NO. 18-1109

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES ERIN MCKINNEY,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition for a Writ of Certiorari to the Arizona Supreme Court

BRIEF OF THE ARIZONA CAPITAL REPRESENTATION PROJECT AND ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

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

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

Amici have a particularized and informed perspective on how the death penalty operated in the relevant time period in the United States and in the state of Arizona.

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[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part. No person or entity other than *amici* made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2, counsel of record for all parties received notice of intent to file this brief at least ten days before the due date. The parties have consented to this filing.

SUMMARY OF ARGUMENT

In *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015), the Ninth Circuit held that for over 15 years Arizona courts violated this Court's decision in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), by repeatedly refusing, as a matter of law, to consider non-statutory mitigating evidence that had no causal nexus to the crime in death penalty cases. *McKinney,* 813 F.3d at 802. The Ninth Circuit remanded to the Arizona District Court with instructions to "grant the writ with respect to McKinney's sentence unless the state, within a reasonable period, either corrects the constitutional error in his death sentence or vacates the sentence and imposes a lesser sentence consistent with law." *Id.* at 827. In response, the State sought independent review of McKinney's sentence in the Arizona Supreme Court. McKinney's Petition for Writ of Certiorari at 3.

On remand, McKinney argued that his sentence was no longer final and urged the Arizona Supreme Court to remand to the trial court for resentencing proceedings consistent with *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 136 S. Ct. 616 (2016). McKinney's Petition for Writ of Certiorari at 3-4. The Arizona Supreme Court denied that request, and instead, the Arizona Supreme Court conducted a *de novo* "independent review" of McKinney's sentence. *State v. McKinney*, 426 P.3d 1204 (Ariz. 2018). In its *de novo* review, the Arizona Supreme Court "weigh[ed]" the mitigating and aggravating evidence presented at McKinney's 1992 judge-sentencing. *Id.* at 1206, ¶6. The court acknowledged that McKinney "endured a horrific childhood," was "verbally and physically abused" and was "frequently deprived [] of

food, forced [] to live in filthy conditions and wear soiled clothes, and regularly locked [] out of the home in extreme temperatures," and also suffered from PTSD. *Id.* at 1206, ¶¶8-9. Despite this, the court "affirm[ed]" McKinney's death sentence—a sentence that was supposedly "final" before its review. *Id.* at 1208, ¶19.

As argued in McKinney's Petition for Certiorari, the Arizona Supreme Court's independent review of McKinney's sentence is unconstitutional under *Ring v. Arizona*, and *Hurst v. Florida*. Further, in conducting the independent review, the Arizona Supreme Court unreasonably confined itself to the original sentencing record—developed over 27 years ago. *McKinney*, 426 P.3d at 1206, ¶6.

The Arizona Supreme Court has already conducted this unconstitutional approach in three capital cases, and has the potential to be repeated in a further 19 cases.

Amici file this brief in support of Petitioner McKinney for several reasons. First, the review procedure created by the Arizona Supreme Court to deal with these *Eddings* errors is unconstitutional and a legal fiction. In order to create this procedure the Arizona Supreme Court had to rule that these cases are both non-final and at the same time before it for an independent/*de novo* review of the sentence. Second, the causal nexus test employed by the Arizona Supreme Court was binding law on trial courts and counsel across the state. Thus, the causal nexus error infected the original sentencing, not just the direct appeal. Third, in conducting this review the Arizona Supreme Court unreasonably limited itself to the original sentencing record. Due to the pervasive

nature of the *Eddings* error, the only appropriate remedy is consideration of the totality of the mitigation evidence—not an ideal function for an appellate court. Lastly, independent review based on a record created decades earlier leads to life or death decisions made on outdated and unreliable scientific evidence.

For the following reasons, and in addition to those argued in McKinney's Petition for Certiorari, *amici* urge this Court to grant certiorari and remedy the unconstitutional actions of the Arizona Supreme Court.

ARGUMENT

I. Cases Cannot be Both Final and Subject to Independent Review.

Beginning with *State v. Styers*, 254 P.3d 1132, 1133-34, ¶¶5-6 (Ariz. 2011), the Arizona Supreme Court created a legal fiction whereby it holds that the finality of a case returning for independent review after an *Eddings* error is undisturbed.

The Arizona Supreme Court is conducting its independent review of these cases pursuant to Ariz. Rev. Stat. § 13–755. *Styers*, 254 P.3d at 1134, ¶8; *McKinney*, 426 P.3d at 1206, ¶6; *State v. Hedlund*, 431 P.3d 181, 184, ¶4 (Ariz. 2018). Section 13–755 mandates independent review of death sentences on direct review. As the dissent in *Styers* recognized,

> [Ariz. Rev. Stat.] § 13–755(A)[ ] applies to direct review, not to post-conviction proceedings. Indeed, no one contends that the Court today is exercising Rule

> 32 post-conviction review jurisdiction, and I am unaware of any other context in which we review criminal sentences other than direct review. But more importantly, independent review is the paradigm of direct review—we determine, de novo, whether the trial court, on the facts before it, properly sentenced the defendant to death. Thus, what the State sought in this case—and what the Court has granted—is a new direct review of the death sentence, designed to obviate a constitutional "error" occurring in the original appeal.

Styers, 254 P.3d at 1137, ¶22 (Hurwitz, V.C.J., dissenting).[2]

A case is not "final" until the availability of direct review to state courts and to the Supreme Court has been exhausted. *Teague v. Lane*, 489 U.S. 288, 295 (1989) (quoting *Allen v. Hardy,* 478 U.S. 255, 258 n.1 (1986)); *State v. Slemmer*, 823 P.2d 41 (Ariz. 1991) (Arizona Supreme Court adopted the *Teague* standard). Thus, conducting independent review necessarily means that the cases are in direct review and are clearly not final. *Styers*, 254 P.3d at 1137, ¶22 (Hurwitz, V.C.J., dissenting) (Styers' case is "plainly not final; after the conditional writ issued, a death

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[2] Ironically, the Arizona Supreme Court acknowledges its reliance on § 13–755(C) as "establish[ing] [their] jurisdiction for independent review," *Hedlund,* 431 P.3d at 184-85, ¶9, despite its refusal to accept that these cases are on direct review and not final.

sentence could not be imposed without further action from this Court, and Styers can plainly seek further direct review, through certiorari, from the Court's reinstitution of that sentence today.").

The effect of this fictional procedure is that *Ring* and *Hurst* do not apply because they are not retroactive and the *Eddings* error cases are "final." *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) ("*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review").

The attraction to this procedure is obvious. With the exception of one—Roseberry—all of the cases currently pending with *Eddings* errors were sentenced by a judge and final prior to *Ring*, and thus their life/death sentencing determination has never been made by a jury. To hold these cases as non-final would mean remanding up to potentially 22 decades-old cases for a jury resentencing in accordance with *Ring* and *Hurst*.

To date, the Arizona Supreme Court has conducted this unconstitutional independent review in three capital cases to correct *Eddings* error: *Styers*, *McKinney*, and *Hedlund*. Further, the Arizona Supreme Court is in the midst of conducting an independent review in one other capital case. *See State v. Poyson,* No. CR-98-0510-AP; *Poyson v. Ryan*, 879 F.3d 875 (9th Cir.), *cert. denied,* 138 S. Ct. 2652 (2018).

Recently, the Ninth Circuit granted relief on the same issue in *Spreitz v. Ryan*, 916 F.3d 1262 (9th Cir. 2019), and it is safe to assume that the Arizona Supreme Court will continue its practice of treating

the case as "final," but independently reviewing Spreitz's aggravation and mitigation.

An additional 17 cases have the same *Eddings* error pending before federal courts. *See* 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. Ryan, No. 08-99027 (9th Cir.); Sansing v. Ryan, No. 13-99001 (9th Cir.); Lee v. Schriro, No. 09- 99002 (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.).

Given the Ninth Circuit's rulings in *Styers*, *McKinney*, *Hedlund*, *Poyson*, and *Spreitz*, and the Arizona Supreme Court's correcting of *Eddings* error by independent review in *Styers*, *McKinney*, and *Hedlund* (and its ruling that it will follow the same approach in *Poyson*), there is a high likelihood that most, if not all, of the cases following *McKinney* and affected by *Eddings* error in the state of Arizona will be denied a resentencing hearing. The likelihood is that they will instead appear before the Arizona Supreme Court for an unconstitutional independent review, thus requiring this Court's intervention.

II. The *Eddings* Error was Not Limited to the Arizona Supreme Court.

The Arizona Supreme Court's decision to conduct a *de novo* independent review instead of remanding to the trial court for a resentencing is not only unconstitutional under *Ring* and *Hurst*, it also fails to appreciate that trial courts and counsel throughout the 1990s and early 2000s followed the law established by the state's high court and applied the causal-nexus standard.

The Arizona Supreme Court has reasoned that resentencing is unnecessary because the *Eddings* error occurred on appeal; therefore conducting an independent review is adequate to correct the error. *Styers*, 254 P.3d at 1133, ¶3 ("The State then moved this Court to *remedy its initial independent review* of Styers' death sentence by conducting a new independent review...") (emphasis added); *id.* at 1137, ¶21 (Hurwitz, V.C.J., dissenting) ("because the purported constitutional error identified by the Ninth Circuit occurred during direct appeal, not in the superior court, the State quite reasonably decided not to seek a new sentencing proceeding"). However, while the Ninth Circuit may not have explicitly held that the trial courts were committing the same *Eddings* error, that is exactly what was happening.

In *McKinney*, the trial court "accepted Dr. McMahon's PTSD diagnosis, but concluded that it was not causally connected to McKinney's criminal behavior…The judge gave McKinney's PTSD no weight as a mitigating factor." *McKinney*, 813 F.3d at 809. *See also id*. at 810 (the Ninth Circuit quoting the trial judge: "no substantial reason to believe that even

if the trauma that Mr. McKinney had suffered in childhood had contributed to an appropriate diagnosis of Post-traumatic Stress Syndrome *that it in any way affected his conduct in this case*.") (emphasis in original). In *Spreitz*, the Ninth Circuit granted the writ of habeas corpus because of overwhelming evidence in the record showing both the trial court and the Arizona Supreme Court applied a causal-nexus test to mitigation. It first quoted the trial judge at length:

> The defendant in his life turned to substance abuse—alcohol and some suggestion he was using cocaine and other drugs. *However, the court does not find such is a mitigating circumstance that impaired his ability to make a judgment on whether he was acting rightfully or wrongfully in the death of the victim*.
>
> The defendant's history of intoxication is longstanding. He had been abusing substances for close to ten years of his life at the time of this offense when he was twenty-two. Again, *the court does not believe that the substance abuse or intoxication impaired the defendant's ability and capacity to appreciate the wrongfulness of his conduct to any significant degree. ... The court does not believe intoxication is any sort of mitigating circumstance*.

Spreitz, 916 F.3d at 1269 (emphasis in original). It then considered how the Arizona Supreme Court

treated the evidence of Spreitz's alcohol and drug abuse on independent review solely in terms of whether it "interfered with his 'capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.'" *Id*. at 1270 (quoting *State v. Spreitz*, 945 P.2d 1260, 1280-81 (Ariz. 1997)). It is undeniable that this important category of mitigation was entirely disregarded by both the trial court and the high court.

But the McKinney and Spreitz trial courts are not unique and could hardly be faulted for requiring a causal nexus when the Arizona Supreme Court required it as early as *State v. Wallace*, 773 P.2d 983, 986 (Ariz. 1989). Spreitz's death sentence was imposed in 1994, not long after the Arizona Supreme Court decided in *State v. Styers*, 865 P.2d 765, 777 (Ariz. 1993), that a defendant suffering from post-traumatic stress disorder at the time of the offense could not use that fact as mitigation because "two doctors who examined defendant could not connect defendant's condition to his behavior at the time of the conspiracy and the murder." Styers' habeas relief in 2008 came much too late for all the defendants who received the death penalty as a result of this causal-nexus test.

It was not until 2005 that the Arizona Supreme Court unequivocally stated that "a jury cannot be prevented from giving effect to mitigating evidence solely because the evidence has no causal 'nexus' to a defendant's crimes." *State v. Anderson*, 111 P.3d 369, 392, ¶93 (Ariz. 2005) (citing *Tennard v. Dretke*, 542 U.S. 274, 282-87 (2004)). Unsurprisingly, trial courts were following Arizona law and requiring the same casual nexus test as the Arizona Supreme Court—and

not just in *McKinney* and *Spreitz*. *See, e.g., Poyson*, 879 F.3d at 883 (the trial court gave no weight to Poyson's mental health, substance abuse, and troubled childhood mitigation because "they were not causally related to the murders."); *State v. Roseberry,* 353 P.3d 847, 848-49, ¶¶4, 8 (Ariz. 2015) (*Roseberry II*) (the trial court instructed the jury "not to consider mitigation evidence unless the defense proved a casual nexus between the mitigation and the crime."); *State v. Djerf*, 959 P.2d 1274, 1289 (Ariz. 1998) (concluding that evidence of the appellant's difficult family background would not mitigate the sentences imposed where the trial court found the evidence "irrelevant" "because proof was lacking that the appellant's family background had any effect on the crimes").

The deficiency of the Arizona Supreme Court's procedure is best exemplified by its opinion in *Roseberry II*. Over the objection of defense counsel, the trial court instructed the jury—consistent with long-standing Arizona Supreme Court case law—that it must reject any proffered mitigation if it does not have a causal nexus to the crime. *Id*. at 848, ¶4. After the jury imposed the death penalty, the trial judge sentenced Roseberry on the other charges, and found three mitigating factors proven by a preponderance of the evidence: "lack of prior convictions, medical problems, and childhood difficulties." *State v. Roseberry*, 111 P.3d 402, 415, ¶73 (Ariz. 2005) (*Roseberry I*). This shows that the one fact-finder who was authorized to consider Roseberry's non-causal mitigation found that some of it was proven.

On post-conviction review, Roseberry raised a claim that his appellate counsel was ineffective for

failing to raise the instruction issue as a ground for reversing the death sentence until after oral argument had been held. *See Roseberry II*, 353 P.3d at 849, ¶¶9-10. After the trial court denied relief, the Supreme Court granted discretionary review "to clarify that our independent review of Roseberry's death sentence considered all the mitigation evidence presented, without requiring a causal connection to the crimes…" *Roseberry II*, 353 P.3d at 848, ¶5. Nowhere in the opinion did the court recognize that Roseberry was deprived of a fair consideration of the evidence by the jury.

Furthermore, as discussed fully *infra*, § III, it was not only trial courts following the Arizona Supreme Court's causal nexus law, but also the prosecution and defense attorneys. Because of this the Arizona Supreme Court's independent review cannot cure the *Eddings* error committed in the trial court.

Thus, because the *Eddings* error was not solely made on direct review by the Arizona Supreme Court but instead began in the trial courts, these cases should be remanded back for resentencing.

III. *Eddings* Error Requires a Sentencer to Consider the Totality of the Evidence.

To correct *Eddings* error, a defendant is entitled to have a sentencer consider the totality of the evidence in mitigation, regardless of when that evidence was developed. During the 15-year span that Arizona imposed a casual nexus test for mitigation, there is no way to determine to what extent the Arizona Supreme Court's jurisprudence affected trial counsel's decisions

as to what kinds of mitigation evidence to investigate, develop, and present to the sentencer.

In *Strickland v. Washington*, 466 U.S. 668, 695–96 (1984), this Court adopted a "totality of the evidence" test in part because "[s]ome errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture." Simply put, it is not possible to isolate and extract some errors because they have far-reaching and unknown consequences.

Like *Strickland* claims, *Eddings* errors should be reviewed by a "totality of the evidence" test, that is the sentencer should consider the totality of the evidence that has been developed, be it at trial, in post-conviction, or in federal habeas. There is simply no way to isolate and extract an *Eddings* error such as the one committed in Arizona for 15 years, because it is impossible to determine how deeply Arizona's unconstitutional causal nexus test pervaded the decisions of trial counsel. During this time, trial counsel in Arizona would have been focused on casual nexus mitigation. Trial counsel's decisions about which mitigation themes to pursue would have been influenced by knowing that trial courts would only allow the presentation of—and consider in its sentencing—mitigation with a casual nexus. With limited available time and resources, pursuing non-causally connected mitigation themes would not have been feasible. Thus, it is highly likely that Arizona defendants sentenced to death during this time period had mitigation investigations narrowly tailored by counsel to evidence counsel thought could be causally connected to their crimes.

Thus, because of such legal limitations, trial counsel would have *completely* forgone powerful mitigation evidence such as remorse, good behavior since incarcerated, and the impact of execution on the defendant's friends and family because it can *never* be casually connected to the crime. *See, e.g.*, *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) ("[Elvidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating.").

However, the Arizona Supreme Court recently explicitly rejected considering mitigation evidence outside of the original sentencing when conducting its independent review.

> [W]e decline Hedlund's invitation to include the evidence newly developed in PCR and habeas proceedings as part of our independent review. Section 13-755(C) establishes our jurisdiction for independent review and provides that we may 'remand[ ] a case for further action if the trial court erroneously excluded evidence or if the appellate record does not adequately reflect the evidence presented.' Thus, § 13-755(C) indicates that additional evidence should be admitted first in the trial court rather than in this Court.

Hedlund, 431 P.3d at 184-85, ¶9. This is not surprising given that appellate courts are not fact-finders.

Further, even if the Arizona Supreme Court were to consider evidence developed after the original sentencing, it would not be adequately curing error because it is not a sentencer; its role is that of an appellate court and not a trial court. Appellate courts by their very nature review a cold record. Appellate courts do not entertain live testimony. Listening to a witness describe a defendant's life circumstances, their effect on his psychological or mental functioning, and their resulting impact on a defendant's behavior is far superior to reading a cold record. Reviewing a record does not give appellate courts the same ability to assess a witness's credibility, to actually see the witnesses and the defendant's demeanor, to see a defendant's remorse, or to be moved in the way that live testimony can move a fact-finder.

This is demonstrated by the fact that the Arizona Supreme Court has been dismissive about mitigation that jurors find powerful and as a reason to sentence to life.

In *Styers*, the Arizona Supreme Court conducted a new independent review of Styers' death sentence to consider his Post-Traumatic Stress Disorder (PTSD). *Styers*, 254 P.3d at 188, ¶8. In its decision the court set out that it could "attribute less weight to the mitigating effect of a disorder if the defendant fails to establish a relationship between the disorder and the criminal conduct." *Id.* at 189, ¶12. The court found that Styers had failed to present any evidence that his PTSD affected his conduct at the time of the crime and set out that that "although we again acknowledge Styers' PTSD and consider it in mitigation, we give it little weight." *Id.* at 190, ¶15. Perhaps unsurprisingly, the court found "no reason to alter the conclusion" it

had previously reached in Styers' direct appeal "[b]ecause we attribute little weight to Styers' PTSD." *Id.* at 190, ¶16.

In *McKinney*, the Arizona Supreme Court acknowledged that McKinney "endured a horrific childhood." *McKinney*, 426 P.3d at 1206, ¶8. He was "verbally and physically abused" and experienced "severe neglect," such as being "frequently deprived [] of food, forced [] to live in filthy conditions and wear soiled clothes, and regularly locked [] out of the home in extreme temperatures." *Id.* Further, the Arizona Supreme Court found that "McKinney also suffered from Post–Traumatic Stress Disorder ("PTSD") at the time of the murders." *Id.* at 1206, ¶9. The trial court described McKinney's childhood as "beyond the comprehension and understanding of most people." *McKinney*, 813 F.3d at 823. Yet, the Arizona Supreme Court ultimately held that this mitigating evidence was not sufficient to warrant leniency because "it bears little or no relation to his behavior during [one] murder," *McKinney,* 426 P.3d at 1206, ¶10, and "place[d] minimal weight on McKinney's mitigation." *Id.* at 1207, ¶17.

In *Hedlund*, the Arizona Supreme Court found that Hedlund "experienced a very abusive childhood. He was neglected, beaten, and punished for basic daily activities like eating and drinking water. Moreover, his step-mother would frequently isolate Hedlund and punish him because he was born out of wedlock. And Hedlund grew up in a household where stealing was encouraged and rewarded." *Hedlund*, 431 P.3d at 187, ¶24. However, the court held that "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." *Id.* at 187, ¶25.

These types of mitigation—mitigation with no causal nexus—are the exact type of evidence this Court has held resonates with jurors and leads to life sentences. *Porter* v. *McCollum*, 558 U.S. 30, 42 (2009) (finding evidence of extreme child abuse, heroic military service, brain abnormality, difficulty reading and writing, and limited schooling, was the kind of evidence which "'might well have influenced the jury's appraisal of [Porter's] moral culpability.'") (quoting *Williams v. Taylor,* 529 U.S. 362, 398 (2000)); *Wiggins v. Smith*, 539 U.S. 510, 535 (2003) (childhood trauma is the "kind of troubled history relevant to assessing a defendant's moral culpability").

Further, substantial research[3] into jury decision-making demonstrates that jurors choose to vote for life because of mitigation such as dysfunctional and

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

traumatic childhoods, mental illness, remorse, and poverty.

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

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

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

Further, some jurors are less likely to vote for death if the defendant was an alcoholic or drug addict, had no previous criminal record, had a loving family, or had a background of extreme poverty. *Id.* "[M]any jurors said that if the defendant had made some showing of remorse they might have switched their votes from death to life… In thirteen of the nineteen death cases, at least one juror explicitly insisted that he would have voted for life rather than death had the defendant shown remorse." Sundby, Scott, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse and the Death Penalty*, 83 CORNELL L. REV. 1557, 1565, 1997-1998.

Thus, these categories of mitigation without a casual nexus—mitigation which the Arizona Supreme Court is giving *de minimis* weight, and the exact type of mitigation trial counsel would have chosen not to investigate, develop, and present, due to Arizona's case law at the time—are exactly the kind of evidence that has never been considered by the sentencer and that jurors value as a reason to vote for life. For these reasons, the Arizona Supreme Court should not be conducting an independent review but should remand for a resentencing.

IV. Failure to Remand for Resentencing Leads to Life or Death Decisions Founded on Outdated and Unreliable Science.

A record-based review of mental health mitigation presented at trial will also produce decisions based on the scientific understanding of those issues as they stood at the time of trial.

Over the past 30 years there has been significant scientific development in the understanding and

presentation of various mental illnesses and brain damage. By conducting an independent review the Arizona Supreme Court prevents defendants from presenting vital mitigating evidence that was either not scientifically identifiable at the time they were originally tried or not fully understood. It is making life and death decisions—which, given the *Eddings* errors, are only being made correctly for the first time—on unsound medical diagnoses. Such evidence could potentially make the difference between life and death.

For instance, by refusing to remand McKinney's case for resentencing, the Arizona Supreme Court is choosing to ignore decades of scientific developments in the understanding and presentation of PTSD. Since McKinney's 1992 sentencing, the definition of PTSD has been revised twice. *See* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (DSM) § 309.81 (4th Ed. 1994); DSM § 309.81 (5th Ed. 2013). The Arizona Supreme Court's independent review relied on 27-year-old expert testimony that due to his PTSD, McKinney "would 'rather withdraw from [a] situation' in which he might encounter violence." *McKinney*, 426 P.3d at 1206, ¶10. However, what we know now is that one symptom of PTSD is "[r]eckless or self-destructive behavior." DSM (5th Ed. 2013) § 309.81 at 272. This development is in direct contradiction to the expert testimony at trial, and what the Arizona Supreme Court relied upon in assigning McKinney's mitigation minimal weight and affirming his death sentence. *McKinney*, 426 P.3d at 1206, ¶10.

Additionally, we know now significantly more about how childhood trauma and neglect can

adversely impact a child's neurological development. *See, e.g.*, Spratt, E., et al, *The Effects of Early Neglect on Cognitive, Language, and Behavioral Functioning in Childhood,* Psychology (Irvine). 2012 Feb 1; 3(2): 175–182 ("Neglect may be the most detrimental maltreatment type on brain development"). Both the trial court and the Arizona Supreme Court described McKinney's childhood as plagued by abuse and neglect, yet the scientific significance of this has never been considered because of the failure to remand McKinney for a resentencing.

This Court has routinely considered developments in science in its Eighth Amendment jurisprudence. *Compare Penry v. Lynaugh*, 492 U.S. 302 (1989), *with Atkins v. Virginia*, 536 U.S. 304 (2002); *compare Stanford v. Kentucky*, 492 U.S. 361 (1989), *with Roper v. Simmons*, 543 U.S. 551 (2004). The scientific developments and literature on how the adolescent brain develops and matures has been instrumental in this Court's treatment of juvenile offenders. *See Roper v Simmons*, 543 U.S. 551 (2005) (no death penalty for juveniles); *Graham v. Florida*, 560 U.S. 48 (2010) (no life without the possibility of parole for juvenile non-homicide offenses); *Miller v. Alabama,* 567 U.S. 460 (2012) (no mandatory life without the possibility of parole for juvenile homicides).

By refusing to remand these cases for resentencing hearings, the Arizona Supreme Court is limiting itself to the medical understanding of relevant mental health conditions as at the time of the original sentencing. It is making life and death decisions while ignoring 30 years of updates to scientific development and research.

CONCLUSION

By considering these matters final while conducting an independent review, confining itself to the record on independent review, and giving *de minimis* weight to mitigating evidence that capital jurors routinely rely upon in coming to life verdicts, the Arizona Supreme Court is compounding the constitutional violation for capital defendants who have suffered an *Eddings* error. For these reasons, *amici* support McKinney's petition and submit that the Arizona Supreme Court's refusal to remand McKinney's case for resentencing violates his Sixth, Eighth, and Fourteenth Amendment rights and fails to cure the original *Eddings* error.

Respectfully submitted,

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