No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROGER WAYNE MURRAY,

Petitioner,

vs.

DORA SCHRIRO,

Director of the Arizona Department of Corrections, et al.,

Respondents.

CAPITAL CASE

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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****CAPITAL CASE****

QUESTIONS PRESENTED

1. Whether the Arizona courts unreasonably applied Batson v. Kentucky, 476 U.S. 79 (1986) and unreasonably determined the constitutionally significant facts thus violating the equal protection clause by striking both (all) minority voir dire panel members.

2. Whether the Arizona state courts violated Eddings v. Oklahoma, 455 U.S. 104 (1982) and unreasonably determined the constitutionally significant facts by refusing to consider Mr. Murray's substantial mitigation evidence by the courts' concluding the evidence was not connected to the crime.

3. Whether harmless error applies when a state court holds mitigation evidence that shows no direct nexus to the crime will automatically not be considered and if harmless error does apply to such constitutional violations whether the Ninth Circuit erred in ruling that the Arizona state courts' violation of Eddings was harmless error.

PARTIES TO THE PROCEEDING

The names of the parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the caption. The petitioner is not a corporation.

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CITATIONS OF THE OPINIONS AND ORDERS BELOW

The Ninth Circuit's order denying panel rehearing and rehearing en banc while amending the panel's 2014 opinion is dated February 14, 2018 and is cited at 882 F.3d 778 (9th Cir. 2018) and attached as Appendix A. The Ninth Circuit's opinion affirming the district court's denial of Mr. Murray's petition for writ of habeas corpus is reported at Murray v. Schriro, 746 F.3d 418 (9th Cir. 2014) and attached as Appendix B. The district court memorandum of decision and order denying Mr. Murray's federal habeas petition is reported at Murray v. Schriro, No. CV-03-00775-PHX-DGC (AZ. Dist. Ct. May 30, 2008), ECF No. 100 and attached as Appendix C. The Arizona Supreme Court opinion affirming Mr. Murray's conviction and sentence is reported at 184 Ariz. 9, 906 P.2d 542 (1995), and attached as Appendix D.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit affirmed the district court's denial of Mr. Murray's petition for writ of habeas corpus in an opinion dated March 17, 2014 (App. B) and subsequently denied Mr. Murray's petition for panel rehearing or rehearing en banc in an order and amended opinion dated February 14, 2018 which also ordered petitioner not to file a petition for rehearing directed at the amended opinion. On May 4, 2018, Justice Kennedy extended the time within which to file this petition for writ of certiorari to July 14, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

"No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d).

STATEMENT OF THE CASE

On May 14, 1991, three events took place within about a two hours time: 1) a friend of Dean Morrison and Jackie Appelhans found their dead bodies at their home/restaurant in Grasshopper Junction Arizona, where they had been shot several times; 2) police came upon an abandoned tow truck they knew belonged to Dean Morrison - the tow truck's police scanner had been torn out and was missing; and 3) police, having run the plates of the vehicle Robert and Roger Murray were driving in as it passed a cruiser on the highway and having it come back as wanted, proceeded

to chase the Murrays at high speeds down the highway until they caught the Murrays on a desert turn off - inside the car were guns that matched the shooting, the missing police scanner from the tow truck, money stashed in a couch cushion cover that matched a missing cover from Grasshopper Junction, and coined money wrapped in paper rolls that were stamped "Grasshopper Junction." Throughout the proceedings in this case, all courts, state and federal, have commented that the evidence of the crime was overwhelming. Roger Murray at the time of the crime was 20 years old. Robert Murray, who was 6 years older than Roger, has recently passed away from throat cancer.

Mr. Murray petitions this court to issue a writ of certiorari to the Ninth Circuit Court of Appeals to correct the Ninth Circuit's substantial errors in its legal analyses and holdings of three issues: (1) whether the Arizona state courts unreasonably applied this Court's holdings in Batson v. Kentucky, 476 U.S. 79 (1986) and its progeny and whether the Arizona courts' unreasonably determined the constitutional facts underpinning the Batson error; (2) whether the Arizona courts applied an unconstitutional legal test that refused, as a matter of law, to consider relevant mitigation evidence because it did not have a causal connection to the crime, contrary to this court's holding in Eddings v. Oklahoma, 455 U.S. 104 (1982) (or whether the state courts unreasonably applied the Eddings holding) and unreasonably determined the constitutional facts of Mr. Murray's mitigation; and (3) whether the Arizona courts' constitutional error, of refusing to consider mitigation evidence unless it was causally related to the crime, was harmless. Mr. Murray presents the Batson issue first only

because the Batson error occurred first chronologically, at the trial stage, and then the Eddings error occurred at the sentencing stage. The order of presentation is not meant to suggest in any way that petitioner believes one constitutional error may be stronger than the other, as the Eddings and harmless errors are compelling.

A. Facts Underlying the Batson Error.

There were only two minority members, both Hispanic, on the jury venire, Christina Pethers and David Alvarado. The prosecutor used peremptory strikes to dismiss both of them leaving an all white jury. App. G (Tr. 5/29/92 vol. II at 20). Mr. Murray's counsel objected to the strikes and requested the court conduct a Batson v. Kentucky, 476 U.S. 79 (1986) inquiry. Id. Although the trial court asked the prosecutor to articulate his reasons for the strikes, the court then simply automatically accepted the explanations. Id. at 23-24. The trial court then opined that since there were only two minorities on the venire, it would be hard to show that striking only two was race motivated. Id. However, the prosecutor made a number of statements that evidence that race motivated the strikes and that his explanations were pretexts.

1. Christina Pethers

The prosecutor initially tried to explain away the reason for striking Ms. Pethers by denying that he ever thought she was Hispanic when he struck her. The prosecutor stated:

> Your Honor, first as to Ms. Pethers, I don't believe that she is a Hispanic. I don't recall seeing that on her jury questionnaire, and I don't recall if she appeared to talk Hispanic to me.

App. G (Tr. 5/29/92 vol. II pp. 20-21). The prosecutor's statement that he did not believe Ms. Pethers is Hispanic and that she did not identify as Hispanic and did not "talk Hispanic," means he was representing to the court that at the time he made the strike he never thought of her as Hispanic and could not have struck her because of it. The prosecutor also is representing that at the time he made the strike he had no information or factual reason to think Ms. Pethers was Hispanic. Defense counsel then pointed out that the jury questionnaire identified the prospective juror as having Garcia as a maiden name. Id. at 21.

The prosecutor then tried a new argument by stating that being named "Garcia" did not mean Ms. Pethers was Hispanic, "as opposed to Spanish." App. G (Tr. 5/29/92 vol. II at 21). Defense counsel pointed out that the questionnaire identified Ms. Pethers as Hispanic. Id. Apparently suspecting his arguments might not be persuasive, the prosecutor suddenly revealed he actually was well aware of Ms. Pethers's background, who she was, and who her mother and her relatives were from a prior prosecution of Ms. Pethers's mother (the charges had been dismissed). App. G (Tr. 5/29/92 vol. II pp. 21-22). The prosecutor stated, "But, I know both these people [Pethers's mother and an uncle] were heavy into drugs. I do not believe that she - - I don't want her on the jury for those reasons, possible bias." Id. pp. 21, 22. If he knew her so well to know who her mother and uncle were, then he knew she was Hispanic, especially since she already identified her mother when questioned earlier by the court and attorneys. She testified as follows.

The Court:	Ms. Pethers, first, I have a question. Do you know any of the attorneys in this case?
Ms. Pethers:	No.
The Court:	Mr. Zack is a deputy county attorney. Do you know any member of his office?
Ms. Pethers:	I have been in there. I know some people that work there, Bob Moon. That's about it.
The Court:	Okay. How do you know Bob Moon?
Ms. Pethers:	Through my mother's case.
The Court:	Your mother is?
Ms. Pethers:	Heidi Garcia.
Mr. Zack:	Pardon me?
Ms. Pethers:	Heidi Garcia.
The Court:	And Bob Moon was the county –
Ms. Pethers:	The county attorney.
The Court:	He was prosecuting your mother, then?
Ms. Pethers:	Yeah. It didn't even go to trial. Judges dismissed it.
The Court:	Anything about the fact that you know Bob Moon as prosecuting your mother that would affect your abilities to sit on this case?
Ms. Pethers:	No.

App. F (Tr. 5/29/92 vol. I at 80-81.). Ms. Pethers's answers evidence she did not know the prosecutor, she did not associate him with her mother's case, and like other venire members whose relatives had been prosecuted (but who remained on the jury), Ms.

Pethers could serve as an unbiased juror. Unlike the others, Ms. Pethers was Hispanic. The State struck her.

The prosecutor next tried to elaborate about the mother's dismissed charges to explain his strike by making additional, inconsistent, and contradictory statements by (1) stating there was a major drug investigation into Mrs. Garcia (the mother), but he then hedges that with, "If I understand [correctly]," (2) stating Mrs. Garcia went to jail for a time, but then hedges that with he is not sure whether Mrs. Garcia went to jail, (3) stating and basically agreeing the charges against Mrs. Garcia actually were dismissed, (4) switching to claiming there was a negotiated deal, and (5) saying he is not positive or sure even about that. App. G (Tr. 5/29/92 vol. II at 21-22). The foregoing inconsistent and contradictory statements show the prosecutor was fishing to try to find some "race neutral" facts to try to excuse his having struck the Hispanic juror.

Before he had made the strike, the prosecutor requested a break to prepare peremptory strikes and noted the judge did not "have to be there for it, unless we get into a Batson problem." Id. at 17. The prosecutor's suggestion of a possible Batson issue implies he already planned on striking the Hispanic jurors - there were no others that could raise a Batson claim. If there were no minorities on the jury venire, he would not have thought about Batson. Having Batson in mind, he would have reviewed the jury questionnaires and known who was and was not Hispanic, contrary to the pretexts he gave to the court. Indeed, he asked for the adjournment expressly to review the information on those he considered striking. Id.

Factually, the "totality of the relevant facts" concerning the prosecutor's conduct and a comparison of nonstruck white jurors is critical evidence of pretext. Miller-El, 545 U.S. at 239. Mr. Murray outlines those factual comparisons here. Ms. Pethers related to the trial court that her mother's case was quickly dismissed and it would not affect her abilities to sit on the case. App. F (Tr. 5/29/92 vol. I at 80-81). Juror Bonsang, who is white, stated that her brother-in-law was even then actively being prosecuted by the County Attorney's office. The case was not in the past, it was active, and fresh for bias. App. E (Tr. 5/28/92 at 46-47, 51). It was not just one DUI, but a series of them, showing there were past convictions. Id. A series of drunk driving convictions results in a long sentence. Ariz. Rev. Stat. §§ 28-1381 to -1384. Mr. Murray's defense attorney was actually representing Ms. Bonsang's brother-in-law on the pending DUI charge. App. E (Tr. 5/28/92 at 46-47, 51). The prosecutor asked her no questions and never moved to strike her from the jury. Id. at 47 & 51; App. G (Tr. 5/29/92 vol. II at 26). Ms. Bonsang served as a juror. App. G (Tr. 5/29/92 vol. II at 26).

Another non-Hispanic juror, Warren Michael Ellis, had a son-in-law who actually was convicted of drug charges. App. F (Tr. 5/29/92 vol. I at 29). The prosecutor did not ask Mr. Ellis any questions, he did not use his peremptory strikes, and Mr. Ellis served on the jury. Id. at 31, App. G (Tr. 5/29/92 vol. II at 26). Mr. Ellis testified he thought his son-in-law probably got off too easy, showing factually that, though not as good of a result as Ms. Garcia's, both Mr. Ellis and Ms. Pethers were grateful for the results and both could serve as jurors, yet the Hispanic was struck.

2. David Alvarado

The prosecutor also struck David Alvarado the only other minority (Hispanic) juror. At the beginning of voir dire, Mr. Alvarado explained he knew the prosecutor, Mr. Zack, "a long time ago, but I haven't seen him – you know, off and on, you know." App. E (Tr. 5/28/92 at 17). The prosecutor stated he struck Mr. Alvarado because he believed Mr. Alvarado was "too nice" which would interfere with Mr. Alvarado's ability to disagree with or to hurt anybody. The prosecutor relied strictly on his outside of the courtroom, nonevidentiary, limited assessment of Mr. Alvarado as "too nice." The prosecutor stated:

> [M]y recollection of Mr. Alvarado is he's a very, very nice person. He is too nice. You couldn't get him to disagree with you. He didn't want to hurt anybody. He is just indecisive, is my recollection of him.

App. G (Tr. 5/29/92 vol. II at 22).

The statement comes in a case where the prosecutor felt NO juror would disagree with the State's evidence, so that the prosecutor refused to make any offer to defendants other than a plea of first degree murder (which would be followed by a judge imposed sentence of death). Repeatedly, the state and federal courts in this case have noted the evidence of the crime was overwhelming. The prosecutor did not say why he would not want a "never disagrees" juror. The prosecutor never asked Mr. Alvarado any questions regarding his ability to serve as a juror or his willingness to agree or disagree or to decide important issues. App. E (Tr. 5/28/92 at 74).

A comparative review of the jurors' testimony and statements demonstrates that Jurors Nelson and Anderson both stated on their jury questionnaires that they would

have a hard time judging the guilt or innocence of a defendant. App. F (Tr. 5/29/92 vol. I at 68 & 141). Although these jurors somewhat edged away from their questionnaire answers on oral examination, as the court tried to rehabilitate them, if the prosecutor was concerned that a juror might be "indecisive" in reaching a verdict, he had written evidence with these two non-Hispanic jurors. Both served on the jury. When asked whether she could sit in judgment and make a decision, Ms. Nelson testified, "Well, I would hope I'd be able to make a decision, yes." Id. at 68. Her answer is hopeful; it cannot be described as decisive. She then actually agreed she could be swayed by others to change her mind on guilt or innocence, even if she had decided to vote otherwise. Id. at 69. The prosecutor did not strike Juror Nelson even though her answers indicated that she might be indecisive, that she might not want to be too disagreeable with other jurors, and that sitting in judgment of others might be challenging.

In contrast, the Hispanic juror, Mr. Alvarado never suggested he would hesitate to pass judgment. To the contrary, Mr. Alvarado testified he had read about the murder in the paper which he thought was, as he described it, "execution style." App. E (Tr. 5/28/92 at 71). Mr. Alvarado's comment how he recalled the killings were "execution style" indicates the lasting, disturbing impression the murder made on him. Mr. Alvarado testified he believed criminals are treated too soft. Id. at 74. He knew the County Attorney as he used to cut his hair for years when Alvarado had a barber shop in Phoenix. Id. at 73:17-25. He testified he would listen carefully and render a verdict based on the evidence. Id. at 73.

The prosecutor's proffered reason for striking Mr. Alvarado because he was "too nice" to the point "you could not get him to disagree with you" is further shown to be a pretext when compared to Juror Bonsang who had to pick up her children each day by 6:00 p.m. in Lake Havasu, Arizona. Id. at 48. Lake Havasu is an hour's drive from Kingman and court was scheduled to let out at 5:00 p.m., making it a close call on whether she would get to Lake Havasu on time. Id. Juror Bonsang, who was unable to stay late and debate issues, could not afford to disagree with other jurors. Her schedule meant she would want the jury to quickly reach a verdict, compared to Mr. Alvarado who was unemployed. Id. at 71. The trial court accepted the prosecutor's proffered reasons and stated that since there were only two Hispanics on the venire to begin with, even though both were struck, it would be difficult to make out a Batson claim on those two strikes alone. App. G (Tr. 5/29/92 vol. II at 24). The trial judge suggested there would have to be more minority strikes for a defendant to make out a case that a prosecutor was violating equal protection. Id.

The Ninth Circuit initially denied Roger Murray's Batson claim, by adopting the panel's decision in Robert Murray's case, Roger Murray v. Schiro, 746 F.3d at 448 (summarily rejecting Roger's Batson claim for reasons stated in Robert Murray v. Schiro, 745 F.3d 984, 1002-10 (9th Cir. 2014)), but Roger provided critical comparative juror analysis while Robert did not. App. F (Tr. 5/29/92 vol. I at 68 & 141) (non-Hispanic jurors admitting to indecisiveness); App. L at 34-37. In its amended opinion, the Ninth Circuit simply stated that since Mr. Murray admitted Jurors Nelson and Anderson "edged away" from their written statements, the comparison to Mr. Alvarado

was unavailing while Juror Bonsang did not say she was indecisive (neither did Alvarado who also did not have a tight schedule). Roger also argued Robert and the panel only addressed whether the prosecutor's stating Pethers "did not talk Hispanic" evidenced racial stereotyping while failing to analyze the statement as an admission of pretext. The Ninth Circuit's amended opinion also avoided the issue.

B. Facts underlying the Eddings issue.

Initially, by relying on Schad v. Ryan, 581 F.3d 1019, 1037 (9th Cir. 2009) (per curium), the Ninth Circuit held there was "no clear indication" in the record that the Arizona courts refused to consider Mr. Murray's relevant mitigation evidence and thus the state courts did not violate Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982) (courts must consider mitigation evidence even if not causally connected to crime). Murray v. Schiro, 746 F.3d 418, 455 (9th Cir. 2014). The court further held that even if the Arizona courts had committed an Eddings violation, the error was harmless. Id. The present case was then stayed while the Ninth Circuit addressed the nexus issue en banc in McKinney v. Ryan, 813 F.3d 798 (9th Cir. 2015) (en banc). The McKinney court held the Arizona courts were routinely applying a nexus test to consider mitigation evidence and McKinney expressly cited the Ninth Circuit's Murray opinion in this case as an example of the Ninth Circuit's erroneously applying the Ninth Circuit's Schad doctrine (that a federal court was prohibited from finding an Eddings violation, without a "clear indication in the record" that the Arizona Court refused to consider mitigation evidence unless it was connected to the crime) to the extent that clear Eddings violations were repeatedly uncorrected. McKinney's citing to the present

case signals the present case as an example of the Ninth Circuit's erroneously excusing the Arizona courts' unconstitutional practice. McKinney, 813 F.3d, at 818 (citing Murray, 746 F.3d, at 455 and overruling Schad). The Ninth Circuit then lifted the stay and Mr. Murray filed his petition for rehearing and rehearing en banc relying on McKinney and outlining the factual similarity in the mitigation evidence between Mr. McKinney and Mr. Murray. The Ninth Circuit then amended its opinion whereby it apparently relies solely on its harmless error holding.

The mitigation presented at sentencing included: Roger was alcohol and drug addicted since he was a "little boy," App. I (Tr. 10/6/92 at 54:12-20, 57:17-20); at around 8 years old, Roger began to use the corner of his room as a urinal to relieve himself (no one cleaned it), id. at 101, App. H; Roger's father repeatedly beat him by fist and weapon, striking him "anywhere he could hit" App. I (Tr. 10/6/92 at 49-50 & 56); Roger's mother testified, as if she were trying to assure the court of normalcy, that the father's actual physical beatings of Roger did not start "'till he got older * * * about eight years old, nine." Id. 61:17-22; the father did not as often hit Roger with a stick (maybe once or twice a month, id. at 62:9-19), because he preferred a belt with which he whipped Roger several times a month, id. 62:1-14; the father also would punch Roger until the mother got in the middle, resulting in her suffering broken ribs, id. at 68; the father verbally abused Roger every day, throughout the day, id. 62:21-25, 63:1; the father had Roger working, as a child, in the father's night club as well as engaged in the father's criminal enterprise (the father was a "bookie," including "collections"), id. at 52 & 53 (the boys also were accused of burning down a competitor's night club);

the father's philosophy in engaging in a criminal enterprise was, "if someone was going to get their money, [I] might as well." id. at 52:16-17, which was a philosophy he schooled to Roger, id. at 92:10-11; the father openly did drugs in front of Roger, id. at 108:10; Roger's mother, sick of her life with the father, abandoned Roger and his siblings when he was 14, id. at 39:4-7; at that same age, the father literally threw Roger out of the house, onto the streets, id. at 14:6-10 & 24:2-5; Roger suffered from traumatic stress disorder, id. at 9 & 87; App. H at 5; psychometric testing showed organic brain damage, caused either by early childhood substance abuse or by multiple head injuries, id.; Roger was a drug and alcohol addict or abuser as a child, id.;Roger was incarcerated at 13 with older, predatory, violent teens, where he cried all the time and displayed violence, App. I (Tr. 10/6/92 at 17); and the state incarcerated Roger, as a minor, with hardened adult prisoners in state prison.[1] The Arizona Supreme Court outlined Roger's life from ages 9 to 17 as follows:

> Roger was arrested for shoplifting at the age of 9. At 13, he was permanently expelled from junior high for bringing a gun to school and was placed on supervised probation in a detention home for juvenile delinquents. In his statement, he wrote that he told his friends at school that he could use the gun to "blow Mr. [illegible]'s brains out if I wanted to." While serving in the detention home, an official reported:

[1] Mitigation investigation in the district court showed why Roger became an angry violent child: an uncle began raping Roger when he was 8 years old (the urinating in the corner of his room age), which began a pattern of being sexually abused as an adolescent incarcerated with violent late teenagers (the crying all the time and reacting violently age), and then beaten and gang-raped as a minor by adult predators in state prison (he came out worse, than he went in). The district court provided funds to allow petitioner to hire an expert who helped uncovered the abuse, but the district court suddenly refused funding to develop the issue. D.Ct. Doc. #s 29 & 34 App. K.

> Roger is very destructive — he constantly talks about killing people esp. policemen. Roger has serious emotional problems — when he isn't crying he is cursing or destroying things around the house. He needs help that we cannot give him here. He is a time bomb waiting to go off.

A psychologist who subsequently conducted an evaluation of Roger for legal authorities stated:

> My fear is that Roger will have no care for society. I believe that Roger and society are going to be at odds until some drastic steps are taken. It appears that it would be to Roger's benefit for those steps to occur as soon as possible if we are going to have a chance of changing his behavior.

After vandalizing a cemetery at age 14, he was committed to the Alabama Department of Youth Services for Criminal Mischief. During this commitment a counselor reported that Roger was receiving behavioral counseling, "but at present [he] just simply does not appear interested in rectifying his misdeeds." Roger also received drug and alcohol counseling. At 17, he pled guilty to the unauthorized use of a vehicle, and he was placed on probation. A few months later, he was again charged with unauthorized use of a vehicle. Also at 17, Roger was arrested for two separate incidents involving armed robbery and third degree burglary and theft. He admitted the theft and robbery. The robbery charge was dismissed. Roger was convicted as an adult for burglary and sentenced to boot camp, which he failed. He was then sentenced to prison for four years and was released in 1990.

Murray, 184 Ariz. at 41, 906 P.2d at 574.

The Arizona Supreme Court's emphasis was on the outcomes as opposed to what was causing the outcomes, which was the true mitigation evidence. The Arizona Supreme Court did not mention or address the urinating in the bedroom, the nonstop beatings by fist and weapon, the being pressed into the father's criminal enterprise and night club, the father's impressing his philosophy of taking other people's money, the father's open drug abuse, Roger's addictions as a young child to drugs and alcohol, the

evidence of brain damage, or the resulting traumatic stress disorder. App. I (Tr. 10/6/92 at 108:7-13). Having focused almost entirely on the criminality of Mr. Murray's juvenile years, Arizona Supreme Court concluded, "He has failed to show * * * that his juvenile experiences significantly impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law." Murray, 184 Ariz. 9, 906 P.2d 542 (1995). The court continued, "[H]e fails to show how this background impacted his behavior at Grasshopper Junction." Id. at 44, 906 P.2d at 577.

The sentencing court also refused to consider Roger's being addicted as a young child to drugs and alcohol as statutory or nonstatutory mitigation. Id. at 45, 906 P.2d at 578 ("The trial court noted there is some evidence that Roger habitually used drugs and alcohol. [It] rejected intoxication as a mitigator because Roger performed complicated maneuvers at Grasshopper Junction. Roger failed to prove that his alcohol or drug abuse is a nonstatutory mitigator."); App. J (Tr. 10/26/92 at 92). The foregoing shows both the sentencing court and supreme court failed and refused to consider childhood alcoholism as mitigation evidence because it allegedly did not cause the crime. Although, the sentencing court appeared to find dysfunctional childhood generally as mitigating, it outright refused to consider physical abuse, family relations, or environment as independent mitigation. By refusing to consider the foregoing, the trial court did not consider Roger's living in squalor in a bedroom used as a urinal, or being pressed into crime as a child, or being a drug and alcohol abuser as a young child. App. J (Tr. 10/26/92 at 94-95). The sentencing court, without explanation, rejected the notion of organic brain injury, without discussion of the undisputed

psychometric testing or the scientific opinion from the court appointed expert, simply stating, "There is no evidence of organic brain injury." Id. at 91. The sentencing court never once mentioned Roger's traumatic stress disorder. The Arizona Supreme Court agreed with the trial court and rejected all mitigation as not causally related. Murray, 184 Ariz. at 44, 906 P.2d at 577 ("We agree that Roger comes from a dysfunctional childhood, but he fails to show how this background impacted his behavior at Grasshopper Junction.").

ARGUMENT

A. The State Struck the Only Two Hispanic Jurors in Violation of Batson.

The only two nonwhite jurors on the venire panel, Juror Pethers and Juror Alvarado, were Hispanic. The prosecutor struck both of them. Defense counsel objected the strikes were discriminatory in violation of the Equal Protection clause. Under Batson v. Kentucky, 476 U.S. 79 (1986) courts are to apply a three-step analysis to claims of racial discrimination in the exercise of peremptory challenges:

> First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Hernandez v. New York, 500 U.S. 352, 358-59 (1991) (plurality opinion). The prosecutor must provide a "'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." Batson, 476 U.S. at 98, n.20. The present case

shows the prosecutor did not provide "legitimate" reasons for his challenges. His reasons also were not "clear and reasonably specific" as the prosecutor kept altering them as he searched for race neutral facts that might help him, after he made the strikes. The proffered reasons themselves show discriminatory animus as they contain typical racial stereotypes about minorities. Moreover, the prosecutor's later proffered reasons contradicted his initial ones, thereby showing they were pretexts. Finally, a comparative jury analysis evidences the prosecutor's reasons for striking both (all) Hispanic jurors were pretextual.

The trial court automatically accepted the prosecutor's reasons and it erroneously claimed that since there were only two Hispanics on the venire to begin with, both of whom were struck, it would be difficult for a defendant to expect to successfully make out a Batson claim. App. G (Tr. 5/29/92 at 24). The trial court's statement suggested that, if there were only two minorities to begin with, striking them would likely be the product of happenstance and not purposeful discrimination. However, this would mean in counties with small populations, that are primarily white, such as Mojave County, Arizona, as in this case, a prosecutor could freely strike the few minorities that appear for jury duty and then claim the resulting all white jury was the product of statistical happenstance. The trial court's assessment of its oversight was unconstitutional as a matter of law. "The Constitution forbids striking even a single prospective juror for a discriminatory purpose." Snyder v. Louisiana, 552 U.S. 472, 478 (2008) (alteration omitted) (quotation marks omitted). The trial court's willingness to accept the strikes was colored by its impermissible belief that there was

a heightened task in proving discrimination since there were only two minorities to begin with. The court should grant Mr. Murray a new trial with a jury that has not been culled of all minorities. Even a defendant who allegedly has overwhelming evidence of guilt against him has a right to a jury panel that comports with the Equal Protection clause. The facts show the State denied Mr. Murray a fair trial.

1. Juror Pethers

The facts concerning the striking of Juror Pethers show (1) discriminatory animus on its face, (2) pretext by the prosecutor's proffering a second explanation that revealed his first explanation had to be false, and (3) pretext by comparing Hispanic jurors to non-Hispanic jurors and seeing the alleged explanation applied to both but non-Hispanics were kept on the panel. The prosecutor initially denied that he ever thought Ms. Pethers was Hispanic when he struck her. He stated, "I don't believe that she is a Hispanic. I don't recall seeing that on her jury questionnaire, and I don't recall if she appeared to talk Hispanic to me." The prosecutor's statement that Ms. Pethers she did not "talk Hispanic to me," is itself, by definition, stereotypical. His admitted bias of how he thinks Hispanics talk meant to communicate that since Ms. Pethers does not "talk like one of them" he could not have had her race in mind when he struck her. When defense counsel pointed out that Ms. Pethers listed her name as "Garcia," the prosecutor continued his argument of not knowing Ms. Pethers's race by claiming "Garcia" sounded to him like Spanish, instead of Hispanic.

The prosecutor's arguing in the present case that the juror bears a Spanish name, apparently "of unknown origin," so that the strike was race neutral and not

geared toward Hispanics, is like the prosecutor's argument in Kesser v. Cambra, 465 F.3d 351, 357 (9th Cir. 2006), that a brown skinned woman was "of unknown origin" and, therefore, his striking her was not geared toward Native Americans. The Ninth Circuit rejected this argument as facially unpersuasive. Id. Likewise, his arguing that he knew Ms. Pethers's last name was Garcia but since she did not "talk Hispanic," he believed (while he lives in Arizona) that she must be of direct descent from Spain, and not Hispanic, is facially unpersuasive and not a "clear and reasonable" explanation that comports with Equal Protection. The trial court should have denied the striking of Mrs. Pethers based on these facially discriminatory reasons alone.

The prosecutor had read the jury questionnaires. He also had asked for a break after the for cause challenges so he could review the information he had on the remaining jurors before striking the only two minority members. When the defense attorneys pointed out how Ms. Pethers had identified herself on the jury questionnaire as Hispanic, the prosecutor was given another shot at explaining his strike. This time, he revealed he actually knew both Ms. Pethers's background and that of her mother, Heidi Garcia and of other members of her family and claimed the mother and uncle had been prosecuted in the past for drugs (the charges were dismissed) and that he struck Ms. Pethers because of possible bias. The statement that he indeed did know, not just who Ms. Pethers was all along, but also her mother and uncle contradicted his initial explanation that he did not have any factual background knowledge of Ms. Pethers and did not think she was Hispanic when he struck her. It also rebutted his invoking a racial stereotype that if Ms. Pethers did not "talk Hispanic" then, a non-

Hispanic such as himself, could not be expected to have thought of her as being Hispanic when he struck her. By admitting he very much knew who Ms. Pethers was all along, the prosecutor was also admitting that his prior explanation that he never thought of her as Hispanic when he struck her had to be dissembling and pretextual. The prosecutor's first trying to deny the juror was Hispanic cannot be thought of as simply litigation gamesmanship in making alternative arguments on an issue. When it comes to explaining the striking of jurors in violation of the Equal Protection clause there is no room for assuming or allowing a prosecutor's stated reasons to be advocacy tactics. A prosecutor explains his reasons for the strike with the understanding his statements are taken at face value of what he had in mind at the time of the strike. When they are shown to be pretextual, Equal Protection is violated.

The Ninth Circuit limited itself to whether the prosecutor's stating Pethers "did not talk Hispanic" evidenced racial stereotyping and failed to analyze the statement as an admission of pretext. The record shows the prosecutor first denied knowing Ms. Pethers was Hispanic (which denial was demonstrably false), then claimed Pethers did not indicate she was Hispanic (which allegation was false), then said, Pethers did not "talk Hispanic," (claiming his innocence by relying on a racial stereotype), then said Pethers's maiden name of Garcia, might be Spanish, not Hispanic (a common excuse when racial profiling), and then admitted he actually knew who Pethers's familial background. The foregoing proves the prosecutor was dissembling about the strike all along. The Ninth Circuit should have analyzed the "she didn't talk Hispanic" comment not just as racism qua racism, but as evidence of pretext and reversed.

The prosecutor followed the foregoing denials with a series of inconsistent and contradictory new "race neutral" statements, by (1) stating there was a major drug investigation into Mrs. Garcia, but he then hedged that with, "If I understand [correctly]," (2) stating the defendants went to jail for a time, but then hedged that with, he was not sure about Mrs. Garcia, (3) stating and basically agreeing the charges against Mrs. Garcia actually were dismissed, (4) then switching to claiming there was a negotiated deal, and finally (5) he backs off of that too, by saying he is not positive or sure even about that. App. G (Tr. 5/29/92 vol. II at 21-22). The foregoing stumbling and flip flopping shows the prosecutor had little information on the prosecution, was trying to embellish what happened, followed by repeatedly having to back off his representations, proving he was fishing for a race neutral way to explain his strike. Id. at 22-23. A court does not accept at face value the excuses given by the prosecutor on his multiple tries to explain his strike. Kesser, 465 F.3d at 359-60. The flip-flop explanations were pretextual as the prosecutor searched for an excuse for striking the Hispanic juror. In Snyder v. Louisiana, 552 U.S. 472 (2008) the Supreme Court examined similar contradictions and relied on such pretexts to reverse the conviction.

In Harris v. Hardy, 680 F.3d 942, 956 (7th Cir. 2012) the court addressed a very similar scenario where the prosecutor first claimed to know little about a juror he struck, followed by a series of noncredible explanations that revealed his actual knowledge of her and that the allegedly race neutral claims were themselves pretexts. The court held, "[The prosecutor's assertions] would tend to show that he kept throwing out possible race-neutral reasons for the strike until he thought he found the one that

would be accepted. As we noted, any old reason doesn't cut it; the prosecutor must state his reason for using the challenge." Id. As in Harris, the trial court allowed the prosecutor to fish until he could come up with what he thought was a race-neutral reason. Even without a comparison to other non-Hispanic jurors, if the prosecutor's statements are pretextual the unconstitutional conviction must be vacated.

In this case, a comparative analysis also fully supports and reveals the reasons were pretextual. Like the comparative juror analyses performed in Snyder v. Louisiana, 552 U.S. 472, 482-485 (2008) and Miller-El v. Dretke, 545 U.S. 231, 286 (2005), an evaluation of the voir dire transcript in the present case refutes the prosecutor's reasons for striking the two sole Hispanic potential jurors that left an all-white jury. In particular, a comparison of nonstruck white jurors shows the prosecutor's third try explanation that the real reason he struck Ms. Pethers was that her mother had been the subject of criminal charges was pretextual. Miller-El v. Dretke, 545 U.S. 231, 239 (2005). Ms. Pethers testified her mother's case was quickly dismissed and it would have no affect on her ability to be fair. App. F (Tr. 5/29/92 vol. I at 80-81). The prosecutor first claimed there actually was a conviction, but he then backed off of it, he then claimed there was a negotiated deal, but then backed off of the, and finally admitted there may have been an outright dismissal. The prosecutor asked Ms. Pethers no questions at all. At the same time, Tina Marie Bonsang, who is white, stated that her brother-in-law was even then actively being prosecuted by the County Attorney for driving under the influence (DUI) and in fact one of Roger Murray's defense attorneys was representing the brother-in-law on that charge. App. E (Tr.

5/28/92 at 46-47, 51). It was not just one DUI, but a series of them. Id. Ms. Bonsang served as a juror. App. G (Tr. 5/29/92 vol. II at 26).

The State argued Juror Bonsang would be less likely to be biased than Juror Pethers because Ms. Bonsang's brother's offense was a series of DUIs, whereas Ms. Pether's mother allegedly faced a major drug charge. According to the State, that difference would make Ms. Pethers biased, but not Ms. Bonsang. The State's argument is specious. The charges in Mrs. Garcia's case were dismissed. In contrast, a series of drunk driving offenses results in a long sentence. Ariz. Rev. Stat. §§ 28-1381 to -1384. If there were going to be juror bias, the more serious offense is with Ms. Bonsang, not with Ms. Pethers where the system worked and the charges quickly dismissed. The cases that were cited by the district court that justify the dismissal of jurors with relatives who have been convicted do not apply to Ms. Pethers as there was no conviction. They do apply to Ms. Bonsang where there already had been some convictions and more being then prosecuted. Ms. Bonsang's bias would be exacerbated by the fact the same defense attorney who was representing her relative on his latest DUI also was representing the current defendant. A prosecutor, who was worried about bias from those whose relatives were subject to criminal prosecution, would think Ms. Bonsang might not want to upset her brother-in-law's current lawyer by voting to convict the lawyer's current client. Yet, the prosecutor did not strike her.

Another juror, Mr. Ellis had a son-in-law who was convicted of drug charges. App. F (Tr. 5/29/92 vol. I at 29). After arguing a prosecution for drugs would more likely bias a juror compared to a series of DUI prosecutions, the State then argues

Juror Ellis however would not be biased like Ms. Pethers, because he said he would not be. The State ignores that Ms. Pethers also stated she would not be biased and the Garcia case was dismissed without conviction. It could not hearten Mr. Ellis's concern for his daughter's family finances to think his daughter's husband could be jail bound. The district court stated that Mr. Ellis and Ms. Pethers were not similarly situated because Mr. Ellis said his son-in-law got off "too easy." Yet, the record shows Ms. Pethers never said anything different. Mr. Ellis's and Ms. Pethers's statements only show that both jurors were grateful with the outcomes, the Hispanic juror at least equally and likely even more so since there was no conviction at all, and yet the Hispanic juror was struck, the non-Hispanic juror was not. Ms. Pethers might have felt very grateful to the County Attorney for deciding not to ensnare her mother despite strong evidence that would have justified the County Attorney's moving forward with the prosecution. Presuming that the Hispanic juror's mother's dismissed charges would cause bias while the non-Hispanic juror's son-in-law's actual conviction would not is a presumption not supported by law when both state they are not biased.

The State's argument below, with which the federal courts agreed, that Ellis's relative was convicted for drugs, but Ellis said he could be fair (so did Pethers) and that Bonsang's relative was convicted of a series of DUIs and was facing mandatory stiff sentencing, but drugs are worse than alcohol (which if true, is irrelevant as there was no conviction with Pethers), attempts to split fine hairs on whether the jurors are similarly situated. The Supreme Court has held, "A per se rule that a defendant cannot win a Batson claim unless there is an exactly identical white juror would leave

Batson inoperable; potential jurors are not products of a set of cookie cutters." Miller-El v. Dretke, 545 U.S. at 247 n.6. The most that can be inferred from the distinction the State argues is that Hispanics who have relatives allegedly into drugs or alcohol abuse are presumed racially biased against authority, while non-Hispanics with relatives into drugs or alcohol abuse are not displaying the very bias in thinking Batson attempts to root out.

"If a prosecutor's proffered reason for striking a [minority] panelist applies just as well to an otherwise-similar [non-minority] who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step." Miller-El, 545 U.S. at 241. The prosecutor's claim of not knowing the juror was Hispanic was disingenuous to begin with, he followed it with a series of contradictory allegations, and, finally, he offered a reason that actually applied with greater force to white jurors who he did not strike. Therefore, the "totality of the relevant facts" concerning the prosecutor's conduct and a comparison of nonstruck white jurors shows his explanation was pretextual. Miller-El, 545 U.S. at 239. The striking of Juror Pethers violated Equal Protection requiring reversal of the conviction.

2. Juror Alvarado

The prosecutor allegedly struck Juror Alvarado because Alvarado was "too nice," "you couldn't get him to disagree with you," and "he is just indecisive" which would keep him from disagreeing with anybody. App. G (Tr. 5/29/92 vol. II at 22). On its face, the explanation is suspicious as it is consistent with traditional voir dire stereotypes of minority jurors' being too hesitant to convict that prevailed before

Batson. The prosecutor's explanation that Mr. Alvarado is Hispanic and too nice to hurt someone is not really race neutral. Batson was decided only a few years before voir dire in this case. The pre-Batson belief - that was even covered in law school classrooms - was that minorities are more antigovernment and more likely to give defendants a break and preemptories are often used to strike them for that biased reason, resulting in minorities being categorically excluded from jury duty. Law schools and treatises used in law school would cover this notion as part of voir dire techniques and theories and the concept still prevails today in practice. See, e.g., T. Mauet, Fundamentals of Trial Techniques (2d ed. 1988) at 31. Mauet states:

> The ethnic characteristics method looks at ethnic backgrounds and assumes that attitudes are deep-rooted beliefs that are affected by values acquired early in life from family and social peer groups. Consequently, plaintiff's personal injury lawyers favor Irish, Jewish, Italian, French, and Spanish jurors under the belief that such jurors are more likely to respond to a sympathetic story and an emotional appeal. Conversely, defendants in such cases look favorably upon English, German, and Scandinavian jurors, Nordic types who are viewed as more responsive to law-and-order arguments and resent windfall damages. Criminal lawyers who subscribe to this theory use the same approach except that they reverse the conclusions. Prosecutors prefer Nordic types; defense attorneys prefer Mediterraneans.

Id.

When the prosecutor stated Mr. Alvarado was Hispanic and "too nice," and he would not want to hurt anyone, the prosecutor was expressing the very stereotype Batson intended to address: Hispanics are less responsive to law-and-order arguments and they do not want to convict people. The prosecutor's "too nice" and "indecisive"

language is suspicious on its face for admitting racial animus and that stereotypes motivated the strike.

A review of the voir dire transcript shows the proffered reason that Mr. Alvarado is "too nice" is pretextual. For example, the prosecutor felt his case was so strong, his only offer to defendants was first degree murder (which would presumably result in the death penalty). If the prosecutor really thought Mr. Alvarado was not one to disagree, the prosecutor would have wanted Mr. Alvarado on the jury as he would not be one, in the face of such strong and persuasive evidence, to hold out for an acquittal. A juror who wishes to avoid conflict is the very juror the prosecutor would want.

In Snyder v. Louisiana, 552 U.S. 472 (2008), the prosecutor argued he struck a black juror because the juror had a busy schedule which might make him rush to vote for a lesser included offense just to avoid the penalty phase. The Supreme Court held the prosecutor's logic was "highly speculative." The Court concluded that if the juror wanted to rush to decision, he would be more inclined to agree with those wanting a first degree murder verdict. The same is true in the present case. If Mr. Alvarado was not one to disagree, he would go with the crowd and vote in favor of what all courts have assessed as overwhelming evidence of guilt. Also, there was no lesser included offense in this case, so the only other option besides first degree murder was acquittal, which would mean having to be even more of a strong headed, disagreeable person. Examining nothing more than the foregoing indicates the explanation is not reasonable or logical and there had to be some other reason, which if left unexplained, as it was, would have to be the Juror was struck based on race.

Moreover, the record belies the prosecutor's claim of Mr. Alvarado's being so nice he might not want to convict and instead it shows Mr. Alvarado already held strong views unfavorable to the defense. The undisputed evidence shows Mr. Alvarado never suggested he would hesitate to pass judgment. To the contrary, he testified he had read about the murder in the paper which he thought was, as he described it, "execution style." App. E (Tr. 5/28/92 at 71). The fact that he could recall having read that the murder took place "execution style" shows it had a lasting and disturbing effect on him. He also testified he believed criminals are treated too soft. Id. at 74. Thinking the system is too soft would make him want to correct that problem where murder occurred execution style. He even knew the County Attorney and used to cut his hair for years when Mr. Alvarado had a barber shop in Phoenix. Id. at 73:17-25. Mr. Alvarado testified decisively that he would listen carefully and render a verdict based on the evidence. Id. at 73. Nothing suggested he would hesitate to convict.

A comparative jury analysis also shows the stated reasons for the strike are pretextual. Juror Nelson and Juror Anderson openly admitted in their jury questionnaires that they would have a hard time judging the guilt of a defendant. App. F (Tr. 5/29/92 vol. I at 68 & 141). Although these jurors under questioning from the prosecutor and the judge who tried to rehabilitate them, edged somewhat away from their questionnaire answers, which would be expected on rehabilitation, they clearly were less certain and if the prosecutor were concerned that a juror might be "indecisive" in reaching a verdict, he had written proof of it with these jurors. They both served on the jury. App. G (Tr. 5/29/92 vol. II at 26); App. L at 32-37. Nelson's

testimony is particularly telling. Asked whether she could make a decision, Juror Nelson testified, "Well, I would hope I'd be able to make a decision, yes." App. F (Tr. 5/29/92 vol. I at 68). She then agreed she might be swayed by others to change her mind even after she decided to vote otherwise, so not to offend anyone. Id. at 69. Her answers admit she is indecisive and would have a hard time disagreeing with others. In contrast, Mr. Alvarado testified unequivocally he would render a verdict based on the evidence, he already had read that the killing was "execution style" and thought criminals are treated too soft.

The pretense is further shown when compared to Juror Bonsang who had to pick up her children each day by 6:00 p.m. in Lake Havasu City, an hour's drive from the court house in Kingman, which let out at 5:00 p.m. App. E (Tr. 5/28/92 at 48). Bonsang would need to be disagreeable so she could leave on time compared to Alvarado who was unemployed. Id. at 71. Ms. Bonsang could not afford to get embroiled in a debate that would drag out. She would be forced to be in a position where you could not get her to disagree with you. Yet she served on the jury.

In Snyder, in addition to rejecting on its face the prosecutor's argument he struck a black juror because the juror's busy schedule might make him rush to vote for a lesser included offense so that the juror could leave quickly and not disagree with others, since the opposite was true (he would be more likely to agree with a first degree conviction), the Supreme Court also held that a number of white jurors who were not struck also had busy schedules which was strong circumstantial evidence of pretense. Likewise, in the present case, there were other jurors who were very clear they might

be hesitant to convict or to disagree or who had a very busy schedule and could not afford to be delayed by disagreeing with others, yet none were struck. The State's argument was a pretext. Once the proffered reason for striking a juror is not logical, the reasons must be deemed pretextual, which creates proof by inference of discrimination. Id. at 485. Thus, the court should reverse.

Moreover, there were several presumably "nice" non-Hispanic jurors on the panel who knew the prosecutor, Mr. Zack, who Mr. Zack did not strike. Charlotte May Evans testified she knew Zack because she and her children delivered his morning paper and they talked on occasion. App. E (Tr. 5/28/92 at 16). Everett Dale Jenks stated he also knew Zack because they were lodge brothers. Id. at 17. Mr. Zack must have felt these two acquaintances were "nice," and yet he did not strike them. In fact, he opposed the defense's challenge to Mr. Jenks, his lodge brother, for cause. Id. at 77. Mr. Zack's opposition to striking Caucasian social acquaintances undercuts the veracity of his purported reason for striking the Hispanic social acquaintance and, as a matter of law, creates an inference of discriminatory intent. See, e.g., Snyder, 552 U.S. 472, 482-485 (finding an inference of discriminatory intent when a comparative juror analysis revealed that the prosecutor had not struck similarly-situated white jurors); Kesser, 465 F.3d at 366-67 (finding indication of racial bias when prosecutor tried to rehabilitate white juror with similar quality of struck Native American juror after defense counsel moved to strike white juror for cause).

The Snyder Court also noted that persisting doubts about the striking of one juror must lead a court to weigh the circumstances in striking the second juror;

however, only one violation need be found for reversal. Once the Snyder court concluded the proffered reason for striking a juror was not logical, it ruled the proffered reasons were then deemed pretextual which creates the proof by inference that the striking of the juror was based on discrimination. Thus, the pretext for striking Ms. Pethers is weighed against the State in striking Mr. Alvarado and vice-a-versa. The court should vacate the conviction.

B. The State Courts Failed to Meaningfully Consider Mr. Murray's Relevant Mitigation Evidence.

The trial judge sentenced Roger Murray to death, disregarding specific mitigation. The mitigation presented at sentencing is enormous and is provided in detail in the Statement of the Case section. The sentencing court refused to consider Roger's being addicted as a young child to drugs and alcohol as statutory or nonstatutory mitigation. Murray, 184 Ariz. at 45, 906 P.2d at 578 ("The trial court noted there is some evidence that Roger habitually used drugs and alcohol. [It] rejected intoxication as a mitigator because Roger performed complicated maneuvers at Grasshopper Junction. Roger failed to prove that his alcohol or drug abuse is a nonstatutory mitigator."); App. J (Tr. 10/26/92 at 92). Although, the sentencing court refused to consider physical abuse, family relations, or environment as independent mitigation and simply thought Mr. Murray had a dysfunctional childhood. By refusing to consider the foregoing, the trial court did not consider Roger's living in squalor in a bedroom used as a urinal, or being pressed into crime as a child, or being a drug and alcohol abuser as a young child (the father did drugs in front of the children, App. I (Tr.

10/6/92 at 108:7-13).The court also rejected the notion of organic brain injury, without discussion of the psychometric testing or the scientific basis for the court appointed expert's opinion, simply stating, "There is no evidence of organic brain injury." App. J (Tr. 10/26/92 at 91). The court apparently required some other form of diagnostic testing such as an MRI to show brain damage; however, the court did not say why it believed there was no brain injury, it simply concluded there was no brain injury. The sentencing court never mentioned Roger's traumatic stress disorder, a medical condition that the McKinney court relied on in concluding the state court's causal connection error was not harmless.

On appeal, the Arizona Supreme Court refused to consider any of Mr. Murray's offered relevant evidence of mitigation because none of it allegedly explained or caused the events at Grasshopper Junction. Murray, 184 Ariz. at 44, 906 P.2d at 577 ("We agree that Roger comes from a dysfunctional childhood, but he fails to show how this background impacted his behavior at Grasshopper Junction."). The Arizona Supreme Court outlined Mr. Murray's life from ages 9 to 17 by focusing primarily on Mr. Murray's criminal past during those juvenile years and on the psychologists' reports of that period that alarmingly showed Mr. Murray as a young boy was a time bomb waiting to go off. Murray, 184 Ariz. at 41, 906 P.2d at 574. The court clearly was focused on the outcomes of Mr. Murray's brutal childhood and abuse without listing or addressing or considering the nonstop abuse itself and criminal training he received; that he became the criminal he was brought up to be as a young boy was only expected. The court's failure to allow consideration of the relevant mitigation evidence led it to

fail to understand that, take any child and put him or her in the environment given to Mr. Murray and the court would likely be describing the same outcomes and consequences that it described for Mr. Murray. Yet, those events that formed Mr. Murray's youth were not mentioned, nor considered. The supreme court did not mention or address the urinating in the bedroom, the beatings by fist and weapon, the traumatic stress disorder, the evidence of brain damage, the being pressed into the father's criminal enterprise and night club or the father's impressing his philosophy of taking others' money, or the expert testimony that Roger was taught criminal thoughts as a child, id. To the contrary, after outlining Mr. Murray's childhood of juvenile criminality (without mentioning the actual mitigation evidence), the Arizona Supreme Court concluded, "He has failed to show * * * that his juvenile experiences significantly impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law." Id. This is almost exactly the same unconstitutional language and holding used by the Oklahoma Supreme Court in Eddings. Eddings, 455 U.S. at 113 (State court: "[P]etitioner has a personality disorder. But * * * he knew the difference between right and wrong at the time he pulled the trigger, and that is the test of criminal responsibility [and] it does not excuse his behavior."). The Arizona Supreme Court also held, "[H]e fails to show how this background impacted his behavior at Grasshopper Junction." Murray, 184 Ariz. at 44, 906 P.2d at 577.

The Arizona Supreme Court agreed with the sentencing court's refusal to consider Mr. Murray's childhood addiction to drugs and alcohol as mitigation. Murray, 184 Ariz. at 44, 906 P.2d at 577. In coming to its conclusion that Mr. Murray's

mitigation could not be considered unless he could show a causal connection between it and the crime, the supreme court relied on State v. Wallace, 160 Ariz. 424, 427, 773 P.2d 983, 986 (1989), which held, at the cited pages, dysfunctional family background is not mitigation, unless it caused the crime. Murray, 184 Ariz. at 44, 906 P.2d at 577. Thus, the Murray court was reaching the same conclusion as the case it cited for authority: dysfunctional background unconnected to the crime is not mitigation. As McKinney held, citation to Wallace and like cases makes it unmistakable that the citing court was rejecting mitigation evidence because it did not cause the crime. McKinney, 813 F.3d at 820; see Eddings, 455 U.S. at 113 & 119 ("Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.").

In Eddings, the state court held dysfunctional background did not change that defendant knew committing the crime was wrongful. Id. at 113 (State court: "[P]etitioner has a personality disorder. But * * * he knew the difference between right and wrong at the time he pulled the trigger, and that is the test of criminal responsibility [and] it does not excuse his behavior."). The Arizona Supreme Court and the trial court in the present case took the same approach. Murray, 184 Ariz. at 41, 906 P.2d at 574 ("He has failed to show * * * that his juvenile experiences significantly impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law."); App. J (Tr. 10/26/92 at 91-92) (Sentencing court: "While there is no question that the defendant suffered from less than an ideal environment as a child, it is also clear that the defendant is an antisocial personality [and the] offenses did not

occur by impulse."). The Arizona courts were focused not on what wrongs were done to a child that would make and cause anyone's child to transmogrify into a dangerously angry human being, but rather on whether the defendant now was that transmogrified, angry, antisocial person (today, Mr. Murray is a model inmate, well regarded by prison staff). The Supreme Court agreed and held, "Family background is a mitigating circumstance only if a defendant can show that something in that background had an effect or impact on his behavior that was beyond the defendant's control." Id.

This court "look[s] only to the decision of the [state supreme court]" in determining error. Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991). The last Arizona court decision rejected all of Mr. Murray's mitigation evidence because it was not causally related to the crime. Neither that court, nor the sentencing court mentioned or gave any specific consideration to Mr. Murray's traumatic stress syndrome. McKinney reviewed the rejected evidence in that case and determined that the defendant's post-traumatic stress disorder from his horrible background was strong evidence that should not have been ignored as mitigation. The McKinney court held the state courts' failure to fully consider the defendant's post-traumatic stress disorder was not harmless error and it required resentencing. McKinney, 813 F.3d at 823. The same is true in the present case where neither the sentencing court, nor the supreme court even mention Roger's traumatic stress syndrome and certainly gave it no weight. Abdul-Kabir v. Quaterman, 550 U.S. 233, 264 (2007) (when sentencer does not give "reasoned moral response" to mitigation evidence, "the sentencing process is fatally flawed"). Mr. Murray's traumatic stress syndrome surfaced repeatedly throughout his

early childhood and into his teens as he was repeatedly abused and physically beatened and openly taught criminal thoughts and criminal activity at home. As in McKinney, the traumatic stress was relevant mitigation evidence that should have been given consideration. Any boy, from any walk of life, affluent or poor, cultured or ignorant, handed Mr. Murray's childhood, would become internally angry and hateful and many would become who they were schooled to be: criminals. The sentencer should be allowed to know why and the sentencer is required to give that evidence meaningful consideration to reach a verdict on whether Mr. Murray was morally deserving of death.

In Styers v. Schriro, 547 F.3d 1026 (9th Cir. 2008), the Ninth Circuit granted relief because the Arizona Supreme Court held the mitigation factor of post-traumatic stress disorder would not be considered in balancing, since it was not a cause of the crime. The state court failure to consider traumatic stress as mitigation was in direct contradiction to Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982) and its progeny. Styers, 547 F.3d at 1035 ("[T]he Arizona Supreme Court appears to have imposed a test directly contrary to the constitutional requirement that all relevant mitigating evidence be considered by the sentencing body. Smith v. Texas, 543 U.S. 37, 45 (2004) (citing Eddings * * *)."). The Ninth Circuit's conclusion that the Arizona Supreme Court went over the mitigation evidence in detail is incorrect as the Arizona Supreme Court does not mention and never considered the traumatic stress syndrome which was the underpinning for the McKinney reversal of the death penalty. Moreover, the Arizona Supreme Court's "review" rarely touched on the mitigation evidence, but

rather outlined the history of juvenile delinquency and juvenile crimes that were the consequences of the factual events that themselves are the mitigation evidence. The Arizona courts' application of its, as a matter of law exclusion of relevant mitigation evidence that is not causally related to the crime is unconstitutional.

C. The Arizona Courts' Refusal to Consider Mr. Murray's Mitigation Evidence Was Not Harmless.

The Ninth Circuit's amended opinion holds that assuming the Arizona Supreme Court refused to consider Mr. Murray's mitigation evidence, the error was harmless. The US Supreme Court has not held that harmless error analysis applies when state courts, as a matter of law, refuse to consider relevant mitigation evidence because it is not causally connected to the crime. To the contrary, in Eddings, this Court held a sentencer in a capital case may not "refuse to consider, as a matter of law, any relevant mitigating evidence"offered by the defendant. 455 U.S. at 114; see also Lockett, 438 U.S. at 604 ("[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death") (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976)). Mr. Murray petitions this court to rule that when a state court refuses to give ANY consideration to relevant mitigation evidence because such mitigation evidence allegedly is not causally connected to the crime, the error is structural and harmless error analysis does not apply.

A review of Supreme Court cases makes clear even if harmless error analysis does applies, the test is that "any risk" that the state courts may not have considered the mitigation evidence suffices for reversal. For example, the Eddings court held "it appears" the state courts considered mitigation to be only that which excused or explained the criminal act and any doubts on whether mitigation was considered require reversal. Id.; Styers v. Schriro, 547 F.3d 1026, 1035 (9th Cir. 2008) (reversing when "it appears" causal nexus required); see Penry v. Lynaugh, 492 U.S. 302, 323 (1989) (holding ambiguous jury instruction was unconstitutional, because sentencer who believed background diminished offender's moral culpability, making death unwarranted, "would be unable to give effect to that conclusion" if sentencer also believed offender knowingly committed crime; reversal of sentence required because "we cannot be sure" death sentence reflects a "reasoned moral response"). Penry held,

> Our reasoning in * * * Eddings thus compels a remand for resentencing so that we do not 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.' * * * Eddings, 455 U.S. at 119 (O'Connor concurring). When the choice is between life and death, that risk is * * * incompatible with the commands of the Eighth and Fourteenth Amendments.

Id. at 328 (emphasis supplied).

In Mills v. Maryland, 486 U.S. 367 (1988), addressing whether a confusing jury instruction might lead a jury to dilute mitigation evidence, the Supreme Court held, "Unless we can rule out the substantial possibility that the [sentencer] may have rested its [sentence on an] 'improper' ground we must remand for resentencing." Id.

at 377 (emphasis added); see also Nelson v. Quarterman, 472 F.3d 287, 315 (5th Cir. 2006) (en banc) (harmless error analysis does not apply to mitigation issues).

In light of the foregoing Supreme Court jurisprudence that "any risk" that relevant mitigation evidence was not fully considered requires resentencing, the Arizona Supreme Court's giving, as a matter of law, NO consideration to relevant mitigation evidence because it was not causally connected to the crime, requires resentencing in this case. The Ninth Circuit erred in holding that the Arizona Supreme Court's automatically refusing to consider Mr. Murray's relevant mitigation evidence because it did not have a causal nexus to the crime was harmless error. This automatically rejected mitigation evidence includes undisputed proof of traumatic stress disorder, a condition that was heavily relied on by the Ninth Circuit en banc in McKinney to reverse that sentence and which militates against Mr. Murray's being sentenced to death without a "reasoned moral response." Eddings, 455 U.S. at 115 ("Nor do we doubt that the evidence Eddings offered was relevant [as e]vidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation. * * * There can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant."). Mr. Murray's excluded relevant mitigation evidence was powerful. Excluding it as a matter of law was error and the error was not harmless.

CONCLUSION

Mr. Murray respectfully requests this Court issue a writ of certiorari.

Respectfully submitted this 13th day of July, 2018.

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