No. 22–6396

In the Supreme Court of the United States

JOHN EDWARD SANSING,
Petitioner,

v.

DAVID SHINN, et al.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

Capital Case

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QUESTION PRESENTED FOR REVIEW

While this Court has held that the Eighth Amendment prohibits the admission of a victim's sentencing recommendation in favor of the death penalty, no clearly established Federal law holds that a defendant is entitled to present a victim's sentencing recommendation in favor of leniency as mitigation in a capital sentencing proceeding. In this AEDPA case, was the Arizona Supreme Court's conclusion that the sentencing judge's refusal to consider the victim's daughter's recommendation for leniency did not violate Petitioner's Eighth Amendment rights "contrary to, or based on an unreasonable application of, clearly established Federal law" under 28 U.S.C. § 2254(d)(1)?

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INTRODUCTION

Sansing was convicted of first-degree murder, kidnapping, armed robbery, and sexual assault for brutally murdering Trudy Calabrese, a church volunteer who was delivering food to Sansing and his family. The trial court sentenced him to death for the murder. The Arizona Supreme Court concluded on direct appeal that the sentencing judge did not err by refusing to consider the victim's daughter's sentencing recommendation in favor of leniency as a mitigating factor, and affirmed Sansing's death sentence.

On habeas review under AEDPA, the Ninth Circuit held that the State court's decision was not contrary to, or based on an unreasonable application of, this Court's precedent. In reaching that conclusion, the court noted that this Court has held that the Eighth Amendment prohibits the State from introducing the victim's family's recommendation that the defendant receive the death penalty and has never held that a capital defendant is entitled to have the jury consider the victim's family's recommendation for leniency.

Sansing requests certiorari review of that decision, but presents no compelling reason for this Court's intervention. The court of appeals' decision was a straightforward application of 28 U.S.C. § 2254(d)(1)'s exceedingly high standard for habeas relief, and did not create any split of authority. To the contrary, as the court below observed, the other state and federal circuit courts to have addressed this question have similarly found that a defendant has no right to have the sentencer consider the victim's family's

recommendation for leniency in a capital sentencing proceeding. As a result, this Court should deny certiorari.

STATEMENT OF THE CASE

A. Sansing's murder of Trudy Calabrese and trial.

On February 24, 1998, Sansing and his wife, Kara Sansing, "were on the fourth consecutive day of heavy crack cocaine consumption." App. 8a. That afternoon, after the couple used the last of their crack cocaine, Sansing contacted a church to request a food delivery for his family. *Id.* Sansing told Kara, in the presence of their four young children, that he would rob the person who delivered the food. *Id.*

Just after 4:00 p.m., Trudy Calabrese parked in front of Sansing's home to deliver the food Sansing requested. *Id.* She entered the house and talked with Kara while Sansing signed paperwork regarding the delivery. *Id.* As Trudy turned to leave, however, Sansing grabbed her and threw her to the floor, where he and Kara bound Trudy with electrical cords. *Id.* Trudy fought back, begged Sansing not to hurt her, and pleaded for the children to call for help. *Id.* Sansing eventually gagged her with a sock. *Id.* at 8a–9a.

Once she was bound and gagged, Sansing hit Trudy twice in the head with a wooden club, knocking her unconscious. *Id.* at 9a. He then moved her vehicle to a nearby parking lot. *Id.* Once Sansing returned to the house after moving the vehicle, he dragged Trudy upstairs and raped her, after which he stabbed her three times in the abdomen with a kitchen knife. *Id.* As he stabbed her, Sansing ground or twisted the knife. *Id.* Trudy died from the stabbing. *Id.* Sansing took Trudy's jewelry and traded it for more crack cocaine. *Id.*

When a pastor from the church called Sansing's home that evening asking about Trudy's whereabouts, Sansing gave a false address and told the pastor that Trudy had never arrived. *Id.* He later attempted to hide Trudy's body in his backyard and hid other evidence of the murder. *Id.* The next day, however, Trudy's truck was located and it contained a note with the Sansings' address. *Id.* at 9a–10a. Police went to the home and found her body; her head was wrapped in a plastic bag that was bound to her neck and she was blindfolded. *Id.* at 10a. After going to work that day, Sansing confessed the murder to his sister. *Id.*

The State of Arizona charged Sansing with first-degree murder, kidnapping, armed robbery, and sexual assault. App. 204a. Sansing pled guilty to all four charges. *Id.* The case then proceeded to sentencing before the trial judge. App. 10a.

The judge found that the State proved two aggravating circumstances which made Sansing eligible for the death penalty: Sansing committed the crime in expectation of pecuniary gain under A.R.S. § 13–703(F)(5)[1]; and Sansing committed the murder in an especially cruel, heinous, or depraved manner under § 13–703(F)(6). App. 240a. The sentencing judge found that Sansing failed to prove any statutory mitigating circumstances, but that he proved five non-statutory mitigating circumstances: (1) impairment from crack cocaine; (2) difficult childhood; (3) acceptance of responsibility and remorse; (4) lack of education; and (5) family

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[1] Unless otherwise specified, Respondents cite the version of the Arizona statutes in effect at the time of Sansing's offense and trial.

support. *Id.* The judge declined to consider as a mitigating circumstance the request of Trudy's 10-year-old daughter that the court not impose the death penalty. App. 223a. Having determined that the mitigating circumstances were not sufficiently substantial to outweigh the aggravating circumstances, the trial judge sentenced Sansing to death. App. 240a.

B. Appeal.

On direct appeal to the Arizona Supreme Court, Sansing argued that, by failing to consider the victim's daughter's sentencing recommendation as a mitigating circumstance, the sentencing judge violated the victim's right to be heard in violation of Article 2, section 2.1(A)(4) of the Arizona Constitution, A.R.S. § 13–4426(A), and Arizona Rule of Criminal Procedure 39(b)(7). App. at 223a. The court disagreed, citing its previous decision in *State v. Trostle*, 951 P.2d 869, 887 (Ariz. 1997), in which it held that the victims' family's sentencing requests were "irrelevant to either the defendant's character or the circumstances of the crime and is therefore not proper mitigation," and A.R.S. § 13–703(D), which forbade the consideration of "any recommendation made by the victim regarding the sentence to be imposed." *Id.* at 223a–224a. Thus, the sentencing "judge correctly refused to consider the [victim's] daughter's sentencing recommendation when imposing the sentence." *Id.* at 224a.

After the Arizona Supreme Court affirmed Sansing's death sentence on appeal, this Court decided *Ring v. Arizona*, 536 U.S. 584 (2002), holding that Arizona's aggravating factors that render a defendant eligible for a capital sentence

must be found by a jury. App. 241a. This Court granted Sansing's petition for certiorari, vacated the Arizona Supreme Court's judgment, and remanded for further consideration in light of *Ring*. *Sansing v. Arizona*, 536 U.S. 954 (2002) (mem.).

On remand, the Arizona Supreme Court held that the failure of a jury to find the aggravating factors rendering Sansing eligible for a death sentence was harmless error. App. 241a. In doing so, the state court concluded that "no reasonable jury could have accorded mitigating weight to the victim's family's request that he be given a life sentence" because a "victim's sentencing request is not proper mitigating evidence and therefore a jury could not have considered it." App. 259a (citing *Lynn v. Reinstein*, 68 P.3d 412, 417 (Ariz. 2003)).

C. Habeas proceedings.

In 2011, Sansing filed a petition for writ of habeas corpus in federal district court raising 29 claims for relief. App. 11a, 125a. In Claim 12, Sansing asserted that the sentencing judge violated his Eighth and Fourteenth Amendment rights when he failed to consider as mitigation the victim's daughter's request that he not be sentenced to death, and that the Arizona Supreme Court's denial of relief on this claim was contrary to, and based on an unreasonable application of, *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986), "because the recommendation of a life sentence from the victim's daughter was relevant mitigating evidence." App. 194a–95a.

The district court denied habeas relief. First, the court noted that this Court "has not addressed the issue or ever held that a victim's recommendation of leniency constitutes relevant mitigation." App. 196a. Consequently, Sansing could not show that the Arizona Supreme Court's decision was contrary to or based on an unreasonable application of "clearly established Federal law" under 28 U.S.C. § 2254(d)(1). *Id.* Second, in *Booth v. Maryland*, 482 U.S. 496, 509 (1987), this Court held that introduction of a victim impact statement during a capital sentencing proceeding violated the Eighth Amendment. *Id.* In *Payne v. Tennessee*, 501 U.S. 808 (1991), this Court partially overruled *Booth*, but retained *Booth*'s "prohibition on admitting 'characterizations and opinions' from the victim's family 'about the crime, the defendant, and the appropriate sentence.'" *Id.* (quoting *Payne*, 501 U.S. at 830 n.2). As a result, the Arizona Supreme Court's "failure to recognize an exception for 'favorable' sentencing recommendations" was not an unreasonable application of *Payne* and *Booth*. *Id.* at 196a–97a.

Sansing appealed to the Ninth Circuit, arguing that the district court erred by denying habeas relief on a number of claims, including Claim 12. The Ninth Circuit affirmed, holding that relief on Claim 12 was precluded under 28 U.S.C. § 2254(d)(1). App. 44a. The court of appeals noted that this Court has held that the Eighth Amendment prohibits the State from introducing the victim's family's recommendation that a defendant receive a death sentence, and has never held that a capital defendant is entitled to present the victim's family's recommendation of leniency. *Id.* In fact, the court stated that, to its knowledge "no court has adopted

that interpretation of the Eighth Amendment, and at least two circuits and a number of state high courts have rejected it." *Id.* Sansing now asks for certiorari review of the Ninth Circuit's decision.

REASONS FOR DENYING THE PETITION

This Court grants certiorari "only for compelling reasons," Sup. Ct. R. 10, and Sansing presents none. In particular, the court of appeals' decision creates no circuit split and does not "decide[] an important federal question in a way that conflicts with relevant decisions of this Court." *Id.* 10(a), (c). Instead, the decision below constitutes a straightforward application of 28 U.S.C. § 2254(d)(1)'s daunting standard for habeas relief. Because the decision below correctly applied § 2254(d)(1), and correctly determined that the Arizona Supreme Court reasonably held that the trial court was not required to consider the victim's daughter's leniency request as mitigation, this Court should deny certiorari.

I. THE COURT BELOW CORRECTLY APPLIED 28 U.S.C. § 2254(D)(1)'S STANDARD IN DENYING HABEAS RELIEF.

Sansing's habeas petition is governed by AEDPA; thus he is not entitled to habeas relief unless he establishes that the Arizona Supreme Court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. 28 U.S.C. § 2254(d)(1). Unless at the time of the state-court decision there is precedent from this Court squarely addressing the issue or clearly establishing a controlling legal principle, there is no clearly established law under § 2254(d)(1) and thus a state prisoner cannot obtain relief. *E.g.*, *Woods v. Donald*, 575 U.S. 312, 317 (2015) (*per curiam*); *Lopez v. Smith*, 574 U.S. 1, 6 (2014) (*per curiam*); *White v. Woodall*, 572 U.S. 415, 427 (2014); *Thaler v. Haynes*, 559 U.S. 43, 49 (2010); *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009);

Wright v. Van Patten, 552 U.S. 120, 125-26 (2008) (*per curiam*); *Carey v. Musladin*, 549 U.S. 70, 76-77 (2006).

In a capital sentencing proceeding, the sentencer cannot be precluded as a matter of law from considering *relevant* mitigating evidence. *See Smith v. Spisak*, 558 U.S. 139, 144 (2010); *Eddings*, 455 U.S. at 113–14; *Lockett*, 438 U.S. at 604. Mitigating evidence, as defined by this Court, consists of "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604–05. This Court has not addressed whether a victim's sentencing recommendation for leniency constitutes relevant mitigating evidence. *See Bosse v. Oklahoma*, 580 U.S. 1, 2 (2016) (*per curiam*) (vacating state court judgment for permitting victim relatives to recommend a sentence to a capital jury).

The Court has addressed, however, the admissibility of victim impact evidence when offered in *favor* of the death penalty, and has found such statements inadmissible. In *Booth*, 482 U.S. at 502–09), this Court held that victim impact statements, including the surviving victims' opinions of the crime and appropriate sentence, violated the Eight Amendment. Several years later, in *Payne*, 501 U.S. at 811–30, the Court overruled *Booth* in part, holding that a state may permit a surviving victim to make a statement describing the deceased victim's characteristics and the emotional impact of the crime on the victim's family. *Id.* at 824–30 & n.2. *Payne* left undisturbed the portion of *Booth* holding that the

admission of a victim's opinion of the appropriate sentence violates the Eighth Amendment. *Id.* at 830 n.2.

The Arizona Supreme Court's denial of Sansing's claim was neither contrary to, nor an unreasonable application of, clearly established Federal law. 28 U.S.C. § 2254(d). Although this Court addressed in *Booth* and *Payne* the degree to which a victim's sentencing recommendation is admissible when offered *against* a defendant, it has never addressed whether a victim's recommendation is admissible when a defendant offers it in mitigation. Given the lack of clearly established federal law on the matter, the Arizona Supreme Court's decision cannot be contrary to, or an unreasonable application of, such law. *See Thaler*, 559 U.S. at 47–49.

Further, *Booth* suggests, as the Arizona Supreme Court determined in Sansing's case, that a victim's sentencing recommendation is inadmissible—and violates the Eighth Amendment—regardless what that recommendation is or which party offers it. At least two other federal circuits, in addition to the Ninth Circuit in this case, have agreed with this assessment, demonstrating that there is no split of authority this Court need resolve. *See United States v. Brown*, 441 F.3d 1330, 1350–52 (11th Cir. 2006) (citing, in context of claim that Government suppressed exculpatory evidence, *Payne* and *Booth* to find that evidence of victim's husband's opposition to death penalty was not material "because it was neither relevant nor admissible"); *Robison v. Maynard*, 829 F.2d 1501, 1503–05 (10th Cir 1987), *overruled on other grounds by Romano v. Gibson*, 239 F.3d 115, 1169 (10th Cir. 2001) (citing, in case where defendant sought to present victim's desire for leniency,

Booth and stating that "the underlying reasoning for limiting the scope of [victim] evidence allows for no distinction between misdirected evidence offered by either party").

Moreover, under this Court's jurisprudence, a victim's sentencing recommendation does not qualify as relevant mitigating evidence. This Court has defined mitigation as evidence relating to the defendant's character, propensity, record, or the circumstances of the crime. *E.g., Lockett*, 438 U.S. at 604–05. A victim's sentencing preference relates to none of these factors. *See Robison*, 829 F.3d at 1503–05 (finding a victim's sentencing recommendation for leniency does not constitute relevant mitigation because it does not relate to the defendant's character or record or the circumstance of the offense); *Lynn*, 68 P.3d at 417, ¶ 17 ("Victims' recommendations to the jury regarding the appropriate sentence a capital defendant should receive are not constitutionally relevant to the harm caused by the defendant's criminal acts or to the defendant's blameworthiness or culpability."). The Arizona Supreme Court's rejection of Sansing's claim was therefore neither contrary to, nor an unreasonable application of, clearly established Federal law.

Finally, even if Sansing had presented a question worthy of this Court's review, this case nonetheless provides a poor vehicle to address it because, even if the sentencing judge had improperly failed to consider the victim's daughter's sentencing preference, Sansing was not prejudiced. A habeas petitioner may obtain relief only if a state court's error resulted in actual prejudice—the error must have

"had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson,* 507 U.S. 619, 637–38 (1993) (quotations omitted). Sansing suggests that the victim's sentencing recommendation could have convinced the sentencing court to impose a life sentence. Petition at 20–21. However, in light of the aggravation's significant weight in this horrific offense, the victim's recommendation would have carried little weight in the sentencing calculus. In fact, Judge Reinstein expressly confirmed this point, stating that, even if he considered *all* of Sansing's proffered mitigation (including the unproven mitigation) against the aggravating factors, it would remain insufficiently substantial for leniency. *State v. Sansing*, Maricopa County Superior Court No. CR98–03520(A), Special Verdict (filed Sept. 30, 1999), at 16. *See Scott v. Schriro*, 567 F.3d 573, 586 (9th Cir. 2009) ("[I]t is not reasonably probable that Scott's sentence would have changed had the leniency recommendation been introduced by itself as mitigating evidence.…") Thus, even if Sansing were able to show error, he is still not entitled to habeas relief for lack of actual prejudice. This Court should deny certiorari.

CONCLUSION

For all of the foregoing reasons, this Court should deny Sansing's petition for writ of certiorari.

Respectfully submitted,

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