

No. _____ 081350 MAR 11 2009

IN THE OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES

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

Petitioner,

vs.

JAMES LYNN STYERS,

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 December 1989, James Lynn Styers took 4-year-old Christopher Milke into the desert and shot him three times in the back of the head. On direct appeal, the Arizona Supreme Court found one aggravating circumstance invalid and re-weighed the remaining aggravating circumstances and proffered mitigation. In its independent review of Styers' death sentence, the Arizona Supreme Court explicitly stated that it had considered all of the proffered mitigating evidence, but found Styers' proffered mitigation not sufficiently substantial to warrant leniency and affirmed his death sentence. *State v. Styers*, 177 Ariz. 104, 117, 865 P.2d 765, 778 (1993).

A panel of the Ninth Circuit concluded that the Arizona Supreme Court failed to properly re-weigh the mitigation evidence pursuant to *Clemons v. Mississippi*, 494 U.S. 738, 748–49 (1990), because it failed to consider Styers' post-traumatic stress disorder mitigation. *Styers v. Schriro*, 547 F.3d 1026, 1035–37 (9th Cir. 2008) (Pet. App. A, at 19–20.)

1. Under the Anti-terrorism and Effective Death Penalty Act (AEDPA), when a State's highest court explicitly states it has considered proffered mitigation evidence, must a habeas reviewing court accept that statement, absent clear and convincing evidence to the contrary?

2. This Court has clearly established that a State cannot preclude a capital sentencer from

considering or giving effect to relevant mitigation evidence. *Smith v. Texas*, 543 U.S. 37, 45 (2004); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). Here, in considering the proffered mitigation evidence of post-traumatic stress disorder, the Arizona Supreme Court elected to give Styers' evidence no significant mitigating weight because he could not connect his alleged condition to his murderous act. Did the Ninth Circuit violate this Court's jurisprudence by holding that *Smith* forbids a sentencer from relying on the absence of a causal nexus between an alleged mental condition and the crime committed in deciding how much weight to give the proffered mitigation evidence?

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I

THE NINTH CIRCUIT FAILED TO GIVE PROPER AEDPA DEFERENCE TO THE ARIZONA SUPREME COURT'S FINDING THAT IT HAD CONSIDERED ALL PROFFERED MITIGATION IN ITS INDEPENDENT REWEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES8
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OPINION BELOW

A panel of the United States Court of Appeals for the Ninth Circuit (Chief Judge Kozinski, and Judges Farris and Bea) held in a per curiam decision that the Arizona Supreme Court failed, after invalidating an aggravating factor, to properly re-weigh the mitigation evidence with the remaining aggravating factors as required by *Clemons v. Mississippi*, 494 U.S. 738, 748–49 (1990). *Styers v. Schriro*, 547 F.3d 1026, 1035–36 (9th Cir. 2008) (Pet. App. A, at 19–20.) The panel decision reversed a decision by the United States District Court for the District of Arizona. *Styers v. Schriro*, 2007 WL 86944 (D.Ariz. Jan. 10, 2007); see also *State v. Styers*, 177 Ariz. 104, 865 P.2d 765 (1993).

STATEMENT OF JURISDICTION

The Ninth Circuit denied Petitioner’s request for rehearing en banc on December 11, 2008. 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 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 OF THE CASE

In early December 1989, Styers shot and killed Christopher Milke, the 4-year-old son of Debra Milke, the woman with whom he shared an apartment. Following a jury trial, Styers was convicted of first-degree murder, conspiracy to commit first-degree murder, child abuse, and kidnapping. The trial court found three aggravating circumstances: the victim was under the age of 15, A.R.S. § 13-703(F)(9); the murder was committed in expectation of pecuniary gain, A.R.S. § 13-703(F)(5); and the murder was committed in an especially heinous and depraved manner, A.R.S. § 13-703(F)(6). After considering all proffered mitigating evidence, the trial court found the mitigation was not sufficiently substantial to call for leniency, and sentenced Styers to death. *State v. Styers*, 177 Ariz. 104, 109, 865 P.2d 765, 770 (1993).

On direct appeal, the Arizona Supreme Court reversed the finding of the pecuniary gain aggravating circumstance. The state court found that there was insufficient evidence that Styers' co-defendant, Debra Milke, agreed to pay Styers to murder her 4-year-old son. 177 Ariz. at 115, 865 P.2d at 776. The court nevertheless upheld Styers' death sentence after independently reviewing the remaining aggravating

circumstances and the mitigation evidence proffered by Styers:

The special verdict stated that none of the statutory mitigating circumstances were proven and found no nonstatutory "mitigating circumstances sufficiently substantial to call for leniency." Defendant argues that the following facts constitute mitigating evidence that warrants leniency: no prior criminal record; honorable discharge from United States Marines after serving in Vietnam; evidence that defendant suffered from post-traumatic stress syndrome; defendant cared for Christopher; and the giving of a felony murder instruction.

Defendant had no prior convictions for either misdemeanors or felony offense. This is relevant mitigating evidence. *See State v. Rossi (Rossi III)*, 171 Ariz. 276, 279, 830 P.2d 797, 800, *cert. denied*, 506 U.S. 1003, 113 S.Ct. 610, 121 L.Ed.2d 544 (1992). Defendant's service in Vietnam and honorable discharge are also relevant mitigating circumstances. *See State v. Lavers*, 168 Ariz. 376, 396, 814 P.2d 333, 353, *cert. denied*, 502 U.S. 926, 112 S.Ct. 343, 116 L.Ed.2d 282 (1991). Defendant also suffered from post-traumatic stress disorder prior to and around the time of the murder as a result of his combat service in Vietnam. This could also, in an

appropriate case, constitute mitigation. *See State v. Bilke*, 162 Ariz. 51, 53, 781 P.2d 28, 30 (1989) (finding evidence of post-traumatic stress disorder constituted newly-discovered evidence that may have affected sentencing). However, two doctors who examined defendant could not connect defendant's condition to his behavior at the time of the conspiracy and the murder.

There was testimony that defendant cared for Christopher at times, but his actions and participation in his murder speak volumes to that. Finally, giving a felony murder instruction "is not relevant 'where the defendant intended to kill the victim or where the defendant knew with substantial certainty that his conduct would cause death.'" *State v. Gillies*, 135 Ariz. 500, 513, 662 P.2d 1007, 1020 (1983) (quoting *State v. Zaragosa*, 135 Ariz. 63, 659 P.2d 22, *cert. denied*, 462 U.S. 1124, 103 S.Ct. 3097, 77 L.Ed.2d 1356 (1983)). The defendant conspired to kill Christopher and then he killed him. The fact that the court gave a felony murder instruction is not mitigating here.

Because the trial court did not list each of the proffered items of claimed mitigation and state that it found them unavailing does not mean that the trial court did not consider them. It is apparent that the trial court considered this evidence, but

ultimately found that it was not sufficiently substantial to call for leniency. We will also *consider* it in our independent review.

...

This court independently reviews aggravating and mitigating circumstances to determine whether the death penalty was properly imposed. *See Rossi*, 171 Ariz. at 278, 830 P.2d at 799. We have excluded from our consideration pecuniary gain, having found the evidence does not prove that factor beyond a reasonable doubt. We have *considered* all of the proffered mitigation and, like the trial court, find it is not sufficiently substantial to warrant leniency.

177 Ariz. at 116–17, 865 P.2d at 777–78. (Emphasis added.)

After exhausting his state post-conviction review, Styers petitioned for a writ of habeas corpus in district court, raising a number of constitutional claims regarding his trial and sentencing proceedings. The district court denied his petition, but granted a certificate of appealability as to his claim that he received ineffective assistance of counsel. A panel of the Ninth Circuit expanded the certificate of appealability to include a claim that the Arizona Supreme Court failed to narrow a facially vague aggravating factor, and failed to properly reweigh all

aggravating and mitigating factors after striking one of the aggravating factors.

The Ninth Circuit panel then held that the Arizona Supreme Court required a causal nexus between the mitigating evidence and the crime before giving the mitigation adequate consideration. The panel concluded that the state court failed to consider Styers' mitigation evidence of post-traumatic stress disorder in violation of *Smith v. Texas*, 543 U.S. 37 (2004), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). *Styers v. Schriro*, 547 F.3d 1026, 1035 (9th Cir. 2008). The State subsequently filed a petition for rehearing en banc, which was denied.

SUMMARY OF ARGUMENT

1. The Ninth Circuit failed to give appropriate AEDPA deference to the Arizona Supreme Court's finding that it had considered all of Styers' proffered mitigation evidence. Under the AEDPA, federal courts are prohibited from granting habeas relief unless a state court's adjudication of a claim "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." The AEDPA also requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with "clear and convincing evidence." Despite the state court's explicit statement that it had considered all of the mitigation evidence, the Ninth Circuit held that the state court failed to do so because the state court "appeared" to apply an unconstitutional

bar to the consideration of Styers' mitigation evidence. There is no clearly established Supreme Court authority that precludes a state court from finding, after considering proffered mitigation evidence, that the proffered evidence is not mitigating. The state court considered Styers' proffered evidence as required by *Eddings v. Oklahoma*. The Ninth Circuit's decision is also improper under the AEDPA because it fails to give any deference to the Arizona Supreme Court's findings or to overcome the presumption that the state court knows and follows the law.

2. The Ninth Circuit's interpretation of the Arizona Supreme Court's opinion in this case directly conflicts with the Arizona Supreme Court's capital sentencing jurisprudence and with this Court's clearly established principle that the sentencer, after considering mitigation evidence, is not required to ascribe a certain weight to that mitigation evidence. Despite the state court's explicit statement that it had *considered* all proffered mitigating evidence, the Ninth Circuit found that the state court had not done so, and erroneously mischaracterized the state court's opinion as requiring a nexus test before considering mitigation evidence in violation of *Smith v. Texas*. Arizona has never required a "causal nexus" test before the sentencer considers mitigation evidence. To the contrary, the state court has always followed the rule announced in *Eddings v. Oklahoma*, and *considers* proffered relevant mitigation. Arizona's assessment of the nexus between the mitigation evidence and a defendant's conduct applies to the weight the evidence is given—not to whether the evidence is *considered*. 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.

REASONS WHY THE WRIT SHOULD BE
GRANTED

I

THE NINTH CIRCUIT FAILED TO GIVE PROPER AEDPA DEFERENCE TO THE ARIZONA SUPREME COURT'S FINDING THAT IT HAD CONSIDERED ALL PROFFERED MITIGATION IN ITS INDEPENDENT REWEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES.

Because Styers filed his petition for writ of habeas corpus after April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") applies. *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997). The Ninth Circuit's ruling violates the basic tents of the AEDPA by finding that the state court failed to do something (consider mitigation evidence) that the state court expressly stated it had done. The Ninth Circuit's ruling ignores basic principles of comity and should be reversed by the Court.

Under the AEDPA, federal courts may grant habeas relief from a state conviction only if it is contrary to, or an unreasonable application of, clearly established law as determined by the United States Supreme Court, or it was based on an unreasonable determination of the facts in light of the evidence presented in the state courts. *See Mitchell v. Esparza*,

540 U.S. 12, 15 (2003).

The AEDPA “modified a federal habeas court’s role in reviewing state prisoner applications in order to prevent federal habeas ‘retrials’ and to ensure that state-court convictions are given effect to the extent possible under the law.” *Bell v. Cone*, 535 U.S. 685, 693 (2002) (citing *Williams v. Taylor*, 529 U.S. 362, 403–04 (2000)). The AEDPA was specifically enacted “to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, and to further the principles of comity, finality, and federalism.” *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (citations omitted); *Greenawalt v. Stewart*, 105 F.3d 1268, 1275 (9th Cir. 1997) (“Congress intended to restrict the availability of habeas corpus relief when it passed the Act.”). Under the AEDPA, a state prisoner is not entitled to federal habeas relief with respect to any federal claim that was adjudicated on the merits in state court proceedings unless adjudication of the claim:

(1) 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

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). This amended statute creates a “highly deferential standard for evaluating state court rulings.” *Lindh*, 521 U.S. at 334, n.7 (1997). Thus, review of the state court’s decision is not “*de novo*.” *Van Tran v. Lindsey*, 212 F.3d 1143, 1149 (9th Cir. 2000) (*overruled in part on other grounds, Lockyer v. Andrade*, 538 U.S. 63, 71 (2003)).

In evaluating the state court decision, the federal courts must refrain from mischaracterization of the state court opinion or record, and must defer to the presumption that state courts know and follow the law. *See, e.g., Bell*, 543 U.S. at 455 (“We do not think that a federal court can presume so lightly that a state court failed to apply its own law. As we have said before, § 2254(d) dictates a ‘highly deferential standard for evaluating state-court rulings,’ which demands that state-court decisions be given the benefit of the doubt. . . . Federal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation.”) (citations omitted)

Despite the Arizona Supreme Court’s explicit statement that it had considered the proffered mitigation in this matter, the Ninth Circuit found that the state court failed to consider and give effect to the mitigation evidence that Styers presented. (Pet. App. A, at 20.) However, after invalidating an aggravating circumstance for insufficient evidence, the Arizona Supreme Court considered the proffered mitigation evidence, including Styers’ alleged post-traumatic stress disorder from his combat service. Specifically,

the state court stated:

Because the trial court did not list each of the proffered items of claimed mitigation and state that it found them unavailing does not mean that the trial court did not consider them. It is apparent that the trial court considered this evidence, but ultimately found that it was not sufficiently substantial to call for leniency. *We will also consider it in our independent review.*

...

We have *considered* all of the proffered mitigation and, like the trial court, find it is not sufficiently substantial to warrant leniency.

177 Ariz. at 117, 865 P.2d at 778.

The Ninth Circuit failed to give deference to the Arizona Supreme Court's determination that it had considered all of Styers' proffered mitigation. Under the AEDPA, federal courts are required to presume a state court's factual determinations are correct. 28 U.S.C. § 2254(e)(1). The Ninth Circuit ignored this mandatory standard of review and mischaracterized the Arizona Supreme Court's opinion.

The Ninth Circuit found instead that, because the Arizona Supreme Court did not find Styers' PTSD to be mitigating, it unconstitutionally barred the

evidence from being considered. This is a tortured reading of the state court's opinion. The Arizona Supreme Court clearly stated that it considered *all* of Styers' proffered mitigation.

Moreover, the Ninth Circuit failed to defer to AEDPA's presumption that the state court knows and follows the law. *Bell*, 543 U.S. at 455. This Court has held that there is a presumption that courts are deemed to have considered all mitigating evidence where the court so states. *Parker v. Dugger*, 498 U.S. 308, 314 (1991). This Court should summarily reject the Ninth Circuit's ruling that the Arizona Supreme Court did not consider Styers' proffered mitigation.

II

THE NINTH CIRCUIT'S ANALYSIS MISAPPLIES *SMITH v. TEXAS*, AND DIRECTLY CONFLICTS WITH ARIZONA'S CAPITAL SENTENCING JURISPRUDENCE.

The failure to presume that the Arizona Supreme Court knew and followed the law notwithstanding, the Ninth Circuit's decision is contrary to this Court's clearly established jurisprudence that mitigation evidence is not entitled to any particular mitigating weight. *Harris v. Alabama*, 513 U.S. 504, 512 (1995). The Ninth Circuit's decision effectively requires the state court to find, after considering proffered mitigation evidence, that the proffered evidence is mitigating. There is no clearly established Supreme Court authority that

precludes a state court from finding, after considering proffered mitigation evidence, that the proffered evidence is not mitigating.

After considering Styers' proffered PTSD mitigation evidence, the Arizona Supreme Court found it was of no mitigating weight because Styers' experts found that his condition had no relevance to his murderous act. Styers planned the murder—Styers tricked the victim into believing he was going to see Santa Claus, took him into the desert and shot the victim in the back of the head. There was no evidence that the murder was the result of any combat flashbacks or combat stress. The state court simply found that this evidence was not relevant to the murder.

This Court has established that a capital sentencing process that excludes from consideration circumstances of the particular offense or the relevant facets of the character and record of the individual offender violates the Eighth Amendment. *Eddings*, 455 U.S. at 113–14; *Lockett v. Ohio*, 438 U.S. 586, 605–06 (1978). The Eighth Amendment requires that the sentencer have the ability to consider and give effect to mitigation evidence. *Smith*, 543 U.S. at 47. The Arizona Supreme Court, in its reweighing of the mitigation evidence in this case, considered and gave effect to Styers' mitigation evidence. The state court's decision is neither contrary to this Court's clearly established authority, nor an unreasonable application of the law.

The Ninth Circuit's decision is based on a flawed

interpretation of *Smith*, 543 U.S. at 37, and *Eddings*, 455 U.S. at 104, to this case. According to the Ninth Circuit, those cases hold that a sentencer must give substantial weight to *any* mitigating evidence proffered by a capital defendant:

In conducting its independent review of the propriety of Styers' death sentence, the Arizona Supreme Court stated that it had "considered all of the proffered mitigation," *see Styers*, 177 Ariz. at 117, 865 P.2d at 778. However, its analysis prior to this statement indicates otherwise.

With regards to the evidence that Styers suffered from post-traumatic stress disorder as a result of his combat service in Vietnam, the court stated the following:

This could also, in an appropriate case, constitute mitigation. *See State v. Bilke*, 162 Ariz. 51, 53, 781 P.2d 28, 30 (1989) . . . *However*, two doctors who examined defendant could not connect defendant's condition to his behavior at the time of the conspiracy and the murder.

Styers, 177 Ariz. at 116, 865 P.2d at 177. (Italics added.)

The court's use of the conjunctive adverb "however," following its acknowledgment that such evidence "could" in certain cases constitute mitigation, indicates that this was not such a case.

...

In applying this type of nexus test to conclude that Styers' post traumatic stress disorder did not qualify as mitigating evidence, the Arizona Supreme Court appears to have imposed a test directly contrary to the constitutional requirement that all relevant mitigating evidence be considered by the sentencing body.

(Pet. App. A, at 18–20) (citing *Smith v. Texas*, 543 U.S. at 45.)

The Ninth Circuit's opinion misinterprets both the Arizona Supreme Court's opinion and the relevant case law. The court of appeals has mischaracterized the Arizona Supreme Court's legal conclusion and analysis. The Arizona Supreme Court did not decline to *consider* Styers' proffered mitigation regarding his diagnosis of post-traumatic stress disorder. Instead, the state court determined that the proffered mitigating evidence of post-traumatic stress disorder had no substantial mitigating weight.

The Arizona Supreme Court's "causal nexus"

test is simply an application of common sense. If, for example, a defendant asserts as mitigating evidence that he is a white male, or that he was born on a Monday, the sentencer is not required to give any particular weight to those facts, particularly when a defendant does not explain how those factors had some bearing on his adult conduct.

The Ninth Circuit's reliance on *Smith* is unavailing. In *Smith*, this Court found unconstitutional a sentencing scheme 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. In that case, before the jury reached its sentencing decision, the trial judge gave a supplemental instruction directing the jury to give effect to mitigation evidence, but allowed the jury to do so only in the context of negating what would otherwise be affirmative responses to the special issues instruction relating to deliberateness and future dangerousness. *Id.* at 38.

This Court, relying on its holding in *Tennard v. Dretke*, 542 U.S. 274 (2004), reiterated that "the jury must be given an effective vehicle with which to weigh mitigating evidence so long as the defendant has met a 'low threshold of relevance,' which is satisfied by 'evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" 542 U.S. at 284–85 (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990)). This Court found that the supplemental jury instruction given in *Smith* was similar to the one found unconstitutional in *Penry v.*

Johnson (Penry II), 532 U.S. 782 (2001). There this Court held:

We generally presume that jurors follow their instructions. Here, however, it would have been both logically and ethically impossible for a juror to follow both sets of instructions. Because Penry's mitigating evidence did not fit within the scope of the special issues in the manner prescribed on the verdict form necessarily meant ignoring the command of the supplemental instruction.

...

The supplemental instruction therefore provided an inadequate vehicle for the jury to make a reasoned moral response to Penry's mitigating evidence.

Id. at 799–800.

Thus, *Smith* and *Tennard* stand only for the proposition that a sentencer cannot be precluded from *considering* proffered mitigation evidence. *Smith* and *Tennard* 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. In its independent review of Styers' death sentence, the Arizona Supreme Court did not unreasonably apply Supreme Court precedent. Unlike in *Smith*, there were no jury instructions barring the consideration of Styers' proffered mitigation, and in fact the evidence was considered by a sentencer (a state trial judge) who

is presumed to know and follow the law. Styers was not barred from presenting mitigation evidence and the state court considered all of his proffered mitigation evidence.

In considering Styers' mitigating evidence of PTSD, the Arizona Supreme Court found that it was not particularly relevant in this case. By stating that Styers' evidence of post-traumatic stress disorder could have been mitigating in another type of case, the Arizona Supreme Court was not saying it did not consider the evidence—the state court was opining that the evidence did not have any particular mitigating weight in Styers' case. This was not a case where Styers' alleged PTSD condition had any connection to the murder of the 4-year-old victim. Styers planned the murder—Styers tricked the victim into believing he was going to see Santa Claus, and took him into the desert and shot the victim in the back of the head. There was no evidence that the murder was the result of any combat flashbacks or combat stress. Styers' condition was not relevant to his murderous act.

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*, 438 U.S. at 608. 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, 455 U.S. at 114 (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*, 548 U.S. 163, 175 (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 Arizona Supreme Court explicitly stated that, like the trial court, it considered all of the proffered mitigation evidence. *Styers*, 177 Ariz. at 117, 865 P.2d at 778. There is nothing in the state court's opinion indicating that it failed to consider mitigating evidence or that it barred any mitigating evidence from consideration. While the Arizona Supreme Court relied on the absence of a causal nexus between *Styers*' alleged PTSD and his subsequent crime in ascribing no significant mitigating weight to the proffered mitigation, there can be no doubt that the court considered the mitigation in its independent review:

It is apparent that the trial court considered this evidence, but ultimately found that it was not sufficiently substantial to call for leniency. We will also consider it in our independent review.

...
We have considered all of the proffered mitigation, and like the trial court, find it is not sufficiently substantial to warrant leniency.

Id.

The Arizona Supreme Court has made clear, both prior to and after the *Tennard* and *Smith* decisions, that the sentencer in a capital case cannot 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 also State v. Pandeli, 215 Ariz. 514, 532, ¶ 72, 161 P.3d 557, 575 (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.’”); *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 reading of *Tennard* and *Smith* is not only incorrect, but it is directly contrary to United States Supreme Court precedent. “The Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer.” *Harris*, 513 U.S. at 512. “As long as evidence of mitigation [i]s not excluded from consideration at the sentencing proceeding,” the principles of *Lockett*, 438 U.S. at 586 and *Eddings*, 455 U.S. at 104 are not violated. *Barclay v. Florida*, 463 U.S. 939, 961, n.2 (1983) (Stevens, J., concurring).

Thus, in direct contradiction to Supreme Court precedent, the Ninth Circuit wrongly set forth a rule that would require a capital sentencer to give specific mitigating weight to mitigation evidence proffered by a capital defendant, regardless of its quality or relationship to the murder. The Ninth Circuit’s new rule has no basis in *Tennard* or *Smith*, and is contrary to *Harris*.

The Ninth Circuit’s *Smith* 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. Moreover, 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 or *Smith* or *Tennard*. See 18 U.S.C. § 2254(d)(1). 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.

Finally, if this Court believes that the Arizona Supreme Court did not even "consider" the evidence of Styers' post-traumatic stress disorder, the State requests that this Court ask for clarification from the Arizona Supreme Court. This Court could do so by certifying the following question to the Arizona Supreme Court:

Does the causal nexus analysis utilized by the Arizona Supreme Court in addressing mitigation evidence preclude consideration of evidence for which there is no causal nexus, or does the analysis simply provide a mechanism for assessing how much weight, if any, should be accorded the proffered evidence?

CONCLUSION

For these reasons, the Petitioners respectfully request that this Court grant their petition for writ of certiorari.

Respectfully submitted

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