

No. 18-1109

IN THE
Supreme Court of the United States

JAMES ERIN MCKINNEY,
PETITIONER,

v.

ARIZONA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARIZONA

BRIEF OF
THE PROMISE OF JUSTICE INITIATIVE
NATIONAL ASSOCIATION FOR PUBLIC DEFENSE

AMICI CURIAE IN SUPPORT OF PETITIONER

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**BRIEF OF *AMICI CURIAE* IN SUPPORT OF
PETITIONER**

The Promise of Justice Initiative, along with the National Association for Public Defense, submit this brief in support of the petition for certiorari.

INTEREST OF *AMICUS CURIAE*¹

The Promise of Justice Initiative (PJI) is a private, non-profit law office located in New Orleans, Louisiana, dedicated to upholding fairness in the criminal justice system. Projects of PJI include exposing injustice in the capital punishment system and addressing harsh sentencing, inadequate representation and racial discrimination in the legal system. Some number of our clients have committed serious offenses, causing deep harm. PJI recognizes that many of these clients are too the victims of deep and enduring trauma.

The National Association for Public Defense (“NAPD”) is an association of more than 14,000 professionals who deliver the right to counsel throughout all U.S. states and territories. NAPD members include attorneys, investigators, social workers, administrators, and other support staff who are responsible for executing the constitutional right

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

to effective assistance of counsel. NAPD's members are advocates in jails, in courtrooms, and in communities and are experts in not only theoretical best practices, but also in the practical, day-to-day delivery of legal services. NAPD has particular insight into the evolution of lawyers' understanding of trauma.

Amici have particularized perspective on how the death penalty currently operates in the United States. *Amici*, have a crystalized understanding of the limitations and constraints of individuals who remain exposed to the death penalty. Our collective understanding reveals how trauma renders our clients both less culpable and more vulnerable.

INTRODUCTION

In 2018, the Arizona Supreme Court acknowledged that: “The record shows that [McKinney] endured a horrific childhood.” *State v. McKinney*, 426 P.3d 1204, 1206 (Az. 2018). The Court noted the Ninth Circuit had “summarize[ed]” “McKinney’s evidence regarding childhood abuse and neglect.” *Id.* citing *McKinney v. Ryan*, 813 F.3d 798, 804, 823-24 (9th Cir. 2015).

The Court of Appeals recognized McKinney suffered severe and enduring neglect, humiliation, shame and abuse. *Id.* McKinney’s mother abandoned him when he was 11, leaving him to protect his two younger sisters. *McKinney v. Ryan*, 813 F.3d at 806; see *id.* (““It was scary. It seems like we were all stressed out wondering...the next time we were getting beat; wondering when we were going to eat.””).

However, the Arizona Supreme Court discounted this mitigation as “insufficiently substantial to warrant leniency” and opined – based upon testimony from McKinney’s original trial concerning Post-Traumatic Stress Disorder – that PTSD bore little relation to his behavior during the crime. *Id.* at 1206. Mr. McKinney’s death sentence is predicated upon an understanding of PTSD and trauma that has since evolved.

STATEMENT OF THE CASE

The potentially devastating consequences of trauma on the human psyche have been discussed for

millennia.² But they were not given formal psychiatric nomenclature until 1980, when the diagnosis of Post-Traumatic Stress Disorder (“PTSD”) was introduced in the third edition of the Diagnostic and Statistical Manual of Mental Disorders (“DSM”).³ The medical community’s emerging recognition of PTSD, resulting in its first appearance in the DSM-III, stemmed from research involving returning Vietnam War veterans and Holocaust survivors.⁴ That same year, James McKinney was a 12-year-old child in the middle of a decade of severe, prolonged physical and psychological abuse and neglect. The

² From the *Iliad* to *Farewell to Arms* to *American Sniper*, the post-traumatic consequences of combatants from the Trojan War to World War I to more recent wars, such as the War in Iraq, have been chronicled. See, e.g., JONATHAN SHAY, *ACHILLES IN VIETNAM: COMBAT TRAUMA AND THE UNDOING OF CHARACTER* (1995); Henry M. Seiden & Mark Seiden, *Ernest Hemingway’s World War I short stories: PTSD, the writer as witness, and the creation of intersubjective community*, 30 *PSYCHOANALYTIC PSYCHOLOGY* 92; CHRIS KYLE, *AMERICAN SNIPER: THE AUTOBIOGRAPHY OF THE MOST LETHAL SNIPER IN U.S. MILITARY HISTORY* (2012); see also Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 *HOFSTRA L. REV.* 923, 928 (2008).

³ AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 236-38 (3d ed. 1980) [hereinafter *DSM-III*]. The Diagnostic and Statistical Manual of Mental Disorders identifies currently recognized categories of mental disorders and the criteria for diagnosing them. See also Matthew J. Friedman, *History of PTSD in Veterans: Civil War to DSM-5*, U.S. DEPARTMENT OF VETERANS AFFAIRS, https://www.ptsd.va.gov/understand/what/history_ptsd.asp.

⁴ *Id.*

beatings he experienced were so frequent that witnesses could not tell if his bruises were new or old.

The criteria for PTSD has been revised in all subsequent DSM editions to reflect continuing research and greater understanding of trauma. During McKinney's trial in 1998, traumatic events were considered "generally outside the range of usual human experience."⁵

In 1998, the fourth edition of DSM classified PTSD as an anxiety disorder with limited symptoms and no specific cause.⁶ The Center for Disease Control and Prevention produced its first investigation into the correlation between Adverse Childhood Experiences (ACE) and neglect and later-life health and well-being.⁷

McKinney's murder trial in Arizona took place the same year the DSM-IV was published. Dr.

⁵ DSM-III, *supra* note 3, at 236-38.

⁶ AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1998); Carol North, Alina Surís, Rebecca Smith & Richard King, *The Evolution of PTSD Criteria Across Editions of DSM*, *Annals of Clinical Psychiatry*, 2016 Aug;28(3) at p. 198.

⁷ The CDC-Kaiser Permanente Adverse Childhood Experiences (ACE) Study was the first large-scale assessment of the connection between adverse childhood experience and later outcomes. See Felitti, Vincent J. et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults*, *American Journal of Preventive Medicine*, Volume 14, Issue 4, 245 – 258 (1998).

McMahon, a clinical psychologist,, testified that McKinney had PTSD as a result of childhood abuse.⁸ Dr. McMahon characterized McKinney as “basically passive,” “quite submissive,” and “susceptible to manipulation, exploitation.”⁹ “He can be emotionally overwhelmed by environmental stress and act in poorly-judged ways just to [re]duce the internal emotional turmoil.”¹⁰ Dr. McMahon also testified that he believed that due to his PTSD McKinney would “rather withdraw from [a] situation” in which he might encounter violence.¹¹ Citing this belief as evidence that McKinney’s PTSD bore little or no relation to his behavior during the murder, the Arizona Supreme Court, in both 1996¹² and 2018¹³, concluded that McKinney’s serious mental disability

⁸ *McKinney v. Ryan*, 813 F.3d 798, 831 (9th Cir. 2015).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *State v. McKinney*, 917 P.2d 1214, 1234 (Az. 1996) (“The judge observed that McKinney’s conduct in engaging in the crimes was counter to the behavior McKinney’s expert described as expected for people with PTSD.”).

¹³ *State v. McKinney*, 426 P.3d 1204, 1206 (Az. 2018) (“In weighing McKinney’s mitigation evidence, we take into account the fact that it bears little or no relation to his behavior during Mertens’ murder. For example, Dr. McMahon testified that due to the PTSD, he believed that McKinney would “rather withdraw from [a] situation” in which he might encounter violence...”).

was not a mitigating factor in the decision to sentence him to death.¹⁴

At the time of McKinney's trial, we knew very little about the actual impact of trauma on the brain.

In 2000, the United States Congress created the National Child Traumatic Stress Network (NCTSN) to develop resources for professionals including judges, attorneys, and mental health personnel to understand the impact of trauma.¹⁵

In 2009, the United States Department of Justice issued a Juvenile Justice Bulletin, addressing the National Survey of Children's Exposure to Violence. The Bulletin recognized that "children who are exposed to violence undergo lasting physical, mental, and emotional harm. They suffer from difficulties with attachment, regressive behavior,

¹⁴ *McKinney v. Ryan* at 832.

¹⁵ See National Child Traumatic Stress Network, Justice, available at <https://www.nctsn.org/trauma-informed-care/creating-trauma-informed-systems/justice>.

anxiety and depression and aggression and conduct problems.”¹⁶

Subsequently, and most significantly, in 2013, the Fifth Edition of the DSM explained that PTSD was more than an anxiety disorder.¹⁷ In contrast to earlier understanding, the DSM-V specifically enumerates aggression, anger, and hyperarousal as symptoms characteristic of PTSD.¹⁸

While PTSD was considered an anxiety disorder at the time of McKinney’s trial, brain imaging technology and sophisticated medical tests developed since his trial, have helped transform our understanding of trauma and PTSD as causing physical changes to the brain.¹⁹

A 2018 study showed that the association between PTSD and aggressive symptoms appears “stronger for men than women, perhaps reflecting

¹⁶ See David Finkelhor, Heather Turner, Richard Ormrod, Sherry Hamby & Kristen Kracke, *Children’s Exposure to Violence: A Comprehensive National Survey*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEPARTMENT OF JUSTICE (Oct. 2009), <https://www.ojjdp.gov/pubs/epub/NatSCEV.epub>.

¹⁷ Friedman, *supra* note 3.

¹⁸ Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) [hereinafter DSM-V].

¹⁹ American Academy of Neurology, PTSD may be physical and not only psychological: Brain’s emotional control center shown to be physically larger, SCIENCE DAILY (July 11, 2017), <http://sciencedaily.com/releases/2017/07/170711171704.htm>.

differences in internalizing versus externalizing responses to trauma.”²⁰ In the same year, the Arizona Supreme Court held that McKinney’s mitigating evidence was “not sufficiently substantial to warrant leniency” and bore “little or no relation to his behavior during Mertens’ murder.”²¹ McKinney’s death sentence was upheld.

SUMMARY OF ARGUMENT

Trauma is life-altering. We now understand that childhood abuse is among the most damaging phenomena that can occur to the human psyche— as it sabotages the still developing brain.²² Indeed, childhood trauma is considered so severe that it is “comparable to that of military combat.”²³ Whereas a veteran experiencing combat may have the maturity, insight and ability to recognize the impact of PTSD and to seek treatment, a child may internalize the injury, causing life-long damage.

PTSD can cause a degree of impairment comparable to, or greater than, other seriously

²⁰ Casey T. Taft, Suzannah K. Creech & Christopher M. Murphy, *Anger and aggression in PTSD*, 14 CURRENT OPINION IN PSYCHOLOGY 67 (2017).

²¹ *McKinney* at 1206.

²² Wayland, *supra* note 2, at 935.

²³ Brief of Texas, Alabama, et al. as *Amici Curiae Supporting Respondent, Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) at 357, citing Dana M. Hagele, *Commentary, The Impact of Maltreatment on the Developing Child*, 66 N.C. MED. J. 356, 356 (2005).

impairing mental disorders.²⁴ The United States Government recognizes that it can be totally disabling.²⁵ Trauma can transform the physical and chemical make-up of a brain, having severe consequences on the development of a child.

We now understand that PTSD, like other severe mental illnesses and disabilities, undermines an individual's ability to control their actions. We previously understood trauma as generating an anxiety disorder, and that it caused withdrawal and social alienation. We now recognize that symptoms such as irritability, aggressiveness and lack of remorse are consequences of hyper-arousal associated with prior trauma.

Moreover, PTSD may undermine the strength of procedural protections that—at least in theory—serve to narrow the class of death-eligible offenders to only the most blameworthy. People with PTSD and other serious mental illnesses may understand right from wrong and be competent to stand trial. Because of their impairments, however, they have diminished capacities to control impulses, recall information, and

²⁴ Ronald C. Kessler, Posttraumatic Stress Disorder: The Burden to the Individual and to Society, 61 J. CLINICAL PSYCHIATRY 4, 9 (Supp. 5 2000).

²⁵ Iulia Filip, *Should Veterans With PTSD Be Exempt From the Death Penalty?*, THE ATLANTIC (Jan. 30, 2015), <https://www.theatlantic.com/national/archive/2015/01/should-veterans-with-ptsd-be-exempt-from-the-death-penalty/384940/>.

communicate. In the law, we recognize that this diminished moral culpability renders the most harsh punishments excessive.

Although “judges will never have perfect foresight or perfect wisdom,” nor should judges blind their eyes to the evolution of understanding and knowledge.²⁶ As our scientific understanding of trauma and psychiatry has evolved, so must the standards of decency that mark a civilized society. “Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time.”²⁷

Ultimately, executing a defendant without a fully informed consideration of the impact of PTSD on his or her life undermines confidence in, and the credibility of, our justice system. To the extent the death penalty is used today to execute people disabled by trauma and other serious mental illnesses, the death

²⁶ *Graham v. Florida*, 560 U.S. 48, 95 (2010) (Roberts, J. concurring).

²⁷ *Graham v. Florida*, 560 U.S. 48, 85, 130 S. Ct. 2011, 2036 (2010) (Stevens, J. concurring).

penalty fails to fulfill its purported purpose of punishing the worst of the worst offenders. We are, quite simply, more civilized than that.

ARGUMENT

I. POST-TRAUMATIC STRESS DISORDER IS A DISABILITY THAT DIMINISHES MORAL CULPABILITY

The Eighth Amendment requires courts to consider whether a person’s diminished moral culpability renders a punishment excessive.²⁸

A. Science Has Evolved To Change Our Understanding Of How PTSD Is A Disability.

Post-traumatic stress disorder (PTSD) is a psychiatric disorder that can occur in people who have experienced or witnessed trauma.²⁹ Scientific understanding of PTSD has exponentially increased in the few decades since PTSD was recognized as its own psychiatric disorder. PTSD can be a chronic and disabling condition eligible for full benefits from the Department of Veterans Affairs and the Social Security

²⁸ Cf. *Graham v. Florida*, 560 U.S. at 69 (noting “twice diminished moral culpability” “bear on the analysis.”); *Hall v. Florida*, 572 U.S. 701, 709 (2014) (“Retributive values are also ill-served by executing those with intellectual disability. The diminished capacity of the intellectually disabled lessens moral culpability and hence the retributive value of the punishment.”).

²⁹ DSM-V, *supra* note 14.

Administration.³⁰ The VA established the National Center for PTSD in 1989 to address the needs of veterans and other trauma survivors.³¹ Advances in brain imaging and the results of longitudinal studies have produced new scientific evidence illustrating the profound consequences of PTSD. The impact of PTSD on individuals is now understood much more comprehensively than it was in 1992, at the time of McKinney's trial – which was how it was considered when the Arizona Supreme Court re-weighed the sentencing evidence without considering new evidence such as:

First, it is now understood that the symptoms of PTSD are heterogeneous, presenting differently in different individuals, and may include aggressive, impulsive behavior. For example, PTSD can lead to withdrawal or alterations in arousal, including irritable or aggressive behavior. A key characteristic of the negative emotional experiences of individuals with PTSD is the failure of emotion regulation—the ability

³⁰ *VA Disability Compensation for Posttraumatic Stress Disorder (PTSD)*, U.S. DEPARTMENT OF VETERANS AFFAIRS, <https://www.va.gov/disability/eligibility/ptsd/>.

³¹ *History of the National Center for PTSD*, U.S. DEPARTMENT OF VETERANS AFFAIRS, https://ptsd.va.gov/about/work/ncptsd_history.asp.

to exert voluntary control over one's emotional responses.³² An individual's symptoms and life-outcomes greatly depend on factors including the timing of the trauma (in childhood or adulthood, for example), the type of exposure, social factors including poverty and familial support, and genetic and biological predisposition.³³ The risk for negative health and well-being outcomes—including criminal behavior—grows exponentially based upon the number of the adverse childhood experiences.³⁴ Where previously such symptoms may have led to other diagnoses, such as antisocial personality disorder, it is now understood that aggressive behavior can be the direct result of trauma. Childhood trauma is associated with a range of negative outcomes in adulthood, including “including physical and mental health disorders and aggressive behavior.”³⁵

Second, PTSD has deleterious effects on memory and cognition. “The hallmark symptoms of PTSD involve alterations to cognitive processes such

³² Robert J. Fenster, Lauren A. M. Lebois, Kerry J. Ressler & Junghyup Suh. *Brain circuit dysfunction in post-traumatic stress disorder: from mouse to man*, 19 *Nature Reviews Neuroscience* 535, 544 (2018).

³³ Wayland, *supra* note 2, at 936.

³⁴ See Center for Disease Control, Behavioral Risk Factor Surveillance System, 2009-2014, April 2016, Major Findings, available at <https://www.cdc.gov/violenceprevention/childabuseandneglect/acestudy/ace-brfss.html>

³⁵ Reavis JA, Looman J, Franco KA, Rojas B., *Adverse Childhood Experiences And Adult Criminality: How Long Must We Live Before We Possess Our Own Lives?*. *Perm J.* 2013;17(2):44-8.

as memory, attention, planning, and problem solving, underscoring the detrimental impact that negative emotionality has on cognitive functioning.”³⁶ Defendants with PTSD may be unable to recall an event, explain their motivations, or express emotion over what happened, uniquely disadvantaging them in a capital sentencing context.

Third, PTSD commonly coexists with other psychiatric conditions or sometimes traumatic brain injuries. People with PTSD are at high risk for one or more additional psychiatric disorders. Approximately 80 percent have at least one comorbid psychiatric disorder, like depression, anxiety, or alcohol or drug abuse.³⁷

Fourth, the impact of trauma, particularly childhood trauma, may be exacerbated by poverty and other social stressors.³⁸ Childhood “maltreatment,” which includes sexual, physical, and emotional abuse, “represents an extreme traumatic insult to the developing child.”³⁹ Indeed, the trauma is considered so

³⁶ Jasmeet P. Hayes, Michael B. VanElzakker & Lisa M. Shin. *Emotion And Cognition Interactions In PTSD: A Review Of Neurocognitive And Neuroimaging Studies*. 6 *Frontiers in Integrative Neuroscience* 89, 89.

³⁷ Wayland, *supra* note 2, at 942.

³⁸ Centers for Disease Control and Prevention, *Behavioral Risk Factor Surveillance System Survey ACE Data, 2009-2014*, Atlanta, Georgia: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention; 2015, Major Findings.

³⁹ Brief of Texas, et al., *supra* note 25.

severe that it is “comparable to that of military combat,”⁴⁰ which we know has caused an epidemic of PTSD. Victims of childhood abuse suffer adverse consequences in physical, emotional, social, and cognitive development and “are more likely to experience adverse outcomes throughout their life span,”⁴¹ including disease and criminality.

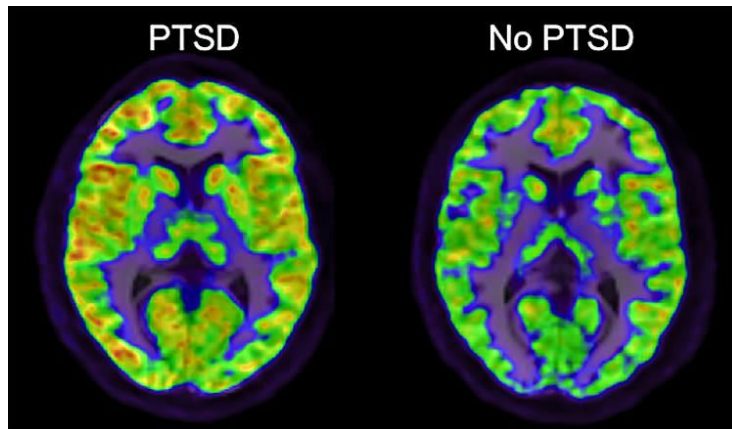
Fifth, while PTSD was previously viewed as a psychological problem, we now understand trauma has profound impact on the brain.⁴² A large and converging body of neuroscience and epidemiology literature indicates that exposure to stress, especially during childhood, is associated with changes in brain

⁴⁰ *Id.*, at 357.

⁴¹ Ching-Tung Wang & John Holton, *Total Estimated Cost of Child Abuse and Neglect in the United States*, PREVENT CHILD ABUSE AMERICA (Sept. 2007).

⁴² Robert F. Worth, *What if PTSD Is More Physical Than Psychological?*, N.Y. TIMES MAGAZINE, June 10, 2016, at 28.

structure, brain chemistry, and brain function. Advances in brain imagery now provide the ability to actually see the impact of PTSD:



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As the National Child Traumatic Stress Network now recognizes: “Without treatment, repeated childhood exposure to traumatic events can affect the brain and nervous system and increase health-risk behaviors (e.g., smoking, eating disorders, substance use, and high-risk activities).”⁴⁴ “Children who have been exposed to one or more such traumas over the course of

⁴³ See Sophie Holmes, the Traumatic Stress Brain Study Group, *et al*, *Altered mGluR5 markers in PTSD*, Proceedings of the National Academy of Sciences, July, 2017, available at <https://www.pnas.org/content/early/2017/07/11/1701749114>. See also Bill Hathaway, *Potential New Path for PTSD Treatment*, Neuroscience News, July 18, 2017, available at <https://neurosciencenews.com/ptsd-treatments-7108/>.

⁴⁴ The National Child Traumatic Stress Network, *What is Child Traumatic Stress*, available at <https://www.nctsn.org/what-is-child-trauma/about-child-trauma>.

their lives may develop physiological reactions that persist and affect the development of their brains and bodies,...and cause psychological and physiological problems that persist into adulthood.”⁴⁵

We now understand that child abuse increases risks of committing violent crimes,⁴⁶ and that increased severity of abuse is associated with increased acting out, anger, aggressive behaviors: evidence that explains the conduct of some capital defendants. Moreover we understand that the experience of child-

⁴⁵ Robert J. Smith, Sophie Cull, Zoe Robinson, *The Failure of Mitigation?*, 65 HASTINGS L.J. 1221, 1252 (June 2014).

⁴⁶ Janet Currie & Erdal Tekin, *Does Child Abuse Cause Crime?*, Andrew Young School of Policy Studies Research Paper No. 06-31 (April 2006), at 4-5. NAT'L INST. OF JUSTICE, *Impact of Child Abuse and Maltreatment on Delinquency, Arrest and Victimization* (Mar. 14, 2011), <http://www.nij.gov/topics/crime/child-abuse/pages/impact-on-arrest-victimization.aspx>.

hood trauma, coupled with neglect and household violence similar to what Mr. McKinney endured, causes what is known as toxic stress.⁴⁷

Without an understanding of how trauma works, fact-finders may have minimized or rejected trauma-related information, especially in capital contexts.⁴⁸ What can now be seen in brain imagery scans

⁴⁷ Center on the Developing Child, *What Are ACEs and How do they Relate to Toxic Stress*, Harvard University, 2018 available at <https://developingchild.harvard.edu/resources/aces-and-toxic-stress-frequently-asked-questions/>. See also Andrew Garner, Robert Saul, *Thinking Developmentally, Nurturing Wellness in Childhood to Promote Lifelong Health*, American Academy of Pediatrics, Itasca, Illinois, 2018 at 21 (“As a consequence of a prolonged exposure to the mediators of the physiologic stress response (eg, cortisol, epinephrine, norepinephrine), potentially permanent biological changes take place through at least 2 known mechanisms... Understanding these mechanisms is paramount because they allow early childhood experiences to become biologically embedded and to influence behavior, learning and health decades later.”).

⁴⁸ Wayland, *supra* note 2, at 925.

is apparent in many of the proceedings of those recently executed.⁴⁹ As scientific understanding continues to progress, the law has much ground to make up.

B. The Law Has Evolved To Recognize That Combat-Trauma Reduces Culpability.

Courts have begun to recognize that exposure to trauma in combat diminishes culpability. In 2009, this Court overturned a Korean War veteran’s death sentence because his original lawyers did not provide the jury enough background of his military service and the resulting physical and psychological wounds.⁵⁰ Some legal experts have argued that veterans with PTSD deserve a “categorical exemption” from capital punishment.⁵¹ “War is hell. Not only for

⁴⁹ Robert J. Smith, Sophie Cull, Zoe Robinson, *The Failure of Mitigation?*, 65 HASTINGS L.J. 1221 (June 2014); see also Death Penalty Information Center, *The Death Penalty in 2018: Year End Report*, at 12 (“Data compiled by DPIC with the assistance of the Promise of Justice Initiative indicates that at least 18 of the 25 people executed in 2018 (72%) had one or more of the following impairments ... chronic serious childhood trauma, neglect, and/or abuse (at least 11)”).

⁵⁰ *Porter v. McCollum*, 558 U.S. 30, 42-44 (2009). See also *Lambright v. Schriro*, 490 F. 3d 1103 (2007) (Ferguson J. concurring).

⁵¹ Joshua London, *Why Are We Killing Veterans? The Repugnance and Incongruity of the U.S. Government Executing Psychologically Wounded Veterans*, 11 U. OF ST. THOMAS L. J. 274, 296; see also Anthony Giardino, *Combat Veterans, Mental Health Issues, and the Death Penalty: Addressing the Impact of Post-Traumatic Stress Disorder and Traumatic Brain Injury*, 77 FORDHAM L. REV. 2955, 2994 (2009).

the soldier who fights on the front lines, but also for the military ambulance driver who must rescue the wounded, the mess hall cook whose friends are killed on the battlefield, the civilian who loses a loved one, and the augmentee.” Kathleen A. Tarr, *Above and Beyond: Veterans Disabled by Military Service*, 5 *Geo. J. Fighting Poverty* 39, 43 (1997) (recognizing “the simple fact that almost anyone who serve[s] during wartime [is] exposed to stress capable of causing mental disability’ and ‘that most service-members’ wartime experiences [are] horrific and potentially disabling, even if not uncommon”).

But what about children?

**C. The Mitigating Circumstances
Of Combat-Trauma Applies In
Full To Trauma Experienced
As A Child.**

Eighth Amendment jurisprudence has long recognized the importance of the developmental years.⁵² “[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be

⁵² See *Roper v. Simmons*, 543 US 551 (2005); *Miller v. Alabama*, 567 U.S. 460 (2012).

most susceptible to influence and to psychological damage.”⁵³

What is true of service members who experience trauma to protect our country is also true of children who endure trauma unprotected by our country. Childhood abuse of the severity suffered by McKinney is now understood to be among the most damaging phenomena that can occur to the human brain—in effect, it sabotages neurodevelopment.⁵⁴ Childhood “maltreatment,” including sexual, physical, and emotional abuse, “represents an *extreme traumatic insult* to the developing child.” Dana M. Hagele, Commentary, *The Impact of Maltreatment on the Developing Child*, 66 N.C. MED. J. 356, 356 (2005) (emphasis in original)⁵⁵. “Indeed, the trauma is considered so severe that it is ‘comparable to that of military combat.’ Id., at 357. “[S]ome chronic, severe, and multiple forms of child abuse and neglect starting very early may generate more severe PTSD (the dissociative type) than the PTSD that war veterans experience.” *Thompson v. State*, 2018 Ala. Crim. App. LEXIS 70.

PTSD caused by childhood abuse, combat exposure, or other traumatic events can cause a degree of impairment comparable to, or greater than, that of

⁵³ *Eddings v. Oklahoma*, 455 US 104 (1982).

⁵⁴ Wayland, *supra* note 2, at 935.

⁵⁵ Cited in *Kennedy v. Louisiana* 2008 U.S. S. Ct. Briefs LEXIS 327, *Amicus Brief of Texas et al.*

other seriously impairing mental disorders.⁵⁶ A strong and growing body of medical evidence shows that adverse childhood experiences influence health and well-being throughout a person's lifespan.⁵⁷ By disrupting neurodevelopment, childhood trauma can cause social, emotional, and cognitive impairment, leading to an increased risk of disease and disability, including serious mental illness. *Id.*

In addition to the field of medicine, there is wide recognition within the legal profession of the severe and lifelong impact of childhood trauma. Advocates for expanding capital punishment and those concerned about its haphazard application recognize the enduring impact of childhood trauma. *Kennedy v. Louisiana* 2008 U.S. S. Ct. Briefs LEXIS 327, *Amicus Brief of Texas et al*; Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 HOFSTRA L. REV. 677, 689 (2008) (listing aspects of the defendant's character and history that defense counsel must investigate as a basis for a sentence less than death in Guideline 10.11(B)).

⁵⁶ Ronald C. Kessler, PostTraumatic Stress Disorder: The Burden to the Individual and to Society, 61 J. CLINICAL PSYCHIATRY 4, 9 (Supp. 5 2000).

⁵⁷ Centers for Disease Control and Prevention, *Behavioral Risk Factor Surveillance System Survey ACE Data, 2009-2014*, Atlanta, Georgia: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention; 2015, Major Findings, available at <https://www.cdc.gov/violenceprevention/childabuseandneglect/acestudy/ace-brfss.html>

Understanding the impact of trauma is now essential to performing the work of capital defense.⁵⁸

Courts have begun to acknowledge the impact of PTSD in children on moral culpability. See *Williams v. Taylor*, 529 U.S. 362, 395 (2000) (finding trial counsel ineffective for failing to investigate and present at trial Taylor's history of criminal neglect and abuse at the hands of his parents and foster caretakers); *Wiggins v. Smith*, 539 U.S. 510, 535 (2003) (finding that defense counsel ought to have discovered and presented evidence of severe privation and abuse at the hands of an alcoholic and absentee mother; physical torment, sexual molestation and repeated rapes in foster care; and finally, homelessness). Our sensitivity to trauma grows with our understanding. *Reddy v. Kelly*, 657 F. App'x 531, 543 (6th Cir. 2016) (noting “the DSM-5 notes that “[f]ollowing prolonged, repeated, and severe traumatic events,” including “childhood abuse,” a person suffering from PTSD “may additionally experience difficulties in regulating emotions or maintaining stable interpersonal relationships, or dissociative symptoms.” And as such, “Evidence of PTSD would have been vital to Reddy's defense.”); *Doe v. Ayers*, 782 F.3d 425, 462 (9th Cir. 2015) (finding testimony about PTSD would “have offered jurors a way to understand (though of course not to justify) Doe's aggression as the product of repeated brutalization that left him suffering from PTSD.”); *Campbell v. Coyle*, 260 F.3d 531 (6th Cir. 2001) (counsel ineffective for “failing to discover and

⁵⁸ Wayland, *supra* note 2, at 960.

present" evidence of "possible" PTSD during the guilt and penalty phases of his trial.); *Thompson v. State*, No. CR-16-1311, 2018 Ala. Crim. App. LEXIS 70, at *29-31 (Crim. App. Nov. 16, 2018).

Federal capital cases where jurors found trauma mitigating, and returned a life sentence, demonstrate how our understanding of trauma grows. These are just a few examples:

- *United States v. Barnes*, 04 Cr. 186 (SD NY)(5/30/2008) (“Mr. Barnes is the product of a childhood marked by chaos, abuse and abandonment.”) (12 jurors) pg 11.⁵⁹
- *United States v. Con-Ui*, 3:CR-13-123 (MD PA)(7/11/2017) (“Jessie Con-Ui was exposed to ‘risk factors’ or ‘adverse childhood experiences’ that had a negative effect on the course of his life.”)(12 jurors) pg 14.⁶⁰
- *United States v. Duong*, 01-CR-20154-JF (NDCA)(12/15/2010) (“During his childhood, Anh’s caregivers were absent, neglectful,

⁵⁹ See https://fdprc.capdefnet.org/sites/cdn_fdprc/files/Assets/public/verdict_forms/barnes_khalid_sd_ny_2008_redacted.pdf

⁶⁰ See https://fdprc.capdefnet.org/sites/cdn_fdprc/files/Assets/public/verdict_forms/2017.07.11_special_verdict_form.pdf

ineffective, broken or abusive.”) (12 jurors) (11 jurors), pg 6.⁶¹

- *United States v. Jones*, 10-CR-03090-DGK (Doc. 436) (WD MO)(10/16/ 2017)(“As a young child, Ulysses Jones Jr. was severely beaten and emotionally abused by his father.”) (11 jurors); (“At a young age, Ulysses Jones Jr. would run away from the house to get away from the beatings and abuse of his father.”) (2 jurors) at pg. 9.⁶²
- *United States v. Northington*, 07-550-05 (ED PA)(6/3/2013)(“The Northington family rarely had a stable address and lived in inadequate housing including homeless shelters, train stations and hotels during Mr. Northington's childhood”)(12 jurors),

⁶¹ See https://fdprc.capdefnet.org/sites/cdn_fdprc/files/Assets/public/verdict_forms/duong_anh_the_nd_ca_2010_redacted.pdf

⁶² See https://fdprc.capdefnet.org/system/files/Assets/public/verdict_forms/jones_wd_mo_2017_verdict_form_redacted.pdf

(“Ms. Northington was physically abusive to her son, Steven”)(9 jurors) at pg. 9.⁶³

In each of these cases, as in others, jurors found death-eligible defendants undeserving of capital punishment based on childhood trauma.

II. THE EVOLVING STANDARDS OF DECENCY COUNSEL RESTRAINT

The growing understanding of trauma has been one of the key drivers in the decline of the use of the death penalty.

A. The Standards of Decency Evolve

Review of the “objective indicia of society’s standards, as expressed in legislative enactments and state practice with respect to executions,” *Kennedy*, 554 U.S. at 408, reveals a growing consensus against the death penalty. Of the fifty-two jurisdictions in the United States (fifty states, the District of Columbia, and the Federal government), the death penalty is

⁶³ See https://fdprc.capdefnet.org/sites/files/Assets/public/verdict_forms/northington_steven_edpa_2013_redacted.pdf.

now entirely prohibited in twenty-one (21) jurisdictions, and has essentially been abandoned or is in disuse in thirty-four (34) jurisdictions.

Decline in support for capital punishment is broad and non-partisan.⁶⁴ This process reflects the broad evolution of a civilized society and a transformative movement that brings us closer to our founding ideals.

1. Twenty-one jurisdictions do not have the death penalty.

Twenty states plus the District of Columbia do not have the death penalty. These states are: Alaska, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, Washington, West Virginia, and Wisconsin.⁶⁵ The trend is clear. *Atkins*, 536 U.S. at 315-316 (“It is not so much the number of these

⁶⁴ See, e.g. Dan Frosch, *Republicans Leading New Charge to End the Death Penalty*, The Wall Street Journal, Feb. 19, 2019, available at <https://www.wsj.com/articles/republicans-leading-new-charge-to-end-the-death-penalty-11550572205> See Harvard Law Today, *Steiker Study Inspires Withdrawal of Death Penalty Section from Model Penal Code*, January 7, 2010 available at <https://today.law.harvard.edu/steiker-study-inspires-withdrawal-of-death-penalty-section-from-model-penal-code/>.

⁶⁵ The death penalty is also prohibited under the constitutions of Puerto Rico and the Commonwealth for the Northern Mariana Islands. See P.R. Const. Art. II § 7 (“The death penalty shall not exist.”); C.N.M.I. Const. Art. I § 4(i) (“Capital punishment is prohibited.”).

States that is significant, but the consistency of the direction of change.”); *Simmons*, 543 U.S. at 566 (same). Eight of these states have rejected capital punishment in the past ten years.

2. *Thirteen additional jurisdictions have either suspended the death penalty or exhibit long-term disuse.*

Thirteen states have either suspended use of the death penalty or exhibit long-term disuse similar to those that have abolished the punishment.

i) Colorado has one execution since 1967 and a moratorium.⁶⁶

ii) Oregon has two “volunteer” executions since 1962, and a moratorium.⁶⁷

iii) Pennsylvania had three “volunteer” executions since 1962, and a moratorium.⁶⁸

iv) California has no executions since 2006, and a moratorium.⁶⁹

v) New Hampshire has not performed an execution in 86 years, and has not sentenced a person to death in ten years.

vi) Wyoming has no person on death row and has executed one person in the last 50 years.⁷⁰

vii) Kansas “has not had an execution in almost five decades,” *Hall*, 134 S. Ct. at 1997.

viii) Idaho has executed two offenders in the last twenty-five years, and has sentenced one person to death in the last eight years.

ix) South Dakota has three people on its row has sentenced one person to death in the last five years. Three of the four individuals executed in South

⁶⁶ See Governor John W. Hickenlooper, Executive Order D-2013-006, May 22, 2013.

⁶⁷ See Governor John Kitzhaber, Executive Order, November 22, 2011. Governor Kate Brown has continued this moratorium.

⁶⁸ See Governor Tom Wolf, Memorandum of Moratorium, February 13, 2015.

⁶⁹ See Governor Gavin Newsom, Memorandum of Moratorium, March 13, 2019.

Dakota over the last fifty years have waived appeals and volunteered for execution.

x) Kentucky has executed three individuals since 1968 and has only sentenced one person to death in the last seven years.

xi) Montana has not sentenced a person to death in twenty-three years, and has not executed a person for more than ten years.

xii) Nevada has not executed anyone since 2006.

xiii) North Carolina has not executed anyone since 2006.

B. The Decline In Use Of The Death Penalty Is Broad

Even in states that retain the death penalty, decline is substantial. Death sentences are down from a peak of 315 per year to 42.⁷¹ Executions are down from a peak of 98 to 25. The size of death row

⁷⁰ See e.g. Charles Fain Lehman, *Wyoming Legislature to Weigh Ending Death Penalty*, *The Washington Free Beacon*, 1/21/2019 (“In 2014, a federal judge vacated the sentence of Wyoming’s last capital offender, Dale Eaton, **leaving Wyoming’s death row totally vacant**. The state’s low homicide rate—there were just 15 murders there last year—means it is likely to remain so.”) (emphasis added).

⁷¹ Death Penalty Information Center, *The Death Penalty in 2018: Year End Report*.

has dropped from 3, 593 in 2000 to 2,743 in 2018.⁷² And of those on death row, over one-third are held in states with moratoria on executions in place.⁷³

Of significance, petitioner in this case is one of the few defendants on death row in America sentenced to death by a judge not a jury.⁷⁴

In a country with over fifteen thousand murders a year—and fewer than thirty executions and fifty death sentences—it is cruel and unusual to execute a defendant whose life was characterized by trauma, especially at an age when he had no choice but to endure.

CONCLUSION

A life scarred by childhood trauma profoundly impacts the biological and physical make-up of a

⁷² Death Penalty Information Center, *Death-Row Prisoners by State and Size of Death Row by Year*.

⁷³ Death Penalty Information Center, *California Moratorium Information*, 3/13/2019.

⁷⁴ See BRIEF OF PROMISE OF JUSTICE INITIATIVE, as *Amicus Curiae Supporting Petitioner*, *Marshall v. Jones*, 2018 U.S. S. Ct. Briefs LEXIS 5259 at 15-16 (noting “The number of individuals under a judge-imposed death sentence is less than the number this Court found dispositive in *Graham*.”). See also *Middleton v. Florida*, 138 S. Ct. 829 (2018) (Breyer, J., dissenting) (“In my view, “the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death.”); *Woodward v. Alabama*, 571 U.S. 1045, 1048 (2013) (Breyer J., Sotomayor J., dissenting) (“Eighteen years have passed since we decided *Harris*, and in my view, the time has come for us to reconsider that decision.”).

growing brain. It implicates our failure to protect the child. In so doing, it doubly diminishes the moral culpability of a person.

The failure of the court system to consider evolving understandings of childhood trauma and post-traumatic stress disorder undermines the morality of our justice system. For this reason, and those in the petition, Amici respectfully suggests the petition for a writ of certiorari should be granted.

Respectfully submitted,

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