No. 08-1350

IN THE

Supreme Court of the United States

DORA B. SCHRIRO, Director,
Arizona Department of Corrections,
Petitioner,

vs.

JAMES LYNN STYERS,
Respondent.

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

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the Antiterrorism and Effective Death Penalty Act (AEDPA), when a State's highest court explicitly states it has considered proffered mitigation evidence, must a habeas reviewing court accept that statement, absent clear and convincing evidence to the contrary?

2. Did the Ninth Circuit violate this Court's jurisprudence by holding that *Eddings* v. *Oklahoma* and *Smith* v. *Texas* forbid a sentencer from relying on the absence of a causal nexus between an alleged mental condition and the crime committed in deciding how much weight to give the proffered mitigation evidence?

3. Was the *Lockett-Eddings-Penry* line of cases wrongly decided and should it be overruled?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to represent the interests of victims of crime and the law-abiding public in the criminal justice system. This case involves one of the most troublesome issues in criminal law, the rule of *Lockett* v. *Ohio* and its progeny. The delay,

1. The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

expense, and injustice caused by this rule are contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The facts are taken from the opinion of the Arizona Supreme Court on direct appeal, *State* v. *Styers*, 177 Ariz. 104, 865 P. 2d 765 (1993). In December 1989, "Defendant James Styers and his two-year-old daughter shared an apartment with co-defendant Debra Milke and her four-year-old son, Christopher." *Id.*, at 108, 865 P. 2d, at 769. On December 2, defendant took Christopher out with him, supposedly going to a shopping mall to see Santa Claus. *Ibid.* Defendant picked up a friend, Roger Scott. Then they took little Christopher out to the desert and shot him three times in the back of the head. *Ibid.*

Defendant was convicted of first-degree murder (both premeditated and felony murder), conspiring with Milke and Scott to commit the murder, child abuse, and kidnapping. *Id.*, at 109, and n. 1, 865 P. 2d, at 770, and n. 1. "The trial court found three statutory aggravating factors: (1) defendant was an adult and the victim was under age 15, A. R. S. § 13-703(F)(9); (2) the murder was committed in expectation of pecuniary gain, A. R. S. § 13-703(F)(5); and (3) the murder was committed in an especially heinous and depraved manner, A. R. S. § 13-703(F)(6)." *Id.*, at 114-115, 865 P. 2d, at 775-776[2]. The trial court further found "no mitigating

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2. At the time of the trial and direct appeal, the factors that made the defendant eligible for the death penalty were found by the trial court in Arizona, and this Court had upheld this system against a challenge that it violated the Sixth Amendment right to jury trial. See *Walton* v. *Arizona*, 497 U. S. 639, 649 (1990). The subsequent, contrary decision of *Ring* v. *Arizona*, 536 U. S.

factors sufficiently substantial to call for leniency, and imposed the death penalty." *Id.*, at 109, 865 P. 2d, at 770.

The pecuniary gain factor was based on a theory that Milke wanted Christopher killed to collect a $5000 insurance policy and that defendant expected a share of the proceeds. The Arizona Supreme Court found that this factor was not proved beyond a reasonable doubt. *Id.*, at 115, 865 P. 2d, at 776.

The Arizona Supreme Court independently reviews the balance of aggravating and mitigating factors as a matter of state law. See *id.*, at 117, 865 P. 2d, at 778. As a matter of federal law, the stricken aggravating circumstance also required either a reweighing of the aggravating and mitigating factors or a remand to the trial court for resentencing. See *Richmond* v. *Lewis*, 506 U. S. 40, 48 (1992). As the Arizona Supreme Court explained in its decision in co-defendant Milke's case, decided the same day, reweighing by the appellate court is indicated when "[t]here is no new evidence to be received and no evidence was improperly excluded at the sentencing hearing." *State* v. *Milke*, 177 Ariz. 118, 128, 865 P. 2d 779, 789 (1993). The state court reviewed Styers' proffered mitigation:

> "Defendant had no prior convictions for either misdemeanors or felony offense. This is relevant mitigating evidence. [Citation.] Defendant's service in Vietnam and honorable discharge are also relevant mitigating circumstances. [Citation.] Defendant also suffered from post-traumatic stress disorder prior to and around the time of the murder as a result of his combat service in Vietnam. This could

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584 (2002), is not retroactive to cases that became final on direct review prior to *Ring*. See *Schriro* v. *Summerlin*, 542 U. S. 348, 358 (2004).

also, in an appropriate case, constitute mitigation. See *State* v. *Bilke*, 162 Ariz. 51, 53, 781 P. 2d 28, 30 (1989) (finding evidence of post-traumatic stress disorder constituted newly discovered evidence that may have affected sentencing). However, two doctors who examined defendant could not connect defendant's condition to his behavior at the time of the conspiracy and the murder.

"There was testimony that defendant cared for Christopher at times, but his actions and participation in his murder speak volumes to that. Finally, giving a felony murder instruction 'is not relevant "where the defendant intended to kill the victim or where the defendant knew with substantial certainty that his conduct would cause death." ' [Citations.] The defendant conspired to kill Christopher and then he killed him. The fact that the court gave a felony murder instruction is not mitigating here." *Styers*, 177 Ariz., at 116-117, 865 P. 2d, at 777-778.

Following state collateral review, Styers sought federal habeas relief. The District Court denied the petition but granted a certificate of appealability solely on his ineffective assistance claim. See *Styers* v. *Schriro*, 547 F. 3d 1026, 1028 (CA9 2008). The Court of Appeals expanded the certificate of appealability to include the aggravating circumstance and reweighing issues. See *ibid.* That court then found that the passage quoted above constitutes a violation of the rule of *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), by refusing to consider as mitigating a mental condition with no connection to the crime. See *Styers*, 547 F. 3d, at 1035.

SUMMARY OF ARGUMENT

As described in the petition for certiorari, the Court of Appeals in this case misapplied the rule of *Lockett* v. *Ohio* and its progeny. The Court of Appeals confused the exclusion from consideration of a factor proffered as mitigating, which would be *Lockett* error, with the decision of the state court, in its capacity as independent re-evaluator of the evidence, that the evidence was simply not mitigating. The latter is perfectly proper. The decision of the Court of Appeals could be summarily reversed on that basis.

Amicus CJLF suggests, however, that this case presents an opportunity to straighten out one of the most troublesome and longest-standing anomalies in this Court's criminal jurisprudence: the "tension" between the *Lockett* rule and the principles underlying *Furman* v. *Georgia*. Pure *Lockett* questions rarely arise anymore since the states conformed their statutes to *Lockett*, and the old cases have worked their way out of the system. The opportunity presented by this case should not be lost.

The sweeping rule of *Lockett* deprived the people of the states of the authority to decide on a uniform, statewide basis which factors will be considered mitigating in a capital case. Such a diminution of the people's right of self-government requires a strong justification. The justification was weak in 1978, and it is even weaker today.

Complying with the *Lockett* rule is expensive. Defense counsel are expected to conduct exhaustive investigations of the defendant's entire life, and judgments may be reversed for ineffective assistance if they do not. This heavy constitutional tax on justice is an excessive burden, particularly when there is no basis for it in the Constitution.

One issue that everyone can agree on is that the delay in reviewing capital cases is a travesty. Litigation over the effectiveness of counsel in presenting evidence having nothing to do with the crime is a large part of that delay. If states could declare that evidence to be irrelevant and inadmissible, this portion of the expense and delay would vanish.

Requiring states to allow "mitigating" factors that most jurors do not consider mitigating does not add to the reliability and consistency of capital verdicts, but just the opposite. Allowing each juror to decide what is mitigating increases the chances of idiosyncratic verdicts.

The *Lockett* rule was initially a useful catalyst to force legislatures to amend statutes they had enacted on the reasonable but mistaken view that *Furman* required them to restrict mitigation to a greater degree than they would have chosen on their own. The need for that catalyst is long gone. The legal landscape is also far different today than it was in 1978 because of the multiple categorical exclusions this Court has created since then. Minor accomplices swept up in the felony-murder rule, persons under 18 at the time of the crime, and mentally retarded people are all exempt. Defendants today in cases with the same facts as the *Lockett*, *Eddings*, or *Penry* cases would not be facing the death penalty at all.

The primary problem is evidence that goes only to the background of the defendant and has no direct bearing on the crime, such as the evidence in the present case. Most jurors consider such evidence to be not mitigating at all or only weakly mitigating. States should be allowed to decide that the very limited value of this evidence is not worth the costs in money, delay, and uneven application.

ARGUMENT

I. This case presents an uncommon opportunity to reconsider the *Lockett* rule.

In 1978, a plurality of this Court handed down an edict of breathtaking sweep. Almost two centuries after its enactment, the Eighth Amendment suddenly stripped the people of the states of the power to decide what factors would be considered mitigating in a capital case. See *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978). Instead of deciding what is mitigating on a statewide basis, applicable equally to all capital defendants, that question had to be decided case-by-case by each jury, or, as we found out later, by each juror. See *Mills* v. *Maryland*, 486 U. S. 367, 384 (1988).

This proposition was not initially joined by a majority of the Court. Justice White, while concurring in the judgment, warned that the Court was undoing what it had accomplished in *Furman* v. *Georgia*, 408 U. S. 238 (1972). See *Lockett*, 438 U. S., at 622-623. In subsequent years, other Members of this Court have come to the same conclusion. See *Walton* v. *Arizona*, 497 U. S. 639, 661 (1990) (Scalia, J., concurring); *Graham* v. *Collins*, 506 U. S. 461, 492 (1993) (Thomas, J., concurring).

Pure *Lockett* issues are uncommon now, because the states with capital punishment changed their laws to conform to *Lockett*'s mandate, either by legislative amendment or by broadly construing mitigating circumstances that could be read more narrowly. See *People* v. *Easley*, 34 Cal. 3d 858, 878, n. 10, 671 P. 2d 813, 826, n. 10 (1983). Even so, the cloud of *Lockett* continues to loom over the law of capital punishment. The requirement that the sentencer consider *everything* the defense throws against the wall, including circumstances that most people would consider aggravating,

see *Graham*, 506 U. S., at 500 (sociopathy), usually presents itself today in claims that defense counsel did not adequately discover and present the mitigation. See, *e.g.*, *Bell* v. *Kelly*, 260 Fed. Appx. 599, 605-606 (CA4 2008), cert. dismissed as improvidently granted, 555 U. S. __, 129 S. Ct. 393, 172 L. Ed. 2d 353 (2008). These cases are inappropriate vehicles for addressing the underlying *Lockett* question, because the defendant is entitled to a lawyer who adequately presents the mitigation the legislature has allowed, whether the legislature was truly constitutionally required to allow that mitigation or not.

This case presents a *Lockett* question because the Arizona Supreme Court was acting in a dual capacity of deciding the law and independently reweighing the circumstances. If the court decided in its law-deciding capacity that a particular item of proffered mitigation could not be considered, that would be *Lockett* error supposedly in violation of the Eighth Amendment. On the other hand, if the court decided in its circumstance-weighing capacity that the proffered factor was simply not mitigating, that would be perfectly proper. See Pet. for Cert. 15-16. The fact that the same decision could be considered either a violation of the nation's fundamental law or a completely legitimate judgment, with the distinction turning on a minor difference in the phrasing of the opinion, is itself evidence that something is seriously wrong.

What is wrong is *Lockett* itself. It is high time to reconsider whether the Eighth Amendment really does strip the people of the legislative authority to specify what will be considered mitigating in capital cases, an authority they have beyond question in noncapital cases.

II. The *Lockett* rule erroneously removes to the federal judiciary a decision that properly belongs to the people of the several states.

Beyond question, the legislative power of the state included the authority to decide what factors would be considered in mitigation of punishment, including capital punishment, at the time of the American Revolution. At common law, all felonies were capital except as mitigated by the "benefit of clergy," and that mechanism was subject to legislative control. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Ring* v. *Arizona*, No. 01-488, pp. 3-8 (tracing history).

> "When the American people created a national legislature with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the states. These powers proceed not from the people of America, but from the people of the several states, and remain, after the adoption of the constitution, what they were before except so far as they may be abridged by that instrument." *Sturges* v. *Crowninshield*, 4 Wheat. (17 U. S.) 122, 193 (1819).

If the people of the states had a legislative power initially, and they have not yielded it by the ratification of the Constitution or any of its amendments, then they still have it.

At what point did the people of the states give up the power to decide what factors would be considered mitigating in capital cases? Certainly not when they ratified the Eighth Amendment or the Fourteenth Amendment. The legislative power to prescribe death as a punishment for a crime without regard to any mitigating circumstances was well established in 1791 and in 1868, and neither amendment was thought at the time of its adoption to abrogate such laws, which

continued in force in many jurisdictions until the late nineteenth century. See *McGautha* v. *California*, 402 U. S. 183, 200, and n. 11 (1971).

Furman v. *Georgia*, 408 U. S. 238 (1972), held that there was a constitutional limit to the states' authority to structure the capital sentencing system. This limit was held to have been exceeded by a system so unstructured as to be arbitrary, with a suspicion lurking in the background that the arbitrariness fostered discrimination against black defendants. See *Graham* v. *Collins*, 506 U. S. 461, 479-484 (1993) (Thomas, J., concurring); *id.*, at 500-501 (Stevens, J., dissenting). This limit was found in the Eighth Amendment, though it would have been better placed in the Equal Protection Clause. See *id.*, at 488 (Thomas, J., concurring) (Eighth Amendment should be limited to substance, not procedure).

Four years later, in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), another bookend was announced, limiting legislative authority in capital sentencing on the other end. Too much structure, *i.e.*, mandatory sentencing, was also deemed unconstitutional, even though it was the norm throughout the United States at the time of the adoption of both the Eighth and Fourteenth Amendments.

The lead opinion gave three reasons for wresting this authority from the people. First, a mandatory death penalty was said to be incompatible with contemporary values, looking to legislative enactments as the primary indication of values, see *Woodson*, 428 U. S., at 294-295, and secondarily to the fact that juries with discretion did not impose death in most cases. See *id.*, at 295-296. Second, a death penalty that is mandatory in theory despite circumstances that make a powerful case for mercy will be discretionary and arbitrary in practice, as juries engage in nullification without

guidance on how to do so and indeed contrary to their instructions and oaths. See *id.*, at 302-303.

The third, and by far weakest, reason was that "fundamental respect for humanity . . . requires consideration of the character and record of the individual offender . . . ." See *Woodson*, 428 U. S., at 304. This proposition is supported by very little beyond a simple *ipse dixit*. As part of its thin justification for this ground, the *Woodson* lead opinion returned to the assertion of "the need for reliability in the determination that death is the appropriate punishment . . . ." *Id.*, at 305. That need supports considering circumstances for which there is a broad consensus of strong mitigation, but it provides no support for a mandatory consideration of factors that most jurors would consider weak, irrelevant, or even aggravating.

In *Lockett*, the Court was confronted with a post-*Furman*, pre-*Woodson* statute that was essentially mandatory, allowing a sentence less than death only under three specific and uncommon circumstances. See *Lockett* v. *Ohio*, 438 U. S. 586, 607 (1978). No more than a modest extension of *Woodson* was needed to declare this statute unconstitutional. Instead, the plurality opinion announced the sweeping edict

> "that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*, at 604 (emphasis in original, footnote omitted).

Woodson's rationale of avoiding arbitrary nullification would have supported a requirement to consider those factors widely regarded as powerfully mitigating,

but the *Lockett* plurality went vastly farther. Why should a state be required to submit to a jury a factor that only a few jurors would consider mitigating, so that its consideration as such depends on the semi-random draw of jurors and not the consensus of the people of the state? Is that not contrary to at least the spirit of *Furman*, if not the letter?

The *Lockett* plurality apparently believed that going through factors one by one would take too long and introduce too much uncertainty in the law. "The States now deserve the clearest guidance this Court can provide . . . ." 438 U. S., at 602. To say that the *Lockett* decision did not achieve this goal would be an understatement. *Lockett* subsequently was employed to invalidate numerous capital judgments in a state where a standard instruction had been crafted by the state bar, approved by the highest court, and written into the rules in the sincere and justified belief that it was in compliance with this Court's precedents. See *Mills* v. *State*, 310 Md. 33, 67, 527 A. 2d 3, 19 (1987) (noting that sentencing form was prescribed in a rule adopted by state high court), rev'd *sub nom.*, *Mills* v. *Maryland*, 486 U. S. 367 (1988). It was used to invalidate a host of judgments in a state where both the state and federal courts believed that the statute had been expressly approved by this Court in *Jurek* v. *Texas*, 428 U. S. 262 (1976). See *Penry* v. *Lynaugh*, 492 U. S. 302, 352-353 (1989) (Scalia, J., dissenting in part). In case after case after case, justice was denied as the *Lockett* cancer continued to metastasize and overturn judgments entered after the state did what they sincerely and justifiably believed *Furman* required them to do.

To take away from the people the authority to decide a question of policy previously within their control is a grave step, never to be taken lightly. To maintain such a removal also requires justification. As

explained in Part IV, the practical justifications that once existed for the *Lockett* rule are gone. On the other hand, as explained in Part III, the practical costs of the *Lockett* rule are huge and growing. It is time to restore to the people the authority that was wrongly taken from them.

III. The *Lockett* rule causes continuing harm in terms of cost, delay, and uneven application of the death penalty.

A. Cost.

A constitutional precedent, even if wrongly decided as an initial matter, may be protected from overruling by the doctrine of *stare decisis* if it has become part of the fabric of the law and if its practical effects are no worse than the alternative. See *Dickerson* v. *United States*, 530 U. S. 428, 443-444 (2000). The latter requirement is definitely not met in the case of the *Lockett* rule. The rule that *Lockett* has become, in conjunction with the right to effective assistance of counsel, now imposes an enormous constitutional tax on justice in the very worst criminal cases.

At the time that the *Lockett* rule was accepted by this Court in a majority opinion, the penalty phase of capital trials was still a relatively brief and straightforward proceeding. The case in mitigation at issue in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), consisted of only four witnesses. See *Eddings* v. *State*, 616 P. 2d 1159, 1169 (Okla. Crim. App. 1980). Today, California finds it necessary to have a rule for cases where the transcripts exceed 10,000 pages. See Cal. Rules of Ct. 8.630(c)(1)(C).

Solid data on the cost of the death penalty are not available at this time. A feasibility study by RAND

Corporation found that the cost of a study of costs, done right, would be large and exceeded the available resources. See S. Everingham, Investigating the Costs of the Death Penalty in California: Insights for Future Data Collection from a Preliminary RAND Effort 1 (2008), available at http://www.rand.org/pubs/testimonies/2008/RAND_CT300.pdf (viewed May 19, 2009). The available data consist to a large extent of reports of organizations with an anti-death-penalty agenda, reports that must be read with considerable skepticism. See, *e.g.*, N. Minsker, The Hidden Death Tax: The Secret Costs of Seeking Execution in California (2008) ("ACLU Report"); J. Roman, *et al.*, The Cost of the Death Penalty in Maryland (2008) ("Urban Institute Report"). In the same category are reports of commissions established by elected officials opposed to the death penalty, stacked with a membership tilted that direction. See, *e.g.*, California Commission on the Fair Administration of Justice, Report and Recommendations on the Administration of the Death Penalty in California (2008); New Jersey Death Penalty Study Commission Report (2007).

Even reading these reports with the appropriate degree of skepticism, though, the picture emerges that the death penalty *as it presently exists* carries a high financial cost, that cost is higher than it needs to be, and the *Lockett* rule is a very large part of the reason.

> "About 70% of the added cost of a death notice case occurs during the trial phase. These additional costs are due to a longer pre-trial period, a longer and more intensive voir dire process, longer trials, more time spent by more attorneys preparing cases, and an expensive penalty phase trial that does not occur at all in non-death penalty cases." Urban Institute Report, *supra*, at 2.

The additional penalty phase trial and the additional preparation for it are for evidence that would not be admissible in the guilt phase. But the jury already knows the circumstances of the crime from the guilt phase. The additional evidence is largely "background" evidence that the states are forced to admit by the *Lockett* rule.

In testimony to the California Commission on the Fair Administration of Justice (CCAJ), Greg Fisher of the Los Angeles County Public Defender's Office described the additional preparation burden:

> "That means investigating the life history of the client. That means putting together a comprehensive multigenerational social history. According to the mandate of the U.S. Supreme Court in cases such as *Wiggins* and *Rompilla*, we are mandated to find every fact in mitigation that may be out there. Now that's a pretty tall task, and in order to do that you have to devote a lot of resources."[3]

Although we cannot assign a number, it is clear that the *Lockett* rule imposes a heavy constitutional tax on the death penalty. Cf. *Blakely* v. *Washington*, 542 U. S. 296, 318 (2004). Such a tax might be a burden that states choosing to have the death penalty would have to bear if the Constitution really required the rule, but it does not. See Part II, *supra*. For this Court to maintain such a heavy burden on justice would require a compelling justification, but there is none.

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3. The full February 20, 2008 hearing of the CCAJ is available as a video file at http://www.ccfaj.org/rr-deathpenalty.html. Unfortunately, there is no transcript, only a summary at http://www.ccfaj.org/documents/reports/dp/expert/LAPublicHearingMinutes.pdf. The statement quoted above occurs at about 2:47:15 in the video file.

B. Delay.

The financial cost of the *Lockett* rule, heavy as it is, is not the only cost. The length of time from sentence to execution, even in cases of unquestioned guilt, is a travesty. Thirteen years after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, we still do not have an effective death penalty. This delay is contrary to the rights of victims. See 18 U. S. C. §§ 3771(a)(7), (b)(2)(A). It diminishes the deterrent effect of the death penalty and thereby costs innocent lives. See Shephard, Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment, 33 J. Legal Studies 283 (2004). There is even an argument that it may violate the rights of the defendant by being a cruel punishment. See *Lackey* v. *Texas*, 514 U. S. 1045, 1045-1047 (1995) (Stevens, J., respecting denial of certiorari); *Knight* v. *Florida*, 528 U. S. 990, 993 (1999) (Breyer, J., dissenting from denial of certiorari). A principal cause of the delay is "this Court's Byzantine death penalty jurisprudence," *Knight*, *supra*, at 991 (Thomas, J., concurring), and the *Lockett* line of cases is the prime example. See *ibid.*; see also *supra*, at 12.

Although cases directly presenting *Lockett* issues are a rare and possibly vanishing breed, as explained in Part I, *supra*, the *Lockett* rule nonetheless lies at the root of a large portion of capital case review. One need only look at this Court's capital cases where the defendant claims ineffective assistance of counsel to see the problem. The ineffectiveness claimed rarely has anything to do with the crime. In case after case, defendants assail their trial counsel for not having dug up and presented "background" evidence. See *Williams* v. *Taylor*, 529 U. S. 362, 370-371 (2000); *Wiggins* v. *Smith*, 539 U. S. 510, 516-517 (2003); *Rompilla* v. *Beard*, 545 U. S. 374, 379-380 (2005); *Bell* v. *Kelly*, 260

Fed. Appx. 599, 605-606 (CA4 2008), cert. dismissed as improvidently granted, 555 U. S. __, 129 S. Ct. 393, 172 L. Ed. 2d 353 (2008); *Kindler* v. *Horn*, 542 F. 3d 70, 83-85 (CA3 2008), cert. granted *sub nom.*, *Beard* v. *Kindler*, No. 08-992 (May 18, 2009). If states could declare "background" evidence irrelevant and inadmissible, this large source of delay would vanish.

C. "Tension" with Furman.

Opponents of the *Lockett* rule and its extensions have long asserted that the rule is contrary to *Furman* v. *Georgia*, 408 U. S. 238 (1972). See *supra*, at 9-9; see also *Kennedy* v. *Louisiana*, 554 U. S. __, 128 S. Ct. 2641, 2659, 171 L. Ed. 2d 525, 549 (2008). That is an overstatement. Even as hampered by *Lockett*, the post-*Furman* reforms have achieved the basic goal. Numerous studies, including those sponsored by opponents of the death penalty, have found that race of the defendant has no detectable effect on the outcome of capital sentencing. See Scheidegger, Smoke and Mirrors on Race and the Death Penalty, 4 Engage (2), 42, 42-44 (Oct. 2003), available at http://www.fed-soc.org/publications/pubID.624/pub_detail.asp (summarizing studies). When properly analyzed, the same studies refute the claim that race of the victim is a major factor. See *id.*, at 44. The Baldus study at issue in *McCleskey* v. *Kemp*, 481 U. S. 279 (1987), "identified a class of clearly aggravated cases where the death penalty was consistently imposed, a class of clearly mitigated cases where it was almost never imposed, and a mid-range where it was sometimes imposed, exactly the way a discretionary system should work." Scheidegger, *supra*, at 42 (footnote omitted).

The "rules that ensure consistency in determining who receives a death sentence," *Kennedy*, 128 S. Ct., at 2658, 171 L. Ed. 2d, at 549, have been a qualified

success, and the consistency is well within constitutional limits. That does not mean, however, that we cannot do better. Capital sentencing can be made more consistent than it is at present by enabling the states to provide more guidance to the sentencer. The original concept of the post-*Furman* reforms was to channel the sentencer's discretion. To be a channel and not a dike, the structure should have *two* banks. While this Court has required that aggravating factors have a " 'common-sense core of meaning . . . that criminal juries should be capable of understanding,' " *Tuilaepa* v. *California*, 512 U. S. 967, 975 (1994) (quoting *Jurek* v. *Texas*, 428 U. S. 262, 279 (1976) (White, J., concurring in judgment)), it has simultaneously forbidden the states to impose a similar requirement on the mitigating circumstances. The Court has noted the "tension" between *Lockett* and *Furman* and that the combination "has produced results not [altogether] satisfactory." *Kennedy*, 128 S. Ct., at 2659, 171 L. Ed. 2d, at 549.

The tension is unnecessary, because the *Lockett* rule is unnecessary. As we will discuss in the next part, *Lockett* did serve a useful function in 1978, but the need for it is long gone.

IV. There is little or no current need for the *Lockett* rule.

A. The Corrective Catalyst of 1978.

In *Lockett*, this Court was presented with a problem of its own making. The Ohio Legislature had enacted the severe restrictions on the kind of mitigation that would be considered not because it wanted to, but because it very reasonably concluded that it had to in order to comply with *Furman*. See *Lockett* v. *Ohio*, 438 U. S. 586, 599-600, nn. 7-8 (1978). Even though the Court's approval of the Georgia system in *Gregg* v.

Georgia, 428 U. S. 153 (1976), made very clear that such restriction was not necessary, legislative inertia left these laws on the books.

By requiring the states to remove their restrictions on mitigation, *Lockett* served a useful catalytic function. There is no longer any capital sentencing statute in any state that restricts mitigation in the way the pre-*Lockett* statutes did. The last such restriction was removed legislatively in 1991. See *Smith* v. *Texas*, 543 U. S. 37, 39 (2004) (discussing Texas legislation in response to *Penry*). If *Lockett* were overruled on terms making it clear that the policy choice is once again in the hands of the people's representatives, any restriction enacted by a legislature would be based on a legislative determination that not allowing a particular type of mitigation is unhelpful to achieving a just result, not worth the expense, or both. Any decision by a state court that a particular type of evidence need not be considered would be based on that court's interpretation of a broad statute, and it would necessarily be limited to evidence on the fringe of relevance, such as the evidence in the present case. The need for the catalyst is long gone.

B. Categorical Exclusions.

Sandra Lockett, Monty Eddings, and John Penry have two things in common. First, the decisions of this Court in their cases established and expanded the rules regarding the unlimited consideration of mitigating evidence in the discretionary capital sentencing decision. Second, on the actual or assumed facts of their cases, none of them would need this rule if they were retried today. All three would be eligible for a categorical exclusion from the death penalty. Lockett would be excluded under the rule of *Enmund* v. *Florida*, 458 U. S. 782, 797 (1982), a rule similar to the one Justice White would have made in her case. See *Lockett*, 438

U. S., at 624. Eddings, who was 16 at the time of the crime, would be exempt under the rule of *Roper* v. *Simmons*, 543 U. S. 551, 578 (2005). If Penry actually were retarded, he would be exempt under the rule of *Atkins* v. *Virginia*, 536 U. S. 304, 321 (2002). But see *Penry* v. *State*, 178 S. W. 3d 782, 785 (Tex. Crim. App. 2005) (he is not).

This is more than coincidence. By creating these categorical exclusions, this Court has carved out the cases with the strongest mitigation and excluded them from capital punishment altogether. The danger that any legislatively enacted capital sentencing system would exclude a case of compelling mitigation is far less than it was in 1978 because of the categorical exclusion of the most compelling cases.

C. Realistic Restrictions.

If we are to consider the possibility that the states may once again place limitations on what kinds of evidence may be considered mitigating in capital cases, we should ask what kinds of restrictions are likely to appear. Is any legislature in this country going to enact a statute that an 18-year-old's youth may not be considered in mitigation at all, even though he would be categorically exempt if he were a day younger? Of course not. Similarly, no legislature and no court is going to forbid consideration of developmental disability less than retardation, of the "nontriggerman" status of a mere accomplice, or of psychotic disorders that do not reach the threshold for negating guilt. Cf. 18 U. S. C. § 17 (codifying *M'Naughten* standard).

On the other hand, a legislature would be entirely reasonable in declaring that being a sociopath is not mitigating. See *Graham* v. *Collins*, 506 U. S. 461, 500 (1993) (Thomas, J., concurring). Whether voluntary intoxication is mitigating is a matter that ought to be

within the legislative competence to decide. See *Montana* v. *Egelhoff*, 518 U. S. 37, 58-60 (1996) (Ginsburg, J., concurring in the judgment).

Most importantly for the cost aspect of the death penalty, state legislatures should be allowed to decide whether they will continue to allow the evidence of the defendant's entire life story that presently is claimed to require massive investigations and astronomical expense. Research indicates that a majority of jurors do not consider such evidence mitigating *at all*. Of those who do, a majority of those who do consider it only slightly mitigating. See Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 Colum. L. Rev. 1538, 1571 (1998).[4] Evidence that provokes idiosyncratic responses based more on the jurors' beliefs and attitudes than on the defendant's culpability is the kind of evidence that produces the greatest tension with the consistency goals of *Furman* and does the least to advance the cause of determining the appropriate sentence for the crime. A legislature should be permitted to decide that, on the whole, this kind of mitigation evidence does more harm than good and ought not be allowed.

For all these reasons, the *Lockett* rule is long overdue for reconsideration. *Amicus* CJLF therefore respectfully requests that the Court grant the petition in this case and consider whether the rule of *Lockett* and its progeny should be modified or overruled.

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4. This point requires further explanation, but due to the limit on the length of certiorari-stage *amicus* briefs, it will have to wait for the merits stage. Also deferred is a discussion of why *Lockett* meets the criteria for overruling a precedent.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

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Respectfully submitted,

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