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 ARIZONA VOICE FOR CRIME VICTIMS INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

COLLEEN CLASE
Counsel of Record
THOMAS E. LORDAN
NATHAN ANDREWS
ARIZONA VOICE FOR CRIME VICTIMS INC.
111 East Taylor Street
Phoenix, AZ 85004
480-600-2661
cclase@voiceforvictims.org
Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF AMICUS CURIAE[1]

Arizona Voice for Crime Victims Inc. ("AVCV") is an Arizona nonprofit corporation that works to promote and protect crime victims' rights and services throughout the criminal justice process. To achieve these goals, AVCV empowers victims of crime through legal advocacy and social services. AVCV also provides continuing legal education to the judiciary, lawyers, and law enforcement. AVCV seeks to foster a fair justice system which (1) provides crime victims with resources and information to help them seek immediate crisis intervention, (2) informs crime victims of their rights under the laws of the United States and Arizona, (3) ensures that crime victims fully understand those rights, and (4) promotes meaningful ways for crime victims to enforce their rights, including through direct legal representation. A key part of AVCV's mission is working to give the judiciary information and policy insights that may be helpful in the task of balancing an accused's constitutional rights with the crime victim's right to finality, while also protecting the wider community's need for deterrence.

Twenty-eight years have now passed since the Petitioner, James Erin McKinney, committed the crimes, including two murders, for which he was sentenced, and twenty-six years since his sentence was passed.

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[1] No counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. Sup. Ct. R. 37.6. The parties have each provided blanket consent, as noted on the docket.

AVCV believes that the granting of the relief now requested by McKinney from this Court, namely, the reversing of the judgment of the Arizona Supreme Court affirming McKinney's sentence (*State v. McKinney*, 245 Ariz. 225, 426 P.3d 1204 (2018)), and the returning of his case to the trial court for a brand-new sentencing hearing before a jury or a judge, would entirely fail to properly balance the interests of the convicted offender and his multiple victims, as well as the larger societal interests at stake.

While the State of Arizona has offered the Court a comprehensive response relative to the two questions presented by the Petitioner for review, AVCV submits this brief in support of the State of Arizona (1) to articulate the distinct and powerful interest – well recognized under state and federal law – that victims of crime have in "finality" by seeing sentences executed, and (2) to demonstrate the harm that delay inflicts on victims' rights and interests.

Under the Arizona Constitution, crime victims have the right to the prompt and final conclusion of a case after conviction and sentence. Ariz. Const., art. II, § 2.1(A)(10). And in balancing the interests of a person convicted of multiple crimes and the interests of his victims in a federal habeas corpus proceeding arising out of a state conviction, the Court must ensure that the victims are afforded "[T]he right to proceedings free from unreasonable delay." 18 U.S.C. § 3771(b)(2)(A) and (a)(7).

AVCV is also concerned that this case is now before this Court on a false premise, namely, that the Arizona courts committed constitutional error under *Eddings v. Oklahoma*, 455 U.S. 104 (1982) and *Tennard v. Dretke*, 542 U.S. 274 (2004). But for the erroneous finding by the Ninth Circuit Court of Appeals in its 6-5 decision in *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) that Arizona applied a "causal nexus" test on nonstatutory mitigation factors in McKinney's sentencing in violation of *Eddings* and *Tennard*, this case would not be before this Court now. Simply put, the Ninth Circuit should not have conditionally granted McKinney's petition for a writ of habeas corpus in the first place.

STATEMENT OF THE CASE

In the instant case, AVCV undertakes to speak for the interests of the victims of the two savage murders committed by the Petitioner, James Erin McKinney, in 1991. McKinney murdered Christine Mertens and Jim McClain in the course of planning and carrying out five residential burglaries. Given McKinney's emphasis on the difficulties of his childhood, it is important that we also recall his crimes. They are described by the Arizona Supreme Court in both of its decisions.

Beginning on February 28, 1991, McKinney and Charles Michael Hedlund, his half-brother, commenced a residential burglary spree for the purpose of obtaining cash or property. In the course of their

extensive planning for these crimes, McKinney boasted that he would kill anyone who happened to be home during a burglary, and Hedlund stated that anyone he found would be beaten in the head.

The fourth burglary took place on March 9, 1991. Christine Mertens was home alone when McKinney and Hedlund entered her residence. McKinney beat Mertens and stabbed her several times. Mertens struggled to save her own life. Ultimately, McKinney held her face down on the floor and shot her in the back of the head, covering his pistol with a pillow to muffle the shot. The medical examiner testified that Mertens was beaten, stabbed multiple times, suffered several defensive wounds, and sustained a broken finger before being held face down on the floor and shot in the back of the head. When her son found her body, Mertens was covered with blood and there was a pillow over her head. The carpet was soaked with blood, and Mertens' glasses were broken, indicating a struggle. After the murder, McKinney and Hedlund ransacked the house and ultimately stole $120 in cash.

McKinney and Hedlund committed the fifth burglary on March 22, 1991. The target was Jim McClain, a sixty-five-year-old retiree. Entry was gained through an open window late at night while McClain was sleeping. Hedlund brought along his .22 rifle, which he had sawed-off to facilitate concealment. McKinney and Hedlund ransacked the front part of the house then moved to the bedroom. While he was sleeping, McClain was shot in the back of the head with Hedlund's rifle. McKinney and Hedlund then ransacked the bedroom,

taking a pocket watch and three hand guns; they also stole McClain's car.

The trial court found as aggravating factors at the sentencing that McKinney (1) committed the murders with the expectation of pecuniary gain, pursuant to former A.R.S. § 13-703(F)(5) (now § 13-751(F)(5)); (2) killed Mertens in an especially heinous, cruel or depraved manner, pursuant to former § 13-703(F)(6) (now § 13-751(F)(6)); and (3) in connection with the McClain murder, was "convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable," i.e., the earlier Mertens murder, pursuant to former A.R.S. § 13-703(F)(1) (now § 13-751(F)(1)).

McKinney was sentenced to death for his crimes in 1993 following a sentencing hearing in which the trial judge, Judge Sheldon, considered, credited, and weighed each and every one of the mitigating factors adduced by McKinney, including the evidence of his childhood that led to the development of Post-Traumatic Stress Disorder ("PTSD"). In full compliance with *Eddings* and *Tennard*, Judge Sheldon considered both statutory and nonstatutory mitigating factors, without imposing a "causal nexus" test on the nonstatutory factors.

In 1996, five years after the murders were committed, the Arizona Supreme Court affirmed McKinney's sentence. *State v. McKinney*, 185 Ariz. 567, 917 P.2d 1214 (1996).

Eighteen years after the murders were committed, the District Court denied McKinney's petition for a writ of habeas corpus, finding that it was "clear from the record that the trial court and the Arizona Supreme Court in its independent review of the sentence considered the mitigation evidence presented by Petitioner's witnesses." *McKinney v. Ryan*, 2009 WL 2432738, *22 (D. Ariz. 2009). The Court also rejected McKinney's "causal nexus" argument. *Id*., at *23. Four years later, the Ninth Circuit affirmed on the same grounds. *McKinney v. Ryan*, 730 F.3d 903 (9th Cir. 2013).

However, one year later, which was twenty-three years after the murders were committed, the Ninth Circuit decided to rehear the case en banc, *McKinney v. Ryan*, 745 F.3d 963 (9th Cir. 2014), and in 2015, the Ninth Circuit, in a 6-5 decision, concluded that the Arizona courts had imposed a "causal nexus" test on the nonstatutory mitigation factors of McKinney's childhood and PTSD in violation of *Eddings* and *Tennard*, notwithstanding a conclusive demonstration by the dissent that the Arizona courts had done no such thing. As a result, the Ninth Circuit reversed the District Court's judgment denying the writ of habeas corpus, and remanded with instructions to grant the writ with respect to McKinney's sentence unless the state, within a reasonable period, either corrected the constitutional error in his death sentence or vacated the sentence and imposed a lesser sentence consistent with law.

As a result, the State filed a motion with the Arizona Supreme Court to conduct a new independent review of McKinney's death sentences, the Court granted the Motion, conducted the review, and affirmed both sentences. *State v. McKinney*, 245 Ariz. 225, 426 P.3d 1204 (2018).

McKinney petitioned this Court for a writ of certiorari, which was granted. *McKinney v. Arizona*, 139 S.Ct. 2692 (2019).

McKinney now seeks not only further delay, but to impose upon the Arizona court system the extremely difficult task of resentencing him at the trial level, whether by jury (as he would prefer) or by judge, over twenty-eight years after these murders that no one doubts he committed.

SUMMARY OF THE ARGUMENT

Violent crime takes an extraordinarily painful toll on victims. But the crime itself is merely the beginning of the emotional harm victims and their families suffer. Victims' suffering is compounded and exacerbated by long delays between the commission of the crime and the imposition of punishment. Now, twenty-eight years since McKinney committed two brutal murders, the victims have yet to receive finality after conviction and sentence, a right guaranteed to them under Arizona constitutional and statutory law, and federal law.

Social science research demonstrates that the initial trauma victims suffer after a violent crime is compounded by their experience with the criminal justice system, no better illustrated than in this case. When punishment and finality are delayed, the victim's trauma is prolonged as resolution to a traumatic life event appears to be nonexistent. And while our system justly ensures that some delays are inevitable, the human cost of delay warrants special consideration. State and federal laws recognize the importance of finality to victim healing and recovery. However, the relief sought by McKinney in this case further indefinitely threatens to harm the interests of crime victims in attaining finality. While the state and victims share a legitimate interest in seeing that punishment is carried out, the state's interest in finality arises from the need for proper enforcement of its laws in a timely manner; but the victims' interest in finality is personal and relates to their emotional well-being. For the victims, finality represents at least such resolution of a traumatic life event and its aftermath as society can make available to them.

It is especially discouraging that this case has reached this Court as a result of a mistake made by the Ninth Circuit majority in ignoring a record plainly set forth by their dissenting colleagues.

Accordingly, AVCV respectfully urges the Court to enforce the crime victims' "right to proceedings free from unreasonable delay" and affirm the judgment of the Arizona Supreme Court.

ARGUMENT

I. Crime Victims Have the Right to Proceedings Free From Unreasonable Delay, Which Would Be Further Thwarted By the Granting of the Relief McKinney Seeks

While Christine Mertens and Jim McClain were the "direct" victims of McKinney, their murders left behind many other persons whom the law equally regards as "victims." Under Arizona's Constitution, if a person is killed, "victim" means "the person's spouse, parent, child or other lawful representative." Ariz. Const., art. II, § 2.1(C). By statute, the definition of "victim" has been expanded to include many others. A.R.S. § 13-4401(19).

18 U.S.C. § 3771 is the federal "Crime Victims' Rights Act" ("CVRA"). In a federal habeas corpus proceeding arising out of a state conviction, "the term 'crime victim' means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person's family member or other lawful representative." 18 U.S.C. § 3771(b)(2)(D).

AVCV undertakes to speak for the interests of all of McKinney's "victims," who otherwise are here without a voice.

One of the most fundamental rights crime victims have is to be free from unreasonable delay in the resolution of the cases in which they find themselves involved. This right is set forth in the Arizona Constitution: "To preserve and protect victims' rights to justice and due process, a victim of crime has a right:

. . . 10. To a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence." Ariz. Const., art. II, § 2.1(A)(10). Subsection (10) thus contains two rights, which should not be conflated: (1) the right to a speedy trial or disposition, and (2) the right to prompt and final conclusion of the case after the conviction and sentence. Subsection (10) should also be read in conjunction with Ariz. Const., art. II, § 2.1(A)(1), which provides the right "To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process."[2]

Traditional principles of federalism and comity, which may be traced back to *The Federalist Papers*, require the Court to recognize and give effect to rights afforded under state constitutions and laws.[3] Indeed, the Antiterrorism and Effective Death Penalty Act ("AEDPA") itself limits the extent to which federal courts may become involved in state criminal cases. 28 U.S.C. § 2254.

The CVRA also applies here. 18 U.S.C. § 3771(b)(2)(A) provides: "In a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights

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[2] Ariz.R.Crim.P. 39(b)(17) provides that a victim "has and is entitled to assert" "the right to a speedy trial or disposition and a prompt and final conclusion of the case after the conviction and sentence."

[3] Of course *Younger v. Harris*, 401 U.S. 37 (1971), albeit in a different context, famously coined the term "Our Federalism."

described in paragraphs (3), (4), (7), and (8) of subsection (a)." Paragraph (7) of subsection (a) provides crime victims with "The right to proceedings free from unreasonable delay." While AVCV is not aware of any cases of this Court applying 18 U.S.C. § 3771(a)(7) in contexts such as those presented by this case, AVCV urges the Court to apply the statute here.[4]

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[4] In *In re Gary Olesen*, 447 Fed.Appx. 868 (10th Cir. 2011), the crime victim's representative sought a writ of mandamus under 18 U.S.C. § 3771(d)(3) seeking to have the convicted murderer's remaining habeas claims dismissed, and to afford the victim his rights under the CVRA, including his "right to proceedings free from unreasonable delay," in an underlying 28 U.S.C. § 2254 habeas action. While the Court denied the motion, noting that mandamus is a "drastic" remedy "to be invoked only in extraordinary situations," the Court did recognize the victim's "right to proceedings free from unreasonable delay," and said that it was "sympathetic to Mr. Olesen regarding the long delays in this case." *Id*., at 871. Interestingly, the victim's representative suggested a use of *Barker v. Wingo* beyond its function in connection with the speedy resolution rights of *defendants*:

> Interestingly, Mr. Olesen asks this court when assessing unreasonable delay to apply the factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), for evaluating the constitutional right to a speedy trial. . . . These factors are: (1) the length of the delay; (2) the reason for the delay; (3) the victim's assertion of his rights; and (4) the prejudice to the victim. *See Barker*, 407 U.S. at 530, 92 S.Ct. 2182. Assuming without deciding that these factors apply, we agree with Mr. Olesen that the more than nine-and-a-half-year delay is too long, he has not been responsible for the delay, he has asserted his rights several times, and he has been prejudiced by the lengthy litigation. Nonetheless, while the question is close, we cannot conclude at this juncture that the prejudice and delay overcome [the convicted murderer's]

The relief sought by McKinney is the reversal of the judgment of the Arizona Supreme Court affirming his death sentences (245 Ariz. 225, 426 P.3d 1204 (2018)), so that he may be sentenced all over again at the level of the trial court, either by a jury (on the basis that *Ring v. Arizona*, 536 U.S. 584 (2002) must be applied retroactively at the resentencing), or by a trial judge (McKinney arguing that in any event, the Arizona Supreme Court could not resentence the Petitioner).

Not only would this further delay resolution of a case already unreasonably delayed, it would require the State to again put on evidence in support of aggravating factors and to respond to any evidence adduced by McKinney of mitigating factors when evidence may no longer even be available. And once resentenced, presumably McKinney would again claim the right to appeal and the right to the various forms of post-conviction relief.

Furthermore, if the relief sought by McKinney is granted by this Court, other prisoners convicted long ago may seek the same relief. In its Opinion, the Ninth

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> due process right to have his habeas case decided. A part of our consideration is the likelihood that under the present briefing schedule this habeas action will soon be concluded by a final ruling by the district court. Thus, although there was delay, we cannot further conclude that Mr. Olesen has a clear and indisputable right to the granting of the motion to dismiss.

Id., at 870-871.

The application of the *Barker v. Wingo* factors in this case would yield a different result.

Circuit (wrongly) alleged that "For a period of a little over 15 years in capital cases [between 1989 and 2005], in clear violation of *Eddings*, the Supreme Court of Arizona articulated and applied a 'causal nexus' test for nonstatutory 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." 813 F.3d at 802. In his Opening Brief, McKinney himself echoed the Ninth Circuit. Brief for Petitioner, at pages 12-13.

The Ninth Circuit incorrectly characterized the Arizona Supreme Court's case law, as the dissent in that case demonstrated: "The majority starts by incorrectly summarizing the Arizona Supreme Court's *Eddings* jurisprudence between 1989 and 2005 as constituting continuous and recurrent *Eddings* error. Not so at all, as our own decisions have repeatedly recognized." 813 F.3d at 829. If McKinney obtains the relief he seeks in this Court, and to which he is not entitled, capital cases decided in Arizona between 1989 and 2005 may suddenly be resurrected, with consequent burdens on not only the Arizona judicial system, but, more importantly, on the myriad victims of the crimes in question.

II. The Importance of "Finality" Militates Against the Granting of the Relief McKinney Seeks

This Court has recognized the fundamental importance of "finality" in criminal, as well as civil, litigation. In *Teague v. Lane*, 489 U.S. 288 (1989), in an effort to simplify its admittedly complex jurisprudence as to when a criminal case becomes "final" and therefore not subject to retroactive application of decisions of the Court made subsequently that "announce a new rule," this Court cited the position of Justice Harlan "that new rules should always be applied retroactively to cases on direct review, but that generally they should not be applied retroactively to criminal cases on collateral review." *Id*., at 303. The Court noted that it had adopted the first part of Justice Harlan's rule in *Griffith v. Kentucky*, 479 U.S. 314 (1987), and in *Teague*, turned to and adopted the second part. In so doing, the Court stressed the policy reasons supporting the doctrine of "finality" in criminal cases.

The Court quoted Justice Harlan on the subject of habeas review: "The interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision, may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed." *Teague*, 489 U.S. at 306 (citing *Mackey v. United States*, 401 U.S. 667, 682-683 (1971)).

Echoing this same concern for finality, this Court continued: "We agree with Justice Harlan's description of the function of habeas corpus. '[T]he Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error.' *Kuhlmann v. Wilson*, 477 U.S. 436, 447 . . . (1986) (plurality opinion). Rather, we have recognized that interests of comity and finality must also be considered in determining the proper scope of habeas review." *Id.*, 489 U.S. at 308.

"The[ ] underlying considerations of finality [in the civil context]," continued the Court,

> find significant and compelling parallels in the criminal context. Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions "shows only that 'conventional notions of finality' should not have as much place in criminal as in civil litigation, not that they should have none." . . . "[I]f a criminal judgment is ever to be final, the notion of legality must at some point include the assignment of final competence to determine legality." . . . *See also Mackey*, 401 U.S., at 691 . . . (Harlan, J., concurring in judgments in part and dissenting in part) ("No one, not criminal defendants, not the judicial system, not society as a

> whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation").

Id., 489 U.S. at 309.

The Court also cited Justice Powell in *Solem v. Stumes*, 465 U.S. 638, 654 (1984), for the proposition that the "'costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus . . . generally far outweigh the benefits of this application'" (*Teague*, 489 U.S. at 310), and said, along the same lines:

> In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, *cf. Younger v. Harris*, 401 U.S. 37, 43-54 . . . (1971), for it *continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards. Furthermore, as we recognized in *Engle v. Isaac*, "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands." 456 U.S., at 128, n. 33. . . . *See also Brown v. Allen*, 344 U.S., at 534 . . . (state courts cannot "anticipate, and so comply with, this Court's due process requirements or ascertain any standards to

> which this Court will adhere in prescribing them").

Id., 489 U.S. at 310.

Based on these strong policy considerations, this Court adopted the second part of Justice Harlan's rule, holding that "[U]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Id*.

The instant case is an example of why finality is so important in the criminal justice system.

Finally, and along these same lines, AVCV strongly supports the arguments of the State of Arizona in the Brief for Respondent that:

(1) The Arizona Supreme Court's 2018 decision pursuant to A.R.S. § 13-755 was an independent review in a collateral proceeding under state law that did not reopen direct review. This case was long ago final, and *Teague* bars the retroactive application of *Ring v. Arizona*, 536 U.S. 584 (2002). *See*, *e.g.*, *Schriro v. Summerlin*, 542 U.S. 348 (2004); *Clemons v. Mississippi*, 494 U.S. 738 (1990); *Styers v. Ryan*, 811 F.3d 292 (9th Cir. 2015), *cert. denied*, 137 S.Ct. 1332 (2017); *Styers v. Ryan*, 2012 WL 3062799 (D. Ariz. 2012); *State v. Styers*, 227 Ariz. 186, 254 P.3d 1132 (2011).[5]

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[5] "The U.S. Supreme Court has never held that the issuance of a conditional writ of habeas corpus necessarily renders non-final a conviction or sentence that was predicated on constitutional

(2) Resentencing in this case is completely unwarranted and would undermine the interests of justice. The trial court sentencing record was more than adequate for post-writ *Eddings* error correction in the Arizona Supreme Court pursuant to A.R.S. § 13-755.[6] *See*, *e.g.*, *Clemons, supra.*[7]

III. Delays in Obtaining Justice Cause Significant Harm to Victims of Violent Crime

Victims have a compelling interest in finality as it is essential to their healing and recovery. The murder of a loved one causes significant psychological implications conceptualized within a post-traumatic stress disorder (PTSD) framework as the most consistently documented consequence of violent crime. Heidi M. Zinzow, et al., *Examining Posttraumatic Stress Symptoms in a National Sample of Homicide Survivors: Prevalence and Comparison to Other Violence Victims*, 24 J. Traum. Stress 743 (December 2011) (findings highlight the high prevalence of subthreshold PTSD symptoms among homicide survivors, and suggest that

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error, and the conditional writ of habeas corpus in this case did not vacate Styers's death sentence. Therefore, the Arizona Supreme Court's determination that Styers's sentence remained final at the time of the second independent review was not contrary to federal law as determined by the Supreme Court of the United States." *Styers v. Ryan*, 811 F.3d at 298.

[6] Even though no *Eddings* error actually occurred.

[7] "This very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first." *Mackey v. U.S.*, 401 U.S. 667, 691 (1971) (Harlan, J.).

homicide survivors are at elevated risk for PTSD symptoms in comparison to victims of other interpersonal violence); Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. Traum. Stress 182 (2010) (common features of the criminal justice system, such as delay, can exacerbate the impact of the initial crime, leading to a secondary victimization); Dean G. Kilpatrick & Ron Acierno, *Mental Health Needs of Crime Victims: Epidemiology and Outcomes*, 16 J. Traum. Stress 119 (2003) (review of epidemiological estimates of criminal victimization derived largely from nationally based studies in the United States, documenting mental health outcomes of violence with a focus on PTSD, but also including depression, substance abuse, and panic); Patricia A. Resick, *The Psychological Impact of Rape*, 8 J. Interpersonal Violence 223, 225 (1993) (review of the literature on the psychological impact of rape on adult female victims, discussing, among other problems, fear and anxiety, PTSD, depression, poor self-esteem, social adjustment issues, and sexual dysfunctions).

Victims of all types of violent crime can experience PTSD or various symptom clusters, but homicide survivors are twice as likely to meet the criteria for PTSD and report more symptoms of PTSD than victims of other types of trauma. Zinzow at 744. The high prevalence of PTSD in homicide survivors may be partially due to the fact that survivors are forced to cope not only with the loss of a loved one, but also the sudden and violent nature of their death. Zinzow at 744, citing

Angelynne Amick-McMullan, et al., *Family Survivors of Homicide Victims: Theoretical Perspectives and an Exploratory Study*, 2 J. Traum. Stress 21, 35 (1989). Studies also report a connection between initial victimization and later depression, substance abuse, panic disorder, agoraphobia, social phobia, obsessive-compulsive disorder, and even suicide. Parsons & Bergin at 182.

Courts often overlook the effects that delayed judicial proceedings, as well as delays in the imposition of punishment, have on victims. Prolonged delays in the criminal justice system add to the intense and painful consequences of initial victimization. *See id.*, at 182-183; *see also* Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. Traum. Stress 159, 159 (2003). Secondary victimization often causes more harm than the initial criminal act. Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 Soc. Just. Res. 313, 321 (2002). A victim's experience with the justice system often "means the difference between a healing experience and one that exacerbates the initial trauma." Parsons & Bergin at 182. For example, one study examining the effect of offender punishment on crime victim recovery found that most victims experienced improved recovery when there was an increased perceived punishment of the offender. Dr. Joel H. Hammer, *The Effect of Offender Punishment on Crime Victim's Recovery and Perceived Fairness (Equity) and Process Control*, University Microfilms International 87, Ann Arbor, MI (1989). Similarly, where offenders accepted plea bargains, the victims experienced greater recovery because of the absence of extended delays. *Id.*

Timely resolution is essential to victim recovery. *Id.* The emotional harm caused by a prolonged process is severe in death penalty cases, such as this one, where the delay between the initial sentencing in 1993 and the current procedural posture of the case has spanned almost three decades. The automatic, and often repeated, appeals in death penalty cases are continually brutal on victim family members. Dan S. Levy, *Balancing the Scales of Justice*, 89 Judicature 289, 290 (2006). Year after year, survivors summon the strength to go to court, schedule time off work, and relive the murder of their loved one. *Id*. The years of delay exact an enormous physical, emotional, and financial toll. *Id.*

Here, forcing the resentencing of McKinney in the trial court, whether before a jury or a judge, would constitute an unnecessary infliction of additional trauma to the victims. Further delays in the imposition of punishment would come at a great cost to the crime victims who, after twenty-eight years, are still seeking a resolution to traumatic life events that only the end of the criminal process and imposition of punishment can bring.

IV. The Emotional Harm Caused to Victims by Delay, Which Is Recognized By State and Federal Law, Should Be Given Great Weight

Arizona, through its Victims' Bill of Rights ("VBR"), seeks to minimize the traumatic impact of murder on victims by enumerating specific individual constitutional rights to victims intended to preserve and protect their rights to justice and due process. Ariz.

Const. art. II, § 2.1; Gessner H. Harrison, *The Good, The Bad, and The Ugly: Arizona's Courts and the Crime Victims' Bill of Rights*, 34 Ariz. St. L.J. 531, 531-532 (2002). In cases involving murder, as indicated above, these rights are conferred on the victims' spouses, parents, children, and other family members. Ariz. Const. art. II, § 2.1(C)-(D); A.R.S. § 13-4401(19).

Most relevant here is that the VBR gives victims an express "right to a speedy trial or disposition and *final conclusion of the case after conviction and sentence*." Ariz. Const. art. II, § 2.1(A)(10) (emphasis added). Arizona constitutional law expressly recognizes the harm caused by undue delay. Thus, Arizona's courts are required to consider not only the speedy trial rights of the accused, but also to account for the crime victim's rights to reasonable finality. *See State v. Dixon*, 226 Ariz. 545, 555, 250 P.3d 1174, 1184 (2011). The Arizona Supreme Court has been clear that a victim's constitutional right to finality warrants protection. *Fitzgerald v. Myers*, 243 Ariz. 84, 402 P.3d 442, 450 (2017); *State v. Gates*, 243 Ariz. 451, 410 P.3d 433, 436-37 (2018). Victim's rights may not be whittled away through judicially created ad hoc exceptions or contrary court rules, and the Arizona legislature is similarly prohibited from reducing rights conferred by Arizona's VBR. *See Knapp v. Martone*, 170 Ariz. 237, 239, 823 P.2d 685, 687 (1992); *see also State v. Lee*, 226 Ariz. 234, 237, 245 P.3d 919, 922 (App. 2011) ("[N]either the legislature nor court rules can eliminate or reduce rights guaranteed by the VBR"). In other words, Arizona's Constitution gives crime victims a fundamental right not to be victimized a second time by an unending criminal justice process.

The authority of a state to enact and pass its own laws is futile if a state cannot enforce them. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). The delay that would occur were this court to grant McKinney the relief he seeks would be detrimental to both the state's interest in enforcing its moral judgment and to the victims' constitutional right to a prompt and final conclusion. By providing a constitutional right to finality, Arizona seeks to ensure that victims of violent crimes such as this one receive a resolution. Without justice, victims cannot heal.

Arizona is not alone in recognizing the need for finality for victims of violent crime. As indicated above, federal law also recognizes the importance of victims seeing finality and avoiding undue delay in capital cases. 18 U.S.C. § 3771(a)(7) and (b)(2). The plain language of the CVRA demonstrates a desire to protect victims from delay and other harms encountered throughout the criminal justice process. The CVRA guarantees that victims will no longer be ignored, but instead guaranteed "a role in the criminal justice process" as "independent participant[s]." *See* Paul G. Cassell, *Crime Victims' Rights During Criminal Investigations?*, 104 J. Crim. Law and Criminology 59, 66-67 (2014).

Like the CVRA, the AEDPA expressly recognizes the need to avoid delay in death penalty cases by imposing a one-year statute of limitations on habeas petitions. 28 U.S.C. § 2244(d)(1). AEDPA also bars second or successive habeas petitions. 28 U.S.C. § 2244(b)(1). This Court has previously recognized the intended function of AEDPA in reducing delay in capital cases

and in the interest states have in finality. *Woodford v. Garceau*, 538 U.S. 202, 206 (2003); *Duncan v. Walker*, 533 U.S. 167, 179 (2001).

Victims of crime share a legitimate interest in seeing that the punishment is ultimately carried out. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). Only after the sentence is executed can a victim achieve true finality, and "[f]inality is essential to both the retributive and the deterrent functions of criminal law." *Id.*, at 555.

"Both the state and the victims of crime have an important interest in the *timely* enforcement of a sentence." *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (emphasis added). A victim's interest in finality is distinct from the state's interest. While the state seeks to exercise its power to enforce laws and impose punishment, a victim's interest in finality is personal and directly related to their physical and emotional well-being, and is seen as a resolution to a traumatic life event and its aftermath. "Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *Calderon*, 523 U.S. at 556.

When lengthy federal proceedings indefinitely delay the implementation of punishment, victims necessarily experience a concomitant postponement of their ability to achieve reasonable finality. *Id.*, at 556. A delay in finality equates to a delay in healing and recovery. This trauma, and the victim's interest of being protected from it, must be accounted for when making

decisions that could cause this harm to continue indefinitely.

Ordering the resentencing of McKinney at the trial court level would indefinitely compound the emotional harm the victims have already endured through the criminal process. Additionally, it would undermine established state and federal policy protecting victims from undue delay.

V. There Was No *Eddings* Error in McKinney's Sentencing[8]

Since there was no *Eddings* or *Tennard* error in McKinney's sentencing, this case should not even be before this Court.

To be clear about what *Eddings* requires, the sentencing judge there *specifically refused, as a matter of law, to even consider in mitigation the circumstances of petitioner's unhappy upbringing and emotional disturbance*. Extending *Lockett v. Ohio*, 438 U.S. 586 (1978), this Court held that just as a state could not by statute preclude *consideration* of any relevant mitigating factor, neither could the sentencer. To clarify its holding, the Court added: "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." *Eddings*, 455 U.S. at 114-115.

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[8] *See also* Brief for Respondent at 12-14 and 29-41.

The Court recognized that "Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation. . . . In some cases, such evidence properly may be given little weight." 455 U.S. at 115. The Court was inclined to give such evidence more weight in *Eddings* itself only because "Eddings was a youth of 16 years at the time of the murder." *Id*. *Eddings* is thus in a line of cases in which this Court has demonstrated a special concern for the sentencing of minors accused of crimes.[9] In contrast, in the instant case, McKinney was 23, an adult, at the time he committed the burglaries and murders for which he was convicted and sentenced in 1993.[10]

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[9] In *Roper v. Simmons*, 543 U.S. 551 (2005), this Court held that the Cruel and Unusual Punishments Clause of the Eighth Amendment barred the death penalty for any person under the age of eighteen at the time of the crime. In *Graham v. Florida*, 560 U.S. 48 (2010), it held that it is "grossly disproportionate" and hence unconstitutional for any judge or jury to impose a sentence of life without parole on a juvenile offender for a nonhomicide case. And in *Miller v. Alabama*, 567 U.S. 460 (2012), it held that the Eighth Amendment is violated when a juvenile convicted of murder receives a mandatory sentence of life without parole. As the Court said in *Miller*, juveniles have a "lesser culpability . . . children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform . . . 'they are less deserving of the most severe punishments.' *Graham*, 560 U.S., at 68, 130 S.Ct., at 2026. . . . *Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." 567 U.S. at 470-471 and 489.

[10] "At the time of the crimes, McKinney was 23 years old." *McKinney v. Ryan*, 813 F.3d at 804.

In later cases, the Supreme Court clarified that the sentencer cannot refuse to consider evidence because that evidence does not bear a causal nexus to the crime. *Tennard v. Dretke*, *supra*. And the Ninth Circuit has recognized that the sentencer may consider a "causal nexus . . . as a factor in determining the weight or significance of mitigating evidence." *Lopez v. Ryan*, 630 F.3d 1198, 1204 (9th Cir. 2011) (citing *Eddings*, 455 U.S. at 114-15).[11]

The only reason this case is now before this Court is because in its 6-5 Opinion rendered in 2015, the Ninth Circuit found that the trial court and the Arizona Supreme Court committed *Eddings* error by applying a "causal nexus" test in McKinney's 1993 sentencing hearing that precluded, as a matter of law, giving any weight to nonstatutory mitigating evidence, such as McKinney's childhood and PTSD evidence.

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[11] A sentencer is free to assign whatever weight, including no weight, that mitigating evidence deserves under the facts of the case, as long as the sentencer does not exclude from his consideration relevant mitigating evidence as a matter of law. *Towery v. Ryan*, 673 F.3d 933, 945 (9th Cir. 2012) ("One could question the wisdom of the Arizona Supreme Court's decision to accord Towery's evidence little or no weight. . . . However, the court's reasoned and individualized decision to give Towery's evidence little or no weight was not contrary to Supreme Court precedent."); *Allen v. Buss*, 558 F.3d 657, 667 (7th Cir. 2009) ("The rule of *Eddings* is that a sentencing court may not exclude relevant mitigating evidence. But of course, a court may choose to give mitigating evidence little or no weight." (citation omitted)); *United States v. Johnson*, 495 F.3d 951, 965 (8th Cir. 2007) ("[J]urors are obliged to consider relevant mitigating evidence, but are permitted to accord that evidence whatever weight they choose, including no weight at all.").

813 F.3d 798. The Ninth Circuit seemed to draw that conclusion in part because of its overarching finding that "For 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 nonstatutory 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." *Id*., at 802. This "overarching" finding was, as the dissent demonstrated, itself incorrect.

It was the Ninth Circuit's 2015 Opinion that led to the Arizona Supreme Court's 2018 Opinion affirming McKinney's death penalty, which was then the subject of McKinney's petition to this Court for a writ of certiorari, granted by this Court earlier this year. And now that the case is here, McKinney simply assumes, in his statement of the "Questions Presented" at page 2 of his Opening Brief, that *Eddings* error was committed. However, since *Eddings* error was not committed, this case should never have come before this Court in the first place, and this Court should simply affirm the judgment of the Arizona Supreme Court.

In 1993, when McKinney was sentenced by the trial court, the statute on mitigation evidence was A.R.S. § 13-703(G) (now A.R.S. § 13-751(G)), but the language has not changed). The statute begins by providing for *nonstatutory* mitigating factors: "The trier of fact shall consider as mitigating circumstances any factors proffered by the defendant or the state that are relevant in determining whether to impose a

sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following: . . . " The statute then provides five *statutory* mitigating factors, of which the first one – the only relevant one for our purposes – is: "1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution" ("Mitigating Factor #1" or "Mental Capacity Factor"). It is critical to note that which the Ninth Circuit majority failed to note, namely, that this *statutory* mitigating factor, by its own terms, includes a causation requirement.

The Ninth Circuit majority held that Arizona violated *Eddings* by imposing a "causal nexus" requirement for the *nonstatutory* mitigating factors. But, as the dissent pointed out, that is not what the trial judge did at all. The majority confused what the trial judge did under the nonstatutory mitigating factors with what the trial judge did under Mitigating Factor #1.

In the many court decisions in this case, the clearest and most thorough treatment of the relevant evidence adduced by McKinney in mitigation at his sentencing is found in the Ninth Circuit dissent.

McKinney v. Ryan, 813 F.3d at 827ff. (Bea, J., dissenting),[12] to which we now turn.[13]

McKinney admitted that the sentencing judge, Judge Sheldon, considered his first argument (under Mitigating Factor #1), but claimed that Judge Sheldon did not consider the mitigating value of his PTSD for leniency purposes regardless of its effect on him at the time of the murders. *Id*., at 828. "McKinney pressed this same claim before the Arizona Supreme Court on direct appeal from the sentence Judge Sheldon imposed." *Id*. But, as this Court has said, we must presume "state courts know and follow the law" (*Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)), and, in the *Eddings* context, "[w]e must assume that the trial judge considered all [the] evidence before passing sentence" (*Parker v. Dugger*, 498 U.S. 308, 314 (1991)). *Id*. "This appeal presents even fewer problems to decide under the standard provided by the [AEDPA]." *Cullen v. Pinholster*, 563 U.S. 170 (2011). *Id*.

Furthermore, said the dissent,

> When the majority turns to the record in this case, it misreads it. The majority first suggests that when Judge Sheldon stated there was no evidence that McKinney's PTSD "in any way affected his conduct in this case," he applied an unconstitutional nexus test to exclude the PTSD from consideration altogether.

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[12] Judge Bea was joined by Kozinski, Gould, Tallman, and Callahan, JJ.

[13] The dissent criticized the majority for treating the sentencing judge's special verdict as generally irrelevant.

Not so. At that portion of the hearing, Judge Sheldon was dealing with, and rejecting, McKinney's *own argument* that his PTSD impaired his ability "to appreciate the wrongfulness of his conduct" at the time of the murders. Next, the majority states the Arizona Supreme Court "recited its unconstitutional causal nexus test" when it decided McKinney's appeal. The court did no such thing; if it did state an unconstitutional nexus test, this case would be simple. Finally, the majority ignores the Arizona Supreme Court's careful articulation of *Eddings's* requirements and focuses instead on a single case citation in the Arizona opinion. None of this is permissible under AEDPA.

In short, the majority ignores Supreme Court precedent, implicitly overrules our own precedent, replaces AEDPA's deferential standard of review of state-court decisions with an impermissible de novo standard, and misstates the record when applying that standard. Also quite troubling, the majority wrongly smears the Arizona Supreme Court and calls into question every single death sentence imposed in Arizona between 1989 and 2005 and our cases which have denied habeas relief as to those sentences. Finally, the majority brushes by the facts of McKinney's gruesome crimes to find that the error the majority has manufactured was indeed prejudicial to the outcome of the sentencing, rather than harmless, in contravention of the prejudice standard stated in *Brecht v. Abrahamson*, 507

> U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).

Id., at 829-830.

The dissent provided a detailed analysis of one of the key documents in the record of McKinney's sentencing, namely, McKinney's sentencing memorandum, which the majority had ignored:

> McKinney's sentencing memorandum included 11 separate parts; each argued for leniency for different reasons. McKinney's two primary arguments in support of leniency were based on his troubled childhood and his claimed resulting PTSD diagnosis. McKinney relied on his PTSD to make two arguments in support of leniency. First, in Part VIII of his sentencing memorandum, McKinney argued his PTSD warranted leniency based on the statutory mitigation factor § 13-751(G)(1) ("Mental Capacity Factor"). . . . McKinney argued his PTSD diminished his capacity to appreciate the wrongfulness of his conduct during the murders of Christene Mertens and Jim McClain. *It must be kept in mind that it was McKinney who claimed a causal nexus between his PTSD and his commission of the murders. So the sentencing judge can hardly be faulted for considering this as "nexus" evidence.*
>
> Second, in Parts I and VII of his sentencing memorandum, McKinney argued his PTSD warranted leniency *separate from any effect that PTSD may have had on him at the*

> *time of the murders. This argument did not assert McKinney's PTSD played a role in the two murders. Thus, it did not fall under the statutory Mental Capacity Factor, or any other specific statutory mitigation factor. . . . Instead, it fit under the nonstatutory catchall, quoted above.*

Id., at 830-831 (emphasis added).

Dr. McMahon, McKinney's expert witness at his sentencing, opined that McKinney's childhood caused him to develop PTSD. *Id*., at 831. Dr. Gray, the prosecution's expert, opined that McKinney did not have PTSD. *Id*.

In considering McKinney's mitigation evidence, Judge Sheldon credited Dr. McMahon's testimony over Dr. Gray's. *Id*. He accepted "Dr. McMahon's PTSD diagnosis as true." *Id*., at 832. He then addressed McKinney's nexus argument for leniency under the statutory Mental Capacity Factor, which McKinney had cited in his sentencing memorandum. *Id*. Judge Sheldon found that there was no evidence McKinney's PTSD " 'in any way significantly affected his conduct in this case.' " *Id*.[14] "Judge Sheldon reached that conclusion based on McKinney's planning of the burglaries and statements

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[14] "Early in its opinion, the majority admits that this language is directed to McKinney's argument for leniency under the statutory Mental Capacity Factor. . . . The majority nonetheless suggests these statements also show Judge Sheldon applied an unconstitutional nexus test. . . . As I discuss in detail below, at this point in the sentencing colloquy, Judge Sheldon is addressing the statutory mitigating factors and only the statutory mitigating factors." *Id*., at 832 n. 20.

McKinney made to witnesses before the burglaries that he would shoot a resident if he encountered one during the burglaries. Judge Sheldon noted Dr. McMahon testified that a person suffering from PTSD would be withdrawn and would 'avoid contacts which would either exacerbate or recreate the trauma that would bring on this type of stress from childhood.' But McKinney sought out stressful situations by planning and executing the burglaries that led to the two murders." *Id*.

> This analysis of PTSD under the statutory mitigation factors did not end Judge Sheldon's consideration of McKinney's PTSD for purposes of mitigation. Judge Sheldon next transitioned to address "the other mitigating factors raised by the defense in their memorandum." Those other mitigation factors included, among others, McKinney's Part VII argument for leniency due to his difficult childhood and his psychological history, including his PTSD. After finding McKinney's childhood did not support leniency, Judge Sheldon concluded: "With respect to the *other* matters set out in the [defendant's sentencing] memorandum, I have considered them at length, and after considering all of the mitigating circumstances . . . I have determined that . . . the mitigating circumstances simply are not sufficiently substantial to call for a leniency under all of the facts of this case." (Emphasis added.) The court then sentenced

> McKinney to death for both first-degree murder convictions.

Id., at 832-833.

As the Arizona Supreme Court found on direct appeal, the trial judge thus did give full consideration to McKinney's childhood and PTSD as nonstatutory mitigation factors, and did not impose a causal nexus test in connection with that consideration, which would have required him to not consider those factors as mitigating evidence at all. As this Court said in *Eddings*, the sentencer "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." *Eddings*, 455 U.S. at 114-115. Judge Sheldon did not give McKinney's childhood and PTSD evidence no weight by excluding it from his consideration on the nonstatutory mitigation factors presented by McKinney. He merely determined the appropriate degree of weight to give it.

The dissent provided further insight into Judge Sheldon's decision by noting that his discussion of McKinney's mitigation evidence proceeded in three careful steps, *id*., at 839ff.:

First, Judge Sheldon discussed the mitigation evidence McKinney proffered, considering all of it, and crediting the conclusion of Dr. McMahon that McKinney's childhood led him to develop PTSD over the conclusion of Dr. Gray.

Second, Judge Sheldon addressed the statutory mitigating factors raised by McKinney, including § 13-751(G)(1), finding in effect that McKinney's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was not significantly impaired by his childhood or his PTSD, especially given McKinney's pre-planning of the burglaries and homicides.

Third, Judge Sheldon addressed the nonstatutory mitigation factors raised by McKinney, "including McKinney's argument for leniency under the nonstatutory catchall due to his PTSD *separate from its effect on his mental state at the time of the murders*." *Id*., at 839 (emphasis added). McKinney's argument here was contained in two separate parts of his sentencing memorandum, Parts I and VII. The title to Part I included a citation to *Eddings v. Oklahoma*, thus bringing "front and center the constitutional requirement that the PTSD diagnosis be considered without restriction." *Id*., at 840. "Judge Sheldon made clear he considered both of these sections." *Id*., at 841. Balancing the aggravating factors against the mitigating factors, however, as he was required to do, Judge Sheldon rejected the argument that McKinney's childhood or PTSD was substantial enough to warrant leniency:[15]

> As the sentencing transcript shows, Judge Sheldon considered "at length" McKinney's sentencing memorandum's arguments

[15] "It was only in Part VIII of the sentencing memorandum that McKinney argued the causal relationship – 'nexus' – between his PTSD and his criminal conduct." *Id.*, at 841 n. 28.

> that his PTSD diagnosis warranted leniency *without any reference to PTSD's possible effect on his mental capacity during the murders*. And Judge Sheldon found the PTSD did not carry enough mitigating weight "to call for leniency." When combined with Judge Sheldon's prior crediting of Dr. McMahon's testimony as to the PTSD diagnosis, the only conclusion to reach is that Judge Sheldon complied with *Eddings*. Even were there an ambiguity in Judge Sheldon's statements (there isn't), the Supreme Court has admonished that "[w]e must assume that the trial judge considered all this evidence before passing sentence. For one thing, he said he did." *Parker [v. Dugger]*, 498 U.S. at 314 [1991].
>
> In short, the Arizona Supreme Court's conclusion that Judge Sheldon properly considered all of McKinney's mitigation evidence was not an "unreasonable determination of fact." In fact, it was the correct conclusion.

Id. (emphasis added).

CONCLUSION

For the reasons set forth above, AVCV respectfully urges this Court to affirm the judgment of the Arizona Supreme Court.

Respectfully submitted,

COLLEEN CLASE
Counsel of Record
THOMAS E. LORDAN
NATHAN ANDREWS
ARIZONA VOICE FOR CRIME VICTIMS INC.
111 East Taylor Street
Phoenix, AZ 85004
480-600-2661
cclase@voiceforvictims.org
Counsel for Amicus Curiae