October Term 2020
No. 20-

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT POYSON,
Petitioner,

vs.

STATE OF ARIZONA,
Respondent.

On Petition for Writ of Certiorari to the
Arizona Supreme Court

CAPITAL CASE
PETITION FOR WRIT OF CERTIORARI

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May 6, 2021

CAPITAL CASE
QUESTIONS PRESENTED

1. Is the *individualized* capital sentencing requirement guaranteed by the Eighth Amendment violated when a State—whether by statute or court-imposed rule—predetermines that in *all* cases only minimal weight is to be afforded non-statutory mitigation, alleged to lack a causal nexus to the capital offense?

2. Whether the Arizona Supreme Court's review of a death sentence satisfies the Eighth and Fourteenth Amendments where it fails to consider whether the State has proved an aggravating factor?

PARTIES TO THE PROCEEDING

Robert Poyson, petitioner on review, was the appellant below.

The State of Arizona, respondent on review, was the appellee below.

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PETITION FOR WRIT OF CERTIORARI

Robert Poyson respectfully petitions for a writ of certiorari to review the judgment of the Arizona Supreme Court in this case.

OPINIONS BELOW

The Arizona Supreme Court's independent review of Mr. Poyson's mitigation, which is the decision upon which certiorari is sought, is reported at *State of Arizona v. Poyson*, 475 P.3d 293 (2020). Pet. App. 1a-15a. That court's order denying rehearing is not reported. Pet. App. 16a. The Arizona Supreme Court's opinion affirming Mr. Poyson's conviction and sentence is reported at 7 P.3d 79 (2000). Pet. App. 17a-45a. The trial court's sentencing opinion is not reported. *Id*. at 46a-51a. The Ninth Circuit decision granting a conditional writ of habeas corpus is reported at *Poyson v. Ryan*, 879 F.3d 875 (9th Cir. 2018). Pet. App. 52a-102a.

JURISDICTION

The Arizona Supreme Court entered judgment on November 2, 2020. Petitioner filed a timely motion for reconsideration, which was denied on December 7, 2020. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment, U.S. Const. amend. VIII, provides:

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

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, §1, provides:

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

INTRODUCTION

This case asks whether the Arizona Supreme Court fulfills its obligation to conduct an individualized sentencing of a capital defendant where it claims to "consider" mitigation, but such consideration has no effect on the outcome of the sentencing decision unless the mitigation is shown to be causally connected to the crime. Robert Poyson's death sentence was first considered by the Arizona Supreme Court in the period of "a little over fifteen years, [when] the Arizona Supreme Court routinely articulated and insisted on its unconstitutional causal nexus test…" In *McKinney v. Ryan*, 813 F.3d 798, 815 (9th Cir. 2015) (en banc). Because of that clearly-unconstitutional test, the Ninth Circuit granted the conditional writ of habeas corpus and ordered the State of Arizona to correct the error.

In a proceeding approved of by this Court in *McKinney v. Arizona*, 140 S. Ct. 702 (2020), the Arizona Supreme Court did not order a new sentencing hearing for Mr. Poyson, but instead independently reviewed the mitigation to determine whether death was the appropriate sentence. Pet. App. at 2a. Consistent with the court's practice since 2005, the court addressed each of Mr. Poyson's proffered mitigating circumstances, and found none was entitled to more than minimal weight because of the lack of causal nexus to the crime. Pet. App. at 5a-15a. Indeed, since the

Arizona Supreme Court claims to have eliminated the causal nexus requirement, it has never found non-causally connected mitigation sufficient to call for a life sentence.

In *Eddings v. Oklahoma*, 455 U.S. 104 (1982) and its progeny, this Court has consistently struck down rules requiring that mitigation has a causal nexus to the capital crime before it achieves the status of relevant mitigation. Yet, over many decades, Arizona has continued to apply the unlawful nexus requirement in order to screen out consideration of relevant mitigation evidence. This petition asks whether this practice satisfies Mr. Poyson's rights under the Eighth Amendment.

In the second question in this petition, Mr. Poyson asks whether the Arizona Supreme Court's independent review is sufficient to genuinely narrow the class of people eligible for the death penalty when that review fails to consider whether the State proved an aggravator. Consistent with this Court's opinion in *McKinney*, the Arizona Supreme Court conducted a new independent review of Mr. Poyson's death sentence after the Ninth Circuit conditionally granted the writ. Under state law, however, Arizona's independent review statute requires the Court to determine which aggravators exist, which mitigation exists, and whether death is the appropriate sentence. In curtailing that independent review to eliminate consideration of the aggravators, the court's review was unconstitutionally limited.

STATEMENT OF THE CASE

I. Factual Background

In April 1996, when Robert Poyson was nineteen years old, he followed a 48-year-old man and his 14-year-old girlfriend in carrying out the murders of Robert Delahunt, Leta Kagen, and Roland Wear. Pet. App. at 17a-18a. Mr. Poyson was convicted by a jury for the three murders and sentenced to death. Pet. App. at 17a.

At his presentencing hearing, Mr. Poyson presented evidence of his traumatic childhood, mental health issues and low IQ, and past substance abuse. Pet. App. 40a, 61a-64a.

Ruth Garcia, Mr. Poyson's teenaged mother, used drugs, including LSD, and alcohol on a daily basis during her pregnancy. Pet. App. at 84a. Mr. Poyson never knew his biological father, who was also an alcoholic. *Id*. Throughout his childhood, Mr. Poyson's mother was in unstable relationships with a number of men. One of these men—Guillermo Aguilar— "brutal[ly]" beat Mr. Poyson with electrical cords. *Id*. at 84a, 121a. Aguilar was eventually prosecuted and incarcerated because of the abuse. *Id*. at 121a. Another one of Ruth's partners drank alcohol and used drugs with Mr. Poyson. *Id*. at 84a. There was no stability in the Poyson home. "Every time he got used to someone, someone else would come into his life." *Id*. at 84a. In addition to abusive step-fathers, Mr. Poyson was regularly left in the care of his grandmother, "who beat him repeatedly and savagely." Pet. App. at 85a.

Mr. Poyson experienced medical and developmental problems throughout his childhood. He was developmentally delayed and slow to crawl, walk, and speak. Pet.

App. at 85a, 112a. He developed a speech impediment and did poorly in school, where he was receiving special education services. *Id.* Mr. Poyson also experienced several head injuries as a child, including once instance where his head was impaled by a stick. *Id.* at 85a He experienced severe headaches and, on several occasions, lost consciousness. *Id.*

When Mr. Poyson was ten years old, Ruth met and married Sabas Garcia. Pet. App. at 85a. Sabas was the only "true father figure" Mr. Poyson ever had. *Id.* However, after only a year and half of marriage, Sabas, who was suffering from cancer, committed suicide. *Id.* Sabas wrote his suicide note on a polaroid photo of himself and the family. *Id.* at 122a. His death was devastating to the family and particularly to young Mr. Poyson, who "was simply never the same after this happened." *Id.*

Within days of Sabas' death, when Mr. Poyson was only 11 years old, he was violently raped by a trusted family friend. Pet. App. at 2a, 85a-86a, 122a. Mr. Poyson dramatically changed after the rape and loss of Sabas. *Id.* at 85a. He began staying away from home, drinking alcohol, and started getting bad grades at school, eventually dropping out. *Id.* at 85a. Also shortly after these immensely traumatic incidents, Mr. Poyson began suffer problems with his mental health, including a mood disturbance. *Id.* At 64a. He had his first interactions with the juvenile justice system as well. *Id.*

II. State Court Proceedings

The sentencing court found that Mr. Poyson proved that he "suffered a dysfunctional childhood, that he was subjected to physical and sexual abuse, and that he was subjected to certain levels of mental abuse," but nonetheless excluded the evidence from the sentencing calculus because Mr. Poyson had not proven "that his latter conduct was a result of his childhood." Pet. App. at 157a.

The sentencing court conceded that there was evidence to support that Mr. Poyson's "mental capacity may be diminished" and that he had "a lower-than-average IQ," however, it dismissed this evidence due to Mr. Poyson's participation in the crimes, which the court described as "certain preparatory steps that were . . . not overly-sophisticated." Pet. App. at 158a. The sentencing court also refused to consider the evidence of Mr. Poyson's history of substance abuse as a mitigating factor because Mr. Poyson had not shown that substance abuse had impaired his ability to engage in goal-oriented behavior at the time of the crimes. Pet. App. at 170a. The sentencing judge imposed the death penalty. Pet. App. at 174a.

On direct appeal, the Arizona Supreme Court agreed with the State and the sentencing court that Mr. Poyson's non-statutory mitigation was barred because there was no causal nexus to the crime. Pet. App. at 39a-41a. Specifically, Mr. Poyson's mental health mitigation was rejected because he failed to show how it "controlled [his] conduct." *Id.* at 40a (quoting *State v. Brewer*, 170 Ariz. 486, 505 (1992)). In the same vein, the Arizona Supreme Court held that the evidence of Mr. Poyson's traumatic childhood, which included physical, mental, and sexual abuse,

was "without mitigating value" because Mr. Poyson failed to demonstrate how this abuse and resulting trauma "rendered him unable to control his conduct." *Id.* at 41a. And the Arizona Supreme Court agreed with the trial court that Mr. Poyson's claims "that he had used drugs or alcohol in the past or was under the influence of drugs on the day of the murders [were] little more than 'vague allegations.'" *Id.* at 40a. The Arizona Supreme Court accordingly affirmed Mr. Poyson's death sentence. *Id* at 44a.

III. Federal Habeas Proceedings

Mr. Poyson filed a habeas petition in federal district court, arguing that the Arizona courts had applied an unconstitutional causal nexus test to non-statutory mitigating evidence in violation of *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104, 114, (1982). Poyson v. Ryan, No. CV-04-0534-PHX-NVW, Dkt. 27 at 39-44. On appeal, a divided Ninth Circuit panel found the record ambiguous, stating that it "[did] not reveal whether the court applied a nexus test as an unconstitutional screening mechanism or as a permissible means of determining the weight or significance of mitigating evidence." Poyson v. Ryan, No. 10-99005, Dkt. 66-1 at 4 (3/22/13). Judge Thomas dissented in part, explaining that "[t]he Arizona Supreme Court unconstitutionally excluded mitigating evidence from its consideration because the evidence was not causally related to the crimes." *Id.* at 35. He acknowledged the court's obligation not to presume constitutional error, *Id.* at 39, but explained that a federal court must "look to the substance of the record

itself to determine whether the state court unconstitutionally excluded relevant mitigating evidence from consideration at sentencing," *Id*. at 41.

That initial opinion was issued on March 22, 2013. Mr. Poyson petitioned for panel rehearing and rehearing *en banc*. Poyson v. Ryan, No. 10-99005, Dkt. 69-1. On November 7, 2013, the court of appeals denied his petitions, the latter over a dissent by twelve judges. Poyson v. Ryan, No. 10-99005, Dkt.73 at 4.

The Ninth Circuit issued an *en banc* opinion in *McKinney* on December 29, 2015. 813 F.3d 798 (9th Cir. 2015) (en banc). The court of appeals accordingly extended the stay in Mr. Poyson's case on May 13, 2016, "pending resolution of Supreme Court proceedings in" *McKinney*. Poyson v. Ryan, No. 10-99005, Dkt. 85. This Court denied Arizona's *McKinney* petition on October 3, 2016. The court of appeals therefore ordered supplemental briefing in Mr. Poyson's case on "the impact of *McKinney*" and again extended the stay pending "further order of this court." Poyson v. Ryan, No. 10-99005, 9th Cir. Dkt. 86.

In January 2018, the court of appeals granted the petition for panel rehearing and filed an amended opinion reversing the district court's denial of Poyson's habeas petition. Pet. App. at 52a. The court held that the Arizona Supreme Court had denied Poyson his Eighth Amendment right to individualized sentencing by applying an unconstitutional causal nexus test to his mitigating evidence of a troubled childhood and mental health issues. *Id*. at 5a. The court concluded that the Arizona Supreme Court "gave no weight at all to the evidence, and it did so because the evidence bore no causal connection to the crimes." *Id*. at 27a. The court noted

that "the Arizona Supreme Court cited a passage from *State v. Brewer*, 826 P.2d 783, 802 (1992), that *McKinney* specifically identified as applying an unconstitutional causal nexus test." *Id.* at 28a. The court further supported its conclusion by noting that the "Arizona Supreme Court affirmed Poyson's death sentence … in the midst of the 15-year period during which that court consistently articulated and applied its causal nexus test." *Id.* at 29a.

Finally, the panel held that the state court's error had substantial and injurious effect, and therefore granted habeas relief on this claim. Pet. App. at 35a. The panel denied relief on Mr. Poyson's claim that the Arizona courts failed to consider his history of substance abuse as a mitigating factor, concluding that the state courts had considered the evidence but found Mr. Poyson's factual showing lacking. *Id.* at 35a-38a.

On March 9, 2018, the State filed a petition for certiorari before this Court, Ryan v. Poyson, No. 17-1274, (03/09/18), which was denied on June 18, 2018. Letter Denying Cert. (06/18/18).

IV. State Court Remand

Following the Ninth Circuit's grant of relief and this Court's denial of its petition for writ of certiorari, the Arizona Supreme Court granted the State's request for a new independent review and ordered briefing. The state court later issued an opinion denying Mr. Poyson relief. Pet. App. at 1a.

REASONS FOR GRANTING THE PETITION

I. There is a Clear Conflict Between the Decisions of the Arizona Supreme Court and Forty Years of This Court's Capital Sentencing Jurisprudence

"'[I]n capital cases, 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 penalty of death.'" *Lockett v.* Ohio, 438 U.S. 586, 604 (1978) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)). Since *Woodson*, this Court has repeatedly made clear that under the Eighth Amendment, a death sentence must be based on individualized consideration of any mitigating circumstances. *See Lockett*, 438 U.S. at 605; *see also Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982); *Tennard v.* Dretke, 542 U.S. 274, 287 (2004); *Smith v. Texas*, 543 U.S. 37, 45 (2004). The "mere mention of 'mitigating circumstances'" does not satisfy the Eighth Amendment—a sentencer *must* "'consider and *give effect to*'" mitigation. *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989)) (emphasis in original). The Arizona Supreme Court, in reviewing Mr. Poyson's death sentence, violated these decades of precedent by refusing to give effect to mitigation for which there was no causal nexus to the crime.

Court-imposed limitations which prevent "giving independent mitigating weight to aspects of the defendant's" mitigating circumstances "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe

penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett*, 438 U.S. at 605. Therefore, a sentencer in a capital case may not "refuse to consider, *as a matter of law*, any relevant mitigating evidence[,]" *Eddings*, 455 U.S. at 114 (emphasis in original), and any barrier to that right, in the form of limiting the consideration of a defender's mitigation, is unconstitutional.

Since at least the time of this Court's decision in *Tennard* when it struck down court-made rules screening out consideration of relevant mitigation, the Arizona Supreme Court has strictly applied a limitation on the consideration of a defendant's mitigating evidence, systematically assigning only "minimal weight" to mitigating evidence lacking a causal connection to the offense. The court's universal and systematic application of a "minimal weight" limitation on the consideration of all categories of mitigating evidence lacking a nexus to the criminal offense violates the individualized sentencing requirement of the Eighth Amendment and results in decisions that fail to reflect "a reasoned moral response to the defendant's background [and] character[.]" *Penry v. Johnson*, 532 U.S. at 788. The Court should grant certiorari to resolve the conflict, which affects numerous capital cases in Arizona.

a. As a Legal Rule, the Arizona Supreme Court Refuses to Accord Significance to Non-Causally Connected Mitigation

In *McKinney v. Ryan*, 813 F.3d at 815, the Ninth Circuit recognized that "for a little over fifteen years, the Arizona Supreme Court routinely articulated and insisted on its unconstitutional causal nexus test…" (citing numerous Arizona

Supreme Court cases). The *McKinney en banc* panel recognized *State v. Anderson*, 111 P.3d 369, 392 (2005), as a turning point in Arizona's jurisprudence. The court noted that it was not until this Court "emphatically reiterated" the rule in *Lockett and Eddings* in *Tennard* that the "Arizona Supreme Court finally abandoned its unconstitutional causal nexus test for nonstatutory mitigation." *McKinney*, 813 F.3d at 817 (citing *Anderson*, 111 P.3d at 392). A year later, in *State v. Newell*, 123 P.3d 833 (2006), the Arizona Supreme Court explicitly acknowledged that this Court's holding in *Tennard*, 542 U.S. at 287, prohibited a causal nexus test for the consideration of mitigating evidence. While *Anderson* may be viewed as the case in which the Arizona Supreme Court abandoned its rule that non-causally connected mitigation may be entirely excluded from the sentencing assessment, the court continues to use the lack of a causal nexus to find that a capital defendant's mitigation is not sufficiently substantial to call for leniency. As a rule applied consistently since 2005, mitigation is not "sufficiently substantial" and, thus, does not entitle a defendant to a life sentence, unless it is causally related to the crime.

Since *Anderson*, the Arizona Supreme Court has had thirty-one occasions to independently review a death sentence.[1] In *two* of those cases, the Arizona Supreme

[1] *State v. Anderson*, 111 P.3d 369 (2005); *State v. Roseberry*, 111 P.3d 402 (2005); *State v. Glassel*, 116 P.3d 1193 (2005); *State v. Cromwell*, 119 P.3d 488 (2005); *State v. Newell*, 123 P.3d 833 (2006); *State v. Johnson*, 133 P.3d 735 (2006); *State v. Hampton*, 140 P.3d 950 (2006); *State v. Ellison*, 140 P.3d 899 (2006); *State v. McGill*, 140 P.3d 930 (2006); *State v. (Joe C.) Smith*, 159 P.3d 531 (2007); *State v. Andriano*, 161 P.3d 540 (2007); *State v. Garza*, 163 P.3d 1006 (2007); *State v. Velazquez*, 166 P.3d 91 (2007); *State v. McCray*, 183 P.3d 503 (2008); *State v. Harrod*, 183 P.3d 519 (2008); *State v. Boggs*, 185 P.3d 111 (208); *State v. Armstrong*, 189 P.3d 378 (2008); *State v. Dann*, 207 P.3d 604 (2009); *State v. Moore*, 213 P.3d

Court found that the defendant demonstrated a causal nexus between his mitigation and the crime and, in both of those cases, the court imposed a life sentence. *State v. Roque*, 141 P.3d 368 (2006); *State v. Bocharski*, 189 P.3d 403 (2008). In 29 cases, the court found that the defendant had failed to prove a causal nexus to the crime and, therefore, the mitigation was not sufficient to support a life sentence.[2]

In many of the Arizona Supreme Court's post-*Anderson* independent review cases, the court recognized that the defendant proved significant relevant mitigation, including mental illness, an abusive childhood, and other factors this Court has routinely found relevant to the sentencing determination. *See, e.g. Porter*, 558 U.S. at 43 (state court "unreasonably discounted" mitigation, including childhood abuse). But, because the mitigation did not cause the defendant to commit capital murder, the Arizona Supreme Court, in every case, found the mitigation entitled to little weight or no weight. *See, e.g. State v. Newell*, 123 P.3d 833, 850 (2006) (Evidence of "unstable childhood," including sexual and physical abuse "is not sufficiently substantial to call for leniency. No evidence explains how Newell's drug addiction and unstable childhood led to the sexual assault and

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150 (2009); *State v. Speer*, 212 P.3d 787 (2009); *State v. Kiles*, 213 P.3d 174 (2009); *State v. Cropper*, 225 P.3d 579 (2010); *State v. Garcia*, 226 P.3d 370 (2010); *State v. Dixon*, 250 P.3d 1174 (2011); *State v. Prince*, 250 P.3d 1145 (2011); *State v. Gomez*, 293 P.3d 495 (2012); *State v. Lynch*, 357 P.3d 119 (2015); *State v. McKinney*, 426 P.3d 1204 (2018); *State v. Hedlund*, 431 P.3d 181 (2018).

[2] In two additional cases, the defendant waived the presentation of mitigation, although the court reviewed the case for record-based mitigation and found none sufficiently substantial to call for leniency. *State v. Bearup*, 211 P.3d 684 (2009); *State v. Hargrave*, 234 P.3d 569 (2010).

murder of eight-year-old Elizabeth."); *State v. Johnson*, 133 P.3d 735, 750 (2006) ("In this case, both the State's and Johnson's experts indicated that Johnson knew right from wrong and could not establish a causal nexus between the mitigating factors and Johnson's crime. Accordingly, we afford Johnson's evidence of personality disorders, difficult childhood, and substance abuse only minimal value."); *State v. Hampton*, 140 P.3d 950, 968 (2006) ("Hampton's mitigation evidence is not insubstantial; it is fair to say that he had a horrendous childhood." But, "Hampton's troubled upbringing is entitled to less weight as a mitigating circumstance because he has not tied it to his murderous behavior."); *State v. Ellison*, 140 P.3d 899, 928 (2006) ("This testimony makes it more likely that Ellison did suffer some mental or emotional damage due to a combination of his upbringing, physical and sexual abuse, physical deformity, and drug and alcohol use. Ellison, however, has not provided any specific evidence that his brain chemistry was actually altered by his past alcohol and drug abuse so as to cause or contribute to his participation in the murder…This mitigator is not of such quality or value as to warrant leniency."); *State v. McCray*, 183 P.3d 503, 511 ("although McCray proved he had a less-than-ideal childhood, he presented no evidence causally relating his childhood to" the crime); *State v. Boggs*, 185 P.3d 111, 130 (2008) ("In this case, no expert testified that Boggs did not know right from wrong, and none could establish his mental state at the time of the crime. Without a causal link between the murders and his troubled childhood or mental health issues, these mitigating circumstances are entitled to less weight."); *State v. Garcia*, 226 P.3d 370, 391

(2010) (Evidence of an abusive childhood including that his father "terrorized his family" was afforded "little weight absent a showing that it affected the defendant's conduct in committing the crime."); *State v. Prince*, 250 P.3d 1145, 1170-71 (2011) ("Prince undoubtedly had a very difficult childhood. We consider it in mitigation, but give it little weight because he has not established a connection between his childhood trauma and the murder."); *State v. McKinney*, 426 P.3d 1204 (2018) ("McKinney's mitigation "is not sufficiently substantial to warrant leniency" because "it bears little or no relation to his behavior during Mertens' murder"); *State v. Hedlund*, 413 P.3d 181, 187 (2018) ("Hedlund experienced a very abusive childhood. He was neglected, beaten, and punished for daily activities like eating and drinking water." However, "no evidence shows that Hedlund's difficult childhood affected his ability to control his actions to conform with the law…Thus, despite the terrible conditions in which Hedlund was raised, we assign this evidence little weight 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.") (citations omitted).

The Arizona Supreme Court's post-*Anderson* treatment of mitigation continues to violate the Eighth and Fourteenth Amendments by depriving capital defendants of an individualized sentencing. Although the court claims to consider non-causally connected mitigation, the court gives such mitigation precisely the same effect as it did prior to 2005. That is, although the Arizona Supreme Court has modified its language, it continues to exclusively find that non-causally connected

mitigation is never sufficient to support a life sentence. Simply recognizing that a defendant has proffered mitigation, but such mitigation is not sufficiently substantial to call for leniency, is inconsistent with this Court's long-established principles on the treatment of mitigation.

In *McKoy v. North Carolina*, 494 U.S. 433, 440-41 (1990), this Court established a very low relevancy standard for mitigation. "'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" 494 U.S. at 440 (quoting *State v. McKoy*, 372 S.E.2d 12, 45 (1988)). "Once this low threshold is met, the 'Eighth Amendment requires that the jury be able to consider and give effect to' a capital defendant's mitigating evidence." *Tennard*, 542 U.S. at 285 (quoting *Boyde v. California*, 494 U.S. 370, 377-78 (1990) (citations omitted)). The Arizona Supreme Court continues to fail to "give effect to" mitigating evidence that meets the low *McKoy* threshhold. Such a practice conflicts with holdings of this Court. This Court must again, for the benefit of the Arizona Supreme Court and the capital defendants that come before it, "emphatically reiterate[ ]," as it did in *Tennard*, that evidence is mitigating even where there is no causal nexus to the crime.

b. Consistent with its Legal Rule, the Arizona Supreme Court Applied an Unconstitutional Causal Nexus Test to Mr. Poyson's Mitigation

As the Arizona Supreme Court has done since 2005, when independently reviewing Mr. Poyson's mitigation, the court stated it would "consider all mitigating

evidence presented without requiring a causal nexus between the evidence and the crime." Pet. App. at 6a. And, consistent with the court's rule since 2005, the court *did* require a causal nexus in order to assign Mr. Poyson's mitigating evidence anything greater than minimal weight. *Id.* at 10a (citing *Prince*, 222 Ariz. at 541-42, ¶¶ 109, 113). In so doing, the court failed to conduct an individualized sentencing determination and failed to give "meaningful consideration" to Mr. Poyson's mitigation.

Specifically, the court discounted Mr. Poyson's mental health evidence because it did not rise to the level of causally connected statutory mitigation, holding:

> no evidence developed at trial suggests that Poyson's mental health issues significantly impaired his capacity to conform his behavior to the law or appreciate the wrongfulness of his conduct. As explained above, *supra* ¶23, Poyson took deliberate and calculated steps to ensure that his murderous plot and flight from Golden Valley would be successful and that he would avoid capture by law enforcement. Moreover, Poyson's own statements demonstrate he knew his actions were wrong, morally and legally. Accordingly, we assign little weight to this mitigation evidence.

Pet. App. at 8a. This Court has explicitly held that limiting mitigation to statutory categories is unconstitutional. *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (Florida law, which limited the jury to considering statutory mitigating factors, violated *Eddings*).

The Arizona Supreme Court also failed to give meaningful consideration and independent mitigating weight to Mr. Poyson's other mitigation. *See, e.g.*, Pet. App. at 8a ("Substance abuse and mental health issues are entitled to little weight when

there is no connection to the crime…"); *id*. at 8a (affording "little weight" to Mr. Poyson's drug abuse, mental health issues, and low intelligence because the crime was "planned and deliberate" and he "briefly evade[d] capture"); *id*. at 10a-11a (reducing weight of childhood abuse evidence because, despite the temporal proximity to the crimes, "the causal link is weak."). Such treatment of Mr. Poyson's mitigation violates Mr. Poyson's Eighth and Fourteenth Amendment rights under *Lockett/Eddings* and their progeny.

The relevancy threshold for mitigation is very low and, once met, requires the sentencer "'be able to consider *and give effect to*' a capital defendant's mitigating evidence." *Tennard*, 542 U.S. at 285 (quoting *Boyde*, 494 U.S. at 377-78 (emphasis added)). Furthermore, this Court has held that a sentencer is required "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 v. Quarterman*, 550 U.S. 233, 246 (2007) (emphasis added). And, while a sentencer is permitted to determine the weight of a mitigating factor, the sentencer may not discount mitigation to the point of irrelevance, regardless of the facts of the crime. *Abdul-Kabir*, 550 U.S. at 246; *Tennard*, 542 U.S. at 284. While the Arizona Supreme Court did not 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 "considers" mitigation by

paying mere lip service to this Court's precedent, as evidenced by the extraordinary infrequency in which non-causally connected mitigating evidence carries the day.

Despite Mr. Poyson's significant mitigation, the Arizona Supreme Court affirmed his death sentence because he was unable to prove his mitigation *caused him to commit the crime*. For every category of Mr. Poyson's mitigation, the court centered its analysis on whether the evidence was causally related to the crime. However, mitigation is deserving of weight and demonstrates a person is deserving of a life sentence, even where it is unrelated to the crime. *Smith*, 543 U.S. at 45 (this Court has "never countenanced and now ha[s] unequivocally rejected" any causal nexus requirement for mitigation). This approach is also in direct conflict with more recent Supreme Court law 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 practice of finding every piece of Mr. Poyson's mitigation to be insufficiently substantial to call for lenience approximates what occurred in *Eddings*, where this Court invalidated the practice in Oklahoma which allowed the sentencing court to confer or deny mitigating effect to a defendant's proffered mitigation based solely on the sensibilities of the sentencing judge. In *Eddings*, the sentencing judge declined to attribute mitigating weight to evidence of Eddings' troubled youth, lack of parental guidance that included a mother who was an alcoholic and prostitute and a father who was physically abusive, emotional disturbance, delayed emotional and mental development, a treatable personality

disorder, and psychiatric evidence of a positive prospect for rehabilitation. 455 U.S. at 107-08. The sentencing court did not find Eddings' abusive background or mental and emotional disturbance to be mitigating.

As in *Lockett*, this Court held that the sentencing court's refusal to consider the defendant's relevant mitigating evidence was unconstitutional. "[I]t was as if the trial judge had instructed a jury to disregard the mitigating evidence proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." *Id.* at 114-15. The failure to afford mitigating weight to a defendant's mitigation deprives him of "'the type of individualized consideration of mitigating factors…required by the Eighth and Fourteenth Amendments in capital cases.'" *Id.* at 105 (quoting *Lockett*, 438 U.S. at 606) (alteration in original). Here, as in *Eddings*, the court has denied mitigating effect to evidence this Court routinely identifies as compelling.

Where, as here, "the [sentencer] 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." *Abdul-Kabir*, 550 U.S. at 264. The Arizona Supreme Court's precedent in all post-*Anderson* independent review cases is to give no meaningful effect to non-causally connected mitigation. Indeed, Arizona Supreme Court has not found non-causally connected mitigating evidence weighty in any of its *Eddings* remand decisions. It is plainly clear that non-causally

connecting mitigating evidence cannot move the needle in the Arizona Supreme Court. In Mr. Poyson's case, the error was not harmless. As the Ninth Circuit held, "the evidence of a traumatic childhood in this case was particularly compelling" and the "unconstitutional causal nexus test 'had substantial and injurious effect or influence on its decision to sentence [Poyson] to death.'" *Poyson v. Ryan*, 879 F.3d 875, 892-93 (2018) (quoting *McKinney*, 813 F.3d at 824) (additional quotation omitted) (alteration in original).

II. The Arizona Supreme Court's "limited" independent review was inadequate to ensure the death penalty was constitutionally imposed

In *McKinney v. Arizona*, this Court held that the Arizona Supreme Court may reweigh evidence of aggravation and mitigation pursuant to *Clemons v. Mississippi*, 494 U.S. 738 (1989), when an *Eddings* error occurs during collateral review. McKinney, 140 S. Ct. 702, 709 (2020). A *Clemons* reweighing by an appellate court is constitutionally permissible where the appellate court carefully considers all of the evidence constituting aggravating and mitigating evidence and carefully reweighs the evidence to decide whether the evidence supports a sentence of death. *Clemons*, 494 U.S. at 748-49. The Court found that such a procedure was constitutionally permissible because "state appellate courts can and do give each defendant an individualized and reliable sentencing determination based on the defendant's circumstances, his background, and the crime." *Id.* The Court emphasized "that meaningful appellate review of death sentences promotes reliability and consistency." *Id.*

The Arizona Supreme Court conducted its independent review of Mr. Poyson's death sentence pursuant to Arizona Revised Statutes Section 13-755. Pet. App. at 3a. Under this statute, the court "shall independently review the trial court's findings of aggravation and mitigation and the propriety of the death sentence." A.R.S. § 13-755(A). In deciding the propriety of the death sentence, the court must also independently reweigh the aggravating and mitigating circumstances. *See* A.R.S. § 13-703.01(A); *see also State v. Medina*, 975 P.2d 94, 106 (1999). In describing its duty of independent review, the Arizona Supreme Court has stated that it "painstakingly examine[s]" the record to determine if the death penalty is warranted. *State v. Stuard*, 863 P.2d 881, 897 (1993) (quoting *State v. Richmond*, 560 P.2d 41, 51 (1976)). Independent review under Arizona law serves an important function—ensuring the death sentence is not imposed on the basis of aggravators that are not supported by facts or the law and, therefore, genuinely narrowing the class of people eligible for the death penalty. *See In re Winship,* 397 U.S. 358, 362 (1970) (state's burden of proving guilt beyond a reasonable doubt is the fundamental component of procedural due process); *see also Furman v. Georgia*, 408 U.S. 238 (1972) (death penalty may not be applied in arbitrary manner). In the modern era of capital punishment, this Court has established that a capital sentencing scheme is constitutional only if it identifies those defendants who are deserving of the death penalty. "If a state has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an

appropriate sanction and those for whom it is not." *Spaziano v. Florida*, 468 U.S. 447, 460 (1984). In Arizona, the state supreme court's independent review of a death sentence is the way in which the court distinguishes those eligible for the death penalty.

However, rather than carefully considering all evidence of aggravation and mitigation and reweighing this evidence to determine if a death sentence was warranted, the state court conducted a "limited" independent review considering only the mitigating factors without the causal nexus requirement and reweighing them against the established aggravators in this case." Pet. App. at 4a (citing *State v. Styers*, 254 P.3d 1132, 1134 (2011)).

In Mr. Poyson's case, the Arizona Supreme Court's failure to review the aggravation was prejudicial because Mr. Poyson was never afforded meaningful review of the three aggravators where defense counsel failed to raise any claims related to the aggravators on direct appeal. *See State v. Poyson*, 7 P.3d 79, 87 (2000) ("Defendant does not challenge" the aggravation findings.) Therefore, "the established aggravators" the court considered on its new "limited" independent review were found in the absence of any adversarial process or advocacy on the part of Mr. Poyson.

Moreover, reliance on at least one aggravating factor, the (F)(5) pecuniary gain factor is questionable given the facts of the case and the Arizona Supreme Court's own caselaw that preceded and this Court's own caselaw that precedes Mr. Poyson's case. *Compare* Pet. App. at 186a, 210a-211a (Mr. Poyson's motivation for

the homicides was the victims' poor treatment of him), *with Medina*, 975 P.2d at 101 ("The existence of an economic motive at some point during the events surround a murder is not enough to establish (F)(5)."); *State v. Robinson*, 796 P.2d 853, 862 (1990) (a co-defendant's pecuniary motive is not attributable to his codefendants).

While this Court has found that Arizona Supreme Court may conduct a *Clemons* reweighing of aggravating and mitigating circumstances, rather than being required to remand the case for a jury resentencing, the *Clemons* alternative is only permissible where the appellate court carefully considers all of the evidence constituting aggravating and mitigating evidence and carefully reweighs the evidence to decide whether the evidence supports a sentence of death. *Clemons*, 494 U.S. at 748-49. Because the Arizona Supreme Court failed to consider the aggravating factors based on the facts of the case, its reweighing was faulty and constitutionally impermissible. Therefore, like in *Clemons*, Mr. Poyson's death sentence must be vacated. *See Clemons*, 494 U.S. at 753-74.

III. The Questions Presented are Important

Arizona's refusal to apply the rule of law to capital defendants makes this case worthy of review. When reviewing the *Lockett/Eddings* error in *McKinney*, the Ninth Circuit identified at least 19 cases, including Mr. Poyson's, that were affected by the Arizona Supreme Court's pre-*Anderson* refusal to consider non-causally connected mitigation. See *Poyson v. Ryan*, 879F.3d 875 (9th Cir. 2018); *Washington v. Ryan*, No. 07-15536 (9th Cir.); *Walden v. Ryan*, No. 08-99012 (9th Cir.); *Salazar v.*

Ryan, No. 08-99023 (9th Cir.); *Djerf v. Rya*n, No. 08-99027 (9th Cir.); *Sansing v. Ryan*, No. 13-99001 (9th Cir.); *Lee v. Schrir*o, No. 09-99002 (9th Cir.); *Spreitz v. Ryan*, No. 09-99006 (9th Cir.); *Martinez v. Ryan*, No. 08-99009 (9th Cir.); *Spears v. Ryan*, No. 09-99025 (9th Cir.); *Kayer v. Ryan*, No. 09-99027 (9th Cir.); *Jones v. Ryan*, No. 18-99005 (9th Cir.); *Smith v. Ryan*, No. 10-99002 (9th Cir.); *Ramirez v. Ryan*, No. 10-99023 (9th Cir.); *Doerr v. Ryan*, No. 2:02-cv-00582 (D. Ariz.); *Detrich v. Ryan*, No. 4:03-cv-00229-DCB (D. Ariz.); *Rienhardt v. Ryan*, No. 4:03-cv-00290 (D. Ariz.); *Greene v. Schriro*, No. 4:03-cv-00605 (D. Ariz.); *Roseberry v. Ryan,* No. 2:15-cv-01507 (D. Ariz.). The Ninth Circuit has already granted relief on *Eddings* errors in *McKinney*, *Poyson*, *Hedlund* and *Spreitz*. In each of those cases, the State has successfully moved the Arizona Supreme Court to conduct a new independent review proceeding, rather than remand for a jury sentencing. Although *Spreitz* is still pending before the court, the court has declined to consider the aggravators in *Poyson,* or *Hedlund*, 431 P.3d at 184. In *McKinney*, the court *did* briefly consider the aggravators, but rather than independently review whether the record supported the aggravators, the court summarily found "no reasonable doubt as to the aggravating circumstances found by the trial court…" *McKinney*, 426 P.3d at 1206.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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