IN THE ARIZONA SUPREME COURT

JESUS BUSSO-ESTOPELLAN, Petitioner, v. HON. ROSA MROZ, Judge of the Superior Court of Arizona in and for Maricopa County, Respondent Judge, STATE OF ARIZONA, Real Party In Interest.	)	S.Ct. No. CV-15-0102-PR Court of Appeals No. 1 CA-SA 15-0068 Maricopa County Superior Court No. CR2011-133622-001

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITIONER

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INTRODUCTION

This case involves a pedestrian evidentiary question with monumental consequences. This capital trial, expected to last months, has now had error unnecessarily injected into the penalty phase by a clearly erroneous ruling by the Respondent Judge. Respondent's ruling evinces a clear belief that it is the role of the court, and not of the jury, to decide what weight to give to mitigating evidence. In precluding this "acceptance of responsibility" evidence, Respondent has decided that an entire category of mitigation can be precluded, in clear violation of this Court's holding in *State v. Payne*, 233 Ariz. 484, ¶¶ 157-158, 314 P.3d 1239, 1273-74 (2013), and the United States Supreme Court's holding in *Lockett v. Ohio*, 438 U.S. 586 (1978).

Amicus curiae Arizona Attorneys for Criminal Justice ("AACJ") asks this Court to grant review in this case pre-trial and address this obvious and egregious error. If left unaddressed, there is a strong probability that this Court will not only have to review a death sentence, but also be obligated to reverse the imposition of death and remand the case for a retrial on penalty. Such a result would serve no valid purpose and would tax not only the finances of the state but also the emotions of the victims and their families who would have to suffer through the ordeal of an inevitable second trial.

INTERESTS OF *AMICUS CURIAE*

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

Amicus offers this brief because the issue presented concerns the right of capital defendants to a fair trial by jury on sentencing. While there is no guarantee at this time that the end result of the trial will be a death sentence, the prospect of such should attract the attention of this Court at this stage in the proceedings so that errors of constitutional magnitude are corrected before the capital trial begins. Leaving Respondent's ruling in place creates an unnecessary risk that this Court will have no choice but to review and reverse death sentences and remand for a new penalty-phase trial.

ARGUMENTS

I. Review of this erroneous evidentiary ruling should occur pre-trial because the expense of a second capital trial is too great to bear.

Appellate courts generally grant special action jurisdiction only when there is no "equally plain, speedy, and adequate remedy by appeal." Ariz. R. P. Spec. Act. 1(a); *Chronis v. Steinle*, 220 Ariz. 559, ¶ 4, 208 P.3d 210, 211 (2009). In any other case, the error alleged here is a standard evidentiary question that can be raised on direct appeal.

This is not any other case, however. This is a capital trial expected to last months. The cost to the system of having to try this case once is extreme; the cost to retry the penalty phase after a reversal makes the remedy by direct appeal anything but plain and speedy.

It is not only the taxpayers who will have to suffer the price of a reversal in monetary cost. Additionally, the victims' family members will have to endure a second trial. The parents of one of the homicide victims appeared at a recent settlement conference (Appendix Exhibit M); thus, they are clearly taking an active interest in this case. The settlement conference judge regularly addressed that victim's mother throughout the hearing, and at one point the judge advised her that there is a 50% reversal rate in cases where a death sentence is imposed. *Id*. at 7-8. While the victim's parents did not ask to speak at that hearing, and it is not known

whether any of the victims or victim representatives have any position on the death penalty in this case, it is a fair assumption that none of them would wish to endure the ordeal of a trial only to see that result reversed on appeal many years later. *See, e.g.*, Bob Autobee, "A terrible burden to victims' families," *Pueblo Chieftain*, op-ed, February 10, 2013.[1] One need only reflect momentarily on the procedural history of the James Wallace case to reach the conclusion that any injection of error into a capital trial will be extraordinarily painful for all involved. *See State v. Wallace*, 229 Ariz. 155, ¶ 1, 272 P.3d 1046, 1048 (2012) (death sentences imposed three separate times and reviewed by this Court four times over twenty-eight years before the sentences were finally reduced to life imprisonment).

II. By precluding this evidence, Respondent Judge erroneously "bootstrapped herself into the jury box via evidentiary rules."

This Court and the Court of Appeals have admonished that "judges must be careful not to 'bootstrap [themselves] into the jury box via evidentiary rules.'" *State v. Machado*, 224 Ariz. 343, ¶ 43, 230 P.3d 1158, 1174 (App. 2010), *aff'd*, 226 Ariz. 281, 245 P.3d 632 (2011) (quoting *State v. LaGrand*, 153 Ariz. 21, 28, 734 P.2d 563, 570 (1987), alteration in *Machado*). Yet that is precisely what the Respondent Judge did in this case when she determined that the offer to plead guilty should be excluded

[1] Available at http://deathpenaltyinfo.org/new-voices-father-slain-corrections-officer-reverses-course-death-penalty (last visited June 4, 2015).

from penalty phase evidence on the ground that "this type of conditional offer [does not constitute] either an acceptance of responsibility or remorse but rather indicates a desire to avoid the ultimate penalty of death." *Ruling of 2/27/15*.

In determining whether to admit evidence, "a judge's inquiry … should be limited to asking whether evidence … would permit a reasonable person to believe" the fact at issue. *LaGrand*, 153 Ariz. at 28, 734 P.2d at 570. The Respondent Judge is not a juror in this case, and, although the settlement court judge suggested the parties to consider the possibility of conducting a bench trial, at this stage no such agreement has been reached. Thus, the Respondent Judge is required to exercise tremendous caution when determining whether the conditional offer to plead guilty is inadmissible as a matter of law or is merely her personal view of the facts. Although the Respondent Judge cited two cases of this Court for authority, neither has any relation whatsoever to this case. *Under Advisement Ruling of 12/16/14*, pp.2-3 (quoting *State v. Dann*, 220 Ariz. 351, ¶ 124, 207 P.3d 604, 626 (2009); *State v. Chappell*, 225 Ariz. 229, ¶¶ 31-33, 236 P.3d 1176, 1185 (2010)). *Dann* involved preclusion of informing the jury that he could not receive parole, and *Chappell* only involved whether the defendant's proffered allocution would expose him to cross-examination.

On the other hand, the Respondent Judge made no effort to address, much less distinguish, Busso-Estopellan's authorities cited in the motion. Busso-Estopellan

cited ample authority to the Respondent Judge (and to this Court) supporting his claim that admission of such evidence is permissible mitigation because early acceptance of responsibility shows true remorse. *Defendant's Motion in Limine No. 1 RE: Defendant's Offer to Plead Guilty as Mitigation*, pp.4-8; *Petition for Review*, pp.9-10, 13.

The standard for relevance in the ***guilt phase*** of a trial is "not particularly high." *State v. Oliver*, 158 Ariz. 22, 28, 760 P.2d 1071, 1077 (1988). "It is not necessary that such evidence be sufficient to support a finding of an ultimate fact; it is enough if the evidence, if admitted, would render the desired inference more probable." *Reader v. General Motors Corp.*, 107 Ariz. 149, 155, 483 P.2d 1388, 1394 (1971). Particularly in the ***penalty phase*** of a capital trial, when a defendant's life is on the line, there is no limit to what a defendant can label as mitigating. When the defendant wishes to express his remorse, the trial court must do nothing to mute that effort. Studies have shown that jurors generally struggle to find remorse, and this feeling is shared by those who vote for life as well as for death. Scott E. Sundby, "The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty," 83 *Cornell L. Rev*. 1557, 1559, 1566-67 (Sept. 1998). Busso-Estopellan must have every opportunity to express his acceptance of responsibility,

and any limitation on the form in which that remorse is express must be narrowly tailored[2] and not so broad as the ruling in this case.

III. No category of mitigation can be wholly precluded, no matter how little weight a judge might afford it, and such preclusion can never be reviewed for harmless error on appeal. Even with harmless error review, however, the facts of this case, as described by the State in the settlement conference, could not discharge that burden.

The United States Supreme Court's jurisprudence on imposition of the death penalty uniformly requires that a capital defendant be permitted to put on any evidence of any mitigating factor that the defendant believes is pertinent to the sentencing authority's decision to impose a sentence of life or death. "[T]he Eighth

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[2] Even in cases where the type of evidence cannot be precluded, the form in which it takes might be impermissible. In *United States v. Fell*, 531 F.3d 197, 219-20 (2d Cir. 2008), the Second Circuit held that preclusion of a draft plea agreement was proper because "admission of the draft would authorize a confusing and unproductive inquiry into incomplete plea negotiations." The Court found that any such evidence was necessarily cumulative, because the jury had already been told by stipulation

> that the government refused his offer to plead guilty. In any event, the record is virtually conclusive that the jury was clearly aware of Fell's willingness to plead guilty. On the verdict form, all twelve jurors found that "Donald Fell offered to plead guilty to kidnapping and murdering [victim], knowing that the law requires a sentence of life in prison without the possibility of release, and he has maintained that offer to this day."

Id. at 220. Thus, in *Fell*, the prosecution entered the stipulation as a way of keeping its views of the case out of the discussion. Similarly, in this case, Busso-Estopellan is seeking to introduce no evidence of the prosecution's mindset or statements beyond the rejection of the plea offer.

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." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original). "The sentencer … may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." *Eddings v. Oklahoma*, 455 U.S. 105, 114-15 (1982). *See also Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (quoting *Lockett* and *Eddings*); *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987) (same); *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (same). The standard for what qualifies as mitigating has "virtually no limits." *Eddings*, 455 U.S. at 114. "Furthermore, the mere declaration that evidence is 'legally irrelevant' cannot bar the consideration of that evidence if the sentencer could reasonably find that it warrants a sentence less than death." *McKoy v. North Carolina*, 494 U.S. 433, 441 (1990) (citing *Eddings* and *Skipper*).

This Court recently addressed the issue of preclusion of an entire category of evidence. In *State v. Payne*, 233 Ariz. 484, ¶¶ 157-158, 314 P.3d 1239, 1273-74 (2013), this Court found that it was error to preclude evidence that the defendant would be a good inmate if sentenced to life in prison pursuant to *Skipper*, but that such error was harmless beyond a reasonable doubt because of the overwhelming

evidence presented that death was an appropriate sentence. Implicit in this Court's statement that this evidence "is generally afforded little weight," *Id*. ¶ 157 (citing *State v. Pandeli*, 215 Ariz. 514, ¶ 82, 161 P.3d 557, 576 (2007)), is the acknowledgment that the evidence is afforded some weight, and that it is thus possible for the weight of such evidence to tip the balance in any given case.

Chief Justice Bales' partial dissent explains the danger of conducting a harmless error analysis in a capital case with jury sentencing, describing the burden on the State as "almost insurmountable." *Id*. ¶ 173, 314 P.3d at 1276 (Bales, V.C.J., concurring in part and dissenting in part). First, although this Court has decided in *Pandeli* and in *State v. Harrod*, 200 Ariz. 309, ¶ 53, 26 P.3d 492, 502 (2001), *vacated on other grounds*, 536 U.S. 953 (2002), that "[w]e give this mitigating circumstance little weight, however, because prisoners are expected to behave and adapt to prison life," this Court's view of the weight to be afforded to such an issue as announced through its independent review is in no way communicated to the individual jurors called upon to decide the penalty. *Payne*, 233 Ariz. 484, ¶ 175, 314 P.3d at 1277 (Bales, V.C.J., concurring in part and dissenting in part). Instead, the jury is instructed to give effect to all the proffered mitigation and assign it the value each individual juror believes it deserves. *Id*. ¶¶ 174-75, 314 P.3d at 1276-77 (Bales, V.C.J., concurring in part and dissenting in part) (quoting *State ex rel. Thomas v. Granville (Baldwin)*, 211 Ariz. 468, ¶ 21, 123 P.3d 662, 667 (2005)). While noting

that the Supreme Court implied in *Skipper* and in *Hitchcock* that harmless error review is possible, *id*. ¶ 170, 314 P.3d at 1276, it went without note that the Supreme Court had not yet defined "structural error," a term that came into being through *Arizona v. Fulminante*, 499 U.S. 279 (1991). Finally, because the law does not presume that death is the appropriate sentence, and a juror might vote for life on any basis, it cannot reasonably be said that exclusion of any mitigation evidence would not have contributed to any juror's verdict. *Payne*, 233 Ariz. 484, ¶ 175, 314 P.3d at 1277 (Bales, V.C.J., concurring in part and dissenting in part).

The fact that a juror can vote for life on any basis—even if no mitigation is presented—makes it impossible to measure whether the error contributed to the verdict. *See State v. Ring*, 204 Ariz. 534, ¶ 105, 65 P.3d 915, 946 (2003) (*Ring III*) (opinion of Feldman, J., concurring in part and dissenting in part) ("the denial of a jury in the sentencing phase is a defect in the fundamental mechanism of the trial"); *State v. Sansing*, 206 Ariz. 232, ¶ 44, 77 P.3d 30, 40 (2003) (Jones, C.J., dissenting) ("because total jury deprivation occurred in the phase of Sansing's trial that resulted in the capital sentence, the error cannot be deemed harmless. Error of such magnitude undermines the very structure of the process. In light of *Ring II*, I do not believe this court is authorized to speculate on what a jury might have done."). In *State v. Henderson*, Justice Hurwitz used his first opportunity[3] to comment on this

[3] Formerly counsel in *Ring*, Justice Hurwitz recused himself from all of the *Ring*

type of error and opine that he believed it should be structural "[w]ere we writing on a clean slate … for the reasons explained by Justices Jones and Feldman…" 210 Ariz. 561, ¶ 37, 115 P.3d 601, 610 (Hurwitz, J., concurring).

None of this Court's former justices who dissented on this question, however, articulated a distinction between capital and noncapital cases. Yet it takes only a glance at the jury instructions given in guilt phase and penalty phase to see the marked distinction. In the guilt phase, regardless of the crime charged, jurors are instructed to follow the law as given and not to base their decisions on sympathy or prejudice. In the capital phase, however, jurors are told to make individual moral judgments and they are very welcome to base a life verdict on mercy for the defendant. State Bar of Arizona, *Revised Arizona Jury Instructions* (Criminal) Std. 1 (3d ed. Rev. 2012) ("RAJI"), tells the jury in guilt phase: "It is your duty as a juror to decide this case by applying these jury instructions to the facts as you determine them. You ***must*** follow these jury instructions." (emphasis added). RAJI Capital Case 2.3 explains, "Mitigating circumstances are any factors that are a basis for a life sentence instead of a death sentence, so long as they relate to any ***sympathetic*** or other aspect of the defendant's character…" (emphasis added). And RAJI Capital Case 2.6 explains, "In reaching a reasoned, ***moral*** judgment about which sentence is

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remand cases.

justified and appropriate…" (emphasis added). Because jurors deciding life or death can choose life for any reason, it defies harmless error analysis.

Even if it can be measured for harmless error, however, such a finding is extremely unlikely to occur in these cases. This Court acknowledged that *Payne* represents an extreme case and explained why it upheld the death sentence against this error:

> We conclude, as we did in *Bible*, that "[i]f the evidence against Defendant had been closely balanced, strong, or even very strong, … it would be impossible to say beyond a reasonable doubt that the [precluded] evidence did not affect the verdict…. Factually, however, this is a very unusual case." *Id*. Virtually undisputed evidence established that Payne locked his children in a closet and starved them to death…. ***If improperly excluded mitigation evidence may ever be considered harmless, surely this is the case***.

Id. ¶ 158, 314 P.3d at 1274 (emphasis added). Thus, the majority opinion in *Payne* does not appear to dispute Chief Justice Bales' description of an "almost insurmountable burden"; instead, it finds that *Payne* is the highly exceptional case that is able to meet that burden.

In stark contrast, the allegations by the State in Busso-Estopellan's case are not even in the same ballpark. The prosecutor stated at the settlement conference that two aggravating factors alleged: (F)(6), cruel, heinous, or depraved (cruel for the length of time between shots, and heinous/depraved for eliminating a witness) and (F)(8) (multiple victims). The settlement judge expressed a small modicum of

skepticism about the State's ability to prove witness elimination.[4] The defense, on the other hand, laid out a strong mitigation case that could easily persuade a jury to vote for life.

Of course, the State's outline of its rebuttal argument suggests that the State could convince a jury to vote for death. There is no question that a jury could find minimal aggravation and still vote for death even with the presentation of substantial mitigation. *See State v. Nelson*, 229 Ariz. 180, 273 P.3d 632 (2012) (a single aggravating factor, for which the defendant barely qualified, served as basis for imposition of death sentence by jury that was upheld on review).

But, if the jury were to impose death after any of Busso-Estopellan's mitigation was precluded, this Court would not be able to find such an error harmless beyond a reasonable doubt. This Court would not apply abuse of discretion review or even independent review; those are reserved as a defendant's last resort. Instead, this Court would apply the analysis in *State v. Gunches*, 225 Ariz. 22, ¶¶ 24-25, 234 P.3d 590, 594-95 (2010) (citing A.R.S. § 13-756(B)); after determining that an

[4] Although "witness elimination" has been removed from the standardized instruction on "cruel, heinous or depraved," the Use Note to Revised Arizona Jury Instructions, 3d ed., Capital Case 1.6(d), includes a sample instruction to use when the State alleges witness elimination under A.R.S. § 13-751(F)(6) instead of as a stand-alone aggravating factor pursuant to § 13-751(F)(12). Even though the (F)(6) "witness elimination" is broader than the (F)(12) factor, the description of the events in this case at the settlement conference suggest that the settlement judge's implied skepticism was not without foundation. *Appendix Exhibit M*, pp.11-13.

evidentiary error was made, this Court would then consider whether the State can prove beyond a reasonable doubt that the lack of evidence of Busso-Estopellan's willingness to plead guilty nearly four years earlier did not contribute to the jury's verdict.

CONCLUSION

AACJ asks this Court to grant review of the petition in this case and resolve this evidentiary question before trial.

RESPECTFULLY SUBMITTED this 5th day of June, 2015.

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