No. 07-452

IN THE

Supreme Court of the United States

DORA B. SCHRIRO, Director,
Arizona Department of Corrections,

Petitioner,

v.

JOE LEONARD LAMBRIGHT,

Respondent.

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

BRIEF IN OPPOSITION

JON M. SANDS
Federal Public Defender
DALE A. BAICH*
JENNIFER Y. GARCIA
OFFICE OF THE FEDERAL
PUBLIC DEFENDER FOR THE
DISTRICT OF ARIZONA
850 West Adams Street
Suite 201
Phoenix, Arizona 85007
(602) 382-2816

* *Counsel of Record*

Counsel for Respondent

212677

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

In this pre-AEDPA capital appeal, the court of appeals remanded this case for an evidentiary hearing on Lambright's claim pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), that his trial counsel was ineffective at sentencing. Following the hearing, the district court denied Lambright's claim. On appeal from that decision, the court concluded that many of the district court's factual findings were clearly erroneous and that Lambright had received ineffective assistance of counsel at sentencing. Although the court briefly discussed the causal nexus standard applied by the district court, that portion of the opinion is unrelated and irrelevant to the holding that Lambright was entitled to relief under *Strickland.*

1. Whether the court of appeals properly applied the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), when it concluded that Lambright's trial counsel provided ineffective assistance at sentencing by failing to investigate and present readily-available evidence in mitigation of Lambright's crime.

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Respondent, Joe Leonard Lambright, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion by the Ninth Circuit in this case. The opinion is reported at *Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2007) (per curiam).

STATEMENT OF THE CASE

Lambright respectfully directs this Court to, and adopts herein, the detailed recitation of the underlying facts and procedural history set forth in the opinion below.[1]

In addition to his incorporation of the facts and procedural history from the opinion below, Lambright notes that his federal habeas corpus petition was filed prior to the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and accordingly, the provisions of that act do not apply to him. (Apx. A-20.) Also, following the Ninth Circuit panel opinion in this case, Petitioner filed a petition for panel rehearing and rehearing *en banc*. (Apx. A-2.) The panel unanimously denied the petition for rehearing, and when the full court was advised of the petition for rehearing *en banc*, no judge requested a vote on that petition. (Apx. A-2 through A-3.)

Further, pursuant to Rule of the Supreme Court of the United States ("Supreme Court Rule") 15.2, Lambright presents the following clarifications

1. Petitioners attached as Appendix A to their petition for writ of certiorari a copy of the opinion below. Reference to the opinion below in this brief will be to Appendix A and will noted as "Apx. A-____."

regarding omissions or misstatements in the petition for certiorari. First, the panel's 2001 remand decision was not solely based on proffered evidence of post-traumatic stress disorder ("PTSD") and methamphetamine abuse, as stated by Petitioner (Petition at 5.) As that opinion discussed at length, the remand decision was necessary to determine whether "Lambright was denied effective assistance of counsel at sentencing because of the failure to investigate and present evidence of his psychiatric condition and social history." *Lambright v. Stewart*, 241 F.3d 1201, 1208 (9th Cir. 2001),[2] *cert. denied*, 534 U.S. 1118 (2002). This question was a point of contention at the evidentiary hearing, and the district court itself eventually agreed that the hearing was not limited to evidence regarding PTSD and methamphetamine abuse. (Tr. Nov. 13, 2003 at 70-71, 197-98.)

At the hearing itself, Lambright presented copious evidence regarding his dysfunctional and abusive childhood, his history of drug addiction, and his lengthy psychiatric history. (Apx. A-13 through A-20.) None of this evidence was presented to the sentencing judge by Lambright's trial counsel. (Apx. A-41.) While the details of a specific combat incident Lambright recalled were not supported by the evidence Lambright presented at the hearing (Apx. A-15 through A-16), the other extensive evidence he presented was not affected by this determination. (Apx. A-54 through A-57 (Ferguson, J., concurring).)

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2. Petitioners did not append this decision to the petition for writ of certiorari. U.S. Ct. R. 14.1(i).

Finally, although Petitioners note that Lambright's trial counsel "was experienced both as a prosecutor and a defense attorney for a number of years prior to representing Lambright" and "prepared thoroughly for trial and sentencing" (Petition at 5), they ignore the fact that counsel only met with "Lambright once for a little over an hour" prior to sentencing. (Apx. A-5.) Also missing from Petitioners' recitation of the facts is that trial counsel spent less than an hour reviewing the pre-sentence report and speaking with the probation officer (Apx. A-5), took three hours to draft a two and a half page sentencing memo (Apx. A-5), and presented mitigating evidence – related solely to Lambright's conduct in jail awaiting trial – that consumed less than three pages of double-spaced transcript. (Apx. A-33.) Although trial counsel was aware of Lambright's "long history of mental health problems, his two suicide attempts, and his resultant hospitalization in a psychiatric facility" (Apx. A-6), trial counsel did not request Lambright's medical records, failed to discuss these matters with Lambright's sister and friends, and did not seek a psychological or psychiatric evaluation of Lambright. (Apx. A-31 through A-38.) It is against this backdrop that the petition for writ of certiorari should be viewed.

REASONS FOR DENYING THE PETITION

1. This Court should deny the petition for certiorari in this case because the grant of relief to Lambright was based entirely upon the ineffectiveness of Lambright's trial counsel at sentencing.

This case is about ineffective assistance of counsel in a capital sentencing proceeding. In 2001, the court of appeals remanded this case for an evidentiary hearing on that specific question, *see Lambright*, 241 F.3d at 1208, and the district court's conclusion that Lambright was not entitled to relief on that ground was the sole issue before the Ninth Circuit in the opinion below. (*See* Apx. A-25 through A-54.) After the remand in this pre-AEDPA, fact-driven capital case, Lambright received relief in the court of appeals because contrary to the erroneous conclusions of the district court, his trial counsel failed to properly investigate and present readily-available mitigation evidence during the capital sentencing proceedings, and because Lambright was prejudiced by that failure. Despite Petitioners' strenuous attempt to refocus this case on irrelevant questions,[3] any discussion by the court of appeals regarding improper application of a causal nexus standard to the evidence presented below is unrelated to the relief granted and should not be grounds for a grant of certiorari.

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3. It is telling that despite the bulk of the decision below being focused on Lambright's ineffective assistance of counsel claim, the petition for certiorari here spends approximately four of its thirty pages discussing the appropriateness of that conclusion. (Petition at 16-19.)

Although the court below did discuss the improper causal nexus standard applied by the district court in a short section near the beginning of the opinion (Apx. A-21 through A-25), that portion of the opinion is spatially distinct and analytically independent from the section concluding that Lambright's trial counsel performed deficiently and that Lambright was prejudiced by counsel's failures at sentencing. (Apx. A-25 through A-54.) Aside from that initial discussion, neither *Tennard v. Dretke*, 542 U.S. 274 (2004), nor the causal nexus standard is ever mentioned in any other section of the opinion, including the thirty pages[4] in which the court determines that Lambright's counsel was ineffective. In fact, the opinion's conclusion, again in a section distinct from any other discussion, makes clear that the causal nexus discussion played no part in the decision to grant relief on the ineffectiveness claim. It reads:

> The district court erred in concluding that Lambright did not receive ineffective assistance of counsel at the penalty phase of his trial and further erred in holding that, even if he did, he suffered no prejudice as a result. The sentence imposed is vacated. Further sentencing by the state court shall be conducted in conformance with applicable law.

(Apx. A-54.) It is clear from the four corners of the opinion that the court did not rely on its discussion of the causal nexus standard in granting relief to

4. The opinion's pages are counted as formatted in Petitioners' Appendix A.

Lambright. Further, there is no indication whatsoever in the opinion that the court even contemplated that relief might be available on those grounds.

Because the panel's freestanding analysis of the ineffective assistance of counsel issue is the exclusive basis for the grant of habeas relief, the causal nexus issue is not an appropriate ground for a petition for certiorari. *Arizona v. Evans*, 514 U.S. 1, 33 (1995) (Ginsburg, J., dissenting) (highlighting the principle that this Court will avoid constitutional questions when there is an alternative basis for a decision); *Ashwander v. TVA*, 297 U.S. 298, 346-47 (1936) (Brandeis, J., concurring) (stating that "[t]he Court will not pass upon a [federal] constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of"); *see also Delaware v. Van Arsdall*, 475 U.S. 673, 692-93 (1986) (Stevens, J., dissenting) (citing Justice Brandeis's concurrence in *Ashwander* as "one of the most respected opinions ever written by a Member of this Court"). Because the court ruled solely based on the ineffectiveness of Lambright's counsel, even if this Court were to grant certiorari on this causal nexus question and grant relief to Petitioners, this decision would have no effect on the relief Lambright received on his ineffectiveness claim, making the issue further inappropriate for a grant of certiorari.[5] Petitioners' contention that certiorari should be granted to address an issue irrelevant to the relief granted by the panel is without merit.

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5. In addition, the fact that Lambright was granted relief based on *Strickland v. Washington*, 466 U.S. 668 (1984), and not *Tennard* removes any consideration of *Teague v. Lane*, 489 U.S. 288, 311 (1989), from this case. (Petition at 14.)

2. This case is not the appropriate vehicle for reaching the question presented by Petitioners regarding the application of *Tennard* to Arizona's sentencing procedures or addressing any alleged conflict between the Arizona Supreme Court and the Ninth Circuit Court of Appeals.

Despite Petitioners' arguments to the contrary, this case is simply not the appropriate vehicle for determining, as Petitioners urge, whether the Arizona courts correctly apply a causal nexus test to evidence presented in mitigation of a capital crime, or whether the Arizona Supreme Court and the Ninth Circuit are in conflict over application of a causal nexus test. Even assuming that this Court might be inclined to address the merits of this claim, this case, which has a complex and convoluted procedural history and factual record and is distinguishable from the state court cases cited by Petitioners, is not a case in which certiorari should be granted.

Here, the causal nexus issue arose for the first time in the federal district court during habeas corpus proceedings. The district court judge presided over an evidentiary hearing and improperly substituted his own judgment regarding the evidence for that of a reasonable juror in a state capital sentencing proceeding, also improperly limiting his consideration of such evidence to that causally connected to the crime. The Arizona Supreme Court has not been fairly presented with the issue in this case, which did even not arise in state court, and that court has not been given the opportunity to address *Tennard* in this case. This is not a case in which a jury was prevented from considering evidence in

presented in a capital sentencing proceeding, and thus is entirely distinguishable from the Arizona Supreme Court's causal nexus jurisprudence in that regard.

3. The court of appeals correctly determined that the district court's factual findings in this case were clearly erroneous and that Lambright was prejudiced by the ineffective assistance of his counsel at sentencing.

As noted above, the petition for federal habeas corpus relief in this case was filed prior to the enactment of the AEDPA, and accordingly, its provisions do not apply.

This Court's Sixth Amendment jurisprudence regarding ineffective assistance of counsel in capital cases is extensive and provides a clear guide for lower courts in determining whether counsel performed deficiently and whether a defendant was prejudiced by that deficiency. *See, e.g., Strickland v. Washington*, 466 U.S. 668 (1984). The analytic process set forth in *Strickland* has been repeatedly reviewed and affirmed by this Court. *See Rompilla v. Beard*, 545 U.S. 374, 393 (2005) (O'Connor, J., concurring) ("[T]oday's decision simply applies our longstanding case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient under *Strickland*. . . ."); *Wiggins v. Smith*, 539 U.S. 510, 521-23 (2003) (reiterating that *Strickland* is the metric by which to judge claims of ineffective assistance of counsel); *(Terry) Williams v. Taylor*, 529 U.S. 362, 391-95 (2000) (discussing the *Strickland* analysis in detail). The court of appeals was properly guided by the Sixth Amendment, *Strickland*,

and this Court's subsequent cases in granting relief to Lambright and nothing about the court's decision below merits examination by this Court.

A. Lambright's trial counsel provided ineffective assistance of counsel at sentencing by failing to investigate and present readily-available evidence in mitigation of Lambright's crime.

The performance by Lambright's trial counsel did not even approach the standards set by *Strickland* and its progeny for counsel in a capital sentencing proceeding, and Petitioners do not make a serious attempt in the few pages of the petition addressing this issue to prove otherwise. Aside from a few unsupported assertions regarding trial counsel's efforts, Petitioners instead take issue with the specific language used by the court in finding that the district court erred in denying relief. None of these complaints have any merit.

First, Petitioners incorrectly contend that the court of appeals paid "only lip service" to the clearly erroneous standard of review, when in fact the opinion below illustrates the lack of evidence supporting the district court's order, resulting in the clearly erroneous findings. (Petition at 17.) In fact, the example provided by Petitioners is a perfect illustration of Lambright's argument and the panel's correct determination that the district court erred in denying this claim. Petitioners argue that Lambright's trial counsel "undertook a significant mitigation investigation prior to sentencing." (Petition at 18.) As the panel correctly determined, there is simply no evidence to support this assertion and any conclusion otherwise is improper. Lambright's counsel

did not reasonably investigate Lambright's background, making any decisions about what evidence to present impossible. *See Wiggins*, 539 U.S. at 536 (noting that "counsel [was] not in a position to make a reasonable strategic choice as to whether to focus on Wiggins' direct responsibility, the sordid details of his life history, or both, because the investigation supporting their choice was unreasonable").

As discussed at length in the opinion, Lambright's trial counsel did travel on one occasion to Texas with counsel for the co-defendant, and "spoke with a number of potential witnesses prior to the guilt phase of Lambright's trial,"

> [I]t is unclear whether any of the individuals [trial counsel] spoke with during this trip were people he viewed as potential penalty phase witnesses. When [trial counsel] spoke to Lambright's sister, he primarily asked her about Lambright's conduct around the time of the crime and does not appear to have asked her about Lambright's upbringing, his mental health, or other potential mitigating evidence.

(Apx. A-32.) Trial counsel himself testified at the evidentiary hearing that his interview with Lambright's sister, the only member of Lambright's family that he contacted, was focused on events shortly before and after the crime; he never asked her about Lambright's history of drug abuse, his abusive and unstable childhood, his mental health history (including his psychiatric hospitalization), his hospitalization after attempting suicide, or his changed and abnormal behavior after returning from Vietnam. (Tr. Nov. 20, 2003 at 756, 760-62, 765.)

Aside from this trip, which was not focused on mitigation investigation and development, trial counsel did almost nothing to prepare for the sentencing hearing. Although trial counsel was aware that Lambright had a history of mental health problems, had attempted suicide at least twice and was hospitalized in a psychiatric facility, counsel "did not discuss these issues with Lambright's friends or family members, nor did he request Lambright's medical or hospital records." (Apx A-31.) In addition, even though trial counsel knew that Lambright discussed his traumatic experiences in Vietnam with the probation officer and a court-appointed psychologist, "he did not attempt to obtain any information about these experiences or their effect on [Lambright]." (Apx. A-31.) Finally, even though counsel knew that Lambright suffered from antisocial personality disorder, trial counsel "did not contact the psychologist to discuss this diagnosis, nor did he attempt to have another psychologist or psychiatrist evaluate Lambright. He likewise failed to hire an independent investigator, despite his awareness that the court would pay for these additional expenses." (Apx. A-31.)

Trial counsel was also aware of Lambright's severe drug addiction, but "conducted no investigation with regard to the extent of [Lambright's] drug use or its effect on his general mental state or behavior." (Apx. A-31.) Counsel never requested any of Lambright's school or military records (Apx. A-31), and never even attempted to interview either of Lambright's ex-wives. (Apx. A-32.) At the sentencing hearing itself, counsel presented almost no evidence on Lambright's behalf, and what he did present "was minimal and markedly uncompelling." (Apx. A-33.) As the court below noted,

"[t]he sum total of the mitigating evidence that [trial counsel] offered at sentencing required less than three pages of a double-spaced transcript and relates only to Lambright's behavior in jail." (Apx. A-33.) These failures clearly establish trial counsel's failure to effectively represent Lambright at sentencing. *See, e.g., Wiggins*, 539 U.S. at 524 (finding ineffective assistance when counsel "abandoned [his] investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources").

Finally, Petitioners argue that Lambright's trial counsel "properly relied on information gathered by the probation department and on a report from the court-appointed mental health expert." (Petition at 18.) Petitioners cannot have their cake and eat it, too; either trial counsel conducted a "significant" investigation, or he relied on others to investigate and present the information for him. In any event, there is no basis for Petitioners' assertion that it was "proper" for counsel to rely on two court-appointed individuals, neither of whom was a member of the defense team or had any obligations to Lambright, to investigate and present evidence in mitigation of Lambright's crime. In fact, such an assertion flies directly in the face of this Court's jurisprudence regarding counsel's obligations in a capital sentencing proceeding. *See, e.g., Strickland*, 466 U.S. at 691; *(Terry) Williams*, 529 U.S. at 396. As the court of appeals correctly concluded, trial counsel's "representation falls far below that which any reasonably competent attorney would provide in a capital case," satisfying the deficient performance prong of *Strickland*. (Apx. A-37 through A-38.)

B. Lambright was prejudiced by the deficient performance of his counsel at sentencing.

A sentencing proceeding infected by constitutionally deficient investigation and presentation of mitigation establishes prejudice because the reviewing court cannot have "confidence in the outcome" of such a proceeding. *Strickland,* 466 U.S. at 669. This Court has emphasized that the prejudice analysis does not depend on whether the outcome of the proceeding would have been different. "[T]he [outcome-determinative] standard is not quite appropriate." *Strickland,* 466 U.S. at 694. Rather, Lambright must show "a probability sufficient to undermine confidence in the outcome" of the proceeding. *Id.* "[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart v. Fretwell,* 506 U.S. 363, 369 (1993). This Court has consistently held that trial counsel's failure to present readily available evidence of mitigation is sufficient to undermine confidence in the result of a sentencing proceeding, thereby rendering counsel's performance prejudicial. *Rompilla,* 545 U.S. at 390-91.

Here, counsel failed to investigate and present evidence of childhood abuse, drug and alcohol addiction, and mental illness. Because there was only one aggravating factor to mitigate in this case, it was even more imperative that the sentencing court have access to all available mitigation evidence, witnesses, and experts.[6] Trial counsel denied the sentencing court the

6. In Arizona, once one aggravating circumstance was found, if no mitigating evidence is presented, a death sentence is virtually assured.

ability to adequately assess and weigh Lambright's life and situation against the single aggravating circumstance, thus counsel's deficient performance rendered the penalty phase and its outcome unreliable.

Lambright presented the district court with ample evidence that he suffered a traumatic and abusive childhood. None of this evidence was presented to the court at sentencing. Lambright was subjected to "constant emotional and physical abuse by his mother throughout his childhood." (Apx. A-42.) As the court below correctly noted, "testimony could have been offered to show that his mother frequently hit, kicked, or whipped him, and that these beatings were a daily occurrence during extended periods of his childhood."

Lambright also suffered from long-term drug abuse and dependency, which the district court concluded was properly presented to the sentencing judge. (Apx. B-40.) However, as the court of appeals correctly found, this finding is clearly erroneous because the sentencing court heard nothing about the "rampant" drug and alcohol abuse in Lambright's family and by Lambright himself (Apx. A-44), or about "the negative impact drug abuse had on his ability to form relationships." (Apx. A-45.) In addition, trial counsel "could have provided expert testimony about the long-term psychological impact on [Lambright] of his extreme methamphetamine abuse. At the evidentiary hearing, even [Petitioners'] expert, Dr. Lang, diagnosed Lambright with profound substance dependency." (Apx. A-45.)

Finally, Lambright suffered from long-term bouts with mental illness, including major personality changes, depression, multiple suicide attempts and hospitalization in a psychiatric facility in the years before the crime in this case occurred. (Apx. A-45 through A-48.) "Dr. Morenz, Lambright's mental health expert, testified that Lambright has experienced varying levels of depression for most of his life and at times has suffered from "major depression." Even Dr. Lang, [Petitioners'] expert, diagnosed him with a depressive disorder." (Apx. A-46.)

None of this evidence was properly presented to the court at sentencing, undermining confidence in the result. The court below relied on this Court's well-established *Strickland* and Sixth Amendment standards in reaching this result, and as discussed herein and at length in the opinion below, it is supported by both the facts and the law. Nothing about the relief granted here should compel this Court to grant certiorari.

4. This Court should disregard Petitioners' irrelevant arguments in the third section of the petition because they were not presented to the courts below and are not even tied to a federal question in the petition itself.

Finally, Petitioners spend nearly a third of the petition for certiorari outlining their disdain for Lambright's mitigation presentation, their general dissatisfaction with the Ninth Circuit, and their disagreement with recent decisions by that court. (Petition at 19-28.) As an initial matter, these arguments were not raised in the courts below and are not fairly included in the questions before this Court as allowed

by this Court's rules, and as such, are not appropriately raised here for the first time. U.S. Ct. R. 14 (requiring a petitioner to show that a federal question was timely and properly raised in the proceedings below); *see also Rita v. United States*, 127 S. Ct. 2456, 2470 (2007) (declining to consider an issue not raised below); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (finding an issue waived when not raised below).

In addition, Petitioners' dramatic discussion of the alleged combat incident is irrelevant to the ultimate constitutional question of whether Lambright received ineffective assistance of counsel at sentencing. Also, their contention that a diagnosis of PTSD cannot be supported without such an incident is both unrealistic and disrespectful to military veterans who served this country in capacities other than engaging in direct combat. The concurrence to the per curiam opinion below summarizes this point:

> War is hell. Not only for the soldier who fights on the front lines, but also for the military ambulance driver who must rescue the wounded, the mess hall cook whose friends are killed on the battlefield, the civilian who loses a loved one, and the augmentee who, like Lambright, runs patrol missions at an Air Force base in a war-plagued country. Any member of the military exposed to trauma may suffer from PTSD, regardless of whether he or she served on the front lines or exchanged gunfire with the "enemy."
>
> . . . .

> There is no question that Lambright came home from Vietnam a changed man. His first wife testified that before his deployment to Vietnam, Lambright "was a kind person, gentle, free-hearted," but that he returned troubled and disturbed. Lambright "wasn't like the same person. . . . [H]e didn't have a calm nature about him. . . . [H]e wasn't a happy person." He had difficulty sleeping and suffered from frequent combat nightmares, including one incident in which he grabbed his wife and told her to get down because the Viet Cong was hiding in the bushes. Lambright often wished himself dead, and on one occasion he drove his car into a tree in an attempt to kill himself.
>
> Lambright's sister also observed a significant change after Lambright returned from Vietnam. She stated, "[B]efore he went to Vietnam[,] Joe was kind, gentle, and well-behaved. When he got back from his service in Vietnam he was completely changed. He was extremely tense, paranoid, and nervous." She once discovered him on her porch, "cowering against a wall [and] swinging a butcher knife," and hallucinating about an "imaginary attack by someone or something."

(Apx. A-54 through A-57.) As the court of appeals correctly discerned, the absence of a combat incident during Lambright's service in Vietnam is not dispositive of whether he is properly diagnosed with PTSD.

Further, Petitioners do not raise a federal question in this third section or tie their arguments to any of the grounds discussed in Supreme Court Rule 10 regarding this Court's considerations governing review on certiorari. Petitioners do not link this third part of the petition to one of the two constitutional questions presented, but instead focus on an attempt to win the Court's sympathy for their arguments regarding the Ninth Circuit's purported attempt to "thwart[] the interests of justice." (Petition at 19.) This is inappropriate and further illustrates Petitioners' repeated attempts to shift the focus of this case away from the factually and legally-supported holding below that Lambright's trial counsel was ineffective at sentencing.

CONCLUSION

For these reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

JON M. SANDS
Federal Public Defender
DALE A. BAICH*
JENNIFER Y. GARCIA
OFFICE OF THE FEDERAL
PUBLIC DEFENDER FOR THE
DISTRICT OF ARIZONA
850 West Adams Street
Suite 201
Phoenix, Arizona 85007
(602) 382-2816

Counsel for Respondent

* *Counsel of Record*