No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

SCOTT DRAKE CLABOURNE, ***Petitioner,***

v.

STATE OF ARIZONA, ***Respondent.***

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

I(A). Whether the Arizona Supreme Court's application of a test that required causal nexus between mitigating circumstances proffered by Scott Clabourne as a basis for a sentence less than death, including a diagnosis of schizophrenia, and the offense of first degree murder constituted a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determine by the Supreme Court of the United States in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), such that the federal courts may grant the writ under 28 U.S.C. § 2254(d)(1)?;

I(B). Whether the Ninth Circuit panel majority erred in denying Clabourne's *Eddings* claim where it failed to find a "clear indication in the record" that the Arizona Supreme Court refused as a matter of law to consider Clabourne's nonstatutory mitigation instead of giving the Arizona court only the normal deference required under the AEDPA?;

II(A). Whether the Arizona Supreme Court's expansion of its narrowing construction of when a murder is especially cruel under A.R.S. § 13-703(F)(6) since the Court's decision in *Walton v. Arizona*, 497 U.S. 639 (1990), renders (F)(6) violative of the Eighth and Fourteenth Amendments because it no longer appropriately channels the sentencer's discretion whether to find the defendant eligible for a sentence of death?;

II(B). Whether the Ninth Circuit erred in failing to grant a Certificate of Appealability as to whether Clabourne made a sufficient showing that the futility of raising the claim in state court excused the procedural default of his challenge to the constitutionality of the cruelty statutory aggravator where the Arizona Supreme Court repeatedly rejected the claim in its past decisions that the cruelty statutory aggravator was constitutionally overbroad?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed on the cover of this document. Respondent is not a corporation.

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OPINIONS BELOW

The Special Verdict of the Superior Court of Pima County, Arizona, of August 8, 1997, in which it resentenced Scott Drake Clabourne to death is attached as Appendix A. The opinion of the Arizona Supreme Court of June 18, 1999, in which it affirmed the procedures employed below to impose the death penalty and resentenced Clabourne to death in its independent review of aggravating and mitigating circumstances is attached as Appendix B. The federal district court denied federal habeas relief in a Memorandum of Decision and Order of September 29, 2009, which is attached as Appendix C. The Opinion of the Ninth Circuit of March 5, 2014, in which it affirmed in part and remanded for application of this Court's decision in *Martinez v. Ryan*, 566 U.SD. 1 (2012), is attached as Appendix D. The Order of the Ninth Circuit of August 1, 2017, that denied rehearing is attached as Appendix E.

JURISDICTION

On March 5, 2014, the Ninth Circuit affirmed the denial of habeas corpus relief on certain claims. App. D. On August 1, 2017, the Ninth Circuit panel majority denied Clabourne's petition for rehearing on those claims, App. E, and, on August 10, 2017, issued its mandate with respect to that judgment. App. F. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. VIII:

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

U.S. Const. Amend. XIV, in pertinent part:

> "[N]or shall any State deprive any person of life, liberty or property, without due process of law."

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STATEMENT OF THE CASE

A. Procedural History

After the United States District Court for the District of Arizona granted penalty phase relief in federal habeas, the Superior Court of Arizona in and for the County of Pima resentenced Scott Drake Clabourne to death. *See* Special Verdict, *State v. Clabourne*, Pima County Super. Ct. No. CR-06824 (App. A). In its independent review on direct appeal, where the Arizona Supreme Court weighs aggravation and mitigation and determines sentence, that court imposed a sentence of death and otherwise affirmed the death sentence. Opinion, *State v. Clabourne*, 194 Ariz. 379 (1999) (App. B). In federal habeas proceedings, the district court denied relief. Memorandum of Decision and Order, *Clabourne v. Ryan*, Dist. Ct. No. CV 03-542-TUC-RCC, Dkt. 41 (App. C). The Ninth Circuit affirmed the denial of habeas relief on several claims but remanded to the district court for a determination of whether this Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), excused the procedural default of one claim of ineffective assistance of trial counsel at capital sentencing. *Clabourne v. Ryan*, 745 F.3d 362 (9th Cir. 2014) (App. D). On August 1, 2017, the Ninth Circuit panel majority denied Clabourne's petition for rehearing with suggestion for rehearing *en banc*, which had been held pending the Ninth Circuit's *en banc* consideration of *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (*en banc*), a case that applied the Court's causal nexus jurisprudence set forth in *Eddings v. Oklahoma*, 455 U.S. 104 (1982). *Clabourne v. Ryan*, 868 F.3d 753 (9th Cir. 2017) (App. E). One judge dissented on the basis that the Ninth Circuit's intervening decision in *McKinney* required the granting of the writ as to punishment. *Id.* at 754 (Berzon, J., dissenting). The court's mandate issued on August 10, 2017. *Clabourne v. Ryan*, Ninth Cir. No. 09-99022, Dkt. 72 (App. F).

B. Statement of relevant facts.

1. State court findings of facts concerning the murder.

On September 18, 1980, twenty-two-year-old college student Laura Webster was enticed to leave the Green Dolphin bar near the University of Arizona campus by Larry Langston and Scott Clabourne, who said they were going to a cocaine party. App. A at 1. The state sentencing

court described co-defendant Langston as a "frightening sociopath who planned the crime." *Id.* at 5. The sentencing court found Clabourne to have a passive personality and that he is "impulsive and easily manipulated by others." *Id.* at 4. During the drive from the bar, Langston stopped the car and beat Ms. Webster. *Id.* at 1. Langston, Clabourne and Edward Carrico took Ms. Webster to a house, where they forced her to remove her clothes and serve them drinks, and she was beaten and raped. The sentencing court found that Langston "urged" Clabourne to murder Ms. Webster. Dr. Valerie Rao, a Pima County Medical Examiner, testified that Ms. Webster was strangled with a scarf and stabbed twice in the chest, and that the cause of death was both strangulation and a stab wound to the heart. RT, *State v. Clabourne*, Pima County Super. Ct. No. CR006824, Nov. 17, 1982, at 251. The wound to the heart occurred while "there was little life left," which Dr. Rao surmised was due to the fact that it "didn't bleed too much, it bled very little" and occurred when she "had a few heartbeats left." *Id.* at 255. The men wrapped her in a sheet and dropped her into a dry river bed, where she was found by workers the next day. App. B at 2.

After the murder, Clabourne made a statement to Shirley Martin that he had killed a woman he had met in a bar, and, approximately a year after Ms. Webster's body was found, Martin reported that information to police. *Id.* at 2. Barbara Bailon, who worked with Clabourne at a Salvation Army halfway house, testified that Clabourne told her during a visit at the Pima County Jail that he killed a girl by strangling her. App. C at 8. Clabourne also confessed the murder to a Tucson police detective.[1] App. A at 2.

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[1] The Ninth Circuit ruled that Clabourne's confession, which was admitted at his 1982 trial and initial capital sentencing hearing, was improperly admitted at resentencing in 1997 based on this Court's intervening decision in *Arizona v. Roberson*, 486 U.S. 675, 677-78 (1988), because Clabourne had invoked the right to counsel when arrested for an unrelated burglary prior to his confessing to the murder. App. D at 9-12. In the § 2254 proceeding below, Clabourne raised a claim of ineffective assistance of counsel at resentencing based on counsel's failure to object to the admission of the clearly inadmissible confession. The district court ruled the claim to be procedurally defaulted for Clabourne's failure to raise it in the state courts. App. C at 15-18. Along with denying relief on the *Eddings* claim for which Clabourne seeks certiorari and issuing its mandate as to that claim, App. F, the Ninth Circuit remanded the IAC claim to determine whether Clabourne can establish prejudice under the second prong of *Strickland v. Washington*, 466 U.S. 668 (1984), to establish "cause" in the form of IAC of PCR counsel under *Martinez v.*

Two prosecution mental health experts testified that Clabourne was sane at the time of the offense, and a defense expert called in support of an insanity defense testified he could offer no opinion as to Clabourne's sanity. App. C at 9. The jury found Clabourne guilty of first degree murder, kidnaping, and three counts of sexual assault. Langston pleaded guilty to first degree murder and was sentenced to life in prison, while Carrico pleaded guilty to hindering prosecution and received a term of probation of three years. App. A at 2.

2. Capital resentencing.

a. The sole statutory aggravating factor.

The Arizona Supreme Court found that the prosecution proved beyond a reasonable doubt that the murder was "especially cruel" under A.R.S. § 13-703)(F)(6), a factor that goes to the "pain and distress visited upon the victim." App. A at 3-4. Clabourne challenged the facial validity of the cruelty factor in Claim 5 of the § 2254 petition that was filed after resentencing, arguing that that factor fails to narrow the class of offenders eligible for a sentence of death, but it was ruled procedurally defaulted for failure to raise it in state courts. *See* App. C at 27. The court rejected Clabourne's argument that the default should be excused because it would have been "futile" to raise the claim in the state courts due to the Arizona Supreme Court's repeated rejections of the claim other capital appeals. *Id.*

b. Statutory mitigation.

The defense introduced in mitigation the evidence it had employed to prove the claim of ineffective assistance of counsel that caused the district court to issue the writ after the initial capital sentencing. Clabourne submitted that lay and expert evidence supported the statutory mitigating factor that "his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired by mental illness." *Id.* *See* A.R.S. § 13-703(G)(1). The resentencing court and the Arizona Supreme Court on independent review found that two mental health experts believed that Clabourne suffered from schizophrenia "during the

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Ryan, 566 U.S. 1 (2012), to excuse the default and his entitlement to relief on the trial counsel IAC claim. *See* App. D at 7-12.

time period when the murder occurred" and another found evidence of a personality disorder. The Arizona Supreme Court concluded:

> Nevertheless, all three experts agreed that there was no evidence of Clabourne's state of mind at the particular time of the offense. None could say he was "psychotic" when he killed Webster. None stated or implied a causal relationship between Clabourne's mental health and the murder.

Id. The Court also rejected the statutory mitigating factor of unusual or substantial duress and attributed minimal statutory mitigating weight to Clabourne's youthfulness. *Id.* at 4-6. *See* A.R.S. § 13-703(G)(2), (5).

c. Nonstatutory mitigation.

The Arizona Supreme Court stated that if mitigating evidence is not sufficient to prove the (G)(1) statutory mitigating factor, it must still be considered as nonstatutory mitigation. App. A at 6. And while the Arizona Supreme Court considered the nonstatutory mitigating effect of Clabourne's passive personality and found that he is impulsive and easily manipulated by others, none of which are symptomatic of schizophrenia, it did not consider Clabourne's schizophrenia as nonstatutory mitigation.[2] In addition, the Arizona Supreme Court noted that Clabourne failed to prove the mitigating effect of his dysfunctional family life because "whatever the difficulty in Clabourne's family life, he failed to link his family background to his murderous conduct or otherwise show how it affected his behavior." *Id.* The court found that Clabourne had not proved the nonstatutory mitigating factors that he was Langston's victim, that his death sentence was disproportionate to those of Langston and Carrico, that he was impaired, that the financial

[2] In Clabourne's direct appeal from the imposition of his first, later-vacated death sentence in this case, the Arizona Supreme Court ruled *as a matter of law* that Clabourne's schizophrenia could be given no weight because it was diagnosed in adolescence and bore no causal nexus to the murder. *See State v. Clabourne*, 142 Ariz. 335, 348, 690 P.2d 54, 67 (1984) ("*Clabourne I*"). *Clabourne I* predated the many Arizona Supreme Court's causal nexus opinions cited in *McKinney*, 813 F.3d at 813-17, as comprising the 15-year period in which the Arizona Supreme Court required a causal nexus between proffered mitigation and a murder before the evidence would be given mitigating weight. That court's direct appeal opinion in *Clabourne II*, which is attached as Appendix B, occurred in the middle of the time period in which a causal nexus was required, and, as will be seen below, *infra* p.7, has been cited by the Arizona Supreme Court to support its application of its causal nexus requirement in other cases.

cost of his death sentence is disproportionate to the cost of a life sentence, or that his time on death row is mitigating because he faces execution even though mentally ill while his co-defendants who are not mentally ill have not faced execution. *Id.* at 6-8.

C. The federal habeas corpus proceedings.

1. Proceedings in the district court.

The district court denied relief on the claim that the Arizona state courts unconstitutionally required Clabourne to "show 'a causal connection' between his schizophrenia and the crime before they would consider schizophrenia as mitigation." App. C at 18. The court ruled that the state courts' consideration of Clabourne's "passive personality/impulsive/easily manipulated" necessarily meant that the state courts considered his schizophrenia as nonstatutory mitigation. *Id.* at 20. The court did, however, grant a Certificate of Appealability on that claim. *Id.* at 32.

As noted in the procedural history above, the court also ruled Claim 5, Clabourne's overbreadth challenge to the cruelty statutory aggravating factor under (F)(6), to be procedurally defaulted due to Clabourne's failure to raise the claim in the state courts. App. C at 27. The court rejected Clabourne's argument that the futility of raising the claim in the state courts, where the identical claim had been previously raised and rejected, served to excuse the procedural default of the claim. *Id.* (quoting *Roberts v. Arave*, 847 F.3d 528, 530 (9th Cir. 1988)).

2. Proceedings in the Ninth Circuit.

Although Clabourne raised the overbreadth attack on the cruelty aspect of the (F)(6) statutory aggravator and other uncertified claims in the Ninth Circuit, and the Ninth Circuit did order Appellee-Director of the Arizona Department of Corrections to respond to some of those uncertified claims, the court did not order Appellee to respond to the (F)(6) claim and the COA was not expanded to include it. *See Clabourne v. Ryan*, Ninth Cir. No. 09-99022, Dkt. 32.

With respect to the causal nexus claim, the Ninth Circuit ruled that the Arizona Supreme Court considered and gave mitigating weight to Clabourne's mental illness and, therefore, did not rule contrary to, or unreasonably apply, *Eddings*, 455 U.S. 104. App. D. at 4. In excusing

the Arizona Supreme Court's failure to actually cite Clabourne's schizophrenia as part of his nonstatutory mitigation, the court relied on the "clear indication test" it announced in another Arizona capital habeas appeal, *Schad v. Ryan*, 671 F.3d 708, 724 (9th Cir. 2011), to find that the failure of the state court to incorrectly state the test of *Eddings* means it correctly applied *Eddings*. App. D. at 5. The Ninth Circuit ruled that Clabourne's passive personality and vulnerability to manipulation, which were explicitly cited by the Arizona Supreme Court as nonstatutory mitigation, were "rooted to some degree in his mental health problems" and, therefore, were coextensive with the diagnosis of schizophrenia. *Id.*

The Ninth Circuit rejected Clabourne's argument that it had granted the writ in other cases where the Arizona Supreme Court previously applied its causal nexus test at capital sentencing, including for example in *Styers v. Schriro*, 547 F.3d 1026, 1035 (9th Cir. 2008). App. D at 5. The court also rejected Clabourne's argument that the Arizona Supreme Court has cited its own direct appeal opinion in *Clabourne II* in three subsequent direct appeals for the proposition that the nonstatutory mitigation must bear a causal nexus to the crime in order to have any mitigating effect. *Id.* (citing *State v. Carlson*, 202 Ariz. 570, 586, 48 P.2d 1180, 1196 (2002) (brain damage not mitigating unless it affected criminal conduct); *State v. Phillips*, 202 Ariz. 427, 46 P.3d 1048, 1060 (2002) (history of substance abuse not mitigating); *State v. Cañez*, 202 Ariz. 133, 164, 42 P.3d 564, 595 (2002) (traumatic childhood and dysfunctional family not mitigating). *Id.* The Ninth Circuit ruled that it could not assume that the Arizona Supreme Court applied a causal nexus test in violation of *Eddings* in those other cases in the absence of a clear indication that it had done so. *Id.* The Ninth Circuit also ruled it was required to ignore the prosecutors' arguments at sentencing and in the State's brief on direct appeal, which Clabourne submitted reflected controlling Arizona law as set forth by the Arizona Supreme Court, that both statutory and nonstatutory mitigation required a causal nexus, because the relevant provision of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d)(1), permits only consideration of the last state court decision in determining whether to grant the writ. *Id.* at 6.

Finally, the Ninth Circuit rejected Clabourne's argument that it should infer that the Arizona Supreme Court failed to consider "schizophrenia" as nonstatutory mitigation where it affirmatively mentioned schizophrenia as lacking a causal nexus in assessing the (G)(1) statutory mitigating factor but failed to mention it at all in discussing nonstatutory mitigation. *Id.* The Ninth Circuit found it would be illogical to draw that inference. *Id.*

After holding Clabourne's petition for rehearing until the Ninth Circuit announced its *en banc* decision in *McKinney*, 813 F.3d 798, the panel majority affirmed its prior decision without any change. App. E at 1. Judge Berzon dissented on the basis that *McKinney* stated that the Arizona Supreme Court, for 15 years, had consistently applied a causal nexus test that forbade as a matter of law giving mitigating weight to nonstatutory mitigation unless the evidence was causally connected to the crime. *Id.* That, according to Judge Berzon, set out a "baseline" from which it was required to review the Arizona Supreme Court's decision in *Clabourne.* She further noted *McKinney* abrogated *Schad's* "clear indication test" in favor of scrupulous application of § 2254(d)(1), which the panel was required to apply because it was an *en banc* decision that now controls in the Ninth Circuit. *Id.* at 2.

On the merits, Judge Berzon found that the Arizona Supreme Court's consideration of "passive personality, impulsiveness, and manipulability" were plausibly connected to the crime and for that reason those traits were given nonstatutory weight by the Arizona Supreme Court. *Id.* at 3. They were, however, distinct from schizophrenia, which does not depend for mitigating effect on Clabourne suffering from it during commission of the crimes. *Id.* Judge Berzon found her conclusion supported by the fact that in the next section of its direct appeal opinion, the Arizona Supreme Court gave no mitigating weight to evidence of Clabourne's dysfunctional childhood and the fact that the Arizona Supreme Court has actually cited *Clabourne* in subsequent decisions that require a causal nexus between nonstatutory mitigation and the crime before the mitigation is given mitigating weight. *Id.* at 4. Judge Berzon would have granted rehearing and ordered that the writ issue as to Clabourne's death sentence.

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HOW THE FEDERAL QUESTIONS WERE RAISED BELOW

After Clabourne was resentenced to death, he claimed on direct appeal that the sentencing court failed to attribute any weight to his nonstatutory mitigating evidence of schizophrenia in violation of *Eddings*, 455 U.S. 104. *See* Appellant's Opening Brief, *State v. Clabourne*, Ariz. Sup. Ct. No. CR 97-0334-AP, at 37. *See* App. C at 18 & n.6 (district court finds the federal claim exhausted in Clabourne's direct appeal brief). The Arizona Supreme Court denied relief on that claim. App. B at 6. The district court denied relief but granted a Certificate of Appealability on the claim. App. C at 32. The Ninth Circuit affirmed the denial of habeas relief on the claim. App. D at 4. On rehearing, a panel majority entered an Order in which it denied rehearing after considering the Ninth Circuit's intervening *en banc* decision in *McKinney*, 813 F.3d 798. App. E.

Clabourne raised a overbreadth challenge to the validity of the A.R.S. § 13-703(F)(6), that the murder was especially cruel, in the federal habeas proceedings, where the district court ruled it to be procedurally defaulted and that the futility of raising the claim in the Arizona Supreme Court, which had repeatedly denied relief on that claim in multiple other cases, did not excuse the failure to exhaust the claim. App. C at 27.[3]

REASONS FOR GRANTING THE WRIT

I. The *Eddings* Claim.

In *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 249-50 (2007), this Court traced its history of requiring the states not only to admit mitigating evidence at capital sentencing but also requiring them to allow the sentencer to give meaningful consideration to that evidence. Such consideration has always been necessary to allow a sentencer to make a reasoned moral determination as to whether the defendant is deserving of the death penalty. *Id.* at 253. In a

[3] The (F)(6) statutory aggravator states in the disjunctive that the murder may be shown to be especially heinous, cruel, or depraved, but the Arizona Supreme Court, on resentencing of Clabourne, found beyond a reasonable doubt only that the murder was especially cruel. App. B at 4.

series of Texas death penalty decisions beginning with *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"), and extending to *Abdul-Kabir* and *Brewer v. Quarterman*, 550 U.S. 286 (2007), the Court granted *certiorari* to the United States Court of Appeals for the Fifth Circuit in which habeas relief was denied where Texas sentencing juries could not give meaningful consideration to a capital defendant's mitigating circumstances despite holdings in *Penry* and its progeny that the Texas special issues, read narrowly, were unconstitutional for failing to give effect to mitigating evidence. The Fifth Circuit grafted onto *Penry I* the unconstitutional requirements of "constitutional relevance" of proffered mitigating evidence or that the mitigating evidence be given only "sufficient mitigating effect," as opposed to "full mitigating effect." *See Smith v. Texas*, 543 U.S. 37 (2004) (citing *Eddings*, 455 U.S. 104); *Tennard v. Dretke*, 542 U.S. 274, 285-88 (2004) (citing *Eddings*).

In a manner consistent with the way Texas' special issues have historically restricted the sentencer's consideration of mitigation, the Arizona Supreme Court, for a period of fifteen years, unconstitutionally restricted its consideration of mitigating evidence as it weighed aggravating and mitigating circumstances in its independent review of death sentences on direct appeal. *See McKinney*, 813 F.3d at 802-03, 813-18 (gathering citations). The Ninth Circuit has compared favorably the unconstitutional causal nexus restrictions of the Texas special issues instructions with the Arizona Supreme Court's practice of applying a test that requires a showing that the proffered nonstatutory mitigation is causally connected to the murder before it can be given any mitigating effect. *See Hedlund v. Ryan*, 854 F.3d 557, 585-86 (9th Cir. 2017) (*citing Tennard*, 542 U.S. 274, and *Smith*, 543 U.S. 37). The Ninth Circuit found the Arizona Supreme Court's causal nexus restriction to apply until this Court again ruled the Texas special issues instructions violative of the Eighth and Fourteenth Amendments in *Tennard*, 542 U.S. 274. *See McKinney*, 813 F.3d at 817.

The Ninth Circuit has found the Arizona Supreme Court's application of its causal nexus requirement to be "contrary to *Eddings*," the case that constitutes clearly established federal law for purposes of § 2254(d)(1), and granted the writ. *See Hedlund,* 854 F.3d at 584; *McKinney*, 813 F.3d at 809; *Williams v. Ryan*, 623 F.3d 1258, 1270 (9th Cir. 2010); *Styers*, 547 F.3d at

1035. In *Henry v. Ryan*, 720 F.3d 1073, 1089-91 (9th Cir. 2013), the Ninth Circuit assumed that the Arizona Supreme Court applied its causal nexus test and refused to consider the petitioner's history of alcoholism but found no substantial and injurious effect in the Arizona Supreme Court's imposition of the death sentence under *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993).

Numerous other Arizona cases in which the Arizona Supreme Court is alleged to have employed its causal nexus test remain the subject of ongoing federal habeas litigation. In *Spreitz v. Ryan*, Ninth Cir. No. 09-99006, Dkts. 78, 79, the court heard oral argument on a causal nexus claim before vacating the submission of the appeal and ordering the matter stayed pending the *en banc* decision in *McKinney*, 813 F.3d 798. *See Poyson v. Ryan*, Ninth Cir. No. 10-99005, Dkt. 12 at 50, Dkt. 46 (causal nexus claim briefed and argued). A COA was granted on a causal nexus claim by the Ninth Circuit and appears in the Appellant's Replacement Opening Brief in *Martinez v. Ryan*, Ninth Cir. No. 08-99009, Dkt. 118 at 80, which awaits oral argument. In *Spears v. Ryan*, Ninth Cir. No. 09-99025, Dkt. 58, the court remanded *inter alia* for application of *McKinney*, 813 F.3d 798, to the petitioner's causal nexus claim. In *Doerr v. Ryan*, Dist. Ct. No. CV-02-00582-TUC-PGR, Dkt. 185, the United States District Court for the District of Arizona ordered supplemental briefing on the application of *McKinney* to the petitioner's causal nexus claim.

In *Clabourne*, App. D at 5-7, the Ninth Circuit denied relief on the causal nexus claim, finding that, although the Arizona Supreme Court failed to state explicitly that it considered as nonstatutory mitigation Clabourne's proffered evidence that he suffered from schizophrenia, that court did consider that evidence when it gave little weight to Clabourne's evidence that he suffered from mental illness that gave rise to passive personality and vulnerability to manipulation. The court ruled that absent a clear indication in the record that the Arizona Supreme Court applied a causal nexus test in violation of *Eddings*, 455 U.S. 104, Clabourne was not entitled to habeas relief. App. D at 5-6.

On the other hand, the dissenting judge found the Arizona Supreme Court's historical practice of denying mitigating effect to evidence that lacked a causal nexus to the crime relevant to whether it did so in this case. App. E at 2 (Berzon, J., dissenting). Significantly, as Judge

Berzon also noted in her dissent, *McKinney* abrogated the Ninth Circuit's "clear indication test" in favor of strict enforcement of the requirement of the AEDPA, 28 U.S.C. § 2254(d)(1), that the federal courts merely determine whether the Arizona state courts have applied a rule contrary to clearly established federal law, to wit, *Eddings*, where they have grafted the "clear indication test" onto the AEDPA. *Id.*

Certiorari should be granted to insure that Arizona causal nexus claims are decided with strict application of clearly established federal law as set forth by this Court in *Eddings* and not the Ninth Circuit's application of the "clear indication test." Certiorari should also be granted and the Ninth Circuit instructed that it may rely for decision on Arizona Supreme Court precedent as to how it considers nonstatutory mitigation especially where, as here, it omits any reference to the defendant's proffered nonstatutory mitigation and its historical causal nexus requirement would be probative of that court's failure to weigh such evidence. In case after case during a 15-year period that included review of Clabourne's death sentence, the Arizona Supreme Court excluded from its consideration nonstatutory mitigation that bore no causal nexus to the crime. As a result, and as occurred here, Arizona prosecutors told sentencing courts to ignore nonstatutory mitigation proffered by the defendant. The number of Arizona causal nexus claims pending in the lower federal courts makes it imperative that the Court grant *certiorari* to decide this important question and stave off the protracted causal nexus litigation that has plagued the Texas state and district courts, the Fifth Circuit, and this Court.

II. Cruelty under the (F)(6) statutory aggravator.

Pending before the Court is a Petition for Writ of Certiorari from an Arizona death row prisoner who challenges the Arizona death penalty statute as including so many very broadly defined statutory aggravating factors that it fails to sufficiently narrow the class of Arizona offenders eligible for a sentence of death. *See Hidalgo v. Arizona*, U.S.S.Ct. No. 17-251. Since *Walton v. Arizona*, 497 U.S. 639, 654 (1990), the Arizona Supreme Court's interpretation of the "cruelty" prong of (F)(6) has expanded to include all conscious victims:

> "For the especially cruel element to exist, the trier of fact must find beyond a reasonable doubt that "the victim consciously experienced physical or mental pain prior to death."

State v. Sansing, 206 Ariz. 232, 235, 77 P.3d 30, 33 (2003). *See also*, *State v. Cropper*, 206 Ariz. 153, 156, 76 P.3d 424, 427 (2003); *State v. Cañez*, 202 Ariz. at 164, 42 P.3d at 595; *State v. Sansing*, 200 Ariz. 347, 356, 26 P.3d 1118, 1127 (2001); *State v. Poyson*, 198 Ariz. 70, 78, 7 P.3d 79, 87 (2000); *State v. Van Adams*, 194 Ariz. 408, 420, 984 P.2d 16, 28 (1999); *State v. Smith*, 193 Ariz. 452, 461, 974 P.2d 431, 440 (1999); *State v. Spreitz*, 190 Ariz. 129, 147, 945 P.2d 1260, 1278 (1997); *State v. Mann*, 188 Ariz. 220, 226, 934 P.2d 784, 790 (1997); *State v. Detrich*, 188 Ariz. 57, 67, 932 P.2d 1328, 1338 (1997).

Mental anguish has been expanded to the point where it includes being held at gunpoint for 18 seconds. *State v. Herrera*, 176 Ariz. 9, 14 ¶6, 859 P.2d 119, 129 ¶6 (1993). In *Herrera*, the victim, a deputy sheriff, was disarmed and held at gunpoint for a short period of time, possibly as little as 18 seconds, before he was shot with his own gun. If the act of pointing a gun at a conscious victim is sufficient mental anguish to support a finding of cruelty, then (F)(6) applies to virtually all shooting deaths and does not narrow at all. Arizona's sole focus on the victim's consciousness and its broad inclusion of all victims who are aware of their peril in the class of victims considered to have suffered mental cruelty fails to narrow, but instead leaves all murders involving conscious victims death eligible.

The Arizona Supreme Court is very comfortable with its expanded interpretation of its own (F)(6) aggravating factor and has repeatedly rejected claims that the factor has become overbroad in violation of *Furman v. Georgia*, 408 U.S. 238 (1972), and has ceased to narrow the class of death eligible defendants. *State v. Van Adams*, 194 Ariz. 408, 422, 984 P.2d 16, 30 (1999); *State v. Mann*, 188 Ariz. 220, 226, 934 P.2d 784, 790 (1997) ("Defendant argues the application of the (F)(6) factor was unconstitutionally vague. We disagree."); *State v. Laird*, 186 Ariz. 203, 210, 920 P.2d 769, 776 (1996) ("We rejected the argument that Arizona's death penalty statute fails to adequately narrow the class of eligible persons in *State v. Greenway*"); *State v. Lee*, 185 Ariz. 549, 558, 917 P.2d 692, 701 (1996) ("Finally, defendant challenges the "especially cruel" language of A.R.S. § 13-703(F)(6) as unconstitutionally vague. We have

previously rejected this argument."); *State v. Mata*, 185 Ariz. 319, 324-25, 916 P.2d 1035, 1040-41 (1996); *State v. Roscoe*, 184 Ariz. 484, 501, 910 P.2d 635, 652 (1996) ("Roscoe argues that Arizona's death penalty statute fails to adequately channel sentencing discretion and that the (F)(6) factor is unconstitutionally vague. These arguments were considered and rejected"); *State v. Gulbrandson*, 184 Ariz. 46, 72, 906 P.2d 579, 605 (1995) ("The (F)(6) aggravating circumstance ('especially heinous, cruel or depraved') is not unconstitutionally vague as construed by this court."); *State v. Walden*, 183 Ariz. 595, 619, 905 P.2d 974, 998 (1995) ("Walden argues that the (F)(6) factor is unconstitutional because it does not sufficiently narrow the class of death eligible defendants. This claim has been rejected."); *State v. Runningeagle*, 176 Ariz. 59, 64, 859 P.2d 169, 174 (1993) ("Runningeagle next argues that the § 13-703(F)(6) 'especially heinous, cruel or depraved' factor is unconstitutionally vague as applied to him because of the pattern of arbitrariness in finding this factor, without adherence to statutory requirements.").

Yet another challenge to (F)(6) overbreadth would have been futile, excusing exhaustion, as there is no reason to suspect that the Arizona Supreme Court would have decided this case any differently. *Lynce v. Mathis*, 519 U.S. 433, 436 n.4 (1997); *Nix v. Whiteside*, 475 U.S. 157, 163 n.3 (1986). The Arizona Supreme Court has complained about seeing the same arguments raised repeatedly in the face of its own precedent. *State v. Huerstel*, 206 Ariz. 93, 97, 75 P.3d 698, 702 (2003) ("kitchen sink approach to appellate advocacy"); *State v. Bolton*, 182 Ariz. 290, 299, 896 P.2d 830, 839 (1995) ("Despite our prior admonitions, defendant has taken the "kitchen sink" approach"); *State v. West*, 176 Ariz. 432, 439, 862 P.2d 192, 199 (1993) ("the "kitchen sink" approach has again been used"); *State v. Atwood*, 171 Ariz. 576, 658, 832 P.2d 593, 675 (1992). As a matter of comity we should accept the Arizona Supreme Court's repeated pronouncements on this issue as final and respect its stated desire to stop rehashing its previous decisions. The Arizona Supreme Court's position on (F)(6) overbreadth is exceedingly well-established.

Certiorari should be granted because the (F)(6) statutory aggravating factor at issue here was found on its face "not to channel the sentencer's discretion" so as to pass Eighth and Fourteenth Amendment muster in the absence of an appropriate narrowing construction in

Walton, 497 U.S. at 654 ("there can be no serious argument that Arizona's 'especially heinous, cruel or depraved' aggravating factor is not facially vague"). The narrowing found to comply with constitutional scrutiny in *Walton* has, with the Arizona Supreme Court's subsequent decisions, given way to constructions having such elasticity that they no longer provide narrowing that brings (F)(6) cruelty within the contours of the Eighth and Fourteenth Amendments. Those constructions render virtually all persons who murder a conscious victim eligible for a sentence of death.

CONCLUSION

For the foregoing reasons, Scott Drake Clabourne respectfully requests that the Court grant the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in which it affirmed the district court's denial of federal habeas corpus relief as to Clabourne's sentence of death.

Respectfully submitted this 29th day of December, 2017.

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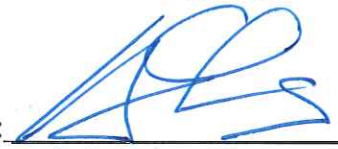
By: 
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December 29, 2017