IN THE
SUPREME COURT OF THE UNITED STATES

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

Petitioner,

VS.

JOE LEONARD LAMBRIGHT,

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

In 2001, the Ninth Circuit ordered an evidentiary hearing to address Lambright's claim of ineffective assistance of counsel at sentencing, noting in particular allegations that counsel failed to pursue evidence that Lambright suffered from post-traumatic stress disorder based on combat experiences in Vietnam, as well as other evidence Lambright asserted would have changed the sentencing decision. After conducting a 6-day evidentiary hearing, the district court denied Lambright's claim, finding that his alleged combat experiences were fabricated, and that his other factual assertions were not proven or related to evidence that was presented at the time of sentencing. The Ninth Circuit reversed, finding that the district court improperly considered the "causal nexus" between the proffered mitigation and the crime in weighing the value of the purported mitigation and determining whether it would have changed the outcome of Lambright's sentencing proceeding.

1. Did the Ninth Circuit err when it held that *Tennard v. Dretke*, 542 U.S. 274 (2004), requires not merely that mitigating evidence with no causal connection to the crime be *considered* at a capital sentencing hearing, but also that a court may not take the absence of a causal connection into account when assessing whether the failure of counsel to present that evidence was prejudicial?

2. Did the Ninth Circuit err by failing to give proper deference to the district court's factual findings and credibility assessments regarding Lambright's proffered mitigation and regarding the persuasiveness of Lambright's argument that the proffered mitigation would have changed the outcome of the sentencing proceeding?

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OPINION BELOW

A panel of the United States Court of Appeals for the Ninth Circuit (Judges Reinhardt, Ferguson, and Thompson) held in a per curiam decision that Lambright is entitled to be resentenced based on trial counsel's alleged deficient performance and resulting prejudice. *Lambright v. Stewart* (*Lambright V*), 490 F.3d 1103, 1115 (9th Cir. 2007) (Pet. App. A, at 4.) The panel opinion reversed a decision by the United States District Court for the District of Arizona. *Lambright v. Lewis* (*Lambright IV*), No. CV-87-235-TUC-JMR (Pet. App. B). See also *Lambright v. Stewart* (*Lambright III*), 241 F.3d 1201 (9th Cir. 2001); *Lambright v. Stewart* (*Lambright II*), 191 F.3d 1181, 1182-83 (9th Cir. 1999) (en banc); *State v. Lambright* (*Lambright I*), 138 Ariz. 63, 673 P.2d 1 (1983).

STATEMENT OF JURISDICTION

The Ninth Circuit denied Petitioner's request for rehearing en banc on July 2, 2007. (Pet. App. A, at 1-2.) 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 and 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

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.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution states, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT

Joe Leonard Lambright and his accomplices, Robert Smith and Kathy Foreman, murdered Sandy Owen in March 1980. The facts underlying the murder are set forth in *Lambright v. Stewart* (*Lambright III*), 191 F.3d 1181, 1182-83 (9th Cir. 1999) (en banc):

> Lambright and Smith were traveling across the country with Lambright's girlfriend, Kathy Foreman. Smith was troubled by the fact that while Lambright and Foreman had intercourse in his presence, he did not have anybody along to satisfy him. For his part, Lambright thought that he "would like to kill somebody just to see if he could do it." They decided that both desires could be fulfilled, and they set out with Foreman to find a victim. They found Sandy Owen and kidnapped her. Smith raped her on the way to a mountain site where they all got out of the car and Smith raped Owen again as Lambright and Foreman had intercourse. What happened next was that Smith began choking Owen, and Lambright declared that she must be killed. So, "Lambright took Foreman's knife out of its sheath and began stabbing the victim in the chest and abdomen, twisting the knife around inside of her. Smith held one of the victim's arms while she was being stabbed, and Foreman held the other arm." After that, "Smith unsuccessfully tried to break Ms. Owen's neck by twisting her head. Then Lambright, Foreman or both began cutting deeply into the victim's neck with the knife. . . . The victim remained alive, and was at least semiconscious, as she attempted to raise herself up

> on one arm. Lambright picked up a large rock and hurled it at her head. Foreman testified that as he threw the rock [Lambright] yelled 'Die, bitch.'" The three then drove off in a celebratory mood, playing the piece "We Are the Champions" as they went. Once caught, the trio's song changed. Foreman turned state's evidence, was given immunity, and testified against her erstwhile lover and his friend. Lambright confessed, but deemed Smith to be the worst of the three. Smith, too, confessed, but he dubbed Foreman and Lambright as the real killers.

(Citations omitted). *See also State v. Lambright* (*Lambright I*), 673 P.2d 1, 4-5 (Ariz. 1983) (noting additional details). Following a jury trial, Lambright was convicted of first-degree murder, and he was sentenced to death by Pima County Superior Court Judge Michael Brown.[1] *Id.* at 4.

After the Arizona Supreme Court rejected Lambright's direct appeal and state post-conviction proceedings, the United States District Court for the District of Arizona denied Lambright's federal petition for writ of habeas corpus. In 2001, Ninth Circuit Judges Reinhardt, Ferguson and Thompson reversed the district court's ruling and ordered an evidentiary hearing on whether trial counsel was ineffective under *Strickland v. Washington*, 466 U.S.

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[1] Co-defendant Smith was also convicted of first-degree murder and sentenced to death. His appeal from the denial of his federal petition for writ of habeas corpus remains pending in the Ninth Circuit. This Court has issued two Opinions reversing Ninth Circuit decisions in Smith's case. *Stewart v. Smith*, 536 U.S. 856 (2002); *Schriro v. Smith*, 546 U.S. 6 (2005).

668, 697 (1984),[2] in representing Lambright at sentencing. *Lambright v. Schriro*, 241 F.3d 1201 (9th Cir. 2001).

The panel based its 2001 remand decision on proffered evidence—primarily in the form of affidavits—indicating that trial counsel should have pursued claims that Lambright suffered from post-traumatic stress disorder ("PTSD") as the result of a combat experience in Vietnam in which Lambright allegedly watched his best friend die in his arms after being "cut in half" by machine gun fire, and that Lambright had chronically abused methamphetamine. *Lambright*, 241 F.3d at 1207-08. The panel further suggested possible deficient performance based on trial counsel's alleged failure to interview Lambright's sister and to seek a second psychiatric evaluation.[3] *Id.* at 1206-07.

Following extensive discovery and evidentiary development, the district court conducted a hearing in November 2003. Over the course of the hearing, Lambright's traumatic wartime experiences were revealed to be blatant lies. In reality, Lambright's military service in Vietnam consisted of time as a mechanic and never involved combat action. (Pet. App. B, at 14, 20, 22-23.) Furthermore, the friend Lambright claimed to have held dying in his arms was still alive and well. (*Id.* at 21-24.)

The district court issued a detailed 31-page order addressing the issues the Ninth Circuit had identified as potential deficiencies in trial counsel's performance. The

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[2] 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.

[3] A court-appointed mental health expert diagnosed Lambright prior to sentencing as having an anti-social personality disorder.

district court noted that Lambright's federal habeas counsel had thoroughly developed Lambright's claims relating to PTSD and drug abuse, but that such claims did not survive scrutiny because they were based on falsehoods. (Pet. App. B, at 39.) The district court found that trial counsel, who was experienced both as a prosecutor and a defense attorney for a number of years prior to representing Lambright, had prepared thoroughly for trial and sentencing, with his preparation including extensive interviews of Lambright's sister and friends, and that counsel's performance was not deficient. (*Id.* at 29-30, 37-38.)

Addressing the prejudice prong of the *Strickland* analysis, the district court found that any alleged deficiencies in trial counsel's performance did not prejudice Lambright, primarily because he did not prove the factual predicates of his claims of PTSD and drug impairment at the time of the crime, or the existence of other alleged mitigating evidence of which the trial judge was not already aware. The district court thus concluded that, even assuming deficient performance, Lambright had not established resulting prejudice:

> Having read all of the trial and sentencing transcripts, listened to all of the testimony at the evidentiary hearing, and reviewed all relevant exhibits, the Court finds that Petitioner's claims regarding PTSD and methamphetamine use contributing to his conduct at the time of the brutal kidnapping, rape and murder of a vulnerable victim are not supported by the evidence. Although only one aggravating factor was established in this case, it was a significant one. The case against Petitioner, which included Petitioner's confession, testimony of an eyewitness, and Petitioner's

> possession of the victim's jewelry, against the backdrop of an entirely merciless and shocking abduction, rape and murder, was unshakable, the many hours of investigation and retrospect devoted to Petitioner's case by two very able habeas attorneys, a mitigation specialist and a psychiatrist notwithstanding.
>
> Mitigation evidence plays a significant role in the penalty phase of a capital case and is even more critical in Arizona because the presence of an aggravating factor without mitigation evidence requires the court to impose the death penalty. *See* A.R.S. § 13-703(E). In a case like the instant one, however, *where the avenues of potential mitigation evidence are either unsubstantiated or were already before the sentencing judge*, the Court is not persuaded that any deficiencies in counsel's representation rendered the sentencing proceeding "fundamentally unfair or unreliable." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993). . . . Because this Court finds that there is no reasonable probability of a different outcome, Petitioner is not entitled to relief on his IAC penalty phase claim.

(Pet. App. B, at 42-43) (emphasis added).

Notwithstanding the district court's careful analysis of Lambright's *Strickland* claim, the Ninth Circuit panel again reversed, this time holding that the district court violated the principles set forth in *Tennard v. Dretke*, 542 U.S. 274 (2004), by giving less weight to Lambright's proffered mitigation because he did not establish a causal nexus between the alleged mitigating evidence and the crime. The Ninth Circuit concluded that the district court's entire

analysis was "fundamentally flawed" because it "relied heavily on its finding that Lambright had not shown a nexus between his proffered mitigation and the crime." (Pet. App. A, at 24-25, 490 F.3d at 1115.)

Purporting to apply a clear error standard of review regarding the district court's factual findings, the Ninth Circuit ruled that the district court erred in concluding that (1) facts relating to Lambright's childhood were "largely identified to the sentencing judge," (2) Lambright did not establish the existence of evidence his attorney should have discovered regarding Lambright's alleged drug use, and (3) Lambright's mental health evidence, in particular testimony from an expert at the hearing, was not persuasive and did not establish significant mental health information beyond what was presented to the sentencing judge. (*Id.* at 43-46, 490 F.3d at 1123-25.)

Finally, notwithstanding evidence of significant preparation by trial counsel, including a five-day trip to Texas and Louisiana to interview Lambright's family and friends, the Ninth Circuit found that trial counsel "spent only five and a half hours obtaining evidence and preparing for the penalty phase." (Pet. App. A, at 33, 490 F.3d at 1119). The Ninth Circuit thus reversed the district court's ruling and ordered that Lambright's sentence be vacated. (Pet. App. A, at 54, 490 F.3d at 1128.)

REASONS WHY THE WRIT SHOULD BE GRANTED

1. The Ninth Circuit's ruling misapplies this Court's Eighth Amendment jurisprudence, including *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Tennard v. Dretke*, 542 U.S. 274 (2004), and directly conflicts with decisions by the Arizona Supreme Court regarding whether the sentencer in a capital case may consider the "causal nexus" between the crime committed and proffered mitigation evidence and give diminished weight to mitigation evidence with no nexus to the crime. In *Tennard*, this Court found that Texas' former capital sentencing scheme improperly restricted defendants from *presenting* evidence to the factfinder absent a causal nexus to specific sentencing factors. 542 U.S. at 283-84. The Ninth Circuit erred by concluding that *Tennard* not only requires a state to allow presentation and consideration of proffered mitigation evidence that may not have a nexus to the crime, but that it restricts the sentencer from taking the absence of a "causal nexus" into account when assessing the value of that evidence.

In direct contrast to the Ninth Circuit's analysis, the Arizona Supreme Court has interpreted *Tennard* as requiring only that a defendant be allowed to present for *consideration* any evidence the defendant or counsel believes to be mitigating, without restricting the sentencer's discretion in assessing the weight to be given the proffered evidence. *See State v. Pandeli*, 215 Ariz. 514, ¶ 72, 161 P.3d 557 (2007) ("Although '[w]e do not require that a nexus between the mitigating factors and the crime be established before we *consider* the mitigation evidence . . . the failure to establish such a causal connection may be considered in assessing the quality and strength of the mitigation evidence.'") (citing *State v. Newell*, 212 Ariz. 389, 405, ¶ 82, 132 P.3d 833, 849 (2006) (emphasis added).

In the instant case, the district court applied a "causal nexus" test in precisely the same manner that the Arizona Supreme Court has repeatedly applied that test. Thus, the Ninth Circuit's rejection of the district court's "causal nexus" analysis affects not only this case, but every other Arizona capital case in which a defendant has presented mitigation evidence that has been given de minimus weight based on the absence of a causal nexus to the crime. The Ninth Circuit's analysis erroneously interprets *Tennard*, and this Court should grant review to correct that error and to resolve the conflict between the Ninth Circuit's and the Arizona Supreme Court's interpretation of *Tennard*.

2. The Ninth Circuit failed to properly defer to specific factual findings by a district court judge who carefully considered the evidence and assessed the credibility of witnesses during a 6-day evidentiary hearing. In doing so, the Ninth Circuit directly violated this Court's mandate that a reviewing court not substitute its judgment for that of a judge who has made credibility assessments and findings following an evidentiary hearing.

3. The Ninth Circuit's ruling interferes with the State of Arizona's and crime victims' interest in the finality of state court convictions and sentences. Lambright was convicted and sentenced more than two decades ago, and his case has been pending in federal court since 1987. Notwithstanding a full-blown evidentiary hearing in which the district court thoroughly reviewed Lambright's ineffective assistance claim and rejected it in a meticulously supported opinion, Lambright's sentence has been set aside. Absent intervention by this Court to correct the Ninth Circuit's overreaching, public confidence in the judiciary will be undermined and the interests of justice will be thwarted.

I. *The Ninth Circuit's analysis misapplies Tennard v. Dretke, and directly conflicts with rulings by the Arizona Supeme Court.*

A. *Misinterpretation of Tennard*

The crux of the Ninth Circuit's analysis of Lambright's ineffective assistance of counsel claim is based on an erroneous interpretation of *Tennard v. Dretke*:

> Here, the district court relied heavily on its finding that Lambright had not shown a nexus between his proffered mitigating evidence and the crime, flatly rejecting the majority of the mitigating evidence he offered on that basis. Indeed, it is apparent from the district court's order that it either did not consider mitigating any evidence without an explicit nexus to the crime, or that it gave such evidence de minimus weight. Because the district court's rejection of Lambright's mitigating evidence on that basis violates the rule set forth in *Tennard*, *Smith v. Texas*, and *Smith v. Stewart*, and their predecessors, we hold that its analysis of Lambright's ineffective assistance of counsel claim was fundamentally flawed.

(Pet. App. A, at 24-25, 490 F.3d at 1115.)

Preliminarily, the Ninth Circuit has mischaracterized the district court's legal conclusions and analysis. The district court did not decline to consider mitigation. Instead, the district court simply determined, for example, that proffered mitigating evidence relating to Lambright's family background did not "significantly affect"

Lambright's conduct at the time of the crime, and that Lambright's drug use unconnected to the crime was not "significantly mitigating." (Pet. App. B at 36, 39-40.) The district court did not exclude any mitigation evidence from consideration, but rather concluded that much of that evidence did not deserve significant weight.

The Ninth Circuit has misinterpreted *Tennard* and *Smith v. Texas*, 543 U.S. 37 (2004). In *Tennard*, this Court held that a state may not prevent the sentencer from considering and giving effect to relevant mitigation evidence by using a "screening test" that requires a nexus to the crime before the evidence can be considered by the sentencer. 542 U.S. at 283-84. In *Smith*, this Court similarly found unconstitutional a nullification instruction that negated jurors' ability to consider and give effect to mitigation evidence if the evidence did not directly relate to two statutorily specified issues. 543 U.S. at 47. Thus, contrary to the Ninth Circuit's analysis, *Tennard* and *Smith* stand only for the proposition that a sentencer cannot be precluded from *considering* proffered mitigation evidence. *Tennard* and *Smith* do not support an assertion that the sentencer cannot determine the weight to be afforded proffered mitigation based on its causal nexus to the crime.

The Ninth Circuit's analysis goes far beyond this Court's Eighth Amendment jurisprudence. Almost thirty years ago, this Court held that "[t]o meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." *Lockett v. Ohio*, 438 U.S. 586, 608 (1978). The Court later held that a capital sentencer must be allowed to consider all relevant mitigating evidence:

> Just as the State may not by statute preclude the sentencer from considering any

> mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. . . . The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Eddings v. Oklahoma, 455 U.S. 104, 114 (1982) (emphasis in original). *See also McKoy v. North Carolina*, 494 U.S. 433, 456 (1990) (Kennedy, J., concurring in judgment) ("*Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all.").

The Eighth Amendment thus requires only that a sentencer be able to consider and give effect to mitigating evidence proffered by a capital defendant. This Constitutional provision is satisfied unless evidence is "placed beyond the effective reach of the sentencer" and the sentencer is precluded from considering the proffered mitigation in the first instance. *Graham v. Collins*, 506 U.S. 461, 474 (1993); *see also Kansas v. Marsh*, __ U.S. __, 126 S.Ct. 2516, 2525 (2006) ("In aggregate, [this Court's] precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to *consider* that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here."). (Emphasis added.)

In the instant case, the district court considered the effect each piece of mitigating evidence offered by Lambright

would have had on the original sentencer. The district court's determination that much of the proffered mitigation would not have been particularly weighty was supported by the record and did not result in an Eighth Amendment violation.

Furthermore, if allowed to stand, the Ninth Circuit's ruling based on its interpretation of *Tennard* would be a new rule imposed on collateral review in violation of *Teague v. Lane*, 489 U.S. 288, 311 (1989). The Ninth Circuit's interpretation does not follow from this Court's jurisprudence, most notably *Eddings*, where this Court found a difficult family background to be "particularly mitigating" because the defendant was only 16 years of age at the time of the crime. 455 U.S. at 115. If evidence can be "particularly mitigating" in that type of situation, it stands to reason that in other situations the evidence may not be particularly mitigating, as the district court found here. This Court should grant certiorari review to correct the Ninth Circuit's erroneous and *Teague*-barred interpretation of this Court's Eighth Amendment jurisprudence in the context of a *Strickland* claim on collateral review.

B. Conflict with Arizona Law

The district court's causal nexus analysis is virtually identical to the analysis that has been applied by Arizona courts in every capital case in which mitigation is proffered. The Arizona Supreme Court has made clear, both prior to and after the *Tennard* decision, that the sentencer in a capital case should not be prohibited from *considering* any proffered mitigation, but that the absence of a causal nexus to the crime may be considered in assessing the weight or significance to be afforded the proffered evidence. In *State v. Hoskins*, 199 Ariz. 127, 152, ¶ 113, 14 P.3d 997, 1022 (2000), the court stated:

> The "nexus" or "causal link" requirement in these cases has purpose. Where we determine questions of aggravation and mitigation in the sentencing process, the significant point in time for causation is the moment at which the criminal acts are committed. If the defendant's personality disorder or dysfunctional family background leads reasonable experts to conclude that the disorder in fact caused the crime, significant mitigation is established. But here, the evidence runs counter to that very proposition. The murder was not consistent with the proffered symptoms of personality disorder or family background because it was not an impulsive act, nor was it based on lapse of judgment.

See Pandeli, 215 Ariz. at 532, ¶ 72, 161 P.3d at 575; *see also State v. Sansing*, 206 Ariz. 232, 239, ¶¶ 26-28, 77 P.3d 30, 37 (2003) (absent expert testimony linking cocaine use to defendant's capacity to control his conduct or his capacity to appreciate the wrongfulness of his actions at the time of the murder, defendant did not establish statutory mitigating circumstance or weighty non-statutory mitigation). *State v. Harrod*, 200 Ariz. 309, 320, ¶ 54, 26 P.3d 492, 502 (2001) ("The [sentencing] court found that the absence of Harrod's biological father was not a mitigating factor because there was no evidence that his absence had any causal relationship to Harrod's participation in the murder. We agree.").

The Ninth Circuit's *Tennard* analysis directly conflicts with that of the Arizona Supreme Court. Left unchanged, that analysis will affect every Arizona case in which courts or jurors have considered, but given diminished weight to, proffered mitigation for which a causal nexus has not been established. Although this case is not governed by the Anti-Terrorism and Effective Death

Penalty Act of 1996 ("AEDPA),[4] the Ninth Circuit's analysis will apply not only to pre-AEDPA cases, but to any case involving an interpretation of *Tennard*. Left unchanged, the Ninth Circuit's interpretation will become the benchmark by which federal courts must determine whether a state court decision involved an unreasonable application of *Tennard*. *See* 18 U.S.C. § 2254(d)(1) (federal habeas petitions governed by the AEDPA will only be granted if the state court adjudication of a claim involved an "unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States"). Given the broad applicability of the Ninth Circuit's decision and its clear conflict with Arizona law as set forth by the Arizona Supreme Court, review by this Court is imperative.

II. *The Ninth Circuit erred by finding that the district court's factual findings were "clearly erroneous."*

Although legal issues raised in a petition for writ of habeas corpus are subject to *de novo* review by an appellate court, *Raley v. Ylst*, 470 F.3d 792, 799 (9th Cir. 2006), factual findings are entitled to significant deference and should only be reversed if clearly erroneous. *See* Federal Rule of Civil Procedure 52(a) ("Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.").

Referring to Rule 52, this Court has stated that "[t]his standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573

[4] Lambright filed his federal petition for writ of habeas corpus in April 1987, prior to the effective date (April 24, 1996) of the AEDPA. (Pet. App. A, at 20, 490 F.3d at 1110.)

(1985). Thus, a district court's factual findings must be accepted absent a "definite and firm conviction that a mistake has been committed." *Id.*

In applying the clearly erroneous standard to factual findings of a district court, the reviewing court "must constantly have in mind that their function is not to decide factual issues de novo," and that the appellate court may not reverse such a determination "even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 574. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.*

Although the Ninth Circuit acknowledged that it must defer to factual findings by the district court unless those findings are clearly erroneous (Pet. App. A, at 21, 490 F.3d at 1114), the Ninth Circuit's ruling pays only lip service to that principle. The Ninth Circuit repeatedly states that "evidence was presented" relating to issues it now deems significant, but neglects to mention evidence to the contrary or the district court findings that the evidence was not credible. For example, the Ninth Circuit cites to "evidence presented at the evidentiary hearing" to the effect that Lambright's mother beat him severely and regularly from the time he was a small child until he was fourteen years old, usually by whipping him with various objects, kicking him, or striking him." (*Id.*, 490 F.3d at 1110.) The panel neglects to mention, however, that Lambright did not report being abused, and he expressly denied any abuse by his parents when he was interviewed prior to sentencing by a mental health expert. (Pet. App. B, at 14.) Dr. Gina Lang, who examined Lambright prior to the evidentiary hearing, testified that when Lambright described the alleged beatings, he chuckled. (*Id.*)

Similarly the Ninth Circuit panel states that evidence "was presented" that one night after returning from Vietnam, Lambright "was hallucinating and appeared to be hiding from an imagined attacker. He kept saying 'I gotta get to 'em. I see 'em. They're burning Mama and Daddy, they're burning.'" (Pet. App. A, at 15, 490 F.3d at 1111). The Ninth Circuit links this information to other evidence that "was also presented" that "[w]hen [Lambright] returned from Vietnam, he seemed deeply traumatized and his personality had radically changed." (*Id.*) The Ninth Circuit neglects to acknowledge, however, a more likely cause of Lambright's mental health issues–his marital difficulties and belief his first wife was unfaithful–than his alleged combat experienced. (See Pet. App. B, at 14-18). The fact that evidence "was presented" does not establish its validity, and the Ninth Circuit's opinion repeatedly ignores this reality.

The Ninth Circuit's brazen assertion that trial counsel "spent only five and a half hours obtaining evidence and preparing for the penalty phase," (Pet. App. A, at 33, 490 F.3d at 1119), ignores the evidence presented at the hearing. Lambright's trial counsel undertook a significant mitigation investigation prior to sentencing, and he properly relied on information gathered by the probation department and on a report from the court-appointed mental health expert. Lambright's trial counsel traveled to Texas and Louisiana and spent 5 days interviewing Lambright's family and friends. Lambright's sister told him about his social and living conditions before the crime and general information about Lambright's background. (Pet. App. B, at 21.) Although trial counsel lacked independent recollection at the evidentiary hearing about specific details of his mitigation investigation, the disclosure he submitted prior to sentencing indicated that he had requested Lambright's medical records from the Veteran's Administration in Texas. Trial counsel testified at the hearing that he must have known before trial about

Lambright's psychiatric hospitalization, particularly given the fact that he emphasized Lambright's breakdown in his pre-sentencing mitigation memorandum, stating that Lambright "relates this hospitalization directly to his Vietnam military experience." (Pet. App. B, at 22.) The district court's ruling noting trial counsel's extensive preparation is supported by the record, and is not clearly erroneous.

The Ninth Circuit's willingness to substitute its own judgment for that of the district court violates basic principles of deference, and this Court should exercise its supervisory authority to reverse the Ninth Circuit's ruling and thereby ensure a more consistent standard of review in cases involving reasoned factual determinations by a district court.

III. ***The Ninth Circuit's ruling interferes with the interests of justice as well as the State's and crime victims' interest in finality.***

The Ninth Circuit's decision to substitute its judgment for that of the district court presents the State with a constantly moving target that thwarts the interests of justice. In 2001, this case had already been pending in federal court for 14 years when the Ninth Circuit ordered an evidentiary hearing to address Lambright's ineffective assistance of counsel claim. Six years later, after painstakingly disproving the factual predicates of Lambright's assertions underlying the Ninth Circuit's 2001 remand order, the State is now faced with the prospect of a resentencing, notwithstanding a paucity of new evidence beyond that considered by the original sentencer in 1982.

In ordering a remand in 2001, the Ninth Circuit noted that evidentiary development was warranted because (1) trial counsel apparently overlooked compelling evidence underlying a claim of post-traumatic stress disorder based on

Lambright's self-reported traumatic combat experiences in Vietnam; (2) trial counsel should have interviewed Lambright's only sibling to obtain family history information; and (3) trial counsel should have pursued evidence relating to Lambright's history of drug abuse.

Following extensive discovery and evidentiary development, the district court concluded that these alleged deficiencies in counsel's performance were based on unsupported allegations or related to evidence that was in fact presented at the time of sentencing. For example, Lambright's alleged mitigation evidence relating to combat service in Vietnam was a complete sham and fabrication. Lambright claimed that he was sent out on patrols and was involved in skirmishes with the Viet Cong, including one where several of his military buddies were killed. (Pet. App. B, at 21. Lambright further claimed that after returning to the States, he had several flashback experiences where he imagined being attacked again. (*Id.*) Although Lambright was a mechanic with scarcely any combat training, and although he was not a member of the security police squadron responsible for defending the base, he claimed he experienced combat while serving as an augmentee and leading a patrol of other augmentees. (*Id.* at 20-22.). Lambright testified that his best friend and fellow augmentee, whose first name Lambright could not recall and whose last name Lambright could neither spell nor precisely remember, was cut in half by machine gun fire and died with his "guts hanging out" in Lambright's arms. (*Id.* at 23.)

In fact, there was no combat engagement such as Lambright described in his testimony and there were no casualties of any kind in that time frame at or near the base where Lambright was stationed. (*Id.*)

Lambright acknowledged that there was no official documentation of the traumatic combat incident, but attributed the absence of documentation to a federal governmental conspiracy for the purpose of manipulating information on casualty figures. (Pet. App. B, at 23.) In contrast, five other fact witnesses (including commanding officers) who served at the Phu Cat Air Base where Lambright was stationed expressly rejected Lambright's story and testified that no United States Air Force personnel were killed in any attack that occurred while Lambright was stationed at the air base. (*Id.*)

Lambright initially claimed that his best friend in Vietnam—the man who died in his arms in the alleged combat event—was named "Neinhart." (*Id.*) He embellished the story by stating that he visited "Neinhart's" parents in Texas a few years after returning from the war, and he told how Mr. and Mrs. Neinhart clung to the belief that their son was not dead, but was merely missing in action. Lambright's pre-hearing disclosure documents identified "Mr. and Mrs. Neinhart" as potential witnesses, describing them as "parents of Petitioner's friend in Veitnam War" who would testify "concerning their knowledge of Petitioner, including his post-war visit to them informing them of their son's death."

When Lambright testified at the evidentiary hearing, he indicated that when he tried to report the incident during which Neinhart died, he was told "it didn't happen." (*Id.*) Lambright testified that when he returned to his bunk, he saw that Neinhart's belongings had been removed and a sign said that Neinhart had gone TDY (on temporary duty at a different location). When Lambright described this event in court, he wept softly. (*Id.*)

Although Lambright never could remember his best friend's first name, his recollection of his friend's last name ultimately confirmed the falsity of his story. A man named "Frederick Neidhardt" was stationed with Lambright at Dyess Air Force Base in Texas in 1967-68. (Pet. App. C, at 2.) Mr.. Neidhardt provided a signed affidavit stating that he was stationed at Dyess Air Force Base in Texas at the same time, and in the same unit, as Lambright; that he had never been in combat; and that he had not seen or communicated with Lambright since early 1967. (Pet. App. C, at 2-3.) Neidhardt and Lambright appear to have been fairly close friends, to the point where Lambright accompanied Neidhardt on several visits to Neidhardt's cousins' home in Abilene, Texas. (*Id.* at 3.) Confronted with Neidhardt's affidavit at the evidentiary hearing, Lambright disavowed any knowledge or insight as to who the affiant was. (Pet. App. B, at 23-24.)

Lambright's federal habeas attorneys repeatedly advised the court and the State that they had not been able to obtain any further information about "Neinhart" or his parents, even though they had contacted Frederick Neidhardt by telephone months earlier, either personally or through an investigator, and even joked with him that he was "supposed to be" a combat fatality. (Pet. App. C, at 3.)

Not surprisingly, the district court found, after reviewing all of the evidence and assessing the credibility of witnesses, that "[Lambright's] combat tale is a fabrication." (Pet. App. B, at 32.)

Although conceding that the "evidence presented at the hearing indicated that [Lambright's Vietnam combat experience] did not occur" (Pet. App. A, at 15-16, 490 F.3d at 1111), the Ninth Circuit ignored the ramifications of that finding. The fact that Lambright fabricated his Vietnam

combat experience was significant not only because it undermined Lambright's credibility in asserting evidence of mitigation, but also because it refuted the basis for Lambright's mental health expert's diagnosis that Lambright suffered from PTSD. The primary mental health expert testimony Lambright presented at the hearing was from Dr. Barry Morenz, who diagnosed Lambright as having PTSD based on his combat experience in Vietnam. Again not surprisingly, the district court found Dr. Morenz' testimony to be unpersuasive. (Pet. App. B, at 32-33.)

The absence of any credible evidence that Lambright suffered from PTSD belies the Ninth Circuit's finding that Lambright's trial counsel was ineffective for failing to further investigate Lambright's mental health. After more than two decades of litigation, including two years spent preparing for an evidentiary hearing in district court, the only credible evidence relating to Lambright's mental health is a diagnosis of anti-social personality disorder, which was made by a mental health expert prior to sentencing, and which was confirmed by the State's expert (Dr. Gina Lang), who the district court found to be more credible than Lambright's expert, Dr. Morenz. (Pet. App. B, at 28, 39.)

The remaining evidence Lambright proffered at the evidentiary hearing was similarly unpersuasive and undercut the basis for the Ninth Circuit's 2001 remand order. The 2001 decision credited an affidavit from Lambright's sister, Mildred Fontenot, stating that Lambright was "kind, gentle and well-behaved" before serving in Vietnam, and that "his behavior and manner were greatly changed" when he returned. 241 F.3d at 1207. The Ninth Circuit pointedly criticized trial counsel for failing to interview Fontenot in preparation for trial and/or sentencing. *Id.* However, that criticism was misplaced because trial counsel had in fact interviewed her, as well as many other potential witnesses

identified by Lambright before sentencing, during a 5-day visit to Orange, Texas and vicinity in 1982. (Pet. App. D, at 3-7.)

The 2001 remand order similarly relied on an affidavit from Donald Stonefeld, a psychiatrist "with a sub-specialty in neurology and post-traumatic stress disorder" who concluded, based solely on documents provided to him by Lambright's attorneys, that Lambright suffered from PTSD. 241 F.3d at 1207. Lambright did not call Dr. Stonefeld as a witness or otherwise rely on him at the evidentiary hearing.

Similarly, Lambright's claim of chronic methamphetamine abuse derived solely from his own statements and documents selected by his attorneys and furnished to experts they had enlisted. The 2001 Ninth Circuit remand decision concluded that a hearing was necessary in part because Dr. Stonefeld opined that Lambright had "a probable disorder due to excessive drug use," and because a pharmacologist named Martha Fankhauser had "concluded that 'chronic amphetamine use such as is reported by Mr. Lambright may cause long-term psychiatric changes including anxiety reactions [and] psychosis.'" 241 F.3d at 1207. Fankhauser, like Stonefeld, did not testify or provide any other evidence at the evidentiary hearing. Moreover, Lambright failed to produce any witness who could confirm his alleged chronic drug abuse, and he refused to testify concerning his alleged drug use in the days and weeks preceding the murder.

In short, the district court's ruling rejecting Lambrights' ineffective assistance of counsel claim is clearly supported by the record, and the Ninth Circuit erred by rejecting the district court's reasoned conclusions that the evidence Lambright proffered at the evidentiary hearing was

unsubstantiated or cumulative to evidence already before the sentencing court.

The Ninth Circuit's ruling undermines the State of Arizona's and crime victims' interest in the finality of its criminal judgments and convictions. The ruling similarly undermines confidence in the judicial system because it demonstrates a willingness to set aside a valid sentence without a compelling basis for doing so. Despite the best efforts of highly qualified counsel throughout state and federal post-conviction proceedings, the most credible diagnosis of Lambright's mental health at the time of the crime is anti-social personality disorder, a diagnosis that is generally entitled to very little weight, if any, in determining whether leniency is warranted. *See, e.g., State v. Jones*, 197 Ariz. 290, 312, 4 P.3d 345, 367 (2000); *State v. Brewer*, 170 Ariz. 486, 505-06, 826 P.2d 785, 802-03 (1992); *State v. Gerlaugh*, 144 Ariz. 449, 459, 698 P.2d 694, 704 (1985) (holding that a personality disorder, standing alone, is entitled to little, if any, mitigating weight, particularly when the defendant demonstrates an ability to control his conduct in different situations).

Lambright's remaining mitigation, again after exhaustive discovery efforts by counsel in state and federal court, consists of evidence of a somewhat difficult family background and drug use, although neither are connected to the crime, and neither are given great weight in capital sentencing proceedings. A difficult family background, in and of itself, is not a significant mitigating circumstance, since nearly every defendant could point to some circumstance in his or her background that would thus call for mitigation. *State v. Wallace*, 160 Ariz. 424, 427, 773 P.2d 983, 986 (1989). "[A]lthough such evidence may be especially relevant in the case of a minor, 'we ascribe to adult offenders [] a greater degree of personal responsibility

for their actions.'" *Id.*

Similarly, a history of drug abuse is not significantly mitigating absent a link to the crime. *See Sansing*, *supra.* Thus, the Ninth Circuit has ordered a resentencing based on evidence that is generally present in any capital case, but is not sufficiently substantial to warrant leniency.

This case is emblematic of the Ninth Circuit's continuing interference with the State's implementation of the death penalty. In *Landrigan v. Shriro*, 127 S. Ct. 1933 (2007), this Court recently reversed a Ninth Circuit decision in a case that had similarly been pending in federal court for more than a decade and involved an assertion of ineffective assistance of counsel. This Court held that the Ninth Circuit erred by substituting its judgment for reasoned factual findings by a state court that had denied Landrigan's request for an evidentiary hearing regarding his claim of ineffective assistance of counsel. 127 S. Ct. at 1944.

Although *Landrigan* was an AEDPA case, the same principles of deference apply here, where the case involves factual findings made following an evidentiary hearing by a factfinder who considered evidence and assessed the credibility of witnesses.

Also emblematic of the Ninth Circuit's refusal to defer to reasoned factually findings by a district court judge is *Correll v. Ryan*, 465 F.3d 1006 (9th Cir. 2006), a case the Ninth Circuit referenced repeatedly in the instant case as having "strikingly similar" facts. (Pet. App. A, 490 F.3d at 1117-18).

The State agrees that the facts in this case are strikingly similar to those in *Correll*, but in a manner

different from that asserted by the Ninth Circuit. *Correll* similarly involved a remand order from the Ninth Circuit and an evidentiary hearing in which a highly respected district court judge rejected a claim of ineffective assistance of counsel after carefully considering evidence presented during a 9-day evidentiary hearing. A Ninth Circuit panel nevertheless rejected the district court's conclusions and substituted its view for that of the district court judge.

Writing in dissent from the Ninth Circuit panel opinion, Judge O'Scannlain noted that the district court had conducted a thorough hearing, which included 17 witnesses and "reams of documents." The district court had rejected an allegation that Correll's attorneys only spent five minutes with him between conviction and sentence, and found instead that counsel met with Correll multiple times and discussed the mitigation case with him extensively. The district court also found that trial counsel spoke to between 40 and 50 witnesses, including all of Correll's family members who would cooperate, but that, unfortunately, "[t]he witnesses were not able to provide relevant useful mitigation information. In fact, in many instances, the witnesses only provided inculpatory and non-mitigating information." 465 F.3d 1006, 1022-23 (9th Cir. 2006). Judge O'Scannlain thus rejected the other panel members' conclusion that the district court erred in denying the ineffective assistance of counsel claim:

> I respectfully dissent from the court's conclusion that Correll has met the "highly demanding and heavy burden of establishing actual prejudice" in the pursuit of his claim of ineffective assistance of counsel during the penalty phase of the trial . . . The majority ignores the mountain of precedent which provides that, in assessing prejudice, we must consider not only the likely benefits of the

> mitigating evidence counsel failed to present, but also its likely drawbacks. *The majority also substitutes its independent analysis of the record for that of the district court, and relies on its own view of the evidence* rather than considering, as we must, the effect the evidence would have had on an Arizona sentencing judge twenty-two years ago.

465 F.3d at 1019 (emphasis added).

On October 13, 2006, the State of Arizona filed a motion seeking en banc review of the panel decision in *Correll*. That petition remains pending as of the date of filing of the instant certiorari petition. The State believes that the "strikingly similar" facts of *Correll* do not justify the result reached by the Ninth Circuit in the instant case, and instead demonstrate the pitfalls of the Ninth Circuit's standardless, non-deferential review of reasoned factual findings and conclusions reached by a district court after a thorough evidentiary hearing.

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CONCLUSION

The petition for a writ of certiorari should be granted.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief is single spaced, uses a 12-point proportionately-spaced typeface, and contains 7,901 words.

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