of certiorari are denied. Justice Sotomayor took no part in the consideration or decision of these petitions.

HABEAS CORPUS DENIED

09-7103 IN RE ALLEN F. CALDWELL

09-7202 IN RE FRANK MEDEL, JR.

The petitions for writs of habeas corpus are denied.

MANDAMUS DENIED

09-6467 IN RE PAUL MINIX

09-7030 IN RE CHARLES P. MAXWELL

The petitions for writs of mandamus are denied.

09-6412 IN RE CHARLES W. ALPINE

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of mandamus and/or prohibition is dismissed. See Rule 39.8.

09-6501 IN RE DOROTHY WOERTH

The petition for a writ of mandamus and/or prohibition is denied.

09-6528 IN RE CHARLES W. ALPINE

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of mandamus and/or prohibition is dismissed. See Rule 39.8.

09-6538 IN RE HENRY VAN BROUGHTON

09-7006 IN RE JOSEPH C. MINNEMAN

The petitions for writs of mandamus and/or prohibition are denied.

REHEARINGS DENIED

08-10148 McMULLEN, KIM V. TENNIS, SUPT., ROCKVIEW, ET AL.

08-10150 FRANKEL, MARTIN V. UNITED STATES

08-10268 COLLEEN F. V. RIVERSIDE COUNTY DEPT. OF PUB.

08-10504 HAWKINS, THOMAS V. CALIFORNIA, ET AL.

08-10508 HAQUE, ABRAR V. UNITED STATES

08-10512 SWIFT, ANTHONY V. MISSISSIPPI

08-10576 YOUNG, ERNIE V. PRESLEY, ELVIS A., ET AL.

08-10600 WRIGHT, MICHAEL D. V. ZOELLER, ATT'Y GEN. OF IN

08-10738 OLIVIER, MAURICE P. V. CALIFORNIA

08-10927 IN RE LeSEAN ROBERTS

08-11003 IN RE ALBERT B. SINGLETARY

08-11127 CHEESEMAN, ROBERT V. REEDSPORT, OR, ET AL.

09-5034 RABY, CHARLES E. V. THALER, DIR., TX DCJ

09-5086 SMITH, ZACHARY V. DENNY, WARDEN

09-5237 GREENE, RODNEY J. V. McNEIL, SEC., FL DOC

09-5439 CORNES, ERNEST V. ILLINOIS

09-5793 BROWN, DERRICK V. UNITED STATES

09-5847 RONWIN, EDWARD V. BAYER CORP.

09-6060 MOORE, IRENE M. V. MSPB

The petitions for rehearing are denied.

Per Curiam

SUPREME COURT OF THE UNITED STATES

ROBERT WONG, WARDEN *v.* FERNANDO BELMONTES, JR.

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

No. 08–1263. Decided November 16, 2009

PER CURIAM.

In 1981, in the course of a burglary, Fernando Belmontes bludgeoned Steacy McConnell to death, striking her in the head 15 to 20 times with a steel dumbbell bar. See *People* v. *Belmontes*, 45 Cal. 3d 744, 759–761, 755 P. 2d 310, 315–316 (1988). After the murder, Belmontes and his accomplices stole McConnell's stereo, sold it for $100, and used the money to buy beer and drugs for the night. *Id*., at 764–765, 755 P. 2d, at 318–319.

Belmontes was convicted of murder and sentenced to death in state court. Unsuccessful on direct appeal and state collateral review, Belmontes sought federal habeas relief, which the District Court denied. The Court of Appeals reversed, finding instructional error, but we overturned that decision. *Ayers* v. *Belmontes*, 549 U. S. 7 (2006); see also *Brown* v. *Belmontes*, 544 U. S. 945 (2005).

On remand, the Court of Appeals again ruled for Belmontes, this time finding that Belmontes suffered ineffective assistance of counsel during the sentencing phase of his trial. The District Court had previously denied relief on that ground, finding that counsel for Belmontes had performed deficiently under Ninth Circuit precedent, but that Belmontes could not establish prejudice under *Strickland* v. *Washington*, 466 U. S. 668 (1984). *Belmontes* v. *Calderon*, Civ. S–89–0736 DFL JFM (ED Cal., Aug. 15, 2000), App. to Pet. for Cert. 140a, 179a, 183a. The Court of Appeals agreed that counsel's performance was deficient, but disagreed with the District Court with respect to

prejudice, determining that counsel's errors undermined confidence in the penalty phase verdict. *Belmontes* v. *Ayers*, 529 F. 3d 834, 859–863, 874 (CA9 2008). We disagree with the Court of Appeals as to prejudice, grant the State's petition for certiorari, and reverse.

I

Belmontes argues that his counsel was constitutionally ineffective for failing to investigate and present sufficient mitigating evidence during the penalty phase of his trial. To prevail on this claim, Belmontes must meet both the deficient performance and prejudice prongs of *Strickland*, 466 U. S., at 687. To show deficient performance, Belmontes must establish that "counsel's representation fell below an objective standard of reasonableness." *Id.*, at 688. In light of "the variety of circumstances faced by defense counsel [and] the range of legitimate decisions regarding how best to represent a criminal defendant," the performance inquiry necessarily turns on "whether counsel's assistance was reasonable considering all the circumstances." *Id.*, at 688–689. At all points, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.*, at 689.

The challenge confronting Belmontes' lawyer, John Schick, was very specific. Substantial evidence indicated that Belmontes had committed a prior murder, and the prosecution was eager to introduce that evidence during the penalty phase of the McConnell trial. The evidence of the prior murder was extensive, including eyewitness testimony, Belmontes' own admissions, and Belmontes' possession of the murder weapon and the same type of ammunition used to kill the victim. Record 2239–2250, 2261; Deposition of John Schick, Exhs. 62, 63, 64 (Sept. 26, 1995).

The evidence, furthermore, was potentially devastating. It would have shown that two years before Steacy McCon-

nell's death, police found Jerry Howard's body in a secluded area. Howard had been killed execution style, with a bullet to the back of the head. The authorities suspected Belmontes, but on the eve of trial the State's witnesses refused to cooperate (Belmontes' mother had begged one not to testify). The prosecution therefore believed it could not prove Belmontes guilty of murder beyond a reasonable doubt. What the prosecution could prove, even without the recalcitrant witnesses, was that Belmontes possessed the gun used to murder Howard. So the State offered, and Belmontes accepted, a no-contest plea to accessory after the fact to voluntary manslaughter. Record 2239–2243; Deposition of John Schick, Exhs. 62, 63, 64.

But Belmontes had not been shy about discussing the murder, boasting to several people that he had killed Howard. Steven Cartwright informed the district attorney that Belmontes had confessed to the murder. A police informant told detectives that Belmontes "bragged" about the murder, stating that he was "mad" at Howard because "the night before, he had quite a [lot] of dope and wouldn't share it with him." After double jeopardy protection set in and he had been released on parole, Belmontes admitted his responsibility for the murder to his counselor at the California Youth Authority, Charles Sapien. During his time in confinement, Belmontes had "always denied that he was the [one] who shot Jerry Howard." But because Sapien "had been square with [Belmontes]," Belmontes decided to level with Sapien upon his release, telling Sapien that he had "'wasted' that guy." Record 2240; Deposition of John Schick, Exhs. 62, 63, 64.

Schick understood the gravity of this aggravating evidence, and he built his mitigation strategy around the overriding need to exclude it. California evidentiary rules, Schick knew, offered him an argument to exclude the evidence, but those same rules made clear that the evidence would come in for rebuttal if Schick opened the door.

Record 2256; see also *People* v. *Rodriguez*, 42 Cal. 3d 730, 791–792, 726 P. 2d 113, 153 (1986); *People* v. *Harris*, 28 Cal. 3d 935, 960–962, 623 P. 2d 240, 254 (1981). Schick thus had "grave concerns" that, even if he succeeded initially in excluding the prior murder evidence, it would still be admitted if his mitigation case swept too broadly. Accordingly, Schick decided to proceed cautiously, structuring his mitigation arguments and witnesses to limit that possibility. Deposition of John Schick 301, 309–310; see *Strickland*, *supra*, at 699 ("Restricting testimony on respondent's character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and respondent's criminal history, which counsel had successfully moved to exclude, would not come in").

As Schick expected, the prosecution was ready to admit this evidence during the sentencing phase. Schick moved to exclude the evidence, arguing that the State should be allowed to tell the jury only that Belmontes had been convicted of being an accessory after the fact to voluntary manslaughter—nothing more. Record 2240–2254. Schick succeeded in keeping the prosecution from presenting the damaging evidence in its sentencing case in chief, but his client remained at risk: The trial court indicated the evidence would come in for rebuttal or impeachment *if* Schick opened the door. *Id.*, at 2256.

This was not an empty threat. In one instance, Schick elicited testimony that Belmontes was not a violent person. The State objected and, out of earshot of the jury, argued that it should be able to rebut the testimony with the Howard murder evidence. *Id.*, at 2332–2334. The Court warned Schick that it was "going to have to allow [the prosecution] to go into the whole background" if Schick continued his line of questioning. *Id.*, at 2334. Schick acquiesced, and the court struck the testimony. *Ibid.*

The Court's warning reinforced Schick's understanding that he would have to tailor his mitigation case carefully to preserve his success in excluding the Howard murder evidence. With that cautionary note in mind, Schick put on nine witnesses he thought could advance a case for mitigation, without opening the door to the prior murder evidence. See *id.*, at 2312–2417.

The Court of Appeals determined that in spite of these efforts, Schick's performance was constitutionally deficient under Circuit precedent. *Belmontes*, 529 F. 3d, at 862–863. The State challenges that conclusion, but we need not resolve the point, because we agree with the District Court that Belmontes cannot establish prejudice.

II

To establish prejudice, Belmontes must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U. S., at 694. That showing requires Belmontes to establish "a reasonable probability that a competent attorney, aware of [the available mitigating evidence], would have introduced it at sentencing," and "that had the jury been confronted with this . . . mitigating evidence, there is a reasonable probability that it would have returned with a different sentence." *Wiggins* v. *Smith*, 539 U. S. 510, 535, 536 (2003).

The Ninth Circuit determined that a reasonably competent lawyer would have introduced more mitigation evidence, on top of what Schick had already presented. For purposes of our prejudice analysis, we accept that conclusion and proceed to consider whether there is a reasonable probability that a jury presented with this additional mitigation evidence would have returned a different verdict.

In evaluating that question, it is necessary to consider *all* the relevant evidence that the jury would have had before it if Schick had pursued the different path—not just

the mitigation evidence Schick could have presented, but also the Howard murder evidence that almost certainly would have come in with it. See *Strickland*, *supra*, at 695–696, 700. Thus, to establish prejudice, Belmontes must show a reasonable probability that the jury would have rejected a capital sentence after it weighed the entire body of mitigating evidence (including the additional testimony Schick could have presented) against the entire body of aggravating evidence (including the Howard murder evidence). Belmontes cannot meet this burden.

We begin with the mitigating evidence Schick did present during the sentencing phase. That evidence was substantial. The same Ninth Circuit panel addressing the same record in Belmontes' first habeas appeal agreed, recognizing "the substantial nature of the mitigating evidence" Schick presented. *Belmontes* v. *Woodford*, 350 F. 3d 861, 907 (2003). It reiterated the point several times. See *id*., at 874, 901, 908.

All told, Schick put nine witnesses on the stand over a span of two days, and elicited a range of testimony on Belmontes' behalf. A number of those witnesses highlighted Belmontes' "terrible" childhood. They testified that his father was an alcoholic and extremely abusive. Belmontes' grandfather described the one-bedroom house where Belmontes spent much of his childhood as a "chicken coop." Belmontes did not do well in school; he dropped out in the ninth grade. His younger sister died when she was only 10 months old. And his grandmother died tragically when she drowned in her swimming pool. See Record 2314–2319, 2324–2325, 2344.

Family members also testified that, despite these difficulties, Belmontes maintained strong relationships with his grandfather, grandmother, mother, and sister. *Id*., at 2317–2318, 2325–2326. And Belmontes' best friend offered the insights of a close friend and confidant. *Id*., at 2329–2332.

Schick also called witnesses who detailed Belmontes' religious conversion while in state custody on the accessory charge. These witnesses told stories about Belmontes' efforts advising other inmates in his detention center's religious program, to illustrate that he could live a productive and meaningful life in prison. They described his success working as part of a firefighting crew, detailing his rise from lowest man on the team to second in command. Belmontes' assistant chaplain even said that he would use Belmontes as a regular part of his prison counseling program if the jury handed down a life sentence. *Id.*, at 2379–2384, 2396–2398, 2400–2407.

Belmontes himself bolstered these accounts by testifying about his childhood and religious conversion, both at sentencing and during allocution. Belmontes described his childhood as "pretty hard," but took responsibility for his actions, telling the jury that he did not want to use his background "as a crutch[,] to say I am in a situation now . . . because of that." *Id.*, at 2343.

On remand from this Court, the Court of Appeals—addressing Belmontes' ineffective assistance claim for the first time—changed its view of this evidence. Instead of finding Schick's mitigation case "substantial," as it previously had, *Belmontes*, 350 F. 3d, at 907, the Ninth Circuit this time around labeled it "cursory," *Belmontes*, 529 F. 3d, at 841, 861, n. 14, 866. Compare also *Belmontes*, 350 F. 3d, at 874, 901, 907 (labeling the mitigation evidence Schick presented "substantial"), with *Belmontes*, 529 F. 3d, at 847, n. 3, 874 (labeling the same evidence "insubstantial"). More evidence, the Court of Appeals now concluded, would have made a difference; in particular, more evidence to "humanize" Belmontes, as that court put it no fewer than 11 times in its opinion. *Belmontes*, 529 F. 3d, at 850, 859, 860, 862, 863, 864, 865, and n. 18, 869, 872, 874. The Court determined that the failure to put on this evidence prejudiced Belmontes.

There are two problems with this conclusion: Some of the evidence was merely cumulative of the humanizing evidence Schick actually presented; adding it to what was already there would have made little difference. Other evidence proposed by the Ninth Circuit would have put into play aspects of Belmontes' character that would have triggered admission of the powerful Howard evidence in rebuttal. This evidence would have made a difference, but in the wrong direction for Belmontes. In either event, Belmontes cannot establish *Strickland* prejudice.

First, the cumulative evidence. In the Court of Appeals' view, Belmontes should have presented more humanizing evidence about Belmontes' "difficult childhood" and highlighted his "positive attributes." 529 F. 3d, at 864. As for his difficult childhood, Schick should have called witnesses to testify that "when Belmontes was five years old, his 10-month-old sister died of a brain tumor," that he "exhibited symptoms of depression" after her death, that his grandmother suffered from "alcoholism and prescription drug addiction," and that both his immediate and extended family lived in a state of "constant strife." *Ibid.* As for his positive attributes, Schick should have produced testimony about Belmontes' "strong character as a child in the face of adversity." *Ibid.* Schick should have illustrated that Belmontes was "kind, responsible, and likeable"; that he "got along well with his siblings" and was "respectful towards his grandparents despite their disapproval of his mixed racial background"; and that he "participated in community activities, kept up in school and got along with his teachers before [an] illness, and made friends easily." *Ibid.*

But as recounted above and recognized by the state courts and, originally, this very panel, Schick *did* put on substantial mitigation evidence, much of it targeting the same "humanizing" theme the Ninth Circuit highlighted. Compare, *e.g.*, *ibid.*, with Record 2317 (death of 10-month-

old sister); *id.*, at 2319, 2325 (difficult childhood); *id.*, at 2314–2315 (family member's addictions); *id.*, at 2314–2315, 2324–2325 (family strife and abuse); *id.*, at 2317, 2319, 2347–2348, 2397 (strong character as a child); *id.*, at 2326–2327 (close relationship with siblings); *id.*, at 2317–2319 (close relationship with grandparents); *id.*, at 2348–2351 (participation in community religious events); see also, *e.g.*, Belmontes' Traverse to Respondent's Return to Pet. for Writ of Habeas Corpus in No. 5–89–0736–EJG–JFM (ED Cal.), p. 64 ("[C]ounsel's presentation was arguably adequate only with respect to [evidence] of 'humanizing' petitioner"). The sentencing jury was thus "well acquainted" with Belmontes' background and potential humanizing features. *Schriro* v. *Landrigan*, 550 U. S. 465, 481 (2007). Additional evidence on these points would have offered an insignificant benefit, if any at all.

The Ninth Circuit also determined that both the evidence Schick presented and the additional evidence it proposed would have carried greater weight if Schick had submitted expert testimony. Such testimony 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." *Belmontes*, 529 F. 3d, at 853. See also *ibid.* (discussing expert's federal habeas testimony on importance of expert testimony). But the body of mitigating evidence the Ninth Circuit would have required Schick to present was neither complex nor technical. It required only that the jury make logical connections of the kind a layperson is well equipped to make. The jury simply did not need expert testimony to understand the "humanizing" evidence; it could use its common sense or own sense of mercy.

What is more, expert testimony discussing Belmontes' mental state, seeking to explain his behavior, or putting it in some favorable context would have exposed Belmontes to the Howard evidence. See *Darden* v. *Wainwright*, 477

U. S. 168, 186 (1986) ("Any attempt to portray petitioner as a nonviolent man would have opened the door for the State to rebut with evidence of petitioner's prior convictions. . . . Similarly, if defense counsel had attempted to put on evidence that petitioner was a family man, they would have been faced with his admission at trial that, although still married, he was spending the weekend furlough with a girlfriend").

If, for example, an expert had testified that Belmontes had a "'high likelihood of a . . . nonviolent adjustment to a prison setting,'" as Belmontes suggested an expert might, see Brief for Appellant in No. 01–99018 (CA9), p. 34, the question would have immediately arisen: "What was his propensity toward violence to begin with? Does evidence of another murder alter your view?" Expert testimony explaining *why* the jury should feel sympathy, as opposed simply to facts that might elicit that response, would have led to a similar rejoinder: "Is such sympathy equally appropriate for someone who committed a second murder?" Any of this testimony from an expert's perspective would have made the Howard evidence fair game.

Many of Belmontes' other arguments fail for the same reason. He argues that the jury should have been told that he suffered an "extended bout with rheumatic fever," which led to "emotional instability, impulsivity, and impairment of the neurophysiological mechanisms for planning and reasoning." Amended Pet. for Writ of Habeas Corpus 120. But the cold, calculated nature of the Howard murder and Belmontes' subsequent bragging about it would have served as a powerful counterpoint.

The type of "more-evidence-is-better" approach advocated by Belmontes and the Court of Appeals might seem appealing—after all, what is there to lose? But here there was a lot to lose. A heavyhanded case to portray Belmontes in a positive light, with or without experts, would have invited the strongest possible evidence in rebuttal—the

evidence that Belmontes was responsible for not one but two murders.

Belmontes counters that some of the potential mitigating evidence might not have opened the door to the prior murder evidence. The Court of Appeals went so far as to state, without citation, that "[t]here would be no basis for suggesting that [expert testimony] would be any different if the expert were informed that Belmontes committed two murders rather than one." *Belmontes*, 529 F. 3d, at 869, n. 20. But it is surely pertinent in assessing expert testimony "explain[ing] . . . involvement in criminal activity," *id.*, at 853, to know what criminal activity was at issue. And even if the number of murders were as irrelevant as the Ninth Circuit asserted, the fact that *these* two murders were so different in character made each of them highly pertinent in evaluating expert testimony of the sort envisioned by the Court of Appeals.

The Ninth Circuit noted that the trial court retained discretion to exclude the Howard evidence even if Schick opened the door. *Id.*, at 869–870, n. 20. If Schick had doubts, the Court of Appeals contended, he could have secured an answer in advance through a motion *in limine*. *Ibid.* The trial judge, however, left little doubt where he stood. While ruling that the prosecution could not present the evidence in its case in chief, Record 2254, the judge made clear that it would come in for certain rebuttal purposes, *id.*, at 2256, 2332–2334. When Schick elicited testimony that Belmontes was not violent, for example, the judge ordered it stricken and warned Schick that he would admit the Howard murder evidence—to let the prosecution "go into the whole background"—if Schick pressed forward. *Id.*, at 2334.

In balancing the mitigating factors against the aggravators, the Court of Appeals repeatedly referred to the aggravating evidence the State presented as "scant." *Belmontes*, 529 F. 3d, at 870, 873, 874, 875, 878. That

characterization misses *Strickland*'s point that the reviewing court must consider all the evidence—the good and the bad—when evaluating prejudice. See *Strickland*, 466 U. S., at 695–696, 700. Here, the worst kind of bad evidence would have come in with the good. The only reason it did not was because Schick was careful in his mitigation case. The State's aggravation evidence could only be characterized as "scant" if one ignores the "elephant in the courtroom"—Belmontes' role in the Howard murder—that would have been presented had Schick submitted the additional mitigation evidence. *Belmontes* v. *Ayers*, 551 F. 3d 864, 867 (CA9 2008) (Callahan, J., dissenting from denial of rehearing en banc).

Even on the record before it—which did not include the Howard murder—the state court determined that Belmontes "was convicted on extremely strong evidence that he committed an intentional murder of extraordinary brutality." *Belmontes*, 45 Cal. 3d, at 819, 755 P. 2d, at 354. That court also noted that "[t]he properly admitted aggravating evidence in this case—in particular, the circumstances of the crime—was simply overwhelming." *Id.*, at 809, 755 P. 2d, at 348 (citation omitted). The Ninth Circuit saw the murder differently. It viewed the circumstances of the crime as only "conceivably significant" as an aggravating factor. *Belmontes*, 529 F. 3d, at 871. In particular, the Court of Appeals concluded that "[t]he crime here did not involve . . . needless suffering on the part of the victim." *Ibid.*

We agree with the state court's characterization of the murder, and simply cannot comprehend the assertion by the Court of Appeals that this case did not involve "needless suffering." The jury saw autopsy photographs showing Steacy McConnell's mangled head, her skull crushed by 15 to 20 blows from a steel dumbbell bar the jury found to have been wielded by Belmontes. McConnell's corpse showed numerous "defensive bruises and contusions on

[her] hands, arms, and feet," *id.*, at 839, which "plainly evidenced a desperate struggle for life at [Belmontes'] hands," *Belmontes*, 755 P. 2d, at 354. Belmontes left McConnell to die, but officers found her still fighting for her life before ultimately succumbing to the injuries caused by the blows from Belmontes. Record 3. The jury also heard that this savage murder was committed solely to prevent interference with a burglary that netted Belmontes $100 he used to buy beer and drugs for the night. McConnell suffered, and it was clearly needless.

Some of the error below may be traced to confusion about the appropriate standard and burden of proof. While the Court of Appeals quoted the pertinent language from *Strickland*, that court elsewhere suggested it might have applied something different. In explaining its prejudice determination, the Ninth Circuit concluded that "[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." *Belmontes*, 529 F. 3d, at 875. But *Strickland* does not require the State to "rule out" a sentence of life in prison to prevail. Rather, *Strickland* places the burden on the defendant, not the State, to show a "reasonable probability" that the result would have been different. 466 U. S., at 694. Under a proper application of the *Strickland* standard, Belmontes cannot carry this burden.

It is hard to imagine expert testimony and *additional* facts about Belmontes' difficult childhood outweighing the facts of McConnell's murder. It becomes even harder to envision such a result when the evidence that Belmontes had committed another murder—"the most powerful imaginable aggravating evidence," as Judge Levi put it, *Belmontes*, S-89–0736, App. to Pet. for Cert. 183a—is added to the mix. Schick's mitigation strategy failed, but the notion that the result could have been different if only

Schick had put on more than the nine witnesses he did, or called expert witnesses to bolster his case, is fanciful.

The petition for certiorari and the motion for leave to proceed *in forma pauperis* are granted. The judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

ROBERT WONG, WARDEN *v.* FERNANDO BELMONTES, JR.

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

No. 08–1263. Decided November 16, 2009

JUSTICE STEVENS, concurring.

When Fernando Belmontes was sentenced to death in 1982, California Penal Code §190.3(k)* conveyed the unmistakable message that juries could not give any mitigating weight to evidence that did not extenuate the severity of the crime. See *Ayers* v. *Belmontes*, 549 U. S. 7, 27 (2006) (STEVENS, J., dissenting). The trial judge who presided at Belmontes' sentencing hearing so understood the law, and his instructions to the jury reflected that understanding. See *id.*, at 33–34. It was only later that both the California Supreme Court and this Court squarely held that a jury must be allowed to give weight to any aspect of a defendant's character or history that may provide a basis for a sentence other than death, even if such evidence does not "'tend to reduce the defendant's culpability for his crime.'" *Id.,* at 28 (quoting *Skipper* v. *South Carolina*, 476 U. S. 1, 11 (1986) (Powell, J., concurring in judgment)).

The testimony adduced at Belmontes' sentencing hearing described his religious conversion and his positive contributions to a youth rehabilitation program. Neither his own testimony, nor that of the two ministers and the other witnesses who testified on his behalf, made any attempt to extenuate the severity of his crime. Their testimony did, however, afford the jury a principled basis for imposing a sentence other than death. See *Ayers,* 549

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* Cal. Penal Code Ann. §190.3(k) (West 1988).

U. S., at 29–31 (STEVENS, J., dissenting). A review of the entire record, especially the colloquy between six jurors and the trial judge, makes it clear to me that "the jury believed that the law forbade it from giving that evidence any weight at all." *Id.,* at 36–39. I therefore remain convinced that in its initial review of this case, the Court of Appeals correctly set aside Belmontes' death sentence.

The narrow question that is now before us is whether the additional mitigating evidence that trial counsel failed to uncover would have persuaded the jury to return a different verdict. The evidence trial counsel might have presented hardly matters, however, because in my view the conscientious jurors' mistaken understanding of the law would have prevented them from giving that additional evidence "any weight at all," *id.*, at 39, let alone controlling weight. Despite my strong disagreement with the Court's decision to review this case once again, I nevertheless agree with the Court's conclusion that trial counsel's failure to present additional mitigating evidence probably did not affect the outcome of the trial.