IN THE
SUPREME COURT OF THE UNITED STATES

DORA B. SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

VS.

JEFFREY TIMOTHY LANDRIGAN, a.k.a.
BILLY PATRICK WAYNE HILL,

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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CAPITAL CASE

QUESTIONS PRESENTED

Respondent Jeffrey Landrigan actively thwarted his attorney's efforts to develop and present mitigation evidence in his capital sentencing proceeding. Landrigan told the trial judge that he did not want his attorney to present any mitigation evidence, including proposed testimony from witnesses whom his attorney had subpoenaed to testify. On post-conviction review, the state court rejected as frivolous an ineffective assistance of counsel claim in which Landrigan asserted that if counsel had raised the issue of Landrigan's alleged genetic predisposition to violence, he would have cooperated in presenting that type of mitigating evidence.

1. In light of the highly deferential standard of review required in this case pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), did the Ninth Circuit err by holding that the state court unreasonably determined the facts when it found that Landrigan "instructed his attorney not to present any mitigating evidence at the sentencing hearing"?

2. Did the Ninth Circuit err by finding that the state court's analysis of Landrigan's ineffective assistance of counsel claim was objectively unreasonable under *Strickland v. Washington*, 466 U.S. 668 (1984), notwithstanding the absence of any contrary authority from this Court in cases in which (a) the defendant waives presentation of mitigation and impedes counsels attempts to do so, or (b) the evidence the defendant subsequently claims should have been presented is not mitigating?

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An *en banc* panel of the United States Court of Appeals for the Ninth Circuit held that Landrigan has established a colorable claim of ineffective assistance of counsel entitling him to an evidentiary hearing in district court. *Landrigan v. Schriro*, 441 F.3d 638 (9th Cir. 2006) (Appendix A). *The en banc* ruling reversed a unanimous three-judge Ninth Circuit panel decision that had upheld the district court's judgment denying federal habeas relief. *See Landrigan v. Stewart*, 272 F.3d 1221 (9th Cir. 2001) (panel decision) (Appendix B); *Landrigan v. Stewart*, No. Civ 96-002367-PHX-ROS (D. Ariz. Dec. 15, 1999) (Appendix C). *See also State v. Landrigan*, 859 P.2d 111 (Ariz. 1993).

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STATEMENT OF JURISDICTION

The Ninth Circuit filed its decision on March 8, 2006. This petition for writ of certiorari is timely filed within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides:

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

STATEMENT OF THE CASE

Respondent Jeffrey Landrigan is on death row in Arizona for a first-degree murder he committed in December of 1989. *See Landrigan*, 859 P.2d at114.

In November of 1989, Landrigan escaped from an Oklahoma Department of Corrections Facility, where he was serving prison terms for a 1982 murder and a 1996 prison stabbing. *Id.*

Soon thereafter, Landrigan arrived in Phoenix, Arizona, where he met the murder victim, a homosexual man who often tried to pick up other men by showing them money. On December 13, 1989, Landrigan went to the victim's apartment, where the two of them drank beer and socialized. The victim, who had picked up his paycheck earlier that day, called a friend to invite him to come over to "party" with "Jeff." *Id.* at 113. The victim called his friend a second time to describe sexual activities he said he was engaging in with Landrigan, and he called a third time to have his friend talk to Landrigan about a possible job. *Id.*

At some point after the phone conversations, Landrigan stabbed the victim and strangled him to death with an electrical cord. Landrigan left the victim's body face down on the bed, with a pool of blood by his head and facial lacerations and puncture wounds on his body. An ace of hearts, from a deck of cards depicting naked men in sexual poses, was carefully propped up on the victim's back, and the rest of the deck was strewn across the bed. The apartment had been ransacked, and the victim's paycheck was missing. *Id.*

When Landrigan was questioned, he denied knowing the victim or having ever been in his apartment. However, he was wearing the victim's shirt when he was arrested, and seven fingerprints taken from the victim's apartment matched Landrigan's. A shoe impression found in spilled sugar at the apartment matched Landrigan's tennis shoes, and blood on Landrigan's shoe matched blood on the victim's shirt. *Id.*

Landrigan had three telephone conversations with his ex-girlfriend in December of 1989. During one of those conversations, Landrigan told her that he was "getting along" in Phoenix by "robbing." Landrigan placed the last call from jail sometime around Christmas and told his ex-girlfriend he had "killed a guy . . . with his hands" about a week earlier. *Id.* at 113-14.

After Landrigan was convicted of murder, burglary and theft, the trial court considered evidence of aggravating and mitigating circumstances. The State established two statutory aggravating circumstances: (1) Landrigan was previously convicted of a felony

involving the use or threat of violence; and (2) the offense was committed for pecuniary gain. *Id.* at 114. Defense counsel presented a sentencing memorandum detailing evidence of Landrigan's long history of drug abuse as mitigation, but Landrigan impeded counsel's efforts to develop other mitigating evidence. (Appendix D, R.T. Oct. 25, 1990, at 7-22.)

Landrigan's counsel subpoenaed two of Landrigan's family members (his mother and his ex-wife) to testify at the sentencing hearing. However, Landrigan instructed them not to cooperate or testify. When counsel attempted to put on the record the type of evidence he had planned to present, Landrigan repeatedly interrupted and undermined every attempt by counsel to portray Landrigan in a more favorable light. (*Id.*) The Ninth Circuit panel decision aptly describes Landrigan's behavior at the sentencing hearing:

> Landrigan was not willing to merely express his opinions to counsel and, once having given those indications about his feelings, recede into comparative silence as counsel went about the business of conducting the proceeding. Quite the contrary; Landrigan took an actively aggressive posture, which ensured that counsel's attempts to place mitigating factors before the sentencing court would come a cropper. Each of counsel's feints in the mitigation direction brought a statement from Landrigan that painted an even bleaker picture and made matters even worse. But we will not merely resort to characterization; we will illustrate the situation with Landrigan's own words.
>
> In an attempt to soften the effect of the fact that Landrigan had previously murdered his best friend, Greg Brown, counsel said that as Landrigan was walking away, Brown, a much larger man, rushed up and attacked him. Landrigan, who happened to be carrying a knife, defended himself and unfortunately

killed Brown. A plausible story, but Landrigan would have none of it. His attorney got it all wrong. Rather, said he, "When we left the trailer, Greg went out of the trailer first. My wife was between us. I pulled my knife out, then I was the one who pushed her aside and jumped him and stabbed him. He didn't grab me. I stabbed him." In other words, Landrigan had come from behind and acted in a murderous way. That was all there was to it.

Landrigan behaved similarly when counsel tried to envelop the assault on another prison inmate in a brume of self defense by suggesting that Landrigan had been threatened by the victim, who was a friend of Greg Brown and Greg's father. Landrigan responded thusly: "That wasn't Greg Brown's dad's friend or nothing like that. It was a guy I got in an argument with. I stabbed him 14 times. It was lucky he lived. But two weeks later they found him hung in his cell." Again, Landrigan had unnecessarily behaved in an extremely violent and murderous way toward another human being.

And when counsel tried to burnish Landrigan's benighted past by indicating that before Brown's murder, Landrigan, for at least one brief shining moment, was a "loving, caring husband," who had married and was taking care of his wife and her child by "working . . . at a golf course during the year-and-a-half" preceding the killing, Landrigan demurred. He explained: "Well, I wasn't just working. I was doing robberies supporting my family. We wasn't married. We wasn't married in Arizona. We lived in Oklahoma. I mean, you, he's not getting the story straight. Why have him tell somebody else's story in the first fucking place?"

If that were not enough, Landrigan made the following presentation when the court asked if he would like to say anything in his own behalf:

> Yeah. I'd like to point out a few things about how I feel about the way this shit, this whole scenario went down. I think that it's pretty fucking ridiculous to let a fagot be the one to determine my fate, about how they come across in his defense, about I was supposedly fucking this dude. This never happened. I think the whole thing stinks. I think if you want to give me the death penalty, just bring it right on. I'm ready for it.

(Appendix B, 272 F.3d at 1226-27.)

The trial court considered the information presented at the sentencing hearing, as well as defense counsel's sentencing memorandum, and the court found as mitigation that Landrigan loved his family and his family loved him, and that the jury did not find premeditation. The court found, however, that the mitigation was insufficient to warrant leniency and imposed a death sentence. The court stated:

> I find the nature of the murder in this case is really not out of the ordinary when one considers first degree murder, but I do find that Mr. Landrigan appears to be somewhat of an exceptional human being. It appears that Mr. Landrigan is a person who has no scruples and no regard for human life and human beings and the right to live and enjoy life to the best of their ability, whatever their chosen lifestyle might be. Mr. Landrigan appears to be an amoral person.

Landrigan, 859 P.2d at 117; (*see also* Appendix D, at 33.) The court also imposed a 20-year prison term for the burglary conviction and 6 months in jail for theft. (Appendix D, at 34.)

Landrigan appealed his convictions and sentences to the Arizona Supreme Court. The court denied the appeal and upheld Landrigan's death sentence after independently reviewing the aggravating and mitigating circumstances. *Landrigan*, 859 P.2d at 117; (*see also* Appendix D, at 22.)

In January of 1995, Landrigan filed a petition for post-conviction relief raising, among other claims, an argument that trial counsel was ineffective at sentencing for failing to present mitigating evidence. Landrigan submitted an affidavit stating that if his attorney had discussed with him the theory of a biological component to violence in his family, he would have allowed that type of evidence to be presented. His affidavit did not allege that he would have been willing to permit the presentation of any other type of evidence. (Appendix E, Affidavit dated January 24, 1995.)

The same judge who sentenced Landrigan considered and rejected the post-conviction claim, holding that it was both frivolous and precluded. (Appendix F, Order dated July 17, 1995, at 3-4.) The judge noted that Landrigan had expressly waived presentation of *any* mitigation, and that Landrigan's "statements at sentencing belie his new-found sense of cooperation." *Id.* The judge denied Landrigan's motion for rehearing, and the Arizona Supreme Court denied Landrigan's petition for review from that ruling.

In October of 1996, Landrigan filed a preliminary petition for writ of habeas corpus and application for appointment of counsel, and he filed an amended petition on July 31, 1997. The petition included a claim that counsel was ineffective at sentencing for not presenting evidence regarding a biological component underlying Landrigan's history of violence.

The federal district court rejected Landrigan's ineffective assistance of counsel claim and denied the petition. In rejecting the claim, the court bypassed the deficient performance prong of the *Strickland* analysis[1], and found that Landrigan "failed to demonstrate he was prejudiced by his trial counsel's alleged failure to discover and present mitigation evidence." (Appendix C, at 15-17.) The district court reviewed the mitigation Landrigan claimed should have been presented and concluded that Landrigan failed to demonstrate a reasonable probability that the result of the proceeding would have been different. (*Id.* at 16.) The district court rejected as unnecessary Landrigan's request for an evidentiary hearing and denied the petition. (*Id.* at 33-36.)

Landrigan appealed that ruling to the Ninth Circuit, and a unanimous three-judge panel upheld the district court. (Appendix B, 272 F.3d at 1231.) In upholding the denial of relief on Landrigan's ineffective assistance of counsel claim, the panel noted that, under *Strickland*, the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. (*Id.*, 272 F.3d at 1225-26.) The panel observed that, although there may be close cases in terms of the reasonableness of counsel's actions or inactions in light of the defendant's actions, this was not one of them:

> [O]ur ultimate decision will depend upon the facts and circumstances of the particular case before us. In the constellation of refusals to have mitigating evidence presented, however, this case is surely a bright star. No other case could illuminate the state of the client's mind and the nature of counsel's dilemma quite as brightly as

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[1] Under *Strickland*, a defendant who challenges his counsel's effectiveness at sentencing must demonstrate (1) deficient performance on the part of counsel, *and* (2) resulting prejudice, that is, a reasonable probability that absent counsel's errors, the sentencer would have imposed a different sentence. 466 U.S. at 687

> this one. No flashes of insight could be more fulgurous than those which this record supplies.

(*Id.*, 272 F.3d at 1226.) The panel thus concluded that Landrigan failed to establish a basis for relief:

> When Landrigan was facing the possibility that the death penalty would be imposed upon him for the murder of his victim, he prevented the placement of some mitigating evidence before the sentencing judge. In fact, when counsel attempted to cast Landrigan's past history in a somewhat better light, Landrigan was quick to demolish those attempts and make sure that the court saw his past as drear indeed. He left the Arizona courts with the thought that he was minatory and remorseless. *Landrigan I*, 176 Ariz. at 8, 869 P.2d at 118. He does say that he would have allowed the presentation of genetic predisposition evidence, but it is not reasonably probable that the outcome would have been affected by that evidence. Perhaps Landrigan now regrets his stance, but we do not sit to palliate regrets. We sit to determine whether there has been error of constitutional magnitude. There has not been.

(*Id.*, 272 F.3d at 1231-31.)

The Ninth Circuit agreed to consider the case *en banc*, however, and the panel decision was subsequently withdrawn. *Landrigan v. Stewart*, 397 F.3d 1235 (9th Cir. 2005). An *en banc* majority reversed, holding that Landrigan had alleged a colorable claim for relief, and was entitled to an evidentiary hearing regarding his claim of ineffective assistance of counsel at sentencing. (Appendix A, 441 F.3d at 649.) Two circuit judges dissented, finding that Landrigan failed to allege facts that, if proven, would demonstrate *Strickland* prejudice. The dissenters noted that even the majority opinion acknowledged that "all the mitigating circumstances Landrigan faults counsel for not raising 'converge' to support the suggestion that he suffers from antisocial

personality disorder and cannot control his actions." (*Id.*, 441 F.3d at 651.) The dissenters concluded that because Arizona courts have found that an antisocial personality disorder diagnosis is not compelling mitigation evidence, Landrigan had not alleged facts that if proven would create an objectively reasonable probability that he would have received a different sentence. (*Id.*, 441 F.3d at 651, 653.)

REASONS WHY THE WRIT SHOULD BE GRANTED

This case provides an extraordinary example of a failure to accord proper deference to factual findings and state court application of this Court's authority in cases decided under the AEDPA's amendments to 28 U.S.C. § 2254. This case also presents a question of great significance nationwide that has not been squarely addressed by this Court regarding the extent of defense counsel's obligation to develop and present mitigation when the defendant actively thwarts counsel's efforts to do so. There is a conflict between the federal circuits in how to address ineffective assistance of counsel claims in cases of this nature.

This Court should reverse the Ninth Circuit's ruling for at least two reasons. First, the Ninth Circuit failed to properly defer to the state court's factual finding that Landrigan "instructed his attorney not to present any evidence at the sentencing hearing." Second, the Ninth Circuit's conclusion that, by denying Landrigan's ineffective assistance of counsel claim, the state courts unreasonably applied this Court's precedent, is unsupportable. There are no cases from this Court that compel the conclusion reached by the Ninth Circuit, and the Ninth Circuit's analysis is in fact inconsistent with this Court's rulings in *Strickland* and *Blystone v. Pennsylvania*, 494 U.S. 299 (1990), and conflicts with rulings from other circuit courts and state courts of last resort. Moreover, the ruling regarding the prejudice prong fails to properly defer under the AEDPA to what is essentially a factual finding by the state courts – in particular the ruling by the original sentencing judge that Landrigan's post-conviction claim was "frivolous."

I. *The Ninth Circuit Exceeded Its Authority Under The AEDPA When It Rejected The State Courts' Factual Finding That Landrigan Instructed His Defense Attorney Not To Present Any Mitigating Evidence.*

Under 28 U.S.C. § 2254(d), a federal habeas petitioner must demonstrate that the state court's adjudication of the merits resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts. *See Lockyer v. Andrade*, 538 U.S. 63, 70-73 (2003); *Bell v. Cone*, 535 U.S. 685, 693-95 (2002).

In the instant case, the Ninth Circuit ruled that the "state court's finding that [Landrigan] instructed his defense attorney not to present any mitigating evidence was an 'unreasonable determination of the facts.'" (Appendix A, 441 F.3d at 638, 647.) However, that ruling does not withstand scrutiny under any standard of review, much less under the highly deferential standard required by the AEDPA.

The state court record shows that at the sentencing hearing, the trial court engaged in the following colloquy with Landrigan:

> THE COURT: Mr. Landrigan, have you instructed yc lawyer that you do not wish for him to bring any mitigating circumstances to my attention?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Do you know what that means?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?

THE DEFENDANT: Not as far as I'm concerned.

(Appendix A, 441 F.3d at 646; (Appendix D, at 4.)) That colloquy clearly establishes a basis for the state courts' finding that "Landrigan instructed his defense attorney not to present any mitigating evidence."

The Ninth Circuit nevertheless posits that Landrigan's comments were taken out of context, and that the remainder of the transcript compels the conclusion that Landrigan was saying something other than that he wanted to waive presentation of any mitigation and may have wanted only to waive presentation of testimony from family members. (Appendix A, 441 F.3d at 646.) However, far from supporting the Ninth Circuit's conclusion, the context of Landrigan's statements confirms that Landrigan was not cooperating with counsel's attempt to develop mitigation and that he did not want *any* mitigating evidence to be presented.

Landrigan's counsel informed the trial court that he had intended to present as mitigation the testimony of Landrigan's natural mother, Landrigan's ex-wife, and psychiatric experts, but that Landrigan prevented his mother and ex-wife from testifying, and his mother's refusal to cooperate impeded counsel's efforts to present expert testimony:

> MR. FARRELL: Your Honor, at this time—I had, as the Court is aware, already filed a sentencing memorandum concerning a number of mitigating factors for the Court to consider concerning my client before sentencing. I have two witnesses that I wish to testify before this Court, one I had brought in from out of state and is my client's ex-wife, Ms. Sandy Landrigan. The second witness is my client's natural mother, Virginia Gipson. I believe both of those people had some important evidence that I believed the Court should take into mitigation concerning my client. However, Mr.

Landrigan has made it clear to me—Jeffrey, the defendant—that he does not wish anyone from his family to testify on his behalf today.

I have talked with Sandra Landrigan, his ex-wife. I have talked a number of times with her and confirmed what I thought was important evidence that she should present for the Court. And I have also talked with Ms. Gipson, and her evidence I think is very important and should have been brought to this Court's attention. Both of them, after talking with Jeff today, have agreed with their, in one case son and the other ex-husband, they will not testify in his behalf.

THE COURT: Why not?

MR. FARRELL: Basically it's at my client's wishes, Your Honor. I told him that in order to effectively represent him, especially concerning the fact that the state is seeking the death penalty, any and all mitigating factors, I was under a duty to disclose those factors to this Court for consideration regarding the sentencing. He is adamant he does not want any testimony from his family, specifically these two people that I have here, his mother under subpoena, as well as having flown in his ex-wife.

I have advised him and I have advised him very strongly that I think it's very much against his interests to take that particular position. I have also advised both the witnesses I could have them sworn in and ask them questions, but they are under an obligation to do what they feel is right, Your Honor they are looking after Jeff's interest.

I'm coming from the position that I have to bring certain evidence before this Court. I'm at a loss. I don't know what this Court wishes to do.

THE COURT: Mr. Landrigan, *have you instructed your lawyer that you do not wish for him to bring any mitigating circumstances to my attention?*

THE DEFENDANT: *Yeah.*

THE COURT: Do you know what that means?

THE DEFENDANT: Yeah.

THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?

THE DEFENDANT: Not as far as I'm concerned.

THE COURT: I believe we should proceed if the witnesses are willing to testify.

MR. FARRELL: Your Honor, both witnesses have advised me they do not wish to and will not testify. If the court wishes, we can ask each of them.

(Appendix D, at 2-5, emphasis added.)

After both witnesses stated in court that they would honor Landrigan's wishes and refuse to testify, the trial court permitted defense counsel to explain what he believed their testimony would be and how it might relate to proposed expert testimony:

MR. FARRELL: Your honor, I have talked with Ms. Gipson a number of times and she advised me about the factors that I was going to ask her concerning my client would basically—since she didn't raise him, would be the fact during her pregnancy, what if any factors could possibly have affected her pregnancy. And she advises me that she and her husband, Jeffrey's natural father,

were both drug users prior to her pregnancy, she was a drug user during her pregnancy, and I believe she used drugs after her pregnancy. The times and the extent I was going to bring out today, because I believe that there is some evidence that has been presented to the Court in the past concerning the possible effect on an infant when the mother takes drugs and their particular susceptibility to drugs and their antisocial behavior resulting because of their dependency on drugs when they were–during the period of gestation when they were being carried in their mother's body.

And I wish to establish that as a mitigating factor, and if sufficient, *I was going to after getting that testimony, I was considering asking for a recess to determine if I could substantiate the testimony that I had here today from other experts that may be available.* It is a relatively new area that I am not really familiar with. I have talked with some attorneys in the Phoenix area as well as the Tucson area concerning this type of mitigation, concerning the effect on an unborn infant when their mother is dependent on drugs and the resulting effect on the infant, neurological effect as well as any antisocial behavior. I believe there are some qualified experts in the area. *Once I was able to ascertain what particular types of substances Ms. Gipson had been on, the duration, and getting some foundation, I would be able to have those particular experts come in and have the Court consider their testimony in that area.*

THE COURT: Were you going to call any psychological experts such as Dr. Tatro?

MR. FARRELL: That was one name that was brought up, Your Honor. There's also—I have been in contact with—I believe it's Arizona Capital Representation people and they have provided me with a number of other

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experts. *But before I could talk with those experts about any specifics, I would have to find out what particular drugs might have been used and how long a period of time.*

THE COURT: Mr. Farrell, my question was not addressed to tying up Ms. Gipson's drug use during pregnancy to the defendant's current psychological condition. My question simply was would you consider—have you considered whether or not a psychological evaluation should be done on your client?

MR. FARRELL: I have considered it, yes.

THE COURT: All right, and have you had sufficient time to have such expert examine your client?

MR. FARRELL: Yes, I have, Your Honor.

THE COURT: And would you have a psychiatrist or psychologist standing in the wings to testify today?

MR. FARRELL: I could have, Your Honor.

THE COURT: Did you choose to, to present mitigating circumstances?

MR. FARRELL: Your Honor, at this time I do not have the information I thought necessary for those experts to testify based on the fact that Ms. Gipson had not presented any specifics for me. And I thought that was really—I understand there may be a problem and if she was not able to testify then I had no specifics for these people.

(Appendix D, at 12–16, emphasis added.)

Landrigan not only objected to testimony from his family members, he objected to counsel's attempt to convey information:

> THE DEFENDANT: Isn't this just hearsay, what is going on here? If I wanted this to be heard, I'd have my wife say it.

(Appendix D, at 7-8.) Thus, the Ninth Circuit's conclusion that Landrigan only objected to testimony from family members is clearly inaccurate; Landrigan's objection obviously applied as well to information presented by his attorney, who was not a member of Landrigan's family. Moreover, Landrigan, who was obviously capable of speaking for himself, did not interject at any point to say, "I only object to testimony from my family members. I do not object to testimony from an expert witness such as described by my attorney." Instead, he made clear he did not want *any* mitigation to be presented.

Furthermore, there is nothing in the record suggesting that the trial court would not have granted the "recess" counsel indicated he would seek if Landrigan agreed to cooperate in developing evidence for consideration by expert witnesses. The trial court evidenced an interest in obtaining as much information as could be made available, and the blame for limiting mitigation lies not with defense counsel or the trial court, but with Landrigan himself.

Finally, in Landrigan's post-conviction affidavit, he avowed only that he would have permitted testimony regarding a biological component to violence in his family. He made no such avowal as to any other type of expert testimony or any other type of mitigating evidence. Thus, the Ninth Circuit's conclusion that Landrigan's express statements to the court waived only testimony from two of his family members is unsupportable. Accordingly, the factual underpinnings of the Ninth Circuit's analysis ruling fails, and the Ninth Circuit exceeded its authority under the AEDPA by failing to defer to the state court's factual finding that Landrigan waived presentation of *any* mitigating evidence.

II. *The Ninth Circuit Exceeded Its Authority Under The AEDPA When It Found That The State Court's Ruling Was An Unreasonable Application of Clearly Established Federal Law.*

The Ninth Circuit erred by finding that the state courts unreasonably applied *Strickland* because there is no source in this Court's case law for the proposition that the defendant cannot waive the presentation of mitigating evidence. *See Kane v. Espitia*, 126 S. Ct. 407 (2005) (holding that under 28 U.S.C. § 2254(d)(1) clearly established federal law means case law from this Court). The state court's decision is in fact entirely consistent with case law from this Court addressing a defendant's right to waive mitigation and is consistent with this Court's jurisprudence regarding the prejudice prong of the *Strickland* analysis.

The same judge who sentenced Landrigan considered his post-conviction petition and applied *Strickland* in addressing Landrigan's ineffective assistance of counsel claim. (Appendix F, at 3-4.) In rejecting the claim as "frivolous," the court noted that "[s]ince defendant instructed his attorney not to present **any** evidence at the sentencing hearing, it is difficult to comprehend how defendant can claim counsel should have presented other evidence at sentencing." (*Id.* at 3, emphasis in original.) The court further noted that Landrigan's assertion in an affidavit that he would have permitted some type of mitigation to be presented was not credible and was belied by his statements at sentencing. (*Id.* at 4.)

In *Strickland*, this Court held that the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." 466 U.S. at 691. Counsel's conduct must be evaluated in light of "informed strategic choices made by the defendant and on information supplied by the defendant." *Id.*

In the present case, Landrigan's actions and strategic choices undermined counsel's concerted efforts to develop and present mitigation. Landrigan made clear he did not want *any* mitigation

presented. Landrigan not only failed to cooperate with counsel, he actively undermined counsel's attempts to develop and present mitigation. Thus, Landrigan cannot establish either deficient performance or resulting prejudice.

The Ninth Circuit *en banc* opinion cites *Williams v. Taylor*, 529 U.S. 362 (2000), *Rompilla v. Beard*, 125 S. Ct. 2456 (2005), and *Wiggins v. Smith*, 539 U.S. 510 (2003), in concluding that the state court opinion was contrary to or involved an unreasonable application of clearly established federal law. (Appendix A, 441 F.3d at 642-43.) However, *none* of those cases involve a situation in which the defendant affirmatively represented to the trial court that he did not want any mitigation to be presented and actively undermined any effort by counsel to present mitigation. Accordingly, the instant case cannot be said to be contrary to clearly established federal law.

The Constitution does not prohibit a defendant in a capital case from waiving presentation of mitigation evidence. *See Blystone*, 494 U.S. at 306 n.4 (affirming death sentence where "[a]fter receiving repeated warnings from the trial judge, and contrary advice from his counsel, petitioner decided not to present any . . . mitigating evidence."). Thus, the state court's ruling that Landrigan's express waiver of presentation of mitigation renders his ineffective assistance claim "frivolous" is consistent with federal law, as set forth in *Strickland* and *Blystone*. Accordingly, the state courts' denial of Landrigan's claim was not an unreasonable application of clearly established law from this Court.

The approach taken by the *en banc* court in this case conflicts with that in other circuits. For example, in *Wallace v. Ward*, 191 F.3d 1235 (10th Cir. 1999), the Tenth Circuit rejected a similar claim that counsel did not provide effective representation in a situation in which the defendant waived his right to present mitigation evidence. The Tenth Circuit noted that the defendant "refused to cooperate with his attorney in the presentation of mitigating evidence; indeed [the defendant] would not even let his attorney cross-examine prosecution witnesses during the sentencing hearing. In rejecting the defendant's

claim of ineffective assistance based on an allegation that counsel allegedly conducted no investigation, the Tenth Circuit quoted this Court's statement in *Strickland* that "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements and actions." 191 F.3d at 1247. The court concluded that counsel's decision not to investigate or present mitigating evidence was completely determined by the defendant and was within the realm of reasonable tactical decisions. *Id.* at 1248. The court further concluded that the defendant had not shown prejudice because he was actively seeking the death penalty. Thus, counsel's alleged deficiencies did not affect the sentence. *Id.*

In *Mitchell v. Kemp*, 762 F.2d 886, 889 (11th Cir. 1985), the Eleventh Circuit similarly rejected a claim of ineffective assistance of counsel based on the defendant's conduct, holding that "[w]hen a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made."

The Ninth Circuit's ruling in the instant case cannot be squared with these decisions from the Tenth and Eleventh Circuits. This Court should grant certiorari review to settle this conflict.

Furthermore, the Ninth Circuit's ruling regarding prejudice fails to defer to what is essentially a factual finding by the state court. The state court found that Landrigan's assertion that his counsel was ineffective for failing to present evidence of a genetic predisposition to violence to be "frivolous." The judge considering this post-conviction claim was the same judge who sentenced Landrigan. Thus, there is no need to speculate about whether the information Landrigan claims should have been presented would have changed the outcome of his sentencing proceeding. The state court's ruling regarding the post-conviction claim is essentially a factual finding entitled to deference, particularly under the AEDPA standard of review.

Finally, even assuming the state court's ruling regarding whether Landrigan was prejudiced by counsel's alleged failure to present evidence of a predisposition to violence is not a factual finding,

and is instead strictly a legal conclusion, the state court's ruling was not objectively unreasonable because the evidence at issue would not have been presented because of Landrigan's unwillingness to present mitigation and because it is only marginally—if at all—mitigating.

The three-judge panel that upheld the district court ruling concluded that Landrigan's tenuous theory that his biological background made him what he is would not have affected the trial judge at sentencing:

> It is highly doubtful that the sentencing court would have been moved by information that Landrigan was a remorseless, violent killer because he was genetically programmed to be violent, as shown by the fact that he comes from a family of violent people, who are killers also.

(Appendix B, 272 F.3d at 1228-29.) The panel noted that this type of information would have shown the court that Landrigan would continue to be violent:

> He had already done that to a fare-thee-well. The prospect was chilling; before he was 30 years of age, Landrigan had murdered one man, repeatedly stabbed another one, escaped from prison, and within two months murdered still another man. As the Arizona Supreme Court so aptly put it when dealing with one of Landrigan's other claims, "[i]n his comments, defendant not only failed to show remorse or offer mitigating evidence, but he flaunted his menacing behavior." *Landrigan I*, 176 Ariz. at 8, 859 P.2d at 118. On this record, assuring the court that genetics made him the way he is could not have been very helpful. There was no prejudice.

(*Id.* at 1229).

The two circuit judges who dissented from the *en banc* ruling agreed with the panel and further noted that, under Arizona law, an antisocial personality disorder diagnosis "has often been treated on appeal as insufficient to justify mitigation," particularly when the defendant is able to control his conduct in other settings. (Appendix B, 441 F.3d at 651) (citing *State v. Brewer*, 826 P.2d 783, 802-03 (1992)). The two dissenting *en banc* judges observed that in the instant case, Landrigan was able to control his impulses long enough to cultivate the victim's trust and attempt to profit from their encounter. Thus, an anti-social personality disorder would not be mitigating in this case. *Id.*

The Arizona Supreme Court has repeatedly held that a personality disorder, standing alone, is not entitled to any mitigating weight. *See e.g. State v. Jones*, 4 P.3d 345, 367 (Ariz. 2000); *State v. Gerlaugh*, 698 P.2d 694, 704 (Ariz. 1985). Only if there is "some reason other than the nature of the disorder" will an antisocial personality disorder be entitled to any mitigating weight. *Gerlaugh*, 698 P.2d at 704. Evidence that Landrigan is a violent unrehabilitative sociopath was clearly established by Landrigan's criminal history and by his statements at the time of sentencing. Additional evidence to that effect would not have aided Landrigan's case, and he has not established even a remote possibility that this evidence would have changed the outcome of his sentencing proceeding. Thus, the state court's ruling denying Landrigan's claim was not unreasonable.

Failure to accord deference on federal review to state court rulings regarding the application of *Strickland* undermines the states' interest in the finality of their judgments in criminal cases. The Ninth Circuit's recent record in addressing *Strickland* claims demonstrates why public confidence in the criminal justice system is undermined when federal courts do not accord deference to state court rulings. Since 1998, the Ninth Circuit has granted habeas relief in six Arizona capital cases on the basis of ineffective assistance of counsel at sentencing. *See Lambright v. Stewart*, 241 F.3d 1201 (9th Cir. 2001) (remanded for evidentiary hearing); *Smith (Joe Clarence) v. Stewart*, 189 F.3d 1004 (9th Cir. 1999) (remanded for new sentencing); *Wallace v. Stewart*, 184 F.3d 112 (9th Cir. 1999) (remanded for new sentencing);

Smith (Bernard) v. Stewart, 140 F.3d 1263 (9th Cir. 1998) (remanded for new sentencing); *Correll v. Stewart*, 137 F.3d 1404 (9th Cir. 1998) (remanded for an evidentiary hearing); *Summerlin v. Schriro*, 427 F.3d 623 (2005) (remanded for new sentencing).

Proceedings subsequent to the Ninth Circuit's reversals in five of those cases have resulted in rulings upholding the death sentence following an evidentiary hearing or resentencings where death has again been imposed.[2] In the sixth case (Summerlin), the defendant is awaiting resentencing. Thus, the Ninth Circuit's reversals have served only to delay finality.

If left unchanged, the Ninth Circuit's ruling in this case will similarly delay finality and exact an unwarranted toll on victims and the criminal justice system. The Ninth Circuit's ruling should be reversed.

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[2] In August 2004, following an evidentiary hearing in district court, the court denied Lambright's ineffective assistance of sentencing counsel claim. (Dkt.325; https://ecf.azd.uscourts.gov/cgi-bin/DktRpt.pl?123647959341114-L_280_0-1). Lambright was originally sentenced to death in May 1982.

In June 2004, a jury re-imposed Joe Clarence Smith's two death sentences. http://www.superiorcourt.maricopa.gov/docket/criminal/caseInfo.asp (CR0000095116). Smith was originally sentenced to death in August 1977 for both murders, an 18-year old girl murdered in December 1975 and a 14-year-old girl murdered in January 1976.

In April 2005, a jury re-imposed Wallace's three death sentences. http://www.cosc.co.pima.az.us/courtpartners/start.asp. (CR-12590). Wallace was originally sentenced in May 1985, following his guilty plea to murdering two children and their mother.

In March 2003, following an evidentiary hearing, the district court denied Correll's ineffective assistance of sentencing counsel claim. (Dkt. 439; https://ecf.azd.uscourts.gov/cgi-bin/DktRpt.pl?111478375068962-L_280_0-1. Correll was originally sentenced to death for the triple murders in November 1984.

CONCLUSION

This case is an extreme example of the Ninth Circuit's failure to accord deference to factual findings by a state court. If the Ninth Circuit's ruling is not reversed, the deference standard required under the AEDPA is essentially meaningless. No amount of mental gymnastics can change the fact that Landrigan told the state court he did not want his attorney to present any mitigating evidence. The Ninth Circuit's ruling to the contrary is unsupportable.

The state court's rejection of Landrigan's ineffective assistance of counsel claim was not an unreasonable application of this Court's *Strickland* jurisprudence. No clearly-established law from this court compels relief. Counsel was not deficient because Landrigan waived mitigation and prevented counsel from presenting mitigating evidence. Landrigan has not established prejudice under *Strickland* because he waived mitigation and there is not even a remote possibility that his sentence would have been different had counsel presented evidence of a genetic component underlying violence in his family. The evidence Landrigan now proffers simply confirms that he is a sociopath. The same state court judge who sentenced Landrigan addressed and rejected Landrigan's ineffective assistance of counsel claim, finding it frivolous in light of Landrigan's express waiver of all mitigation at the time of sentencing. That ruling is entitled to deference under the AEDPA as a factual determination and as a reasonable application of clearly established federal law as determined by this Court. This Court should grant certiorari and reverse the decision of the Ninth Circuit.

Respectfully submitted

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