No. 18-5271

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

A. The State Ignores Controlling Case Law Cited by Petitioner For Why This Court Should Reverse the Batson Violation.

The opposition brief dedicates most of its argument on the issue of whether the State violated the Equal Protection clause and Batson v. Kentucky, 476 U.S. 79 (1986) by striking the only two minority members of the venire panel, to claiming there is no compelling reason for this court to accept jurisdiction to correct the violation. In making its argument, the State conspicuously neither cites nor discusses the Supreme Court's most recent pronouncement on the issue, Snyder v. Louisiana, 552 U.S. 472, 478 (2008), which Mr. Murray cited and relied on in presenting the Petition. The State argues instead that when a judge has credited from his or her own perspective the reasons given by the prosecutor for the strike, the defendant is in a "virtually impossible" position to challenge the strike as based on invidious discrimination. The State argues Mr. Murray has failed to assert any basis that would lead this Court to grant a writ of certiorari such as so to correct a split among the circuits or to resolve a novel issue and that the Petition asserts a pure factual issue. Without the advantage of having reviewed and addressed Snyder, the State misstates the law. In Snyder, the Court expressly stated that even under the most deferential standard of review, a comparative analysis of the juror who was struck in that case, under similar circumstances as the striking of Mr. Alvarez in the present case, compared to the nonminority jurors who were not struck demonstrated an inference of discrimination which was enough for this Court to accept jurisdiction, hear the case, and reverse the

conviction. Id. at 479. As the Snyder court made clear, this Court will accept review and reverse when the trial court has "committed clear error in its ruling on a Batson objection." Id. at 474. The State's claim there is no basis for review is thus simply wrong.

Moreover, the prosecutor in this case stated he struck Mr. Alvarez for reasons he admits have exactly no evidentiary support. He claimed Mr. Alvarez was "too nice." The prosecutor fully admitted and explained that he drew that conclusion of Mr. Alvarez, not from anything said or that took place in the court room, but from personal opinions he allegedly had of Mr. Alvarez based purely, 100%, from observations he made of Juror Alvarez OUTSIDE of the courtroom at parties and private settings that long predated the in-court colloquy and jury examination. Those alleged characterizations of Mr. Alvarez the State admits were not evidenced in the courtroom. The State has never cited or been able to cite to where in the record Mr. Alvarez displayed anything to suggest his being too nice or too indecisive. There is exactly no evidence in the record to support the prosecutor's allegation and the prosecutor never tried to claim there was anything that happened or that was said in the court room that would support the reasons for the strike. The State concedes the same. To the contrary, Mr. Alvarez's court room commentary made it clear he was anything but indecisive. He stated that the murders in this case took place "execution style" after the elderly victims were made to lay down and that he thought the judicial system was too soft on criminals. App. E (Tr. 5/28/92 at 71 and 74). His statements suggested fury, anger, and frustration about the crime. The only evidence in this case was

uniform on two things: 1) he was not indecisive and 2) he was Hispanic, and the only two minorities were both struck.

The prosecutor did nothing to draw out for the record Mr. Alvarez's alleged indecisiveness. The prosecutor did not question Mr. Alvarez and did not inquire into Mr. Alvarez's ability to make decisions based on the evidence. App. E (Tr. 5/28/92 at 74) In the circumstances of this case, any prosecutor could claim his or her discriminatory strike of a juror was justified by secret communications that took place in another setting and not in court where a record could be made and where the defense attorney could prepare to address the issue that took place in open court. Instead, whereas the strike and explanation took place after jury examination and in no way related to the jury examination, the defense attorneys were left in a position where they were prevented from arguing Mr. Alvarez was not too nice at the party or private setting or from probing into or challenging the explanation that Mr. Alvarez exhibited indecisiveness or the character of being "too nice." Defense counsel were not present when the minority juror allegedly manifested these characteristics. Every discriminatory strike, especially in small counties, could be justified by out of court "evidence" as this one was justified. The prosecutor at the trial level and the State ever since have never once pointed to the record to allege where such indecisive tendencies were manifested or evidenced. At the same time, the comparative juror analysis refutes the prosecutor's explanation that he struck Mr. Alvarez because he was concerned Mr. Alvarez would be too nice and would not function well if in a position where he would need to disagree.

As outlined in the Petition, which the State has ignored, Snyder's factual patterns and legal issues are strikingly similar to the present case. In Snyder, the prosecutor claimed to have struck a minority juror because his schedule made him too likely to want to rush to judgment, while the prosecutor did not strike other jurors who clearly were going to be inconvenienced by serving on the jury. Id. at 479-90. The Supreme Court's jury comparison outlined the similarities between the jurors and even demonstrated the minority juror was less likely to be inconvenienced which showed the prosecutor's proffered reason had to have been pretextual. Id.

The same analysis and reasoning applies even stronger in the present case where the prosecutor claimed Mr. Alvarez was so nice he would not want to disagree with anyone which could affect his ability to convict as there were other jurors who expressly stated they could be hesitant in reaching a judgment or in disagreeing with others. Juror Nelson in particular was notably less than certain that she would disagree and admitted she hoped she would be able to decide issues and that even after reaching a judgment others might cajole her to vote otherwise. App. F (Tr. 5/29/92 vol. I at 68-69). Those nonminority jurors who expressed indecisiveness were not struck. There also was a white juror, as outlined in the petition, who stated her schedule required the picking up of her young child at a long distance from the courthouse. That schedule clearly was going to risk causing the juror to "not disagree" so to be able to leave the courthouse on time to pick up the child. App. E (Tr. 5/28/92 at 48). The prosecutor did not strike her despite her predicament. Mr. Alvarez in contrast was then unemployed and would not be inconvenienced or need to rush.

The Ninth Circuit's original opinion never addressed the strike of Juror Alvarez. Murray v. Schriro, 745 F.3d 984, 1002-10 (9th Cir. 2014). In response to a petition for rehearing the court amended its opinion to state simply that the court did not think there was discrimination with the striking of Juror Alvarez and how other indecisive jurors somewhat backed away from their indecisiveness on examination (while Juror Alvarez never expressed any indecisiveness and actually expressed that he felt criminals get off too easy and that the crime had a heinous component in how it was committed). The Ninth Circuit's amended opinion does not give proper weight to the comparisons between the jurors and it gave no consideration to the fact that the alleged evidence of Mr. Alvarez's being too nice was secreted so that it could never be evidenced or tested.

The State also concedes that the prosecutor's statements in explaining why he struck Juror Plethers were "regrettable" as they show the prosecutor bore discriminatory stereotypes in mind when it came to the exact issue of whether he was discriminating when he struck the juror. From an Equal Protection analysis, the prosecutor's comments and revealed thinking that no one could successfully claim he would know a juror was a minority if the juror did not "talk like one" is far more than morally "regrettable," rather it evidences racial animus in violation of the Constitution. This case presents "exceptional circumstances" where there is no evidence to support the explanation for the strike of Mr. Alvarez while there is evidence in the form of a comparative juror analysis to fully rebut the prosecutor's explanation leaving the inference the explanation was pretextual, thus precluding deference to the trial court.

Snyder, 552 U.S. at 477. There also is direct evidence of the prosecutor's racial stereotyping in voir dire selection. For the foregoing reasons, the Court should accept review and correct the Constitutional violation.

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

The State argues that Mr. Murray's claim that the State courts violated Eddings v. Oklahoma, 455 U.S. 104 (1982) by refusing to consider his mitigation evidence because it was not causally linked to the crime is moot because in its amended opinion the Ninth Circuit stated it would assume that Mr. Murray was correct that the State courts in fact erroneously refused to consider Mr. Murray's mitigation evidence. The State argues that after making the assumption, the Ninth Circuit concluded that the state courts' error was harmless. The State concludes that, for purposes of this Petition, the state courts are conclusively presumed to have erred by refusing to consider the mitigation evidence and, thus, the issue sub judice is only whether such constitutional error was harmless and that this Court therefore should not accept the Petition on the actual violation issue. Mr. Murray agrees with the State on the foregoing point that the issue of whether the state courts violated Eddings is resolved and the true issue is harmless error. Before addressing the harmless error argument, however, Mr. Murray is compelled to reply to the State's gratuitous assertion or apparent alternative argument that the State courts did not really refuse to consider Mr. Murray's mitigation evidence, because the Arizona Supreme Court stated, "We have considered the nonstatutory mitigating factors for each defendant, including those

falling short of establishing statutory mitigation. We find the evidence, at best, to be minimal." The State concludes this quotation means the Arizona Supreme Court did consider all offered mitigation evidence.

The State's argument is misleading as the Arizona Supreme Court's opinion shows it defined mitigation evidence to exclude that which was not causally related to the crime. The Arizona Supreme Court held that if the evidence did not cause defendant to commit the crime it was not mitigation evidence. State v. Murray, 184 Ariz. 9, 44, 906 P.2d 542, 577 (1995) ("We agree that Roger comes from a dysfunctional childhood, but he fails to show how this background impacted his behavior at Grasshopper Junction."). Even in addressing Mr. Murray's childhood addiction to alcohol and drugs, acquired while being pressed into working as a minor in his father's nightclub and by the father's own use of drugs in front of family, the Arizona Supreme Court refused to view the addictions as mitigation, noting in some detail how they did not cause the crime. 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."). The state courts likewise did not consider Mr. Murray's living in squalor in a bedroom used as a urinal, or being pressed into crime as a child, or Mr. Murray's traumatic stress disorder. Traumatic stress disorder is precisely the medical condition that the en banc Ninth Circuit relied on in McKinney v. Ryan, 813 F.3d 798 (9th Cir. 2015) (it was post-traumatic stress disorder in McKinney) in concluding that the Arizona courts'

erroneous refusal to consider the disorder as mitigation was not harmless. Id. at 812-813 ("We hold that the Eddings error committed by the Arizona Supreme Court in this case had a 'substantial and injurious effect' on McKinney's sentence within the meaning of Brecht."). The state courts in the present case also refused to consider Mr. Murray's traumatic stress disorder and the Ninth Circuit never mentioned it either, opting instead to assume error occurred.

Instead of focusing on what was the mitigation evidence, the Arizona Supreme Court reviewed Mr. Murray's history of crime from early childhood starting when he was 8 years old. It may be the Arizona Supreme Court was relying on a history of crime in stating it considered the nonstatutory mitigating factors, but the commission of crimes is not mitigation evidence; bearing nonstop violence and childhood abuse, juvenile criminal training from a parent, and suffering traumatic stress evidence by using the corner of one's bedroom as a urinal (all of which the state courts refused to consider) are evidence of mitigation. 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."). It is a statement that restricts mitigation evidence to its causal connection with the crime. The United States

Supreme Court rejected this thinking, holding, "We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in Lockett. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." Id. at 113-14 (emphasis in orginal). The Court remanded for new sentencing. Id. at 116-17.

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 Arizona 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."). The en banc McKinney court went further however and specifically cited the Ninth Circuit's original panel opinion in the present case as one of those cases in which the Ninth Circuit erroneously concluded the Arizona Supreme Court was merely balancing mitigation evidence based on its causal connection to the crime and not outright rejecting consideration of it. McKinney, 813 F.3rd at 818 (citing

Murray opinion as erroneous). In its amended opinion, in response to Mr. Murray's petition for rehearing that relied on McKinney, the Ninth Circuit did not excuse the state courts' failure to consider mitigation evidence but rather simply noted it would assume the constitutional error occurred. Murray, 882 F.3d 778 (9th Cir. 2018); Pet. App. A, at 74-76. In light of the foregoing, both parties agree the true Eddings issue sub judice is that of harmless error and not whether the Eddings violation occurred. However, to the extent the State nevertheless opines the violation did not occur, the foregoing conclusion of the Ninth Circuit in this case and in McKinney and the very holdings of the Arizona Supreme Court opinion in this case at the state court level show the violation did occur and that relevant mitigation evidence was excluded from consideration because it was deemed unrelated to explaining the crime.

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

The Ninth Circuit's amended opinion holds that it assumes the Arizona Supreme Court erroneously refused to consider Mr. Murray's mitigation evidence, but that the error was harmless. The Ninth Circuit's holding that "harmless error" analysis applies to an Eddings violation is consistent with some other circuits, but contrary to the Fifth Circuit which holds that harmless error does not apply to the constitutionally erroneous failure to give mitigation evidence meaningful consideration. Henry v. Quaterman, 472 F.3d 287,314 (5th Cir. 2006) (en banc). While the State tries to limit the Henry holding to relating only to a jury charge on "special issues" unique to Texas's former sentencing procedure, it is clear neither the Fifth Circuit nor other circuits,

such as the Ninth Circuit, consider the Henry decision to be restricted. See, e.g., McKinney, 813 F.3d at 848, n.43 (dissenting opinion). The Ninth Circuit's assessment is consistent with the Henry opinion itself. In Henry, the court expressly stated, "This reasoned moral judgment that a jury must make in determining whether death is the appropriate sentence differs from those fact-bound judgments made in response to the special issues. It also differs from those at issue in cases involving defective jury instructions in which the Court has found harmless-error review to be appropriate." Henry, 472 F.3d at 315. Thus, the holding was not limited. This Court should resolve the split in the circuits on this important issue by granting the petition and issuing the writ.

The Supreme Court's own jurisprudence demonstrates that the Henry holding is correct and other circuit opinions that have applied harmless error analysis are inconsistent with the law propounded by the Supreme Court. For example, the Eddings court held 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. Eddings 455 U.S. at 113-15. In Eddings, the Court spoke forcefully about the importance that relevant evidence be given meaningful consideration.

> Nor do we doubt that the evidence Eddings offered was relevant mitigating evidence. Eddings was a youth of 16 years at the time of the murder. Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation. See McGautha v. California, 402 U.S. 183, 187-188, 193, 91 S.Ct. 1454, 1457 1460, 28 L.Ed.2d 711 (1971). In some cases, such evidence properly may be given little weight. But when the defendant was 16 years old at the time of the offense 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.

Id. at 115. As the Eddings opinion makes clear, the issue is whether the mitigating evidence is relevant and if so its exclusion was injurious. Mr. Murray was 20, but his childhood abuse was life long and he was pressed into criminal acts as a young child and then nurtured on alcohol and drugs. His history of abuse of every form imaginable is far more compelling than most.

Likewise, in Penry v. Lynaugh, 492 U.S. 302, 323 (1989) the Court held an ambiguous jury instruction was unconstitutional, because a 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). The Penry's holding makes clear even the risk the error took place is enough to require reversal. Id.; see also Mills v. Maryland, 486 U.S. 367, 377 (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.") (emphasis added).

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 and the exclusion of this critical evidence was not harmless. 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."

The State argues the state courts' error in excluding relevant mitigation evidence was harmless because the sentencing court found three aggravating factors and the mitigation evidence could not overcome that many aggravating factors. The State's argument is wrong as a matter of law. First, the assessment of mitigating evidence is not a quantitative analysis, but a qualitative one. The meaningful consideration of mitigating evidence does not require the sentencer to count how many mitigating factors there are in the evidence. Indeed, the State's argument essentially reverts back to Arizona's constitutionally erroneous traditional approach that the

mitigating evidence must be so related to the crime as to offset the aggravating factors that themselves directly relate to the crime. A sentencer is not prohibited from giving that weight that the sentencer believes is appropriate to the evidence in determining the sentence. Otherwise, the moral assessment would be compromised.

Likewise, the State overlooks that the defendant in McKinney actually had four aggravating factors assessed against him. McKinney, 813 F.3d at 848 (dissenting opinion). The fact that there were four aggravating factors did not mean that a sentencing court could ignore the mitigating evidence. In McKinney, as in the present case, one of the mitigating factors that presented powerful evidence was traumatic stress from an incomprehensibly brutal childhood. Therefore, as a matter of law, the State's argument, that when there are aggravating factors, the quantitative assessment means the unconstitutional error is harmless, is a merit ess argument.

The mitigation evidence in the present case shows the error was not harmless even if harmless error analysis applies. 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 Murray'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 beaten and openly taught criminal thoughts and criminal activity at home. In light of the foregoing, the court should accept review and reverse for a sentencing that considers critical mitigating evidence.

CONCLUSION

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

Respectfully submitted this 4th day of October, 2018.

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