No. 17-7257

IN THE
SUPREME COURT OF THE UNITED STATES

SCOTT D. CLABOURNE,
PETITIONER,
-vs-
CHARLES L. RYAN, ARIZONA DEPARTMENT OF CORRECTIONS,
RESPONDENTS.

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

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED FOR REVIEW

1. Should this Court grant the petition for writ of certiorari where Clabourne seeks only to correct the Ninth Circuit's non-existent error in concluding under the Anti-terrorism and Effective Death Penalty Act's deferential standard that the Arizona Supreme Court had not violated *Eddings v. Oklahoma*, 455 U.S. 104 (1982), because it considered and gave weight to Clabourne's mental health evidence?

2. Is Clabourne's claim that Arizona's (F)(6) aggravating factor is overbroad properly before this Court where he failed to raise the claim in state court, the district court concluded that the claim was procedurally defaulted, and the Ninth Circuit correctly denied a certificate of appealability as to Clabourne's argument that the futility of raising the claim in state court excused the procedural default of the claim? Does the Arizona Supreme Court's narrowing construction of the (F)(6) aggravating factor appropriately channel the sentencer's discretion, as this Court has previously held?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

RULES

OPINIONS BELOW

Following the district court's grant of habeas relief on an ineffective-assistance-of-counsel claim, Clabourne was resentenced to death in a special verdict by the Pima County Superior Court, which is included in the Appendix to Clabourne's petition for writ of certiorari. (Pet. App. A.) The Arizona Supreme Court affirmed Clabourne's convictions and sentences in an opinion reported at *State v. Clabourne*, 983 P.2d 748 (Ariz. 1999), and included in the Appendix to Clabourne's petition for writ of certiorari. (Pet. App. B.) The district court denied habeas relief in a memorandum decision and order included in the Appendix to Clabourne's petition for writ of certiorari. (Pet. App. C.) The Ninth Circuit affirmed in part and vacated and remanded in part the district court's decision in an opinion reported at *Clabourne v. Ryan*, 745 F.3d 362 (9th Cir. 2014), and included in the Appendix to Clabourne's petition for writ of certiorari. (Pet. App. D.) The Ninth Circuit denied rehearing in an order reported at *Clabourne v. Ryan*, 868 F.3d 753 (9th Cir. 2017), and included in the Appendix to Clabourne's petition for writ of certiorari. (Pet. App. E.)

STATEMENT OF JURISDICTION

Clabourne requests that a Writ of Certiorari issue to review the decision of the Ninth Circuit affirming in part and reversing and vacating in part the district court's denial of habeas relief. The Ninth Circuit issued its decision on March 5, 2014, and denied rehearing on August 1, 2017. Clabourne timely filed the petition for writ of certiorari within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254(1); and Supreme Court Rule 10.

PROVISIONS INVOLVED

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 provides, in pertinent part:

> No State shall . . . 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) provides:

> (d) 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; 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.

STATEMENT OF THE CASE

The Arizona Supreme Court summarized the facts of Clabourne's murder of Laura Webster in its opining affirming Clabourne's convictions and sentences[1]:

> On the evening of 18 September 1980, Laura Webster, a student at the University of Arizona, entered the Green Dolphin Bar with a friend. Shortly after arriving there, defendant, Scott Clabourne, and Larry Langston approached her. They talked with her for approximately twenty minutes after which all three left the bar. The next day, Ms. Webster's body was found near the Santa Cruz River. She was naked and wrapped in a bloody sheet. A blue and white bandanna was tied tightly around her neck. An autopsy revealed that the victim had been strangled and then stabbed twice in the chest. There was also evidence of oral, anal and vaginal intercourse just prior to death.
>
> No arrests were made for over a year. In August of 1981, defendant's girlfriend, Shirley Martin, contacted Detective Luis Bustamonte. She informed the detective that defendant had told her that he had killed a woman he had met in a bar. He told her that he had gone there with two friends who had ordered him to kill her. Clabourne told Martin that his friends had forced him to ingest some drugs which caused him to lose control so that he was unable to resist their command.
>
> On 12 October 1981 the Detective interviewed defendant at the Pima County Jail, where defendant was incarcerated on another charge. After receiving his *Miranda* warnings, defendant agreed to discuss the murder. He told the Detective that on the evening of 18 September 1980, he was asleep at the Salvation Army halfway house where he had been staying. Larry Langston and a man that Clabourne knew as Bob, later identified as Ed Carrico, woke him up and the three of them drove to the Green Dolphin Bar. There they met Laura Webster and convinced her to go to a cocaine party with them. They all left and began to drive around. Langston stopped the car, pulled the victim out and beat her. He threw her back into the car and they drove to where Langston had been staying. During this time Miss Webster began pleading with Clabourne to protect her.
>
> Once inside the house, the men forced the victim to remove her clothes and serve them drinks. Langston continued to beat her and all three men raped her. Clabourne claimed that she consented to relations

[1] This factual summary is presumed correct. *See* 28 U.S.C. §§ 2254(d)(2), (e)(1).

> with him. A prison guard testified at the trial that he overheard the defendant state "Yeah. I raped her. She didn't want it but I know she liked it." They were inside the house for approximately six hours.
>
> At the end of the evening, Langston told defendant to kill the woman. Clabourne maintained that he was in fear of his own life and wanted to let her escape but was scared Langston would kill him. He strangled her with a bandanna that he carried in his pocket. He then stated that Langston handed him a knife, he stabbed her twice and the three men wrapped her in a sheet and threw her in the Santa Cruz riverbed. It appeared from the autopsy, however, that she had been stabbed after she was wrapped in the sheet.

State v. Clabourne, 690 P.2d 54, 59-60 (Ariz. 1984).

A jury found Clabourne guilty of first-degree murder, kidnapping, and three counts of sexual assault. *Id.* at 59. The trial court sentenced Clabourne to death for the murder, fourteen years for the kidnapping, and fourteen years for each of the sexual assault charges, to run concurrently with each other and with the kidnapping charge. *Id.* The Arizona Supreme Court affirmed Clabourne's convictions and sentences. *Id.* at 68.

Following post-conviction-relief proceedings in state court, Clabourne filed a petition for writ of habeas corpus in federal district court. *Clabourne v. Lewis*, No. 4:91-CV-00465 (D. Ariz. 1991) The district court found that Clabourne's counsel was ineffective for failing to adequately prepare and present a case for mitigation at sentencing, granted the writ, and remanded the case for resentencing. The Ninth Circuit affirmed. *Clabourne v. Lewis*, 64 F.3d 1373 (9th Cir. 1995). On August 8, 1997, the trial court resentenced Clabourne to death for the murder and to four consecutive fourteen-year terms for the kidnapping and sexual assault charges. (Pet. App. A.) The

trial court found that the State had proven that Clabourne had "committed the offense in an especially heinous, cruel and depraved manner." (*Id.*) *See* A.R.S. § 13-751(F)(6).

The Arizona Supreme Court again affirmed the death sentence. *State v. Clabourne*, 983 P.2d 748 (Ariz. 1999). The court first determined that Clabourne had not proven the statutory mitigating factor of impairment, which requires a causal nexus, *see* A.R.S. § 13-751(G)(1) (formerly A.R.S. § 13-703(G)(1)). *Id.* at 754-55, ¶¶ 20-25. Clabourne's experts testified that "Clabourne understood the nature of his action and the difference between right and wrong, and that he was legally sane at the time of the murder." *Clabourne*, 64 F.3d at 1376.[2] One expert testified that he could not opine on Clabourne's mental state at the time of the murder and that "he could only surmise that Clabourne might be suffering from a mild form of schizophrenia." *Id.* The court noted that "all three experts agreed that there was no evidence of Clabourne's state of mind at the particular time of the offense," and no expert "stated or implied a causal relationship between Clabourne's mental health and the murder." *Clabourne*, 983 P.2d at 754, ¶ 21. In addition, the court observed, no one "indicate[d] that Clabourne had lost contact with reality or acted abnormally when he participated in the crime." *Id.*

The Arizona Supreme Court rejected Clabourne's argument that the resentencing court violated Arizona law by not explicitly stating that it had considered Clabourne's mental capacity evidence as non-statutory mitigation after rejecting the statutory claim. *Id.* at 756, ¶ 32. The court stated, "A trial court need not explicitly

[2] At his resentencing, Clabourne relied on the medical testimony that had been presented at the evidentiary hearing before the district court to support his mitigation case. *Clabourne*, 983 P.2d at 752.

indicate that mental problems carry no nonstatutory weight; the court must only consider the proffered mitigation for nonstatutory effect." *Id.* The court reasoned that "[t]he resentencing court's finding of the nonstatutory mitigating factor, passive personality/impulsive/easily manipulated . . . , demonstrates consideration of Clabourne's mental health evidence." *Id.* In considering the evidence of Clabourne's personality defects, the Arizona Supreme Court "agree[d] with the resentencing court's finding that Clabourne has a passive personality and that he is impulsive and easily manipulated by others" and "afford[ed] some nonstatutory mitigating weight to Clabourne's mental and personality deficiencies." *Id.* at 756, ¶ 33.

Following the Arizona Supreme Court's decision, Clabourne again unsuccessfully pursued post-conviction relief. After those proceedings concluded, Clabourne filed a second petition for writ of habeas corpus. *Clabourne v. Ryan*, No. 4:03-CV-00542 (D. Ariz. 2003). Clabourne alleged that the Arizona courts had refused to consider evidence of his schizophrenia as non-statutory mitigation because he failed to establish a causal connection between his schizophrenia and the murder. *Id.* (Dkt. 27.) He further alleged that the (F)(6) aggravating circumstance did not sufficiently narrow the class of defendants eligible for the death penalty. *Id.* The district court denied habeas relief but granted a certificate of appealability on the causal nexus claim. *Id.* (Dkt. 41.)

The Ninth Circuit affirmed in part and vacated in part the district court's decision and remanded the case. *Clabourne v. Ryan*, 745 F.3d 362 (9th Cir. 2014). The court determined that the Arizona Supreme Court "considered and gave mitigating weight to Clabourne's mental health problems, so its decision was not contrary to

federal law." *Id.* at 371. The court noted that "[w]hen the record reflects that the court considered and weighed the value of the proffered mitigating evidence, even when the court does not specifically cite the mitigating evidence, there is no violation of the principle described in *Eddings*." *Id.* The court reviewed the Arizona Supreme Court's consideration of Clabourne's mental health evidence and concluded that, "[b]y its own words, the Arizona Supreme Court considered and gave mitigating weight to Clabourne's mental condition." *Id.* at 372.

The Ninth Circuit rejected Clabourne's argument that the Arizona Supreme Court failed to consider his mental health evidence as mitigation because "Arizona law at the time of his resentencing generally required a causal nexus before giving mitigating weight to a defendant's mitigation evidence." *Id.* The Ninth Circuit noted that it had held in *Schad v. Ryan*, 671 F.3d 708 (9th Cir. 2011), that "a federal court sitting in review of a state court decision could not assume that a state court violated *Eddings* without a clear indication from the record that the state applied an unconstitutional rule" and stated that it could not make that assumption in Clabourne's case. *Id.* at 373. The Ninth Circuit also rejected Clabourne's argument that the Arizona Supreme Court failed to consider his evidence of schizophrenia because it did not mention schizophrenia in its discussion of non-statutory mitigation. *Id.* The court stated that it could not draw the inference that "the court considered schizophrenia in its discussion of Clabourne's 'mental illness' for purposes of statutory mitigation . . . , but disregarded schizophrenia when it later discussed Clabourne's 'mental and personality deficiencies' in its analysis of nonstatutory mitigation." *Id.* at

374. The Ninth Circuit declined to expand the certificate of appealability to include Clabourne's overbreadth challenge to the (F)(6) aggravating factor. *Id.* at 367.

Clabourne petitioned for panel rehearing and rehearing en banc. The Ninth Circuit stayed the petitions pending the resolution of *McKinney v. Ryan*, No. 09-99018 (9th Cir. 2009). The en banc court issued its decision in *McKinney* on December 29, 2015, *see McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015), and this Court denied certiorari on October 3, 2016. The Ninth Circuit ordered the parties to file supplemental briefs addressing the impact of *McKinney* on the issues presented in Clabourne's appeal. On August 1, 2017, the Ninth Circuit panel denied the petition for panel rehearing and rehearing en banc. *Clabourne v. Ryan*, 868 F.3d 753 (9th Cir. 2017). Two judges wrote an opinion concurring in the denial of rehearing, stating that, although there had been developments in the Ninth Circuit's precedents since its opinion in *Clabourne*, "none alter our assessment of what the Arizona Supreme Court did in resolving Clabourne's appeal." *Id.* at 754. The concurring judges concluded that the panel's previous analysis of the Arizona Supreme Court's action, which the judge dissenting from the denial of rehearing had joined, remained correct. *Id.*

REASONS FOR DENYING THE WRIT

This case presents no reason, much less a compelling one, for this Court to grant certiorari. *See* Sup. Ct. R. 10 (compelling reasons include decision that decides an important federal question in conflict with other state court of last resort or United States court of appeals, decides an important question of federal law that has not been settled by this Court, or decides an important federal question in conflict with relevant decisions of this Court). First, Clabourne seeks only to correct the Ninth Circuit's alleged error in concluding that the Arizona Supreme Court did not violate *Eddings* by applying a causal nexus requirement to Clabourne's mitigating evidence. The questions of federal law presented by this case have been well-settled by this Court, and the Ninth Circuit's decision does not conflict with this Court's precedent or decisions by other state courts of last resort or the courts of appeals. Second, the Arizona Supreme Court did not apply a causal nexus requirement to Clabourne's mitigating evidence and that decision therefore was neither contrary to nor based on an unreasonable application of this Court's clearly established precedent. *See* 28 U.S.C. § 2254(d)(1).

Clabourne's claim concerning the statutory "especially heinous, cruel or depraved" aggravating circumstance, *see* A.R.S. § 13-751(F)(6), is not properly before this Court because Clabourne did not raise the claim in state court, the district court correctly concluded that it was procedurally defaulted, and both the district court and Ninth Circuit declined to certify it for appeal. Alternatively, as this Court has held before, the Arizona Supreme Court's narrowing construction of the (F)(6) aggravating

circumstance "genuinely narrow[s] the class of persons eligible for the death penalty." *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

A. Clabourne Seeks Only to Correct a Perceived Error, which is not a Compelling Reason to Grant Certiorari. Further, the Ninth Circuit did not Err in Denying Relief on Clabourne's Causal Nexus Claim.

"A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Despite Clabourne's other stated reasons for granting the petition, he ultimately contends only that the Arizona Supreme Court and the Ninth Circuit misapplied *Eddings* in concluding that the state courts had not applied a causal nexus requirement to Clabourne's mitigating evidence. (Pet. at 9-12.) *See Butler v. McKellar*, 494 U.S. 407, 429 (1990) (Brennan, J., dissenting) ("[T]he Supreme Court's burden and responsibility are too great to permit it to review and correct every misstep made by the lower courts in the application of accepted principles. Hence the Court generally will not grant certiorari just because the decision below may be erroneous.") (quotations omitted). This Court should not grant certiorari merely to correct the alleged error. In any event, no error occurred.

1. The Ninth Circuit has Abandoned the Clear Indication Test, and, in any event, that Test was Consistent with AEDPA.

Clabourne argues that this Court should grant certiorari "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.'" (Pet. at 12.) However, the Ninth Circuit abandoned the "clear indication" test in *McKinney*. There is no need for this Court to grant certiorari to

instruct the Ninth Circuit not to apply the test in future cases. For this reason alone, certiorari is not warranted.

Further, the "clear indication" test applied in this case was consistent with AEDPA. The Ninth Circuit announced the "clear indication test" in *Schad*. There, in concluding that the Arizona courts had not violated *Eddings*, the Ninth Circuit distinguished *Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2007), and *Styers v. Schriro*, 547 F.3d 1026 (9th Cir. 2008), stating that in both of those cases, "it was clear from the record that the lower court had applied the unconstitutional nexus test and had excluded mitigation evidence." 671 F.3d at 723-24. In contrast, in Schad's case,

> there [was] no indication that the state courts applied a nexus test, either as a method of assessing the weight of the mitigating evidence, or as an unconstitutional screening mechanism to prevent consideration of any evidence. Rather, the record shows that the sentencing court did consider and weigh the value of the small amount of childhood mitigation evidence that was offered, stating that it was not "a persuasive mitigating circumstance in this case."

Id. at 724. The Ninth Circuit concluded that, "[a]bsent a clear indication in the record that the state court applied the wrong standard, we cannot assume the courts violated *Eddings*'s constitutional mandates." *Id.*

In *Clabourne*, the Ninth Circuit applied the "clear indication" test, explaining that "[r]elief must be justified by the decision adjudicating Clabourne's claim." 745 F.3d at 373 (citing 28 U.S.C. § 2254(d)). By citing § 2254(d), the Ninth Circuit indicated that the "clear indication" test was consistent with the deference it was required to accord the state courts' decisions under AEDPA. Similarly, in *Murray v. Schriro*, 746 F.3d 418 (9th Cir. 2014), the Ninth Circuit, in its discussion of the clear

indication test, cited this Court's precedent in *Woodford v. Visciotti*, 537 U.S. 19 (2002), which established that federal courts must presume that state courts know and follow the law and that AEDPA imposes a "'highly deferential standard for evaluating state court rulings.'" *Id.* at 24 (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997)). In *Murray*, the Ninth Circuit clarified that it must presume that the state court applied a causal nexus analysis only as a permissible weighing tool absent a clear indication in the record that the state court had violated *Eddings*. 746 F.3d at 455. The court continued, "[t]his presumption applies not only when we are drawing inferences from a state court's silence, but also when we are interpreting a state court's ambiguous statement." *Id.* (citing *Visciotti*, 537 U.S. at 22-24). By citing *Visciotti*, the Ninth Circuit in *Murray* showed that its "clear indication" test was consistent with both this Court's precedent regarding the presumption that state courts know and follow the law and AEDPA deference.

In *McKinney*, however, the Ninth Circuit abandoned the "clear indication" test. 813 F.3d at 819. The court stated, "Section 2254(d) is already a form of a clear statement or a clear indication rule, which all federal courts are required to follow." *Id.* The Ninth Circuit concluded that the "clear indication" test was "an inappropriate and unnecessary gloss on the deference already required under § 2254(d)." *Id.* Significantly, the Ninth Circuit determined that the "clear indication" test was consistent with the deference required under § 2254(d) and that the additional "gloss" was unnecessary to decide causal nexus cases.

During the years that the Ninth Circuit applied the "clear indication" test, this Court never found that test inconsistent with either § 2254(d) or this Court's precedent. And the cases above applying the test make plain that it was consistent with AEDPA's requirement that a federal court cannot grant habeas relief unless a state court's decision was contrary to or based on an unreasonable application of this Court's precedent. If anything, the test understated the prisoner's burden under AEDPA. To obtain habeas corpus relief from a federal court, a state prisoner must show that the challenged state-court ruling rested on "an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). The AEDPA standard is more difficult to meet than a "clear error" standard. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (expressly disapproving *Van Tran v. Lindsey*, 212 F.3d 1143, 1153–54 (9th Cir. 2000)). "The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." *Id.* (citing cases). "For purposes of § 2254(d)(1), 'an *unreasonable* application of federal law is different from an *incorrect* application of federal law.'" *Richter*, 562 U.S. at 100 (quoting *Williams (Terry) v. Taylor*, 529 U.S. 362, 410 (2000)). "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). "This is a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (citations and internal

quotation marks omitted). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Richter*, 562 U.S. at 103. The Ninth Circuit's "clear indication" standard was effectively the lower "clear error" standard already rejected by this Court.

Clabourne further argues that

> [c]ertiorari 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.

(Pet. at 12.) Clabourne's suggestion that the Ninth Circuit be permitted to consider past cases in which the Arizona Supreme Court purportedly applied a causal nexus requirement would effectively establish a presumption that the Arizona Supreme Court violated *Eddings* in any particular case. This presumption would erroneously invert the presumption that the state courts know and follow the law. *Visciotti*, 537 U.S. at 22-24. It also would contravene AEDPA's prohibition against granting a writ of habeas corpus unless "the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law" as decided by this Court. 28 U.S.C. § 2254(d). As the Ninth Circuit stated in this case, "[a] federal court reviewing a state court decision on a petition for a writ of habeas corpus sits in review of the last decision that resulted in the prisoner's incarceration, not subsequent interpretations justifying results in other cases." *Clabourne*, 745 F.3d at 373. The Arizona Supreme Court's opinions in other cases have no relevance to whether that court applied a causal nexus test in Clabourne's case. Because Clabourne

has not presented a compelling reason for this Court to grant certiorari, this Court should deny the petition.

2. The Arizona Supreme Court did not apply a Causal Nexus Requirement to Clabourne's Mitigating Evidence, and the Ninth Circuit Correctly Denied Habeas Relief.

Even if error-correction were a compelling reason for this Court to grant certiorari, there was no error in this case. The Ninth Circuit correctly concluded that the Arizona Supreme Court had not applied a causal nexus requirement to Clabourne's mitigating evidence. The Arizona Supreme Court considered all of Clabourne's non-statutory mitigating evidence and correctly determined that the evidence was entitled to little weight because Clabourne had not demonstrated a causal nexus between it and the murder. Thus, as the Ninth Circuit concluded, the Arizona Supreme Court's decision was neither contrary to, nor based on an unreasonable application of, *Eddings*. *Clabourne*, 745 F.3d at 371.

The Arizona Supreme Court first considered the mental health evidence that Clabourne proffered to prove the (G)(1) statutory mitigating factor. *Clabourne*, 983 P.2d at 754-55, ¶¶ 20-25. The court specifically considered the expert testimony and Clabourne's mental health records and concluded that Clabourne's mental illness alone was insufficient to support a (G)(1) finding. *Id.* at 754, ¶ 21. The court went on to consider Clabourne's mental health evidence in its review of non-statutory mitigation, noting that, "[w]hen a defendant's mental capacity is insufficient to support a (G)(1) finding, the court must consider whether it is a nonstatutory mitigating circumstance." *Id.* at 756, ¶ 31. The court "afford[ed] some nonstatutory weight to Clabourne's mental

and personality deficiencies." *Id.* at 756, ¶ 33. Thus, as the Ninth Circuit observed, "By its own words, the Arizona Supreme Court considered and gave mitigating weight to Clabourne's mental condition." *Clabourne*, 745 F.3d at 372. The Arizona Supreme Court did not consider whether Clabourne's mental and personality deficiencies had affected his conduct. Although the Arizona Supreme Court did not specifically mention Clabourne's evidence that he suffered from schizophrenia in its review of non-statutory mitigation, the court did specifically refer to it in its consideration of the (G)(1) mitigating factor. As the Ninth Circuit determined, "It is illogical to conclude that the Arizona Supreme Court considered that diagnosis and explicitly referenced it in one portion of its opinion but forgot it when considering nonstatutory mitigation discussed just a few pages later in the opinion." *Id.* at 374. Thus, the Arizona Supreme Court considered all of Clabourne's mental health evidence, and the Ninth Circuit correctly denied habeas relief. Clabourne has not presented a compelling reason for this Court to grant certiorari.

B. Clabourne's Claim that the (F)(6) Aggravating Factor is Overbroad is Procedurally Defaulted, and the Apparent Futility of Raising the Claim in State Court does not Excuse the Default. Thus, the Ninth Circuit Correctly Declined to Issue a Certificate of Appealability.

Clabourne asserts that the (F)(6) aggravator is overbroad, and that the narrowing instructions the Arizona Supreme Court has approved do not appropriately channel the sentencer's discretion. (Pet. at 14-15.) The Ninth Circuit correctly declined to expand the certificate of appealability to include the (F)(6) overbreadth claim. Under AEDPA, "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28

U.S.C. 2253(c)(2). To obtain a certificate of appealability, a petitioner must "'sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 529 U.S. 483 (2000)). Because reasonable jurists could not debate the district court's conclusion that the apparent futility of raising the overbreadth claim in state court did not excuse the procedural default, the Ninth Circuit correctly declined to expand the certificate of appealability to include the claim.

Clabourne raised the overbreadth claim for the first time in his habeas petition, and the district court determined that the claim was procedurally defaulted. *Clabourne v. Ryan*, No. 4:03-CV-00542 (D. Ariz. Sept. 29, 2009) (Dkt. 41.) The district court rejected Clabourne's argument that the futility of raising the claim in state court excused the procedural default, citing *Roberts v. Arave*, 847 P.2d 528 (9th Cir. 1988). *Id.* (Dkt. 41 at 27.) In *Roberts*, the Ninth Circuit stated, "the apparent futility of presenting claims to state courts does not constitute cause for procedural default." *Id.* at 530 (citing *Engle v. Isaac*, 456 U.S. 107, 130 (1982)). In *Engle*, this Court stated,

> the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid.[3]

[3] Although the Ninth Circuit had adopted the "futility doctrine" in *Sweet v. Cupp*, 640 F.2d 233, 236 (9th Cir. 1981), its application of that doctrine was "short-lived." *Noltie v.*

Four years after *Engle*, this Court reaffirmed that case, stating,

> [I]t is the very prospect that a state court "may decide, upon reflection, that the contention is valid" that undergirds the established rule that "perceived futility alone cannot constitute cause . . . . , for allowing criminal defendants to deprive the state courts of [the] opportunity" to reconsider previously rejected constitutional claims is fundamentally at odds with the principles of comity that animate [*Wainwright v. Sykes*, 433 U.S. 72 (1977)] and its progeny.

Smith v. Murray, 477 U.S. 527, 535 (1986) (quoting *Engle*, 456 U.S. at 130 and n.36). Thus, even if it would have been futile to present the constitutional claim regarding the (F)(6) aggravating circumstance, that does not excuse Clabourne's failure to present it.

Clabourne cites *Lynce v. Mathis*, 519 U.S. 433 (1997), and *Nix v. Whiteside*, 475 U.S. 157 (1986), for the proposition that the futility of presenting a challenge to the (F)(6) aggravating circumstance excuses the exhaustion requirement. Neither *Lynce* nor *Nix* addressed *Engle.* In *Lynce*, this Court stated that it was "satisfied . . . that exhaustion would have been futile." 519 U.S. at 436 n.4. In *Nix*, the this Court simply noted that "the Court of Appeals accepted the District Court's conclusion that the Sixth Amendment claim was exhausted, since further proceedings would be futile." 475 U.S. at 163 n.3. However, neither statement was necessary to resolve the issues in those cases, and the question of whether apparent futility excuses the exhaustion requirement was not squarely before this Court. Thus, *Lynce* and *Nix* do not support Clabourne's argument. Clabourne's argument that his procedural default should be excused based on apparent futility is baseless.

Peterson, 9 F.3d 802, 805 (9th Cir. 1993). As noted above, after this Court's decision in *Engle*, the Ninth Circuit rejected the futility doctrine in *Roberts*. *See* 847 F.2d at 520;

But even if the claim that the (F)(6) aggravating circumstance is unconstitutionally overbroad is not procedurally defaulted and is properly before this Court, the claim is meritless because the Arizona Supreme Court's narrowing construction in this case is consistent with the narrowing constructions this Court has previously approved. In *Walton v. Arizona*, 497 U.S. 639 (1990), this Court held that the (F)(6) aggravating factor was unconstitutionally vague on its face. *Id.* at 654. This Court also held that a facially vague aggravator may be remedied by narrowing instructions, regardless of whether a judge or jury makes the sentencing determination. *Id.* at 653-54. Further, this Court stated, "Recognizing that the proper degree of definition of an aggravating factor of this nature is not susceptible of mathematical precision, we conclude that the definition given to the 'especially cruel' provision by the Arizona Supreme Court is constitutionally sufficient because it gives meaningful guidance to the sentencer." *Id.* at 655. In *Lewis v. Jeffers*, 497 U.S. 764 (1990), this Court stated that *Walton* "squarely forecloses any argument that Arizona's subsection (F)(6) aggravating circumstance, as [previously] construed by the Arizona Supreme Court, fails to channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Id.* at 777-78. Thus, this Court approved the narrowing construction that the Arizona Supreme Court had adopted in earlier cases.

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see also Parson v. San Quentin Prison Warden, 158 Fed. Appx. 814, 816 (9th Cir. 2005) (rejecting futility argument and citing *Engle*).

In *State v. Gretzler*, which this Court addressed in *Walton* and *Jeffers*, the Arizona Supreme Court had stated that "cruelty involves the pain and distress visited upon the victims." 659 P.2d 1, 10 (Ariz. 1983). The court further stated that cruelty also involves "'mental . . . distress visited upon the victims.'" *Id.* (quoting *State v. Clark*, 616 P.2d 888, 896 (Ariz. 1980)). Here, the sentencing court in the special verdict stated,

> Cruelty addresses the actual suffering of the victim. To prove that the murder was especially cruel, the State established beyond a reasonable doubt that the victim consciously suffered physical or mental pain, that the suffering was beyond the norm experienced by other victims of first degree murder, and that the Defendant knew or should have known the effect his actions would have on the victim.

(Pet. App. A.) The Arizona Supreme Court described the "especially cruel" prong as "involv[ing] pain and distress visited upon the victim. This distress includes mental anguish." *Clabourne*, 983 P.2d at 753, ¶17. This narrowing construction was consistent with the narrowing constructions this Court approved in *Walton* and *Jeffers*.

Since *Gretzler*, the Arizona Supreme Court has rejected numerous challenges to the (F)(6) aggravator. *See* Pet. at 13-14 (collecting cases). This Court has not addressed the constitutionality of the (F)(6) aggravator since *Walton* and *Jeffers*. Thus, this Court's determination that the (F)(6) aggravator as construed by the Arizona Supreme Court is not overbroad still stands.

Clabourne contends that "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." (Pet. at 13.) He cites *State v.*

Herrera, 859 P.2d 119 (1993), as an example of a case that demonstrates that the Arizona Supreme Court's narrowing construction of the (F)(6) aggravator does not actually narrow the class of death-eligible defendants. In *Herrera*, the defendant fought with an officer who had been summoned to the scene by a motorist who thought that one of the vehicles Herrera and his sons had been driving had forced the other off the road. *Id.* at 122. After Herrera refused to comply with the officer's request for identification and the officer placed him in the back of his patrol car, Herrera wrestled the officer to the ground, held him at gunpoint, and commanded one of his sons to shoot the officer. *Id.* at 122-23. Defendant's son testified that after a "kind of little long" while, he heard the sound of a gun going off. *Id.* at 123.

The trial court found in the special verdict that the officer had been on his back in the dirt with a gun "pointed at him and with the screams of his tormentors ringing in his ears. This went on for a period of time estimated by those present to be from 18 seconds to two or three minutes." *Id.* at 129. The Arizona Supreme Court determined that the record did not support the trial court's reference to "18 seconds to two or three minutes." *Id.* at 130. Rather, the court stated, the record "clearly demonstrates that *enough* time elapsed between the time that Deputy Marconnet's gun was taken away from him and the time that he was shot to give rise to tremendous emotional anguish." *Id.*

Herrera is not a case that merely involves a conscious victim. The victim there was forced to the ground and lay in the dirt while Herrera pointed a gun at him. Some time passed after Herrera gave the command to kill the officer before Herrera's son

shot the officer. The officer had ample opportunity in that time to contemplate his fate. As the trial court found and the Arizona Supreme Court agreed, "the victim must have experienced extreme and terrifying fear while staring into the barrel of the gun pointed at his face" and "obviously underwent excruciating mental anguish as well." *Id.* at 130. The facts of *Herrera* set it apart from a case in which a victim is merely conscious. A victim can be conscious and still be unaware of his or her fate or not have sufficient time to contemplate his or her fate. Thus, contrary to Clabourne's assertion, the Arizona Supreme Court's narrowing construction does not expand the (F)(6) aggravator to apply to any conscious victim. The Arizona Supreme Court's focus on the mental anguish suffered by the victim sufficiently narrows the class of death eligible defendants. There is no need for this Court to revisit its prior decisions on this issue.

CONCLUSION

Based on the foregoing authorities and arguments, Respondents respectfully request that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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