NO. 18-1109

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES ERIN MCKINNEY,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Writ of Certiorari to the Arizona Supreme Court

BRIEF OF THE ARIZONA CAPITAL REPRESENTATION PROJECT IN SUPPORT OF PETITIONER

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Arizona Supreme Court was required to apply current law when weighing mitigating and aggravating evidence to determine whether a death sentence is warranted.
2. Whether the correction of error under *Eddings v. Oklahoma*, 455 U.S. 104 (1982), requires resentencing.

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INTEREST OF AMICUS CURIAE[1]

The Arizona Capital Representation Project (ACRP) is a statewide non-profit legal services organization that assists indigent persons facing the death penalty in Arizona through direct representation, *pro bono* training and consulting services, and education. ACRP tracks and monitors all of the capital prosecutions in Arizona.

Amicus has a particularized and informed perspective on how the death penalty operated in the relevant time period and how it currently operates in the State of Arizona.

SUMMARY OF ARGUMENT

In *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015), the Ninth Circuit held *en banc* that for a period greater than 15 years, the Arizona Supreme Court consistently violated this Court's decision in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), by refusing to consider, as a matter of law, mitigating evidence that was not causally related to the crime. The Ninth Circuit remanded McKinney's case to the Arizona District Court with instructions to "grant

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[1] Pursuant to Rule 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part and that no person other than amicus curiae made a monetary contribution to the preparation or submission of this brief. The parties have provided a blanket written consent to the filing of this brief.

the writ with respect to McKinney's sentence unless the state, within a reasonable period, either corrects the constitutional error in his death sentence or vacates the sentence and imposes a lesser sentence consistent with the law." *McKinney,* 813 F.3d at 827.

In order to correct the constitutional error, the state sought a new independent review of McKinney's death sentences in the Arizona Supreme Court. *State v. McKinney*, 426 P.3d 1204, 1205 (Ariz. 2018). The defense objected on the grounds that Mr. McKinney's death sentences were no longer final, and thus, subject to the Sixth Amendment protections articulated in *Ring v. Arizona*, 536 U.S. 584 (2002). The Arizona Supreme Court granted the state's motion, undertook an independent review of McKinney's death sentences and affirmed both sentences. *Id*. This Court granted certiorari from that decision. *McKinney v. Arizona*, 2009 WL 936074 (June 10, 2019) (mem.).

By conducting a new independent review, rather than order a new sentencing hearing, the Arizona Supreme Court has failed to recognize the effect its causal nexus requirement had on trial courts and defense counsel. Furthermore, in its new independent review decisions, the Arizona Supreme Court has continued its long history of finding non-causally connected mitigation deserving of nothing more than *de minimis* weight—and never sufficiently substantial to call for a life sentence.

ARGUMENT

I. Arizona's Unconstitutional Causal Nexus Test Deprived Capital Defendants of a Fair Sentencing Hearing.

An *en banc* panel of the Ninth Circuit recognized that "[f]or a period of a little over 15 years in capital cases, in clear violation of *Eddings*, the Supreme Court of Arizona articulated and applied a 'causal nexus' test for non-statutory mitigation that forbade as a matter of law giving weight to mitigating evidence, such as family background or mental condition, unless the background or mental condition was causally connected to the crime." *McKinney*, 813 F.3d at 802. The unconstitutional causal nexus test originated in the Arizona Supreme Court's decision in *State v. Wallace*, 773 P.2d 983 (Ariz. 1989):

> A difficult family background, in and of itself, is not a mitigating circumstance. *If it were, nearly every defendant could point to some circumstance in his or her background that would call for mitigation*. A difficult family background is a relevant mitigating circumstance if a defendant can show that something in that background had an effect or impact on his behavior that was beyond the defendant's control.

Id. at 986 (emphasis supplied). This language makes clear that the Arizona Supreme Court was attempting to limit the number of capital defendants

who may be afforded mercy through its causal nexus test. *See also State v. Bolton*, 896 P.2d 830, 854 (Ariz. 1995) (citing *Wallace*) ("If [a difficult family background] were [mitigating without a causal nexus], many homicide defendants could point to some circumstance in their background that would call for mitigation.").

Arizona's causal nexus test "forbade as a matter of law giving weight to mitigating evidence" that was not causally connected to the crime. This unconstitutional limitation has had the effect of depriving scores of capital defendants their Eighth Amendment right to individualized capital sentencing proceedings.

a. Consistent with Arizona Law, Sentencing Courts Refused to Consider Non-Casually Connected Mitigation.

The Arizona Supreme Court has reasoned that resentencing is unnecessary to cure *Eddings* violations because the *Eddings* error occurred on appeal, and therefore conducting an independent review is adequate to correct the error. *State v. Styers*, 254 P.3d 1132, 1133 (Ariz. 2011) ("The State then moved this Court to *remedy its initial independent review* of Styers' death sentence by conducting a new independent review...") (emphasis added); *id.* at 1137 (Hurwitz, V.C.J., dissenting) ("because the purported constitutional error identified by the Ninth Circuit occurred during direct appeal, not in the superior court, the State quite

reasonably decided not to seek a new sentencing proceeding"). However, the Arizona Supreme Court's rule requiring defendants to establish a causal nexus between the mitigation and the crime deprived capital defendants of a fair sentencing hearing. The Arizona Supreme Court's decision to conduct a *de novo* independent review in *McKinney*, instead of remanding to the trial court for a resentencing, fails to appreciate that throughout the 1990s and early 2000s, trial courts followed the law established by the state's high court and followed the causal-nexus law.

Trial judges, who were responsible for sentencing capital defendants in Arizona until this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), excluded mitigation from the sentencing calculation on the basis of an unconstitutional causal nexus test. This Court has long recognized that "[t]rial judges are presumed to know the law and to apply it in making their decisions." *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds by Ring v. Arizona*. *Walton* is particularly instructive here because, in that case, this Court determined that sentencing judges in Arizona looked to the decisions of the Arizona Supreme Court to determine how to apply the law to a capital sentencing decision. *Id*. In Arizona, from approximately 1989 to 2005, the state supreme court *and* the trial courts unconstitutionally applied a causal nexus test.

In *McKinney*, the trial court "accepted Dr. McMahon's PTSD diagnosis, but concluded that it was not causally connected to McKinney's criminal

behavior…The judge gave McKinney's PTSD no weight as a mitigating factor." *McKinney*, 813 F.3d at 809; *see also id*. at 810 (the Ninth Circuit quoting the trial judge: "no substantial reason to believe that even if the trauma that McKinney had suffered in childhood had contributed to an appropriate diagnosis of Post-traumatic Stress Syndrome *that it in any way affected his conduct in this case*.") (emphasis in original). In McKinney's original independent review of his death sentence, conducted on direct appeal, the Arizona Supreme Court affirmed the trial court's refusal to give any weight to the non-causally connected mitigation. *State v. McKinney*, 917 P.2d 1214, 1234 (Ariz. 1996). Although the Ninth Circuit granted relief on the basis of the state supreme court's error, it is clear that it was initially the sentencing court who deprived McKinney of his Eighth Amendment right to the consideration of mitigating evidence.

Likewise, in *State v. Poyson*, the Arizona Supreme Court incorporated the trial court's analysis of the defendant's mitigation in its unconstitutional application of the causal nexus test. *Poyson v. Ryan*, 879 F.3d 875, 889 (9th Cir. 2018) (the trial court gave no weight to mitigation, including Poyson's mental health, substance abuse, and troubled childhood because it was "not causally related to the murders.") Indeed, in the relevant time period, it was common for the Arizona Supreme Court not to independently review the mitigating evidence at all, but to simply adopt the lower court's rationale for imposing a death sentence. *See, e.g.,*

State v. Canez, 42 P.3d 564, 595 (Ariz. 2002) ("The trial court acknowledged that Cañez had endured 'violence, suicide, mental illness, and poverty' as a child, but determined that these experiences were 'not sufficiently connected to his conduct at the time of his offense to constitute a substantial relevant mitigating circumstance.'"); *State v. Djerf*, 959 P.2d 1274, 1289 (Ariz. 1998) ("The trial court considered the evidence [of defendant's difficult family background] but found it irrelevant and declined to give it weight because proof was lacking that his family background had any effect on the crimes."); *State v. Towery*, 920 P.2d 290, 310-11 (Ariz. 1996) ("[T]he judge rejected the evidence [of the defendant's abusive upbringing] as a mitigating factor because he failed to establish a causal nexus between his family background and the crime…"); *State v. Williams*, 904 P.2d 437, 453 (Ariz. 1995) ("We agree with the trial court, which said, '[T]here was no evidence, including considering the Defendant's own testimony, to indicate that the cocaine usage by Defendant was a factor in the perpetration of the murder.'") (alteration in original).

The Arizona Supreme Court's long-standing unconstitutional causal nexus test has had lasting effects on the trial courts. Even today, the Arizona judicial branch publishes a Capital Sentencing Guide, *which instructs judges they may reject mitigation where the defendant fails to prove a causal nexus*. The Capital Sentencing Guide "was created by the Capital Staff Attorneys of the Arizona Death Penalty Judicial Assistance Program to assist

Arizona's Superior Court Judges." https://www.azcourts.gov/ccsguide/ (updated June 2019). The Guide cautions judges that "a difficult family background, including child abuse, *is not necessarily relevant* without a showing that it affected the defendant's conduct in committing the crime." https://www.azcourts.gov/ccsguide/Mitigating-Circumstances/CHILDHOOD-FAMILY (last accessed August 8, 2019) (citing *State v. Sansing*, 77 P.3d 70 (Ariz. 2003); *State v. Greene*, 967 P.2d 106 (Ariz. 1998); *State v. Doerr*, 969 P.2d 1168 (Ariz. 1998); *State v. Mann*, 934 P.2d 784 (Ariz. 1997); *State v. Towery*, 920 P.2d 290 (Ariz. 1996)). The guide further notes, "[a]t times, the [Arizona Supreme Court] has expressly stated that a difficult family background is not relevant or mitigating *at all* unless it is causally linked to the defendant's conduct at the time of the crime." *Id.* (citing *State v. White (I)*, 815 P.2d 869 (Ariz. 1991)).

Of course, this sentencing guide is providing unconstitutional guidance inconsistent with the entirety of this Court's death penalty jurisprudence. In 1976, this Court recognized that "the fundamental respect for humanity underlying the Eighth Amendment … requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the death penalty." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (internal citation omitted). In the more-than-thirty years since *Woodson*, this Court has repeatedly reaffirmed that

facts regarding a capital defendant's background and character, including a difficult upbringing, are relevant and the consideration of such evidence is not discretionary. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 264 (2007) ("Our cases following *Lockett* have made clear that when the jury is not permitted to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence—because it is forbidden from doing so by statute or a judicial interpretation of a statute—the sentencing process is fatally flawed."); *Sumner v. Shuman*, 483 U.S. 66, 75-76 (1987) (quoting *Lockett*, 438 U.S. at 604) ("[I]n order to give meaning to the individualized-sentencing requirement in capital cases, the sentencing authority must be permitted to consider 'as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense.'")

The Guide also notes "conflicting case law" on the mitigating effect of a prisoner's good behavior and notes that, in Arizona, "[t]he overwhelming majority of cases state rather emphatically that 'good conduct during trial' is *not* a mitigating circumstance, since it is in the defendant's best interests to behavior well and cooperate." https://www.azcourts.gov/ccsguide/Mitigating-Circumstances/MODEL-PRISONER (last accessed August 8, 2019) (citing *State v. Trostle*, 951 P.2d 869, 887 (Ariz. 1997); *State v. (Michael) Apelt*, 861 P.2d 634, 653 (Ariz. 1993); *State v. Spencer*, 859 P.2d 146, 154 (Ariz. 1993); *State v. Atwood*, 832 P.2d 593, 668-69 (Ariz. 1992); *State v. Lavers*, 814 P.2d 333, 352-53 (Ariz. 1991)) (emphasis in original). The

Guide does not acknowledge this Court's decades-old holding that an inmate's good behavior is mitigating and must be considered pursuant to *Eddings*, even though it may "not relate specifically to … [the defendant's] culpability for the crime he committed." *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986).

Although the Arizona Supreme Court now recognizes in its caselaw that a causal nexus test is inconsistent with this Court's precedent, the court nevertheless continues to publish materials, which are intended to educate judges and attorneys across the state, that perpetuate the *Eddings* error.

b. The Arizona Supreme Court's Causal Nexus Test Deprived Defendants of the Investigation and Presentation of Mitigating Evidence.

Beyond the outright rejection of non-causally connected mitigation, the Arizona Supreme Court's causal nexus test impacted indigent defense funding and strategy decisions.

In *State v. Apelt*, 861 P.2d 634, 651 (Ariz. 1992), the trial court refused to fund the mitigation investigation unless the defendant was able to explain how the proposed investigation would produce causally connected mitigation. Apelt's defense counsel sought funding to travel to Germany, where his client was born and where he lived 25 years until shortly before the crime. The trial court denied the funding, stating "'this has been a very expensive case to this point in time and I am

concerned about when it is the defendant has the right to have all these things furnished to him at no cost.'" *Apelt v. Ryan*, 878 F.3d 800, 811 (9th Cir. 2017). The Arizona Supreme Court affirmed the denial of funding because

> [a]lthough defendant claimed to have a couple of "leads" as to mitigating information available in Germany, he only specifically mentioned an alleged "psychological hospitalization." He did not explain why the hospitalization might be mitigating,… [and] failed to explain what evidence was available in Germany and how it would assist him. He did not offer any reason why a difficult childhood and lack of education would be mitigating.

861 P.2d at 651 (citing *Wallace*, 773 P.2d at 986). Because of Arizona's unconstitutional causal nexus test, Apelt was deprived of any opportunity to investigate or present mitigating evidence at his capital sentencing hearing.

Arizona's unconstitutional causal nexus test also deprived capital defendants of their Sixth Amendment right to the effective assistance of counsel, because it led counsel to abandon mitigation that did not explain the crime. In *State v. Bearup*, CR2003-024938, defense counsel declined to present mitigation that was "not directly related to the offense." *Bearup v. Ryan*, 2:16-cv-03357-SPL, Dkt. 39 at 185 n.24 (9/18/2017). In *State v. Nordstrom*, CR-55947, defense counsel failed to investigate or

present any mitigation after the defendant waived the presentation of causally-connected mitigation. *See* Petition for Post-Conviction Relief (6/29/2015). Notably, mitigation proceedings have become far more expansive in the time period since the Arizona Supreme Court stopped prohibiting sentencers from considering non-causally connected mitigation. *Compare e.g. State v. McKinney*, CR91-90926 (two days of evidence at the sentencing hearing); *State v. Styers*, 89-12631 (one-day sentencing hearing); *with State v. Ricci*, CR2011005961 (2019 life verdict; six-week penalty phase hearing); *State v. Redondo*, CR2010106178 (2019 life verdict; two week penalty phase hearing).

In *State v. Roseberry*, 353 P.3d 847 (Ariz. 2015) (*Roseberry II*), post-conviction counsel raised a claim of ineffective assistance of counsel arising out of appellate counsel's failure to challenge the trial court's improper causal nexus instruction to the jury. The trial court had instructed the jury that it was not permitted to consider mitigation unless Roseberry proved a causal connection to the crime. *Id*. at 508. On review from the post-conviction court's denial of relief, the Arizona Supreme Court determined there was no prejudice resulting from counsel's failure because the "[c]ourt was well aware that all mitigation evidence must be considered … [A]ccordingly, any error in the jury instruction was cured when this [c]ourt considered all mitigation evidence in its independent review of the entire record …" *Id*. at 849. The Arizona Supreme Court, on petition for review, did not recognize that because

non-causally connected mitigation was precluded from the jury's consideration, defense counsel likely did not offer any non-causally connected mitigation and, thus, it did not exist in the record on independent review. The trial court's error tainted the record on which the Arizona Supreme Court conducted its review. Importantly, the Arizona Supreme Court has long held that, in conducting an independent review, it serves "as an appellate court, *not as a trial court*." *State v. Rumsey*, 665 P.2d 48, 55 (Ariz. 1983), *aff'd Arizona v. Rumsey*, 467 U.S. 203, 210 (1984) (emphasis supplied). Simply put, the Arizona Supreme Court's independent review of death sentences is not sufficient to cure limitations on the presentation and consideration of mitigating evidence that occurred at trial.

II. The Arizona Supreme Court Continues to Fail to Give Meaningful Consideration to Non-Causally Connected Mitigation.

The Arizona Supreme Court has now had occasion to conduct three new independent reviews of cases remanded by the Ninth Circuit Court of Appeals for violations of *Eddings v. Oklahoma*. *State v. Hedlund*, 431 P.3d 181 (Ariz. 2018); *State v. McKinney*, 426 P.3d 1204 (Ariz. 2018); *State v. Styers*, 254 P.3d 1132 (Ariz. 2011). In each of those cases, the Arizona Supreme Court has given mere lip service to the requirements of *Eddings* and its progeny—acknowledging the Eighth Amendment's prohibition against the exclusion of mitigating

evidence where a causal nexus is lacking, but assigning *de minimus* weight.

In *Styers*, the court began its analysis of the mitigation by stating, "[w]hen assessing the weight and quality of a mitigating factor, we take into account how the mitigating factor relates to the commission of the offense." *Styers*, 254 P.3d at 1135 (citing *State v. Newell*, 132 P.3d 833, 849 (Ariz. 2006)). The court continued to explain that, even where a defendant proves he suffers a psychological defect, such evidence is not entitled to much weight if "'it does not explain why defendant murdered [the victim].'" *Id.* at 1136 (quoting *State v. Spears*, 908 P.2d 1062 (Ariz. 1996)). The court concluded that, while "Styers suffered from PTSD as a result of his military service in Vietnam," Styers had "failed to present any evidence that his PTSD affected his conduct at the time of the crime." *Id.* at 1135, 36 (citation omitted). Because "Styers' entire course of action was not impulsive, but instead was 'planned and deliberate,'" there was no causal nexus and the court "attribute[d] little mitigating weight to Styers' PTSD" and found "no reason to alter the conclusion reached in Styers' direct appeal" that death was the appropriate sentence in light of the two aggravating factors. *Id.* at 1136.

The Arizona Supreme Court's 2011 independent review of Styers' death sentence was not substantially different than their original unconstitutional review of the sentence. *State v. Styers*, 865 P.2d 765 (Ariz. 1993). In 1993, the Arizona Supreme Court entirely disregarded PTSD

as a mitigating circumstance because "two doctors who examined defendant could not connect defendant's condition to his behavior at the time of the conspiracy and murder." 865 P.2d at 777. On remand after the Ninth Circuit found that opinion to violate *Eddings*, the court simply "acknowledge[d] Styers' PTSD," but gave it "little weight" and found it "not sufficient to warrant leniency in light of the aggravating factors proven in this case." 254 P.3d at 1136. Notably, the Arizona Supreme Court claimed in its new independent review of Styers' case that it "disagree[s] with the [Ninth Circuit's] reading of" the earlier *Styers* case because it had not previously excluded non-causally connected mitigation. *Id.* at 1135; *see also id.* at 1137 (Hurwitz, J. dissenting (the court "believe[s] the Ninth Circuit decision was "erroneous."). In the face of that perceived error, the Arizona Supreme Court has not endeavored to correct this long history of unconstitutionally rejecting mitigation, but has instead *slightly* rephrased its language in an effort to reaffirm its prior decisions rejecting non-causally connected mitigation.

Similarly, in *State v. Hedlund*, the Arizona Supreme Court reviewed the defendant's evidence of PTSD, childhood abuse, depressive disorder, substance addiction, and remorse, and assigned them "slight mitigating weight." 431 P.3d at 187. The court discounted Hedlund's mental health evidence because "the expert testimony and the record do not establish that Hedlund could not appreciate right from wrong or conform his conduct to the

requirements of the law." *Id*. Because "there is neither temporal proximity nor any demonstration that the conditions rendered Hedlund unable to differentiate right from wrong or to control his actions," the "terrible conditions in which Hedlund was raised" received minimal weight from the Arizona Supreme Court. *Id*.

This language from the court's 2018 review of Hedlund's death sentence, is strikingly similar to the Arizona Supreme Court's unconstitutional rejection of Hedlund's mitigation in 1996. *See Hedlund v. Ryan*, 815 F.3d 1233, 1260 (9th Cir. 2016) (finding an *Eddings* violation where the Arizona Supreme Court affirmed the death sentence because "a difficult family background, including child abuse, does not necessarily have substantial mitigating weight absent a showing that it significantly affected or impacted the defendant's ability to perceive, comprehend, or control his actions.") (quotation omitted).

The court's focus on whether Hedlund was able to "appreciate right from wrong or conform his conduct to the requirements of the law" elevated the mitigation standard to the defendant's burden of proof for an insanity defense. At the time of Hedlund's offense, a criminal defendant was not responsible for criminal conduct where he could prove "the person was suffering from such a mental disease or defect as not to know the nature and quality of the act or, if such person did know, that such person did not know that what he was doing was wrong." Ariz. Rev. Stat. §13-502 (1991). If

Hedlund was able to meet such a burden, he would not be eligible for conviction, let alone could he be sentenced to death. At the very least, he would be able to prove a *statutory* mitigator. Ariz. Rev. Stat. §13-751(G)(1) ("the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired, but not so impaired as to constitute a defense to prosecution.")

In *McKinney*, too, the Arizona Supreme Court's independent review after remand fails to abide by the Eighth Amendment mandate to meaningfully consider and give effect to mitigation. In *State v. McKinney*, 917 P.2d 1214 (Ariz. 1996), the Arizona Supreme Court rejected the defendant's mitigating evidence of childhood abuse and PTSD because it did not "significantly affect[ ] or impact[ ] the defendant's ability to perceive, comprehend, or control his actions." *Id.* at 1234 (citing *State v. Ross*, 886 P.2d 1354, 1363 (Ariz. 1994)). In the 2018 independent review, the Arizona Supreme Court did recognize that McKinney suffered "horrific abuse" in childhood, but found that such abuse and his PTSD diagnosis were not sufficiently substantial to call for leniency because "it bears little or no relation to his behavior" during the crime. *McKinney*, 426 P.3d at 1206.

In a 15-year period during which the Arizona Supreme Court reviewed the death sentences imposed in *Styers*, *Hedlund*, and *McKinney*, "the Arizona Supreme Court consistently articulated and applied its causal nexus test, in accordance with its strong view of stare decisis." *McKinney*, 813 F.3d at

803 (citing *Young v. Beck*, 251 P.3d 380, 385 (Ariz. 2011)). However, the court continues to make clear that it does not consider non-causally connected mitigation sufficient to call for a life sentence. Though the court has been careful not to explicitly absolutely bar the consideration of mitigation where there is no causal nexus to the crime, the effect on independent review is precisely the same. The Arizona Supreme Court will affirm a death sentence unless the appellant is able to prove his mitigation caused him to commit the crime. This approach is in direct conflict with this Court's holding that it is "unreasonable to discount to irrelevance" mitigating evidence, including childhood abuse. *Porter v. McCollum*, 558 U.S. 30, 43 (2009).

The Arizona Supreme Court's continued practice of relegating mitigation to the category of "not causally connected," and then, in turn, defining all such mitigation as *de minimis* is the equivalent of barring mitigation or assigning it no weight at all. This Court "ha[s] firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future." *Abdul-Kabir*, 550 U.S. at 246. The Arizona Supreme Court's new independent reviews in *Styers*, *Hedlund*, and *McKinney* demonstrate that the Arizona Supreme Court does not yet comply with the Eighth Amendment's requirement. By discounting non-

causally connected mitigation to irrelevance, the court continues to fail to "give meaningful consideration" to mitigation, including powerful mental health diagnoses such as PTSD.

III. Arizona Juries Regularly Find Non-Causally Connected Mitigation Sufficiently Substantial to Call for Leniency.

Although the Arizona Supreme Court continues to fail to give meaningful consideration to any non-causally connected mitigation, evidence demonstrates that *jurors* treat such mitigation far differently. Research[2] into jury decision making has demonstrated that jurors vote for life because of mitigation including dysfunctional and traumatic childhoods, mental illness, remorse, and poverty.

> Mitigating evidence such as the defendant was suffering severe delusions and hallucinations, [ ] had

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[2] The bulk of this research was performed by the Capital Jury Project (CJP). CJP is a long-term research project that began in 1991 with support from the National Science Foundation. Over the last 25 years, the CJP has conducted 1198 in-depth interviews with jurors from 353 capital trials over 14 states. "[T]he CJP was designed to: (1) systematically describe jurors' exercise of capital sentencing discretion; (2) assess the extent of arbitrariness in jurors' exercise of such discretion; and (3) evaluate the efficacy of capital statutes in controlling such arbitrariness." University at Albany School of Criminal Justice, *What is the Capital Jury Project*, http://www.albany.edu/scj/13189.php (last accessed March 25, 2019).

> engaged in drug use at the time of the murder, [ ] was diagnosed as borderline mentally retarded and placed in special services classrooms throughout his education, and [ ] was severely physically and verbally abused by his parents during childhood yielded a proportion of life sentences statistically greater than would be expected had no mitigating evidence had been presented.

Barnett, Michelle, *When Mitigation Evidence Makes A Difference: Effects Of Psychological Mitigating Evidence On Sentencing Decisions In Capital Trials*, 22 BEHAVIORAL SCIENCES AND THE LAW 751 (2004).

The CJP found that a majority of jurors would be less likely to vote for death if the defendant has a history of mental illness, or if the defendant was intellectually disabled (previously mentally retarded). *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 COLUM. L. REV. 1538, 1559, 1565 (1998). It also tells us that nearly half of all jurors are less likely to vote for death if the defendant had been in institutions but had not received "any real help or treatment." *Id.* at 1565. More than a quarter of jurors are less likely to vote for death if the defendant had been seriously abused as a child or would be a well-behaved inmate. *Id.* at 1559. Further, some jurors are less likely to vote for death if the defendant was an alcoholic or drug addict, had

no previous criminal record, had a loving family, or had a background of extreme poverty. *Id.* "[M]any jurors said that if the defendant had made some showing of remorse they might have switched their votes from death to life… In thirteen of the nineteen death cases, at least one juror explicitly insisted that he would have voted for life rather than death had the defendant shown remorse." Sundby, Scott, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse and the Death Penalty*, 83 CORNELL L. REV. 1557, 1565, September 1998.

Beyond the decades of research, an examination of the life verdicts imposed by Arizona juries demonstrates conclusively that jurors are concluding that a defendant's background and upbringing, and particularly a history of trauma, are sufficiently substantial to call for leniency.

Since 2015, there have been 27 capital trials and sentencing hearings in Arizona.[3] In 11 cases, the jury imposed death. In 15 cases, the jury imposed life or hung at the penalty phase.[4] In the 15 cases where the jury rejected a death sentence, the defendant

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[3] In one case, the jury acquitted the defendant of the *Enmund/Tison* factors making him ineligible for the death penalty.

[4] In Arizona, a hung jury at the penalty phase does not automatically result in the imposition of a life sentence. Unlike most jurisdictions, state law allows the prosecution to proceed to a second penalty phase in front a new jury. If there is a second hung jury, a life sentence will be imposed. A.R.S. § 13-752(K).

presented evidence similar to that in *Styers, Hedlund*, and *McKinney*. *See* Table A. As described in Table A, every case in which the jury rejected a death sentence since 2015, the defendant presented evidence of trauma, including childhood abuse and neglect. In eight sentencing hearings that did not result in death, the defendant presented evidence of a diagnosis of PTSD. The data demonstrates that Arizona jurors, unencumbered by the Arizona Supreme Court's historical refusal to consider or give meaningful effect to mitigation without a causal nexus to the crime, regularly find an abusive upbringing and PTSD sufficiently substantial to call for leniency. *See* Table A.

For example, in *State v. Buckman,* CR2012-007044, the capital defendant presented mitigating evidence including that she suffered physical and sexual abuse in childhood, that she suffered PTSD as a result of childhood trauma, that she was less culpable for the homicide than her co-defendant, and that she had offered to plead guilty and serve a life sentence. Defendant's Objections Regarding Final Jury Instructions (8/21/17). These mitigators are similar to those presented in *Hedlund*, *supra*. In *Hedllund*, the Arizona Supreme Court minimized such evidence to the point of irrelevance because Hedlund could not prove that it caused him to commit the crime. *Id*. at 185-86. In *Buckman*, however, at least one juror found the mitigation powerful enough to call for a life sentence. Minute Entry (9/6/17) (jury is unable to reach a verdict; mistrial declared). As in *Hedlund*, the homicide for

which Buckman was convicted was not an impulsive act and instead resulted from a sustained period of neglect and abuse of the victim. https://www.azcentral.com/story/news/local/phoenix/2015/06/30/phoenix-couple-girls-murder-trial-abrk/29490389/. Furthermore, there was a single aggravator in Hedlund's case, while in Buckman's the jury found the presence of two aggravators—that the crime was especially cruel, heinous, and depraved; and that the victim was a child. CR2012007044, Minute Entry (7/7/17) (aggravation verdict).

In *Styers*, 254 P.3d at 1136, the Arizona Supreme Court considered the defendant's PTSD diagnosis, which arose as a result of his service in Vietnam, but assigned *de minimis* weight to the evidence because "Styers' actions in this case were…'planned and deliberate, not impulsive.'" (quoting *Spears*, 908 P.2d at 1079). When a jury considered similar evidence in *State v. Lambright*, CR05669, *see* Table A, they hung in the penalty phase with five votes for life, and the state decided to withdraw the death notice. RT 11/19/15. As in *Styers*, the crime for which Lambright was convicted involved some planning and was not recognized by the court as impulsive. *Compare State v. Lambright*, 673 P.2d 1, 4 (1983) (describing plan to kill a victim); *with Styers*, 254 P.3d at 1136 ("defendant's actions were planned and deliberate, not impulsive.").

In short, when Arizona capital defendants have the opportunity to present their non-causally connected mitigation in the trial court, jurors are

more often than not persuaded to reject a death sentence. The Arizona Supreme Court's stubborn adherence to a paradigm that assigns *de minimis* weight to non-casually connected mitigation is both unconstitutional and prejudicial to Arizona's capital defendants.

CONCLUSION

This Court should reverse the judgment of the Arizona Supreme Court.

Respectfully submitted,

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Table A

CASE	MITIGATION
State v. Ricci, CR2011005961 Life verdict (3/7/19)	• Extreme physical abuse in childhood • Exposure to domestic violence • Parental neglect • Poverty • Intoxication at time of crime Final jury instructions (3/5/19)
State v. Redondo, CR2010106178 Life verdict (5/7/19)	• Extreme physical abuse, including sexual abuse, in childhood • Paranoid schizophrenia, paranoia, delusions • Depressive disorder • PTSD • Borderline intellectual functioning • Severe brain damage Defendant's Sentencing Memorandum (5/16/19)
State v. Noonkester, CR2011138281 Second hung penalty phase jury (6/11/19) First hung penalty phase jury (4/18/17)	• Brain damage to frontal lobe • Loss of stepmother to cancer when defendant was 12 years old • Within one year, when defendant was 12, he lost his stepmother to cancer, his 13-year-old brother to suicide and his father to suicide

	• Discovered his brother's body • Substance addiction starting in childhood • Severe depression and multiple suicide attempts • Victim of sexual assault at age 12 • PTSD Penalty phase closing argument (6/3/19)
State v. Eggers, CR201201293 Second hung penalty phase jury (10/3/18) First hung penalty phase jury (3/1/18)	• Dysfunctional home environment • Incarceration since age 16 • Ability to be managed safely in prison; good behavior in prison • Engagement in spiritual discovery Final Jury Instructions (2/20/18)
State v. Busso-Estopellan, CR2011133622 Hung penalty phase jury (4/30/18)	• Brain damage and cognitive impairment • Impaired impulse control • Childhood head trauma • Exposure to toxins from living near and landfill and agricultural fields • Poverty, poor nutrition • Remorse and acceptance of responsibility Final Jury Instructions (4/9/18)
State v. Buckman, CR2012007044 Hung penalty phase jury	• Multigenerational history of physical and emotional abuse • Victim of domestic

(9/6/17)	violence • Suffered physical and emotional abuse, sexual abuse, and neglect in childhood • Lack of prior criminal record • PTSD and depression • Less culpable than co-defendant Defendant's Objections Regarding Final Jury Instructions (8/21/17)
State v. Coleman, CR2012008340 Life verdict (12/19/16)	• ADHD and learning disorder diagnoses • Attended a school for students with behavioral problems and emotional handicaps • Sexual assault in childhood • PTSD • Depressive disorder • Substance addiction • Head blows suffered in childhood Final jury instructions (12/6/16)
State v. Levis, CR2013002559 Life verdict (11/10/16)	• Acceptance of responsibility and remorse • Childhood trauma, including death of father by suicide • Mother's addiction to methamphetamine and related troubles, including

	numerous evictions Closing Argument Reporter's Transcript (11/9/16)
State v. Lopez, CR2011007597 Life verdict (5/5/16)	• Brain damage • Family dysfunction • Poverty • Exposure to domestic violence • Suicide attempts • Genetic predisposition to substance abuse • Ability to be housed safely in the prison Defendant's Disclosure (8/1/14)
State v. Villalobos, CR2004005523 Life verdict (10/11/16)	• PTSD • Psychosis • Brain damage and cognitive impairment • Physical abuse and exposure to domestic violence Defendant's Sentencing Memorandum (10/25/16)
State v. Arias, CR2008031021 Second hung penalty phase jury (3/5/15)	• PTSD • Physical abuse in childhood • Victim of domestic violence • Mental illness • No prior criminal history or propensity for violence Defendant's Sentencing Memorandum (4/10/15)
State v. Licon, CR2011100207	• Psychosis, delusions, hallucinations

Life verdict (11/6/15)	• Abandonment by father • Family dysfunction • Depression and family history of depression • Childhood abuse • Abuse of drugs and alcohol to cope with stress • Remorse Defense Requested Jury Instructions (9/15/15)
State v. Lambright, CR05669 Hung penalty phase jury (11/19/15)	• Poverty • Childhood abuse and neglect • Military service in Vietnam • PTSD • Remorse Penalty Phase Jury Instructions (11/19/15)