No. 05-1575

IN THE SUPREME COURT OF THE UNITED STATES

DORA B. SCHRIRO, et al.,

Petitioners,

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

REPLY BRIEF

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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 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 counsel's attempts to do so, or (b) the evidence the defendant subsequently claims should have been presented is not mitigating?

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STATEMENT OF THE CASE

Petitioners rely on the Statement of the Case set forth in the Petition for Writ of Certiorari.

REASONS WHY THE WRIT SHOULD BE GRANTED

Landrigan's characterization of this case as "unremarkable" and one that "will affect few others" (Brief in Opposition, at 5) is simply wrong. Instead, this case provides an extraordinary example of a federal court's failure to properly accord deference under the AEDPA to state court factual findings and state court interpretations of federal law as determined by this Court. This case also presents a question of nationwide significance regarding the extent of defense counsel's obligation to develop and present mitigation when a defendant actively thwarts counsel's efforts to do so.

The Ninth Circuit's en banc ruling eviscerates the deference standard set forth in 28 U.S.C. § 2254. There was nothing unreasonable about the state courts' factual determination that Landrigan instructed his attorney not to present any evidence at the sentencing hearing. Nor was there anything unreasonable about the state courts' application of this Court's *Strickland* jurisprudence. Accordingly, the Ninth Circuit's ruling should be reversed.

I. *The Ninth Circuit Clearly Erred by Rejecting The State Courts' Factual Finding That Landrigan Instructed His Defense Attorney Not To Present Any Mitigating Evidence.*

Under 28 U.S.C. § 2254(d)(2), 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 this Court, 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). Factual determinations by a state court are presumed correct, and the habeas petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

In the instant case, the state courts' factual conclusion that Landrigan instructed his counsel not to present any mitigation is clearly supported by the record and was not unreasonable. The Ninth Circuit's decision to the contrary is belied by the assessment of every other court that has considered the issue. The state trial court, the Arizona Supreme Court, the Federal District Court for the District of Arizona and the Ninth Circuit panel that originally considered this case all reached a different conclusion. The Ninth Circuit panel in fact noted that this is not a close case regarding the reasonableness of the state court's factual determination that Landrigan waived presentation of mitigation:

> In the constellation of refusals to have mitigating evidence presented . . . 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 this one. No flashes of insight could be more fulgurous than those which this record supplies.

Landrigan v. Schriro, 272 F.3d 1221, 1226 (9th Cir. 2001). That assessment, consistent with the state court's ruling, is clearly supported by the record.

Landrigan argues that the State's "broad brush" claim is simply conclusory. (Brief in Opposition, at 6.) Landrigan further argues that he did "not foreclose the possibility of investigation; rather, he simply directed counsel not to put two family members on the stand at sentencing." (*Id* n.5.) That assertion, however, is belied by the record.

At the sentencing hearing, Landrigan's attorney had subpoened Landrigan's mother and his ex-wife to testify on Landrigan's behalf. Landrigan not only ordered that they not testify, he actively thwarted his attorney's efforts to make a record of the type of information he was seeking to develop, including testimony from a mental health expert. (Appendix D, R.T. Oct. 25, 1990, at 7–22.) Landrigan's attorney was not one of Landrigan's family members. Yet Landrigan repeatedly interrupted and made derisive comments when Landrigan's counsel attempted to put information into the record. *See, e.g.*, (Appendix B, 272 F.3d at 1226-27) ("I mean, you, he's not getting the story straight. Why have him tell somebody else's story in the first f—ing place?") Thus, Landrigan's assertion that he "simply directed counsel not to put two family members on the stand at sentencing" is unsupportable.

Finally, Landrigan's argument ignores the fact that he bears the burden of proving by clear and convincing evidence that the state courts' factual determination--that he instructed his attorney not to present mitigation evidence--was objectively unreasonable. Landrigan has not presented any evidence contradicting that finding, let alone evidence meeting the clear and convincing standard. Thus, the Ninth Circuit clearly erred by failing to accord deference to the state court's factual finding regarding this issue.

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.*

Noticeably absent from Landrigan's response is any discussion of this Court's opinion in *Blystone v. Pennsylvania*, 494 U.S. 299, 306 n.4 (1990) (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.") Under *Blystone*, it is clear that the Constitution does not prohibit a defendant in a capital case from waiving presentation of mitigation evidence.

Blystone is significant because this Court held in *Strickland* that "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions, . . . and must be evaluated in light of 'informed strategic choices made by the defendant and on information supplied by the defendant.'" 466 U.S. at 691. The Ninth Circuit's en banc ruling ignores that principle and should be reversed by this Court.

Landrigan incorrectly asserts that Petitioners have not challenged the finding of a colorable claim of prejudice under *Strickland*. The certiorari petition explains that the same judge who sentenced Landrigan considered and rejected Landrigan's post-conviction claim of ineffective assistance of counsel, 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.* This finding, which was entitled to deference under the AEDPA standard of review, illustrates that Landrigan failed to establish a colorable claim of prejudice.

Furthermore, the only evidence Landrigan has ever said he would have presented at sentencing was evidence that he had a genetic propensity to violence. Petitioners have never disputed that Landrigan has a propensity to violence. They have disputed, however, that such a propensity is mitigating. Petitioners argued in the certiorari petition that the state courts' rejection of Landrigan's *Strickland* claim was not objectively unreasonable given the fact that "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." (Petition at 20.) Thus, Petitioners have repeatedly contested Landrigan's assertion that he established a colorable claim for relief on his claim of ineffective assistance of counsel.

Petitioners further pointed out in their certiorari petition that

the Arizona courts have repeatedly held that a personality disorder, standing alone, is not entitled to any mitigating weight. *See State v. Gerlaugh*, 698 P.2d 694, 704 (Ariz. 1985) (an antisocial personality disorder is not entitled to any mitigating weight absent "some reason other than the nature of the disorder."). (Petition, at 21.) Thus, the new evidence Landrigan has attempted to proffer simply confirms that he has a personality disorder. Evidence that Landrigan is a violent 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 colorable claim of ineffective assistance of counsel.

As noted in the Petition, the Tenth and Eleventh Circuits have rejected claims similar to Landrigan's claim. *See Wallace v. Ward*, 191 F.3d 1235 (10th Cir. 1999), *Mitchell v. Kemp*, 762 F.2d 886, 889 (11th Cir. 1985). Recently, the Sixth Circuit similarly rejected such a claim. In *Keith v. Mitchell*, ___ F.3d ___, 2006 WL 1879646 (6th Cir. 7/10/06), the court rejected Keith's claim that his attorney acted ineffectively by failing to present mitigation because Keith failed to show prejudice, "and because an otherwise constitutionally ineffective strategy is not a grounds for habeas relief if the client knowingly directed the strategy." *Id.* at * 8. The Ninth Circuit's analysis of Landrigan's *Strickland* claim conflicts with those rulings.

CONCLUSION

This case is an extreme example of the Ninth Circuit's failure to accord deference to state court factual findings and applications of this Court's *Strickland* jurisprudence. Landrigan expressly waived presentation of mitigation and actively thwarted his attorney's attempt to put any type of mitigating evidence in the record. Landrigan's belated claim that he would have allowed his attorney to present evidence that he was genetically predisposed to violence does not establish even a colorable claim of ineffective assistance of counsel, much less a basis for challenging (under the AEDPA deference standard) the state courts' denial of the claim. The Ninth

Circuit's analysis of Landrigan's *Strickland* claim conflicts with rulings from this Court and from other circuits. This Court should grant review to resolve these conflicts and enforce its holdings.

Respectfully submitted,

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