No._____

IN THE SUPREME COURT OF THE UNITED STATES

John Edward Sansing, Petitioner,

vs.

David Shinn, Respondent.

****CAPITAL CASE****

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
QUESTION PRESENTED

John Edward Sansing pleaded guilty to first-degree murder and other felonies with no agreements offered by the state. During the sentencing proceedings, the victim's 10-year-old daughter twice asked the court not to sentence Sansing to death. The trial court refused to consider her statements and imposed a death sentence.

On appeal to the Arizona Supreme Court, Sansing argued that the trial court erred in refusing to consider this information because it was both relevant and mitigating. The Arizona Supreme Court unreasonably applied clearly established federal law in denying Sansing's claim, but both the district court and the United States Court of Appeals for the Ninth Circuit denied this claim during Sansing's federal habeas proceedings.

Did the appellate court err in affirming the denial of Sansing's petition on this meritorious claim?

PARTIES TO THE PROCEEDING

The petitioner (and petitioner-appellant below) is condemned prisoner John Edward Sansing. The respondent (and respondent-appellee below) is David Shinn, Director of the Arizona Department of Corrections, Rehabilitation, and Reentry.[1]

[1] Mr. Shinn is automatically substituted in for his predecessor, Charles Ryan. S. Ct. Rule 35.3.

STATEMENT OF RELATED PROCEEDINGS

State v. Sansing, 26 P.3d 1118 (Ariz. 2001) (opinion affirming convictions and sentences).

Sansing v. Arizona, 536 U.S. 954 (2002) (mem.) (order granting petition for writ of certiorari and remanding for reconsideration in light of *Ring v. Arizona*, 536 U.S. 584 (2002)).

State v. Sansing, 77 P.3d 30 (Ariz. 2003) (supplemental opinion affirming death sentence).

Sansing v. Arizona, 542 U.S. 939 (2004) (mem.) (order denying petition for writ of certiorari).

Sansing v. Ryan, No. CV-11-1035-PHX-SRB, 2013 WL 474358 (D. Ariz. 2013) (order denying petition for writ of habeas corpus).

Sansing v. Ryan, 997 F.3d 1018 (9th Cir. 2021) (opinion affirming denial of petition for writ of habeas corpus).

Sansing v. Ryan, 41 F.4th 1039 (9th Cir. 2022) (order and amended opinion affirming denial of petition for writ of habeas corpus and denying petition for rehearing and rehearing en banc).

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PETITION FOR WRIT OF CERTIORARI

John Edward Sansing, an Arizona death-row prisoner, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the United States District Court for the District of Arizona's denial of his petition for writ of habeas corpus.

OPINIONS BELOW

The Ninth Circuit's amended opinion affirming the denial of Sansing's petition for writ of habeas corpus and denying his petition for rehearing and rehearing en banc is reported at *Sansing v. Ryan*, 41 F.4th 1039 (9th Cir. July 29, 2022), ECF No. 94, and included in Petitioner's Appendix ("Pet's App.") at Pet's App. 1a–62a. Its initial opinion was reported at *Sansing v. Ryan*, 997 F.3d 1018 (9th Cir. May 17, 2021), ECF No. 80-1, and included in the appendix at Pet's App. 63a–124a. The district court order denying Sansing's petition for writ of habeas corpus is available at *Sansing v. Ryan*, No. CV-11-1035-PHX-SRB, 2013 WL 474358 (D. Ariz. Feb. 7, 2013), ECF No. 65, and is included in the appendix at Pet's App. 125a–230a.

The Arizona Supreme Court opinion affirming Sansing's convictions and sentences is reported at *State v. Sansing*, 26 P.3d 1118 (Ariz. 2001), and included in the appendix at Pet's App. 204a–237a, and this Court's order granting Sansing's petition for certiorari and remanding for reconsideration in light of *Ring v. Arizona*, 536 U.S. 584 (2002), is reported at *Sansing v. Arizona*, 536 U.S. 954 (2002) (mem.),

and included in the appendix at Pet's App. 238a. The state court's supplemental opinion is reported at *State v. Sansing*, 77 P.3d 30 (Ariz. 2003), and included in the appendix at Pet's App. 239a–263a, and this Court's order denying Sansing's petition for certiorari from that opinion is reported at *Sansing v. Arizona*, 542 U.S. 939 (2004) (mem.), and included in the appendix at Pet's App. 264a.

STATEMENT OF JURISDICTION

On May 17, 2021, the United States Court of Appeals for the Ninth Circuit affirmed the United States District Court's denial of Sansing's petition for writ of habeas corpus. (Pet's App. 63a–124a.) The court denied Sansing's timely filed petition for panel rehearing and/or petition for rehearing en banc and issued an amended opinion on July 29, 2022. (Pet's App. 1a–62a.) Sansing applied for a 57-day extension of time in which to file this petition, and the application was granted by Justice Kagan. Sansing now timely files this petition asking the Court to review the judgment of the Ninth Circuit affirming the denial of habeas relief. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. VIII:

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

U.S. Const. amend. XIV:

> All persons born or naturalized in the United States, and subject

> to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d)(1):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the 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 . . . .

STATEMENT OF THE CASE

Sansing's Background

John Edward Sansing and his siblings were raised in Alabama by a single mother in a life dominated by poverty, neglect, alcoholism, and abuse. (2-ER-351) They received food stamps and welfare payments and lived in low-income housing. (2-ER-345, 348.) Even with food stamps, the children often did not have enough food. The utilities were frequently turned off, and as a result, there was often no water, heat, or food in the home. (5-ER-995, 1023.) Sansing's older brother stole from his mother's purse to purchase food or school lunch for the family, and sometimes he stole food for his siblings from stores. Welfare workers or police deputies came to the house on several occasions and found the home in unacceptable condition, where only the "bare essentials" were being provided. (2-ER-360, 373, 379.)

Sansing's mother Glenda heavily abused alcohol. (2-ER-381.) Despite the lack of money for food and utilities, Glenda always had enough money to go out drinking. (5-ER-994–95, 1023.) When Glenda got married again, she and her new husband Silas Skinner constantly drank alcohol. (2-ER-384.) Skinner was physically abusive toward Glenda, and she was emotionally and verbally abusive towards him. Glenda and Skinner would fight often, and the fights could last for days. (2-ER-384.) Sansing and his siblings witnessed their mother being beaten, choked, knocked out of a chair,

shoved out the front door, and, more than once, watched her break a window and cut herself to get back into the house. (2-ER-385.)

In addition to the constant drinking and domestic violence of his parents, Sansing himself was subjected to both physical and verbal abuse. Skinner paddled and slapped the children; Glenda hit them with hickory switches or grabbed them by the arm and dug her fingernails into their skin, leaving bruises. (2-ER-391.) She forced the siblings to choose which switch she would use on the child she was about to beat. (2-ER-391–92.) Glenda's next husband was also an alcoholic and abuser, and would beat Sansing and his brother and force them to physically fight him. (2-ER-374; 5-ER-988–90.)

When Glenda went out, Sansing's siblings had friends over to their house to party. They drank alcohol and smoked cigarettes and marijuana with their friends, and "John was right there with us." (2-ER-402, 403.) Sansing's sister Susan found Sansing "high on marijuana" when he was about eleven years old and "caught him sniffing gas and glue on occasion." (2-ER-403.) Sansing was depressed and alone much of the time. (2-ER-380, 431.) He would earn money from cutting grass and would give some to his mother and use the rest for drugs. When this was not enough, however, he stole or hung out with others who had drugs. (2-ER-404.) As a teenager, he took pills, including amphetamines, and he tried acid and crystal methamphetamine, which he obtained through friends. (2-ER-404.)

School was not an escape for Sansing. He was given at least two IQ tests as a child, one revealing an IQ of 75 (2-ER-306), and the second placing him in the "borderline range of mental ability" (5-ER-1146). Sansing liked school when he started, but it quickly turned into a frustrating and hopeless situation for him. (2-ER-317, 406.) From the sixth grade on, he never really comprehended or understood the material. (2-ER-408.) Sansing's standardized test scores were more than two grade levels behind his actual grade in reading, spelling, and language (2-ER-308), and he met the criteria for a learning disability yet never received any special education services or assistance. (2-ER-408.) While he did enroll in high school, he failed all his subjects and quit school the following year. (2-ER-410.)

After Sansing left school, Glenda bought him a bus ticket and sent him to Utah to live with his biological father. (2-ER-351.) Within months, Sansing's father caught him selling marijuana with his sister Patsy's boyfriend and kicked him out. (2-ER-351, 378.) Sansing was just sixteen years old. (2-ER-378.) He moved in with Patsy and her boyfriend, and they supported and enabled his drug use through their own use and addiction. (2-ER-378.) At times all three were homeless and sought shelter and food from local authorities.

When Sansing was seventeen years old, he met fifteen-year-old Kara Lamphere. (2-ER-351.) Kara became pregnant within two months of meeting Sansing, and they got married and had four children in the next four years. (2-ER-

351–52, 417.) Sansing and Kara, who both had serious substance abuse problems, squandered Kara's trust fund from a settlement to support their rampant addictions to alcohol, marijuana, and methamphetamine. Sansing's drug use had become his only way of coping with stress. (2-ER-417.)

In 1995, Sansing moved his family to Arizona to again live with Patsy. (2-ER-352.) In the months preceding the crime in this case, Sansing's and Kara's drug use escalated. To buy drugs, Sansing sold most of their belongings and stole purses. (5-ER-1108.) The little money Sansing and Kara earned from jobs also went to drugs. (2-ER-437.) John would smoke methamphetamine daily, engaging in binges in which he would stay awake for three or four days at a time. (2-ER-425–26, 436–37.) Patsy and her husband introduced Sansing and Kara to crack cocaine, and that drug took over their lives. (2-ER-404.) About a month before the crime, crack cocaine became Sansing's drug of choice. (2-ER-437.) He repeated the same binging process he had developed with methamphetamine. In fact, in the four days before the crime occurred, Sansing and Kara had smoked between $750 and $2000 worth of crack cocaine. (2-ER-343, 353.)

The Crime

On February 24, 1998, Kara went to work while Sansing stayed at home with the kids. (6-ER-1334–35.) Sansing asked Kara to steal $20 from her job to buy more crack cocaine. (4-ER-888; 2-ER-437.) While Kara was at work, Sansing called her two

or three times to discuss getting more drugs. (6-ER-1335.) During one of those calls, Sansing explained to Kara that he had unsuccessfully tried to obtain an advance on his paycheck. (6-ER-1336.) Later, Sansing called Kara to tell her that he had obtained a $20 rock of crack cocaine as an advance from their drug dealer and was smoking it then. (6-ER-1337.) Kara informed Sansing that she was unable to steal $20. (2-ER-437.) On the phone, Sansing sounded "hyped up" and "anxious." (6-ER-1224.) Around the same time, Sansing called a local church and asked that a food box be delivered to their home. (6-ER-1337, 1401.) Sansing had previously been able to trade a turkey for a $20 rock of crack cocaine, and he hoped to do the same with this food delivery. (2-ER-437.)

Kara arrived home from work around 3:30 p.m. (2-ER-437.) Sansing was nervous, pacing, and agitated. (6-ER-1224.) Sansing was not acting as he had on previous occasions after smoking crack cocaine. (6-ER-1225.) Sansing was "cold," as if he was "in another world" and "spac[ed] out." (6-ER-1225.) "It wasn't my husband. It wasn't his normal. Even though he has smoked crack before, he wouldn't act the way he did that day." (6-ER-1225.)

High on crack cocaine and needing to find a way to pay for the drugs he had already smoked, Sansing and Kara discussed a plan to steal a purse from whoever delivered the church's food box. (6-ER-1340; 2-ER-437.) They would do this by sending one of the children out to the person's car to steal her purse while Kara and Sansing

distracted the person in the house. (2-ER-437; 4-ER-888.) The testimony at trial established that the only plan was to rob the victim. (*See* 6-ER-1300, 1340.) After discussing their plan, Sansing and Kara smoked some more crack cocaine. (6-ER-1341; 2-ER-437.)

That afternoon, the victim delivered two food boxes to the Sansing house. (6-ER-1341–42.) She walked into the kitchen with one box and was followed by Kara carrying the other box. (6-ER-1342.) As she talked with Kara, one of the Sansing children went out to her car to steal her purse. (2-ER-437; 4-ER-888.) However, the victim's car was locked and the children came in the home to inform Sansing that the plan would not work. (2-ER-438.) Sansing made a hand gesture to Kara apparently indicating that they could not get the purse. (2-ER-438.) High on crack cocaine, Sansing became irrationally worried that the victim knew what his hand gesture meant and that he was doing something illegal. (2-ER-438.) Sansing became convinced that the victim would call the police regarding his drug use. (2-ER-438–39.)

Sansing's cognitive impairments, coupled with the crack cocaine, led him to act in an irrational and violent manner. He grabbed the victim from behind. (2-ER-438.) He threw her to the floor and proceeded to tie her up. (2-ER-438; 6-ER-1345–46.) During this time Kara was yelling at Sansing, but he could not respond. (2-ER-438.)

After Sansing tied up the victim and placed a sock in her mouth, he hit the victim on the head with sufficient force to knock her unconscious.[2] (6-ER-1353–55.)

Still high and paranoid, Sansing began to panic. (2-ER-438–39.) He looked out of the window frequently, convinced that police were on their way. He decided to move the victim's truck. (6-ER-1365–66; 2-ER-438–39.) When he returned, he moved the unconscious victim to his bedroom, where he covered her with clothing. (6-ER-1356, 1366.) Sansing and Kara then called their drug dealer to buy more crack cocaine. (2-ER-439.) They traded some of the victim's jewelry for the drugs and smoked again. (2-ER-439.)

Displaying even more highly irrational thinking, Sansing decided that if he made the crime look like a robbery and rape, then police might think that someone else attacked the victim. (2-ER-439.) Consequently, Sansing raped and stabbed the victim. (6-ER-1362.) At some point, Sansing again called his drug dealer and smoked more crack cocaine. (2-ER-439; 6-ER-1367–70.) Sansing took the victim's body to the backyard and placed her between the fence and a shed. (6-ER-1307.) However, the fence was less than five feet tall and anyone "could just walk up to it from the alley and look over" and see the victim's body there. (6-ER-1307.)

[2] The brain damage to the victim from that blow was such that she likely never regained consciousness. (6-ER-1253.)

The next morning, Sansing went to work. (6-ER-1373.) Sansing felt intense remorse for what he had done. He left work and went to his sister Patsy's house to confess and call his mother before turning himself in to law enforcement. (5-ER-1189.) After Patsy talked to their father, he contacted the police, and Patsy told Sansing that the police were on their way to arrest him. (5-ER-1189–90.) Sansing made no attempt to escape or evade arrest. (5-ER-1190.) He waited until the police arrived at Patsy's home and peacefully walked outside to be arrested. (5-ER-1190.)

PROCEDURAL HISTORY

A. Trial

Only six months after the crime, Sansing appeared before the trial court to enter a guilty plea admitting to first-degree murder and other dangerous offenses, with the state seeking the death penalty and having offered no plea agreement. On the first day of the sentencing phase, trial counsel Emmet Ronan entered a stipulation with the state. (5-ER-1107.) The state alleged three aggravating circumstances: that the defendant had convictions for serious offenses, had committed the murder in expectation of pecuniary gain, and had committed the offense in an especially cruel, heinous, or depraved manner. (6-ER-1380.) The state called several witnesses to prove the aggravating circumstances.

The medical examiner testified that the victim died from multiple stab wounds and blunt force head trauma. (6-ER-1274.) In addition, Kara testified against Sansing

in exchange for a lighter sentence. (6-ER-1376.) Sansing's counsel did not submit testimony from any witnesses in mitigation and did not present testimony or reports from any expert witnesses or from family members regarding Sansing's abusive upbringing. Some of Sansing's family members and his wife were all present at the hearing, but Ronan did not question them about the abuse and neglect Sansing suffered as a child, Sansing's struggles as a result of his cognitive deficits, or what they witnessed of Sansing's drug abuse and addiction. Instead, counsel merely allowed the family members to make brief statements pleading the court for mercy. Trial counsel directed a mitigation specialist to prepare a report on Sansing's personal history, but then presented no testimony, lay or expert, about the results of that investigation.

The judge found two aggravating circumstances had been proven beyond a reasonable doubt and imposed a sentence of death. (1-ER-258–61.) The judge found that the few factors proposed by Sansing as mitigating circumstances, when balanced against the especially cruel manner in which the victim was murdered, were not sufficiently substantial to call for leniency. (1-ER-270.)

B. Direct Appeal Proceedings

In Sansing's first direct appeal opinion, the Arizona Supreme Court struck the trial court's finding of the pecuniary gain aggravating circumstance, but upheld Sansing's death sentence after finding that the mitigation presented was not

substantially sufficient to overcome the sole remaining aggravating circumstance. *State v. Sansing*, 26 P.3d 1118, 1131 (Ariz. 2001) ("*Sansing I*"). (Pet's App. 229a.) This Court granted Sansing's subsequent petition for certiorari, remanding his case for further consideration in light of *Ring v. Arizona*, 536 U.S. 584 (2002). *See Sansing v. Arizona*, 536 U.S. 954 (2002) (mem.). (Pet's App. 238a.) On remand, Sansing's case was consolidated with those of thirty-one other capital defendants whose cases were not yet final, and the Arizona Supreme Court ultimately concluded that the *Ring* error in all the cases was not structural but was subject to harmless error analysis. *State v. Ring*, 65 P.3d 915 (Ariz. 2003).

Following supplemental briefing in Sansing's case, the Arizona Supreme Court found the *Ring* error in Sansing's specific case to be harmless and, once again affirmed his death sentence. *State v. Sansing*, 77 P.3d 30 (Ariz. 2003) ("*Sansing II*"). (Pet's App. 239a–260a.) When considering Sansing's motion for reconsideration of this decision, the Arizona Supreme Court was equally divided, with two justices voting for remand, two voting against, and one recusing himself. (5-ER-1112.) Because the court was equally divided, it denied the reconsideration motion. (5-ER-1112.) Notably, Sansing was one of only two cases in which the Arizona Supreme Court found the *Ring* error to be harmless. In more than twenty other cases, the court vacated the death sentences and remanded the cases for jury resentencing. This

Court denied Sansing's petition for certiorari from this opinion. *Sansing v. Arizona*, 542 U.S. 939 (2004) (mem.). (Pet's App. 238a.)

C. Post-Conviction Relief ("PCR") Proceedings

Following briefing from Sansing and the state, the PCR court found that Sansing's claim of ineffective assistance of trial counsel was colorable and ordered an evidentiary hearing. (1-ER-101.) The court denied relief on all other claims. (1-ER-101.) After a four-day evidentiary hearing on the ineffectiveness of trial counsel, the PCR court denied relief. (1-ER-85–99.) The Arizona Supreme Court issued a one-word denial of Sansing's petition for review and issued a warrant of execution. (1-ER-84.)

D. District Court Proceedings

Following initial filings in the district court, the court appointed undersigned counsel to represent Sansing and issued a stay of the warrant of execution. (Dist. Ct. ECF No. 7; Dist. Ct. ECF No. 8.) By order of the court, Sansing was required to file his petition for writ of habeas corpus just five months after counsel was appointed, well before the AEDPA statute of limitations had expired. (Dist. Ct. ECF No. 22; Dist. Ct. ECF No. 35.) After further briefing, the court denied relief on each of Sansing's claims, granted five certificates of appealability (Pet's App. 126a–203a), and entered judgment against him (1-ER-4). Sansing timely appealed. (1-ER-1.)

Following briefing, a stay pending this Court's resolution of Respondents' petition for certiorari in *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (en banc),

and then further briefing, the appellate court held oral argument and then issued a 2-1 opinion denying relief. *Sansing v. Ryan*, 997 F.3d 1018 (9th Cir. 2021). (Pet's App. 63a–124a.) Shortly after the opinion, the court entered another stay of the proceedings pending this Court's decision in *Brown v. Davenport*, 142 S. Ct. 1510 (2022), which involved the legal issues that formed the basis of the split between the majority and dissenting opinions. (Ninth Cir. ECF No. 86.) After the stay was lifted, Sansing filed a replacement petition for rehearing and rehearing en banc (Ninth Cir. ECF No. 93-1), and the Ninth Circuit issued an amended opinion and order denying rehearing, *Sansing v. Ryan*, 41 F.4th 1039 (9th Cir. 2022). (Pet's App. 1a–62a)

This petition for writ of certiorari follows.

REASONS FOR GRANTING CERTIORARI

1. The state court's decision in Sansing's direct appeal was based on an unreasonable application of clearly established federal law and the Ninth Circuit erred in finding otherwise.

The Antiterrorism and Effective Death Penalty Act ("AEDPA") authorizes federal courts to grant habeas relief "when a state court's decision on the merits was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by' decisions from [the Supreme] Court." *Woods v. Donald*, 575 U.S. 312, 315 (2015) (per curiam) (quoting 28 U.S.C. § 2254(d)). A state court's decision "is contrary to this Court's clearly established precedents if it applies a rule that contradicts the governing law set forth in [this Court's] cases." *Brown v. Payton*,

544 U.S. 133, 141 (2005). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)). When a state court's decision is "objectively unreasonable," it is improper for a federal court to defer to it. *Id*.

The morning after the crime in this case, Sansing's drug intoxication had worn off and he was immediately and intensely remorseful for what he had done. He went to his sister's house to confess to her and to call his mother before turning himself in to law enforcement. (5-ER-1189.) After Sansing and his sister spoke with family members, Sansing's sister told him that the police were on their way to arrest him. (5-ER-1189–90.) Sansing made no attempt to escape or evade arrest, and when the police arrived at his sister's home he peacefully walked outside to be arrested. (5-ER-1190.)

Only six months later, Sansing entered a guilty plea admitting to first-degree murder and other dangerous offenses, with the state still seeking the death penalty and having offered no plea agreement. (6-ER-1383–1400.) Sansing pleaded guilty so quickly and without any agreements specifically to avoid causing any additional pain to his family or to the family of the victim. (*See* 5-ER-1206–07.) At sentencing, the victim's daughter wrote a letter to the trial court stating that "it says in the [B]ible

that you should forgive and forget. . . . Instead of dying, [the Sansings] should live to do something for their kids that my mom can't do now. They should go to jail instead of dying." (5-ER-1114.) In other materials, she again asked that Sansing not be given a death sentence because it would give him a better chance to be saved and because a death sentence would not bring her mother back. (5-ER-1115.)

The trial court acknowledged these materials but refused to consider them as mitigating evidence because the statements did not relate to Sansing or the circumstances of the offense. (1-ER-269.) The judge found that Sansing had proven the following non-statutory mitigating factors: 1) impairment from the use of crack cocaine at the time of the offense; 2) difficult childhood; 3) lack of education; 4) acceptance of responsibility and remorse; and 5) family support. (1-ER-266–69; *see also* Pet's App. 258a.) The judge also found that these mitigating circumstances, when balanced against the especially cruel manner in which the victim was murdered, were not sufficiently substantial to call for leniency. (1-ER-270.)

The Arizona Supreme Court upheld the trial court's decision, finding that the request from the victim's daughter was "irrelevant to either the defendant's character or the circumstances of the crime and is therefore not proper mitigation." (Pet's App. 223a–224a.) *Sansing I*, 26 P.3d at 1129 (quoting *State v. Trostle*, 951 P.2d 869, 887 (Ariz. 1997)). The state supreme court's decision is contrary to clearly established

federal law, and both the district court and appellate court erred in denying this claim.

The panel majority erred in denying Sansing's claim because it found no United States Supreme Court opinion directly on point with Sansing's argument. Similarly, the district court denied this claim because the "Supreme Court has not addressed the issue or ever held that a victim's recommendation of leniency constitutes relevant mitigation." (Pet's App. 196a.) The panel majority agreed, stating that "the [Supreme] Court has never held that a defendant in a capital case is entitled to have the jury consider the victim's family's recommendation of leniency." (Pet's App. 105a.)

However, none of those courts engaged in the correct analysis. The law is clear that courts need not "wait for some nearly identical factual pattern before a legal rule must be applied." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (quoting *Carey v. Musladin*, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring)). A federal habeas court may find "an application of a [legal] principle unreasonable when it involves a set of facts different from those of the case in which the principle was announced." *Id.* (internal quotation and citation omitted). The phrase "clearly established Federal law" in 28 U.S.C. § 2254(d)(1) refers to a governing legal principle set forth in Supreme Court precedent. *See Williams*, 529 U.S. at 405–06, 407. Accordingly, contrary to the panel majority's decision, the fact that there is no Supreme Court case

specifically discussing a recommendation of leniency by a victim's family member does not control consideration of Sansing's claim.

Instead, the focus here should be on the fact that both the trial court and the Arizona Supreme Court refused to consider evidence in mitigation of Sansing's crime. As this Court has repeatedly recognized, the Eighth and Fourteenth Amendments require that a capital sentencer, along with a reviewing court, consider and give effect to any and all relevant mitigating evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982); *see also Lockett v. Ohio*, 438 U.S. 586 (1978); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Boyde v. California*, 494 U.S. 370, 377–78 (1990). This requirement furthers the fundamental underpinnings of constitutional capital sentencing: avoiding arbitrary death sentences and judging the character and record of the individual defendant. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 436, *modified on denial of reh'g*, 554 U.S. 945 (2008). Thus, a state may not preclude the sentencer "from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." *Eddings*, 455 U.S. at 113–14; *see also Penry v. Lynaugh*, 492 U.S. 302, 317 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

Through these opinions, this Court has clearly established that all relevant mitigating evidence must be considered in a capital sentencing hearing. Thus, regardless of whether the Court has addressed a case in which this precise type of

mitigation evidence was presented, it has firmly established the governing legal principle: the only constitutional limit to evidence offered in mitigation of a crime is relevance. *See, e.g.*, *Lockett*, 438 U.S. 586; *Eddings*, 455 U.S. 104. Relevancy is not limited only to evidence that relates to the defendant or the circumstances of the crime. *Skipper*, 476 U.S. at 4. Thus, the question here is whether the statements from the victim's daughter asking that Sansing not be given a death sentence was relevant evidence in mitigation of Sansing's crime. *See id.* It is undoubtedly relevant, especially when considered in light of the intense remorse expressed by Sansing to the victim's family members. The state court's adjudication to the contrary violated clearly established federal law.

The wishes of the victim's ten-year-old daughter could reasonably have been found to warrant a sentence less than death, especially when coupled with Sansing's cooperation with the police, acceptance of responsibility, remorse, his use of crack cocaine during the crime, and his difficult childhood. The state court's refusal to consider such evidence was contrary to this Court's precedent and, therefore, does not require deference. The Ninth Circuit has held under analogous circumstances that while a request for leniency from the victim's father was not enough, standing alone, to establish prejudice for an ineffective assistance of counsel claim, it must be considered along with the other mitigation counsel did not present. *Scott v. Schriro*, 567 F.3d 573, 585–86 (9th Cir. 2009) (per curiam). The state courts' refusal to consider

this highly probative mitigating evidence was therefore an unreasonable application of and contrary to the clearly established precedent on mitigation. The panel majority and the district court erred by finding otherwise.

2. In addition, this Court's decisions involving requests for imposition of the death penalty in a specific case are distinguishable and do not control the outcome here.

In denying Sansing's claim, both the panel majority and the district court also relied on opinions from this Court holding that the Eighth Amendment prohibits testimony from the victim's family members regarding their opinions on the appropriate sentence. *Booth v. Maryland*, 482 U.S. 496 (1987), *overruled in part by Payne v. Tennessee*, 501 U.S. 808 (1991); *see also Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam); (Pet's App. 105a, 196a). However, the focus in *Booth*, *Payne*, and *Bosse* was whether the state could present evidence of the harm that the victim's family suffered. *See Booth*, 482 U.S. at 503–07; *Payne*, 501 U.S. at 825; *Bosse*, 137 S. Ct. at 2. In those cases, this Court was addressing the more typical situation in which the state tries to put forth evidence of the loss suffered by the victim's family to help secure a death sentence. This was not the situation here and, therefore, those cases did not prohibit the victim's daughter's wishes from being considered. Indeed, it is a rare case when a murder victim recommends any degree of leniency for a defendant. Rather than victim-impact evidence offered by the state, as discussed in *Booth*,

Payne, and *Bosse*, the statements here are mitigating evidence that call for a sentence less than death and are entitled to significant weight.

A plea for leniency from the victim's daughter, who is directly affected by the crime, is powerful mitigating evidence. Given that there was only one aggravating factor in this case, the trial court's failure to consider and give effect to such a unique request had a substantial and injurious effect on Sansing's sentence. Further, consideration of this mitigating evidence could have changed the calculus in the Arizona Supreme Court's *Ring* error analysis. (*See* Ninth Cir. ECF No. 51 at 25–44; Pet's App. 11a–26a, 45a–62a (discussing *Ring* claim).) A reasonable jury could have viewed the victim's daughter's plea as sufficiently substantial to call for leniency. Including such mitigation evidence in the weighing of aggravation and mitigation in this case would have substantively changed the sentencer's consideration, and, therefore, it cannot be harmless. Sansing was prejudiced by the fact that this mitigating evidence was not considered, and he is entitled to relief.

CONCLUSION

Sansing respectfully requests that this Court grant his petition for writ of certiorari and reverse the order and judgment of the Ninth Circuit Court of Appeals affirming the district court's denial of his petition for writ of habeas corpus.

Respectfully submitted: December 21, 2022.

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