No. 18-1109

IN THE
Supreme Court of the United States

JAMES ERIN MCKINNEY,
Petitioner,

v.

STATE OF ARIZONA,
Respondent.

On Writ of Certiorari to the Arizona Supreme Court

BRIEF FOR PETITIONER

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Arizona Supreme Court was required to apply current law when weighing mitigating and aggravating evidence to determine whether a death sentence is warranted.

2. Whether the correction of error under *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982), requires resentencing.

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INTRODUCTION

James McKinney seeks nothing more than any other defendant facing the ultimate penalty: The opportunity to present mitigating evidence in the trial court, and to have that evidence considered by the sentencer, before being put to death. *See Eddings* v. *Oklahoma*, 455 U.S. 104 (1982) (holding that a capital sentencer may not refuse, as a matter of law, to consider relevant mitigating evidence). The Arizona Supreme Court has twice denied him that opportunity. This longstanding defect in McKinney's sentence, moreover, has now been joined by a new error: In the decision below, the Arizona Supreme Court violated *Griffith* v. *Kentucky*, 479 U.S. 314

(1987), which required the court to apply current law when correcting McKinney's sentence. These two constitutional errors—one old and one new—each require reversal of the decision below.

By all accounts, McKinney "endured a horrific childhood." Pet. App. 5a. He was physically abused, frequently deprived of food and water, and forced to live in filth. *See id.* at 19a-24a. As his sister explained, "we were all stressed out wondering when the next time we were getting beat; wondering when we were going to eat next." JA48. As a result of his abusive childhood, McKinney suffers from Post-Traumatic Stress Disorder. *See* Pet. App. 25a.

In 1991, at the age of 23, McKinney and his half-brother killed two people in the course of burglarizing the victims' homes. *See id.* at 17a-18a. McKinney was tried before a jury and convicted of murder. *Id.* at 18a. He was sentenced by a judge. At his sentencing hearing, McKinney presented evidence that he suffered from PTSD. Although the judge accepted this diagnosis, he did not consider it as part of his sentencing decision. *See id.* at 187a-189a. Under Arizona law at the time, the judge was prohibited from taking into account mitigating evidence that was not causally connected to the crime. *See id.* at 29a-30a. The judge sentenced McKinney to death, and his sentence was affirmed on direct review by the Arizona Supreme Court.

In 2015, the Ninth Circuit granted McKinney a conditional writ of habeas corpus. The court concluded that both the sentencing judge and the Arizona Supreme Court had refused as a matter of law to consider the mitigating evidence of McKinney's PTSD, in violation of *Eddings*. *See* Pet. App. 68a. In

response to the Ninth Circuit's ruling, the State sought independent review of McKinney's death sentence by the Arizona Supreme Court. *Id.* at 3a. McKinney opposed that motion on the ground that he is entitled to resentencing by a jury under *Ring* v. *Arizona*, 536 U.S. 584 (2002), and *Hurst* v. *Florida*, 136 S. Ct. 616 (2016), which hold that juries—not judges—must make the findings necessary to impose the death penalty.

The Arizona Supreme Court granted the State's request, concluding that the 2002 *Ring* decision did not apply because McKinney's conviction became final in 1996. *See* Pet. App. 3a-4a. The Arizona Supreme Court then proceeded to weigh on its own the mitigating and aggravating evidence in McKinney's case. *Id.* at 4a-9a. It concluded that "[g]iven the aggravating circumstances in this case," McKinney's "mitigating evidence is not sufficiently substantial to warrant leniency." *Id.* at 5a. The court "affirm[ed]" McKinney's death sentence. *Id.* at 9a.

This case presents two questions. The first is whether a court must apply the law as it exists today, rather than as it existed at the time a defendant's conviction first became final, when weighing anew the mitigating and aggravating evidence in a capital case. The answer to that question is yes. In *Griffith*, the Court held that current law applies to all cases pending on direct review or not yet final. *See* 479 U.S. at 328. A case becomes final when this Court denies certiorari or the time for seeking certiorari expires. *See id.* at 321 n.6. But a final case does not always remain final. In *Jimenez* v. *Quarterman*, 555 U.S. 113 (2009), the Court held that a state court

may *reopen* direct review, rendering a case non-final. *See id.* at 120.

When the Arizona Supreme Court granted independent review of McKinney's death sentence, it reopened direct review of McKinney's criminal case. That was, after all, the whole point: The sentencing court had erred in its refusal to consider mitigating evidence during McKinney's initial sentencing, and the Arizona Supreme Court sought to correct that error by considering this disregarded evidence. Once the Arizona Supreme Court reopened direct review, however, *Griffith* dictates that it had to apply current law. The Arizona Supreme Court refused to do so, and its decision therefore should be reversed. Under current law, McKinney is entitled to resentencing in the trial court by a jury.

The second question presented asks whether correction of the *Eddings* error in McKinney's case—whether under old law or new—requires resentencing in the trial court. This Court's longstanding precedents make clear that it does. After finding an *Eddings* error, the Court has repeatedly remanded for resentencing in the trial court. *See, e.g.*, *Hitchcock* v. *Dugger*, 481 U.S. 393, 399 (1987). In *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985), the Court explained why this is so: *Eddings* "clearly envisioned" that consideration of mitigating evidence "would occur among sentencers who were present to hear the evidence and arguments and see the witnesses," rather than by appellate courts, which are institutionally incapable of providing in the first instance the consideration of mitigating evidence that *Eddings* requires. *Id.* at 330-331. Thus, even if current law does not apply to McKinney's case, this

Court's precedents dictate that he is entitled to resentencing in the trial court. The Arizona Supreme Court denied McKinney that opportunity. For this reason as well, the decision below should be reversed.

OPINIONS BELOW

The Arizona Supreme Court's independent review of McKinney's death sentence, which is the decision upon which certiorari was granted, is reported at 426 P.3d 1204 (2018). Pet. App. 1a-9a. That court's order denying rehearing is not reported. *Id.* at 10a-11a. The Arizona Supreme Court's opinion affirming McKinney's conviction and sentence is reported at 917 P.2d 1214 (1996). Pet. App. 119a-167a. The trial court's sentencing decision is not reported. *Id.* at 168a-193a. The Ninth Circuit's en banc decision granting a conditional writ of habeas corpus is reported at 813 F.3d 798 (2015). Pet. App. 12a-118a.

JURISDICTION

The Arizona Supreme Court entered judgment on September 27, 2018. Petitioner filed a timely motion for reconsideration, which was denied on October 23, 2018. Justice Kagan granted a 30-day extension of the period for filing a petition to February 21, 2019, and McKinney timely filed his petition. The Court granted certiorari on June 10, 2019. The Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment, U.S. Const. amend. VI, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and pub-

> lic trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Eighth Amendment, U.S. Const. amend. VIII, provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law * * * .

STATEMENT

A. Factual Background

McKinney suffered a "horrific childhood." Pet. App. 5a. He began life with his biological parents, James McKinney, Sr., and Bobbie Jean Morris, in a home that McKinney's aunt described as squalid. *See id.* at 19a. As she put it, "[w]hen you walked through the door, it wasn't nothing to see, you know, diapers full of—all around. * * * Everything stunk." *Id.* (internal quotation marks omitted). James was an alcoholic, and Bobbie tried to leave him when McKinney was three years old. *Id.*

Bobbie fled with McKinney and his two sisters to California, and then Kansas, and then California again, and then Texas, and then New Mexico. *Id.* at 19a-20a; JA61-62. Each time, James found Bobbie and brought her and the children back to Arizona. Pet. App. 20a. According to James, Bobbie "kidnapped" the children, and "he took them back after he found out they were being physically abused and were being locked in closets, hungry and sick." *Id.* (internal quotation marks omitted). James eventually remarried and gained custody of McKinney and his sisters. *Id.*

McKinney's life with his father and stepmother, Shirley Crow McKinney, was "even worse" than before. *Id.* at 20a. The house was "gross," "filthy," and "disgusting." JA65. As McKinney's aunt put it, "the kids were filthy, they never had clean clothes that I ever saw them in." *Id.* McKinney shared a small bedroom with his two sisters, his half-brother Michael Hedlund, and the animals Shirley routinely brought home—including a boa constrictor, a monkey, goats, chickens, dogs, and cats. Pet. App. 20a; JA66-67. The animals "regularly defecated and urinated in the bedroom." Pet. App. 20a-21a. McKinney attended school in "dirty clothes that reeked of urine from being on the bedroom floor with the animals," and he was harassed by other children as a result. *Id.* at 21a-22a.

McKinney and his siblings "suffered regular and extensive physical, verbal, and emotional abuse." *Id.* at 22a. Shirley kept belts, switches, and cords available for near-daily beatings. JA32-33, 44. McKinney's younger sister "could not recall a time when none of the children had a welt or bruise inflicted by"

their stepmother. Pet. App. 22a. On one occasion, Shirley took a garden hose and beat McKinney "on the back of his head, down his back, all over his legs, his arms; anything that moved, she hit him." JA69. McKinney also frequently witnessed Shirley beating his siblings. *See id.* at 147. In addition to physical abuse, Shirley verbally abused the children, telling them that they were "stupid, ugly, and not worth anything." Pet. App. 23a (alterations and internal quotation marks omitted); JA44.

Shirley regularly locked McKinney and his siblings out of the house for hours, often in little clothing and without food or water. Pet. App. 23a; JA70-72. When Shirley "was really angry at them, they couldn't turn the water faucet on outside" or "get a drink of water," even when temperatures reached "110 degrees outside" in the Arizona summer. Pet. App. 23a; JA70-71. If the children wanted to eat, they were required to prepare food for themselves. McKinney's aunt testified that she saw McKinney and Hedlund "standing on chairs at the stove cooking or having to stand on chairs to do the dishes because they were too small to reach the stove and the counters." Pet. App. 21a (internal quotation marks omitted); JA70. If the dishes were not done, Shirley would beat McKinney and his siblings. Pet. App. 22a. As McKinney's sister explained, their childhood was "horrible. It was scary. It seems like we were all stressed out wondering when the next time we were getting beat; wondering when we were going to eat next." JA48.

By age 10, "McKinney had become distant, quiet and withdrawn." Pet. App. 24a. At age 11, he ran away from home, "dirty" and "bruised" from a recent

beating. *Id.* McKinney took a bus across state lines and then hitchhiked to his aunt's home. *Id.*; JA75-76. McKinney's biological mother Bobbie responded by calling the police, and the sheriff placed McKinney in juvenile detention. Pet. App. 24a. McKinney began drinking alcohol and smoking marijuana around age 11, and he dropped out of school in the seventh grade. *Id*.

In 1991, McKinney and his half-brother, Hedlund, committed five burglaries. The last two burglaries resulted in the death of Christine Mertens and Jim McClain. *Id.* at 17a-18a. In the course of the burglary of Mertens' home, Mertens was stabbed multiple times and suffered defensive wounds, which "indicat[ed] a struggle" took place. *Id.* at 7a-8a. One of the burglars then "held Ms. Mertens down on the floor and shot her in the back of the head with a handgun, covering the gun with a pillow." *Id.* at 18a.[1] About two weeks later, McKinney and Hedlund entered McClain's home, also to commit burglary. McClain "was shot in the back of the head by either McKinney or Hedlund" while asleep in his bedroom. *Id.* At the time, McKinney was 23 years old. *Id.* at 17a.

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[1] McKinney's half-brother, Christopher Morris, may also have been present in Mertens' home. *See* Pet. App. 18a. Morris, who was involved in three of the burglaries with McKinney and Hedlund, "testified that he was at work at Burger King on the night" of Mertens' murder, "but Burger King had no record of him working that night." *Id.* The identity of Mertens' assailant was not determined by the jury. *See id.* at 27a.

B. Procedural History

1. The State tried McKinney and Hedlund together before two different juries. *Id.* at 18a. McKinney's jury found him guilty of two counts of first-degree murder by way of a general verdict form, which did not indicate whether McKinney had committed premeditated murder or felony murder. *Id.* at 18a, 27a. Hedlund was found guilty of one count of first-degree murder and one count of second-degree murder. *Id.* at 18a. The trial judge indicated that he believed McKinney had killed Mertens but not McClain. *See id.* at 27a, 185-186a.

McKinney's capital sentencing took place before the same trial judge. *See id.* at 27a. At the time, "Arizona law provided for two kinds of mitigation factors in capital sentencing—statutory and nonstatutory." *Id.* at 14a. McKinney sought leniency based on 11 mitigating circumstances, including his PTSD (a nonstatutory mitigating factor) and his inability to appreciate the wrongfulness of his conduct (a statutory mitigating factor). *See* JA311-323.

At the sentencing hearing, a psychologist testified that he had diagnosed McKinney with "PTSD resulting from the horrific childhood McKinney had suffered." Pet. App. 25a. The psychologist explained that McKinney had a tendency to "withdraw[ ]" from stressful situations. *Id.*; JA118. This tendency to withdraw, however, went hand-in-hand with a tendency to "be emotionally overwhelmed by environmental stress and act in poorly-judged ways just to reduce the internal emotional turmoil." Pet. App. 26a (internal quotation marks and alterations omitted); *see* JA108. The psychologist explained that McKinney's personality traits—withdrawal from

stressful situations paired with emotional outbursts—are "two of the primary ingredients of Post-Traumatic Stress." JA111. The psychologist concluded that the burglaries may have "triggered something" in McKinney, *id.* at 124, potentially leading to "some kind of reflexive kind of thinking, some emotional kind of thinking rather than logical, reflective assessment of the alternatives." *Id.* at 126. To support the psychologist's testimony, the defense introduced two scientific articles connecting abusive childhoods with violent crimes. *See id.* at 343-366, 367-384.

The trial judge accepted the psychologist's diagnosis, *see* Pet. App. 29a, 187a-188a, describing McKinney's childhood as "beyond the comprehension and understanding of most people." *Id*. at 187a. Under Arizona law at the time, however, the judge was prohibited from considering nonstatutory mitigating evidence that lacked a causal connection to the crime. *Id*. at 28a-29a. The judge explained that he did not "find any credible evidence to suggest that, even if the diagnosis of Post-traumatic Stress Syndrome were accurate in Mr. McKinney's case, that [it] in any way significantly impaired Mr. McKinney's conduct." *Id.* at 189a. The judge similarly stated that "there simply was no substantial reason to believe that even if the trauma that Mr. McKinney had suffered in childhood had contributed to an appropriate diagnosis of Post-traumatic Stress Syndrome that it in any way affected his conduct in this case." *Id*. at 189a-190a. The judge concluded that McKinney's PTSD was unconnected to his criminal behavior and that it accordingly did not qualify as mitigating evidence. *See id.* at 30a-31a, 189a-191a.

The judge sentenced McKinney to death. *Id.* at 29a. On *de novo* review of McKinney's death sentence, the Arizona Supreme Court affirmed. The court did not consider McKinney's PTSD, accepting the sentencing judge's conclusion "that, as a factual matter," McKinney's PTSD was not causally connected to the crime. *Id*. at 53a. The Arizona Supreme Court emphasized the psychologist's testimony that McKinney's PTSD would have caused him to "avoid engaging in stressful situations, such as these burglaries and murders." *Id*. at 161a. McKinney did not seek certiorari.

2. In 2003, McKinney filed a habeas petition in federal court in Arizona. McKinney argued that his sentence violated *Eddings*, which prohibits the capital sentencer from refusing as a matter of law to consider relevant mitigating evidence. *See Eddings*, 455 U.S. at 114-115. McKinney explained that neither the trial judge nor the Arizona Supreme Court had considered the mitigating evidence of his PTSD. The district court denied relief. *McKinney* v. *Ryan*, No. CV 03-774-PHX-DGC, 2009 WL 2432738, at *22-23 (D. Ariz. 2009). A Ninth Circuit panel affirmed. 730 F.3d 903, 921 (9th Cir. 2013).

The Ninth Circuit granted rehearing en banc, 745 F.3d 963 (9th Cir. 2014), and reversed. After reviewing Arizona capital sentencing proceedings from the 1980s to the mid-2000s, the Ninth Circuit held that "the Arizona Supreme Court [had] repeatedly articulated" a "causal nexus test" that prohibited consideration of nonstatutory mitigating evidence unconnected to the defendant's crime. Pet. App. 37a. The Ninth Circuit concluded that the Arizona courts had

violated *Eddings* in death penalty cases over a 15-year period between 1989 and 2005. *Id.* at 37a-47a.[2]

Turning to McKinney's case, the Ninth Circuit held that both the trial judge and the Arizona Supreme Court had committed *Eddings* error, and that the error was not harmless. *Id*. at 50a-60a. As the Ninth Circuit explained, "McKinney's evidence of PTSD resulting from sustained, severe childhood abuse would have had a substantial impact on a capital sentencer who was permitted to evaluate and give appropriate weight to it as a nonstatutory mitigating factor." *Id.* at 60a. The Ninth Circuit remanded to the federal district court "with instructions to grant the writ with respect to McKinney's sentence unless the state, within a reasonable period, either corrects the constitutional error in his death sentence or vacates the sentence and imposes a lesser sentence consistent with law." *Id.* at 68a. The State sought certiorari, and the Court denied the petition. *Ryan* v. *McKinney*, 137 S. Ct. 39 (2016).

3. Following the Ninth Circuit's decision, the State filed a motion in the Arizona Supreme Court for a new independent review of McKinney's death sentence. The State contended that the "only remedy to cure any error" in the Arizona Supreme Court's "independent review is to have" that court "conduct a new independent review of McKinney's death sentences and reconsider the proffered PTSD and other

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[2] The *Eddings* error identified by the Ninth Circuit in McKinney's habeas appeal affects at least 19 other capital cases in Arizona. *See* Pet. 24; *see also* Cert.-Stage Amicus Br. of Arizona Capital Representation Project and Arizona Attorneys for Criminal Justice 6-7.

mitigation he presented in the sentencing calculus." JA389. McKinney opposed the motion, arguing that he was entitled to resentencing by a jury under *Ring* and *Hurst*.

The Arizona Supreme Court granted the State's request for independent review. The court concluded that McKinney was not entitled to resentencing by a jury because his "case was 'final' before the decision in *Ring*." Pet. App. 3a-4a. The Arizona Supreme Court cited its earlier decision in *State* v. *Styers*, 254 P.3d 1132 (Ariz. 2011), which held that *Ring* did not apply on independent review where the defendant "had exhausted available appeals, his petition for certiorari had been denied, and the mandate had issued * * * before *Ring* was decided." *Id.* at 1133-34. The Arizona Supreme Court did not address *Hurst*. *See* Pet. App. 3a-4a.

The Arizona Supreme Court conducted an "independent review" of McKinney's death sentence to "correct[ ]" the *Eddings* error identified by the Ninth Circuit. *Id.* at 3a (internal quotation marks omitted). As part of that review, the court on its own weighed the mitigating and aggravating evidence in McKinney's case. *See id.* at 4a-9a. The court concluded that the evidence of McKinney's PTSD was entitled to little weight because "it bears little or no relation to his behavior during Mertens' murder." *Id.* at 5a. The court emphasized the psychologist's opinion that McKinney would "withdraw" from violent situations as a result of his PTSD. *Id.* at 5a-6a (internal quotation marks omitted). The court did not discuss the same psychologist's testimony that violent situations could trigger McKinney's PTSD. *See id.* After weighing the mitigating and aggravating evidence in

McKinney's case, the Arizona Supreme Court "affirm[ed]" McKinney's death sentence. *Id.* at 9a.

This Court granted certiorari.

SUMMARY OF ARGUMENT

I. This Court held in *Griffith* that current law applies to all cases, state or federal, pending on direct review or not yet final. *See Griffith*, 479 U.S. at 328. In the ordinary course, a case becomes final—and direct review ends—when the Court denies certiorari or the time to seek certiorari expires. *See id.* at 321 n.6. In *Jimenez*, however, the Court held that a state court may *reopen* direct review, rendering the defendant's conviction "again capable of modification through direct appeal to the state courts and to this Court on certiorari"—and thus non-final. 555 U.S. at 120.

By granting independent review of McKinney's death sentence, the Arizona Supreme Court reopened direct review. At that point, McKinney's death sentence was "again capable of modification" by the Arizona Supreme Court. Indeed, that was the very purpose of the proceedings below: The Arizona Supreme Court sought to correct the *Eddings* error in McKinney's sentence by reassessing the mitigating and aggravating evidence, including the evidence of McKinney's PTSD. *See* Pet. App. 4a-9a. Weighing mitigating and aggravating evidence to determine whether a death sentence is warranted is a fundamental and profoundly consequential part of a capital defendant's criminal case. *See Eddings*, 455 U.S. at 110. By agreeing to conduct this weighing, at the State's request, the Arizona Supreme Court necessarily reopened McKinney's criminal case.

As numerous state and federal courts have held, when a court exercises its discretion to correct a sentence or conduct a resentencing, current law applies. *See, e.g.*, *United States* v. *Hadden*, 475 F.3d 652, 664, 670-671 (4th Cir. 2007); *State* v. *Fleming*, 61 So. 3d 399, 407 (Fla. 2011); *State* v. *Kilgore*, 216 P.3d 393, 398 & n.10 (Wash. 2009). This conclusion flows from *Griffith*, which holds that "selective application of new rules violates the principle of treating similarly situated defendants the same." 479 U.S. at 323. Thus, when the Arizona Supreme Court weighed the mitigating and aggravating evidence in McKinney's case, it was required to apply the same constitutional framework as any other case on direct review. *See id.*

The Arizona Supreme Court failed to do so and thereby bypassed our Constitution's jury system. Instead of evaluating whether McKinney was entitled under current law to resentencing by a jury, the court held that under the law in effect when McKinney's sentence initially became final, the court itself could reweigh the mitigating and aggravating evidence in McKinney's case. *See* Pet. App. 3a-4a. In reaching that conclusion, the Arizona Supreme Court violated *Griffith*.

Under this Court's decisions in *Ring* and *Hurst*, moreover, it is clear that McKinney is entitled to resentencing by a jury. As the Court stated in *Hurst*, the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." 146 S. Ct. at 619. In Arizona, before the death penalty can be imposed, the sentencer must find that the mitigating evidence does not outweigh the aggravating evidence. In the proceedings below,

the Arizona Supreme Court *itself* made this finding. *See* Pet. App. 4a-9a. Because this finding was made by an appellate court rather than a jury, McKinney's death sentence is infected with error. Therefore, the Arizona Supreme Court's judgment should be reversed.

II. Even if the Arizona Supreme Court did not err by applying the Constitution as it was understood in 1996 when correcting McKinney's sentence, the court still erred by refusing to remand McKinney's case for resentencing in the trial court. The only remedy that this Court has recognized for *Eddings* error is resentencing in the trial court. Appellate reweighing of mitigating and aggravating evidence cannot cure the sentencer's failure to consider mitigating evidence in the first instance. The decision below violates this longstanding principle.

In McKinney's original sentencing proceeding, the judge refused as a matter of law to consider the mitigating evidence of McKinney's PTSD. *See* Pet. App. 189a-191a. The Arizona Supreme Court committed the same error on direct review. *See id.* at 161a. In the proceedings below, the Arizona Supreme Court considered the mitigating evidence of McKinney's PTSD, but it did so as an appellate court, not as a capital sentencer. As a result, *no sentencer* has ever considered the mitigating evidence of McKinney's PTSD.

That result is inconsistent with this Court's precedents. In *Mills* v. *Maryland*, 486 U.S. 367 (1988), the Court stated that where a "sentencer's failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence," it is the Court's "duty to remand [the] case for resentencing."

Id. at 375 (alterations and internal quotation marks omitted). And in *Hitchcock*, the Court remanded for a new sentencing hearing where a court—as here—permitted the defendant to introduce mitigating evidence but ultimately refused to consider that evidence, in violation of *Eddings*. *See Hitchcock*, 481 U.S. at 399.

The Arizona Supreme Court's decision to conduct an independent reweighing of the mitigating and aggravating evidence in McKinney's case is also inconsistent with this Court's decision in *Caldwell*, where the Court explained that appellate courts are "wholly ill-suited to evaluate the appropriateness of death in the first instance" and that *Eddings* "clearly envisioned" that the consideration of mitigating evidence "would occur among sentencers who were present to hear the evidence and arguments and see the witnesses." *Caldwell*, 472 U.S. at 330-331. Appellate review of a 20-year-old cold record is simply insufficient to provide the consideration of mitigating evidence that *Eddings* requires.

The record in this case, moreover, is irrevocably tainted by the *Eddings* error. In McKinney's original sentencing proceeding, prosecution and defense alike elicited testimony from the psychologist to determine whether McKinney's PTSD was causally connected to his crimes—as required by Arizona law at the time. A new sentencing proceeding is required to elicit testimony regarding McKinney's PTSD that is not tainted by that error. *See Madison* v. *Alabama*, 139 S. Ct. 718, 731 (2019) (holding that state courts "may not rely on any arguments or evidence tainted" by legal error when determining whether a death sentence is warranted). Moreover, the scientific under-

standing of PTSD has evolved significantly since McKinney's sentencing more than two decades ago. The Arizona Supreme Court's continuing reliance on outdated expert testimony is incongruous with *Eddings*' direction that courts must consider all relevant mitigating evidence. For these reasons too, the *Eddings* error in this case requires resentencing in the trial court. This Court should reverse.

ARGUMENT

I. THE ARIZONA SUPREME COURT WAS REQUIRED TO APPLY CURRENT LAW WHEN WEIGHING THE MITIGATING AND AGGRAVATING EVIDENCE IN MCKINNEY'S CASE.

There are three straightforward steps to McKinney's argument. *First*, Article III and the Supremacy Clause require current law to apply to all cases, state or federal, pending on direct review or not yet final. *See Griffith*, 479 U.S. at 322, 328. *Second*, McKinney's conviction, although previously final, was reopened. His conviction became final in 1996, when the time expired to seek certiorari from the Arizona Supreme Court's first review of his sentence. But his conviction did not remain so. Following the Ninth Circuit's grant of habeas corpus relief, the State sought and obtained a fresh review of McKinney's sentence by the Arizona Supreme Court. By granting a new review—which included a *de novo* weighing of the mitigating and aggravating evidence in McKinney's case to determine whether a death sentence is warranted—the Arizona Supreme Court reopened direct review of McKinney's criminal case. *Third*, because McKinney's case is on direct review, the Arizona Supreme Court was required to apply

current law, including *Ring* and *Hurst*. The Arizona Supreme Court refused to do so, and its decision should be reversed.

A. Current Law Applies To All Cases Pending On Direct Review.

New rules for the conduct of criminal prosecutions apply "to all cases, state or federal, pending on direct review or not yet final." *Griffith*, 479 U.S. at 328. This basic principle derives from Article III and the Supremacy Clause of the Constitution. As Justice Harlan explained in his separate opinion in *Mackey* v. *United States*, 401 U.S. 667 (1971), the Court "possess[es] this awesome power of judicial review * * * only because we are a court of law, an appellate court charged with the responsibility of adjudicating cases or controversies according to the law of the land." *Id.* at 678 (Harlan, J., concurring in the judgments in Nos. 36 and 82 and dissenting in No. 81). The nature of judicial review precludes the Court from "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule." *Id.* at 679.

The Court adopted Justice Harlan's view in *Griffith*, where it held that the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." 479 U.S. at 322. Once the Court announces a new rule in the case before it, "the integrity of judicial review requires" that the Court "apply that rule to all similar cases pending on direct review." *Id.* at 323. This approach avoids "the actual inequity that results when the Court chooses

which of many similarly situated defendants should be the chance beneficiary of a new rule." *Id.* (emphasis and internal quotation marks omitted).

"As a practical matter, of course," the Court "cannot hear each case pending on direct review and apply the new rule." *Id.* Instead, the Court fulfills its "judicial responsibility by instructing the lower courts to apply the new rule" to all cases that are "not yet final." *Id.* State courts, as well as federal courts, are obligated to apply new constitutional rules to cases pending on direct review. *See id.* at 328. Simply put, "[s]tates may not disregard a controlling, constitutional command in their own courts." *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 727 (2016) (citing *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340-341, 344 (1816)). Where a state court "has considered the merits of the federal claim, it has a duty to grant the relief that federal law requires." *Yates* v. *Aiken*, 484 U.S. 211, 218 (1988).

The Arizona Supreme Court has acknowledged that all new federal "rules or principles announced for the conduct of criminal cases" must be applied "to cases not yet final in the state and federal court systems." *State* v. *Slemmer*, 823 P.2d 41, 47 (Ariz. 1991). Moreover, the Arizona Supreme Court has adopted the same approach with respect to new rules of state constitutional law, which similarly apply to all Arizona cases pending on direct review or not yet final. *See id.* at 47, 49.

B. The Arizona Supreme Court Reopened Direct Review Of McKinney's Criminal Case, Requiring It To Apply Current Law.

1. It is clear that current law applies to cases on direct review. At issue in this case is whether

McKinney's case is on direct review. Direct review ends—and a conviction becomes "final"—"when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or, if a petitioner does not seek certiorari, when the time for filing a certiorari petition expires." *Gonzalez* v. *Thaler*, 565 U.S. 134, 149 (2012) (internal quotation marks omitted); *see also Griffith*, 479 U.S. at 321 n.6. But a conviction that has become final does not always remain final.

In *Jimenez*, the Court held that after a conviction "initially [becomes] final," a state court may *reopen* direct review, rendering the conviction non-final. 555 U.S. at 119-120. Once reopened, a conviction does not become final again until "the entirety of the state direct appellate review process [is] completed" and the "time for seeking certiorari review in this Court expire[s]." *Id.* at 120-121. In *Jimenez*, the Court found that the defendant's conviction became final in 1996, when direct review concluded. *Id.* at 119. In 2002, however, the state court reopened direct review by permitting the defendant to file an out-of-time appeal, and the defendant's conviction became "again capable of modification through direct appeal to the state courts and to this Court on certiorari review." *Id.* at 119-120. The defendant's conviction remained non-final until 2004, when direct review once again concluded. *See id.* at 120.

The same analysis applies in this case. McKinney's conviction became final in 1996, when the time expired to seek certiorari from the Arizona Supreme Court's first review of his conviction. In 2015, however, the Ninth Circuit determined that McKinney's death sentence was unconstitutional under *Eddings*

because both the sentencing judge and the Arizona Supreme Court on *de novo* review had refused as a matter of law to consider nonstatutory mitigating evidence of McKinney's PTSD. *See* Pet. App. 50a-55a. The Ninth Circuit issued a conditional writ of habeas corpus, instructing the federal district court "to grant the writ with respect to McKinney's sentence unless the state, within a reasonable period, either corrects the constitutional error in his death sentence or vacates the sentence and imposes a lesser sentence consistent with law." *Id.* at 68a.

The State thus had a choice: It could reduce McKinney's sentence to life in prison or it could "correct the constitutional error in his death sentence." *Id.* The State sought to correct the error, requesting that the Arizona Supreme Court "conduct a new independent review of James McKinney's death sentence and reweigh the aggravating and mitigating factors." JA385. The Arizona Supreme Court granted the State's request. At that point, McKinney's conviction was "again capable of modification through direct appeal to the state courts and to this Court on certiorari review." *Jimenez*, 555 U.S. at 120.

Indeed, as in *Jimenez*, the very purpose of the independent review proceeding below was to re-do the original direct review proceeding—this time with proper consideration of all the mitigating and aggravating evidence in McKinney's case, as required by *Eddings*. The Arizona Supreme Court's decision to affirm McKinney's death sentence following independent review, moreover, is appealable to this Court on certiorari. By granting independent review, the Arizona Supreme Court thus reopened

McKinney's criminal case, and McKinney's conviction became non-final under *Jimenez*. Because direct review has not concluded before this Court, McKinney's conviction remains non-final.[3]

2. This conclusion is consistent with the position of numerous state and federal courts, which hold that direct review is reopened—and current law applies—when a court exercises discretion to correct a defendant's sentence or conduct a resentencing. As the Fourth Circuit explained in *Hadden*, when a court "correct[s]" a criminal defendant's sentence, "the order is part of the prisoner's criminal case, and, accordingly, a prisoner's appeal of that aspect of the order is part of the petitioner's criminal case." 475 F.3d at 664. Current law thus applies to the sentence correction. *See id.* at 666, 670 (applying *United States* v. *Booker*, 543 U.S. 220 (2005), in a case that

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[3] Whether McKinney's conviction is final, or has instead been reopened, is a matter of federal law. *See Gonzalez*, 565 U.S. at 152 (rejecting "state-by-state definitions of the conclusion of direct review"). It is notable, however, that the Arizona Supreme Court treated the proceedings below as a continuation of direct review. The court used the same docket number and docket as McKinney's original direct review proceeding. *See* JA1. On that docket, the court stated that McKinney's case was "[c]losed" on July 2, 1996, and "[r]einstated" on October 7, 2016. *Id.* The court referred to McKinney as the "Appellant" and the State as the "Appellee." *Id.* The court ordered McKinney to file an opening brief and the State to file an answering brief. *Id*. at 6-8 (Dkt. 79). And following its decision, the court automatically stayed its mandate under Arizona Rule of Criminal Procedure 31.22(c) until the time expired for filing a petition to this Court "challenging the decision affirming the defendant's conviction or sentence *on direct appeal*." Ariz. R. Crim. P. 31.22(c)(1)(A) (emphasis added); *see* JA10 (Dkt. 111).

became final prior to *Booker* but was later reopened through sentence correction proceedings).

The Washington Supreme Court reached a similar conclusion in *Kilgore*, which acknowledged "the ability of state courts to restore the pendency of a case" under *Jimenez*. *Kilgore*, 216 P.3d at 398 & n.10. Where a court exercises its discretion "to revisit an issue," the court subjects its decision to "a later appeal"—requiring it to apply current law. *Id.* at 398 (examining whether *Blakely* v. *Washington*, 542 U.S. 296 (2004), applied to a case that became final prior to the *Blakely* decision). The Florida Supreme Court likewise has held that under *Griffith*, where a court acts "*de novo*" in a resentencing proceeding, "the decisional law in effect at the time of the resentencing or before any direct appeal from the proceeding is final applies." *Fleming*, 61 So. 3d at 407. That is because the "court has discretion at resentencing—within certain constitutional confines—to impose sentence using available factors not previously considered." *Id.* at 406.

In this case, the purpose of the independent review proceedings was to "correct" McKinney's sentence through a do-over of the original, flawed direct review proceeding. *See* Pet. App. 4a. The question the Arizona Supreme Court ordered the parties to brief was the *exact* question it confronted on its first direct review. *Compare* JA6-8 (Dkt. 79) (ordering parties to brief "[w]hether the proffered mitigation is sufficiently substantial to warrant leniency in light of the existing aggravation"), *with* Pet. App. 138a (stating that the Arizona Supreme Court is to "conduct[ ] a thorough and independent review of the record and of the aggravating and mitigating evi-

dence to determine whether the sentence is justified"). And the Arizona Supreme Court performed the same review a second time. The court exercised its discretion—at the State's request—to examine the mitigating circumstances and weigh them against the aggravating circumstances, ultimately concluding that "[g]iven the aggravating circumstances in this case," McKinney's "mitigating evidence is not sufficiently substantial to warrant leniency." Pet. App. 5a.

By redoing a fundamental aspect of McKinney's capital sentencing, the Arizona Supreme Court reopened direct review. This Court has made clear that sentencing determinations are "part of the criminal case," including in capital cases. *Mitchell* v. *United States*, 526 U.S. 314, 328-329 (1999); *see Estelle* v. *Smith*, 451 U.S. 454, 462-463 (1981) (rejecting the argument in a death penalty case that "incrimination is complete once guilt has been adjudicated" (internal quotation marks omitted)). Indeed, there is *no* final judgment in a criminal proceeding until the defendant has been sentenced. *See Burton* v. *Stewart*, 549 U.S. 147, 156-157 (2007) (per curiam) ("Final judgment in a criminal case means sentence. The sentence is the judgment." (quoting *Berman* v. *United States*, 302 U.S. 211, 212 (1937))). As this Court stated in *Mitchell*, to "maintain that sentencing proceedings are not part of any criminal case is contrary to the law and to common sense." 526 U.S. at 327 (internal quotation marks omitted).

Consideration of relevant mitigating circumstances is an integral part of the capital sentencing process. *See Eddings*, 455 U.S. at 114-115. In the proceedings below, the Arizona Supreme Court granted

independent review so that it could consider *for the first time* mitigating evidence of McKinney's PTSD, and so that it could weigh all of the mitigating and aggravating evidence in McKinney's case to determine whether a death sentence is warranted. That exercise of discretion is part of McKinney's criminal case.

In *Burrell* v. *United States*, 467 F.3d 160 (2d Cir. 2006) (Sotomayor, J.), the Second Circuit explained that where a sentence correction is "strictly ministerial" and requires "a routine, nondiscretionary act" that "could not [be] appealed on any valid ground," direct review remains closed. *Id.* at 161. The Washington Supreme Court has likewise held that direct review is not reopened where a court "did not exercise its independent judgment," leaving nothing for review on appeal. *Kilgore*, 216 P.3d at 399. Determining whether a defendant's crime and character warrant a death sentence, however, is not a ministerial exercise. It is one of the most fundamental and consequential exercises of discretion in our entire judicial system. By granting independent review of McKinney's death sentence to correct the *Eddings* error—which required a *de novo* weighing of the mitigating and aggravating evidence to determine the appropriate sentence—the Arizona Supreme Court reopened McKinney's criminal case, requiring it to apply current law.

3. The approach adopted by the Arizona Supreme Court in this case fundamentally undermines the rule of law. If the Arizona Supreme Court is correct that the law governing McKinney's case is frozen at the moment his conviction first became final—no matter what happens afterward—then courts may

ignore new constitutional rules established by this Court when re-doing core aspects of a defendant's criminal case.

For example, jurors empaneled post-*Batson* to resentence a pre-*Batson* defendant could be struck on account of their race. *Cf. Batson* v. *Kentucky*, 476 U.S. 79, 89 (1986) (holding that a prosecutor could not strike jurors on the basis of race). A pre-*Simmons* capital defendant at a post-*Simmons* resentencing could be prohibited from informing the jury of his parole ineligibility if the State seeks the death penalty based on his future dangerousness. *Cf. Simmons* v. *South Carolina*, 512 U.S. 154, 171 (1994) (plurality op.) (holding that a capital defendant must be permitted to inform the jury of his ineligibility for parole); *see id.* at 177 (O'Connor, J., concurring in the judgment). And a post-*Mills* sentencing jury empaneled to resentence a pre-*Mills* defendant could ignore mitigation factors that were not found unanimously by the jury. *Cf. Mills*, 486 U.S. at 374-375, 384 (holding that state may not require jury unanimity with respect to mitigating evidence).

That cannot be the way the Constitution works. As the Court held in *Griffith*, "selective application of new rules violates the principle of treating similarly situated defendants the same." 479 U.S. at 323. In the proceedings below, the Arizona Supreme Court was not simply reviewing the decision of another court. It was instead weighing, for the first time, all of the mitigating and aggravating evidence in McKinney's case to determine whether a death sentence is warranted. That is the opposite of letting a final decision remain final. When conducting this

weighing, the Arizona Supreme Court was required to comply with the Constitution as it is understood today, not as it was understood 20 years ago.

New rules "for the conduct of criminal prosecutions" are "to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Id.* at 328. McKinney's case is once again on direct review. He is accordingly entitled to the benefit of new rules governing the conduct of the criminal prosecution again him.[4] In the decision below, the Arizona Supreme Court explicitly refused to apply current decisional law to McKinney's case. It instead held that because McKinney's conviction remained "final," new law did not apply. Pet. App. 3a-4a (internal quotation marks omitted). That is error.

C. Under Current Law, McKinney Is Entitled To Resentencing By A Jury.

In *Ring*, the Court announced a new rule of criminal procedure: The Sixth Amendment requires that "the specific findings authorizing the imposition of the sentence of death be made by the jury." 536 U.S. at 598, 609 (internal quotation marks omitted); *see Schriro* v. *Summerlin*, 542 U.S. 348, 353-354 (2004) (*Ring* requires "a jury rather than a judge find the essential facts bearing on punishment."). "If a State makes an increase in a defendant's authorized

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[4] Because McKinney's case is on direct review, he is entitled to the benefit of new rules of federal law announced in other cases, and he is entitled to seek a new rule of law in his case. He is also entitled to the benefit of new rules of state constitutional law. *See Slemmer*, 823 P.2d at 49.

punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602.

In *Hurst*, the Court reaffirmed its ruling in *Ring*, holding that Florida's death penalty scheme, which "does not require the jury to make the critical findings necessary to impose the death penalty," was inconsistent with the Sixth Amendment. 136 S. Ct. at 622. Instead, the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Id.* at 619; *see also United States* v. *Haymond*, 139 S. Ct. 2369, 2377 (2019) (plurality op.) (reiterating that *Ring* prohibits "imposition of [the] death penalty based on judicial factfinding"). As Justice Gorsuch explained in *Haymond*, the failure to have the jury make the findings necessary to increase a defendant's sentence not only "infringe[s] the rights of the accused; it also divest[s] the people at large * * * of their constitutional authority to set the metes and bounds of judicially administered criminal punishments." *Id.* at 2378-79 (internal quotation marks omitted).

Under Arizona's capital sentencing scheme, the death penalty cannot be imposed without a finding that the mitigating evidence does not outweigh the aggravating evidence. *See State* v. *Ring*, 65 P.3d 915, 943 (Ariz. 2003). The first step in the weighing process is to make findings regarding the existence of mitigating and aggravating circumstances. *See State* v. *Hedlund*, 431 P.3d 181, 184 (Ariz. 2018) (jurors must weigh the quality and significance of mitigating evidence they have found to exist), *petition for cert. filed*, No. 19-5247 (July 18, 2019). Here, it was the

sentencing judge—not the jury—that made findings related to the mitigating and aggravating evidence. *See* Pet. App. 178a-184a, 187a-192a (finding aggravating and mitigating circumstances). For that reason alone, *Ring* and *Hurst* dictate that McKinney is entitled to resentencing by a jury. *See Murdaugh* v. *Ryan*, 724 F.3d 1104, 1115 (9th Cir. 2013) (concluding that "the existence or absence of a mitigating circumstance" is "a finding of fact upon which the increase of the defendant's authorized punishment [is] contingent" (internal quotation marks and alteration omitted)).

The Arizona Supreme Court further erred, moreover, by *weighing* the mitigating and aggravating evidence in McKinney's case, rather than remanding so that a jury could conduct this weighing. In *Hurst*, the Court examined Florida's capital sentencing scheme, which—like Arizona's capital sentencing scheme—permitted a judge to find that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." 136 S. Ct. at 622 (internal quotation marks omitted). The Court described this inquiry as a finding of "fact[ ]" that is necessary to make the defendant eligible for the death penalty. *Id.* (internal quotation marks omitted).

The Arizona statute at issue in this case similarly instructs the Arizona Supreme Court to affirm a death sentence if it "finds that the mitigation is not sufficiently substantial to warrant leniency." Ariz. Rev. Stat. Ann. § 13-755(B).[5] This finding of fact is

[5] Following the Court's decision in *Ring*, the Arizona legislature ended the Arizona Supreme Court's independent review of

an essential prerequisite for the imposition of a death sentence, and it therefore must be made by a jury under *Ring* and *Hurst*. *See Murdaugh*, 724 F.3d at 1115 (describing determination under Arizona law that "there are no mitigating circumstances sufficiently substantial to call for leniency" as a finding of fact that must be made by the jury).[6] The Arizona Supreme Court violated that basic constitutional requirement in McKinney's case. It is no excuse that *Ring* and *Hurst* had yet to be decided the *first* time that the Arizona Supreme Court weighed the aggravating and mitigating evidence in McKinney's case. As the Court made clear in *Magwood* v. *Patterson*, 561 U.S. 320 (2010), an "error made a second time is

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capital sentences for murders committed after August 1, 2002. *State* v. *Martinez*, 189 P.3d 348, 361 (Ariz. 2008). Instead, a jury must determine whether the death penalty is warranted, and the Arizona Supreme Court reviews the jury's decision for an abuse of discretion. *See* Ariz. Rev. Stat. Ann. § 13-756. Section 13-755 continues to apply to convictions for murders committed before August 1, 2002. *See State* v. *Prince*, 250 P.3d 1145, 1168 (Ariz. 2011).

[6] The Arizona Supreme Court has concluded that *Ring* does not apply to the weighing of mitigating and aggravating evidence because that is a "sentencing decision" rather than a "fact question." *Hedlund*, 431 P.3d at 184 (internal quotation marks omitted). As this Court explained in *Ring*, however, the relevant question is not "how the State labels" a particular determination, but whether the "State makes an increase in a defendant's authorized punishment contingent on the finding of a fact." 536 U.S. at 602. Here, the State requires a finding that the mitigating evidence does not outweigh the aggravating evidence in order to impose the death penalty. That is a factual determination for the jury.

still a new error." *Id.* at 339. The decision below should be reversed.[7]

II. CORRECTION OF *EDDINGS* ERROR REQUIRES RESENTENCING IN THE TRIAL COURT.

Regardless of whether old or new law applies to the correction of the *Eddings* error in McKinney's sentence, the Arizona Supreme Court erred by refusing to remand McKinney's case for resentencing in the trial court. This Court has long recognized that when a sentencer fails to consider all relevant mitigating evidence, as required by *Eddings*, the remedy is resentencing in the trial court. The Arizona Supreme Court disregarded that precedent, requiring reversal of the decision below.

A. The Arizona Courts' Failure To Consider Mitigating Evidence Of McKinney's PTSD Violated *Eddings*.

For over three decades, *Eddings* has required the consideration of all relevant mitigating evidence before the death penalty can be imposed. *Eddings* has its roots in two plurality decisions of this Court. In *Woodson* v. *North Carolina*, 428 U.S. 280 (1976), a plurality of the Court held that the "respect for

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[7] The error is not harmless, and the State did not assert otherwise in its brief in opposition. *See* Sup. Ct. R. 15.2 (issues not raised in brief in opposition are waived); *see also* Pet. at 23 n.4; Opp. Br. at 5-7. As the Ninth Circuit held, "McKinney's evidence of PTSD resulting from sustained, severe childhood abuse would have had a substantial impact on a capital sentencer who was permitted to evaluate and give appropriate weight to it as a nonstatutory mitigating factor." Pet. App. 60a.

humanity underlying the Eighth Amendment" requires "consideration of the character and record of the individual offender" as a "constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* at 304 (plurality op.). A plurality of the Court reiterated that conclusion in *Lockett* v. *Ohio*, 438 U.S. 586 (1978), explaining 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." *Id.* at 604 (plurality op.) (footnote and emphasis omitted).

In *Eddings*, the Court adopted the reasoning of the *Woodson* and *Lockett* pluralities, concluding that a capital sentencer may not "refuse to consider, *as a matter of law*, any relevant mitigating evidence." 455 U.S. at 114. Applying that rule to the case before it, the Court reversed a state court decision that had refused under state law to consider mitigating evidence of the defendant's "troubled youth" and resulting "emotional disturbance." *Id.* at 107-109. The Court explained that "the rule in *Lockett* is the product of a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." *Id.* at 110.

In determining McKinney's sentence during his initial trial and direct review proceedings, both the trial court and the Arizona Supreme Court refused as a matter of law to consider mitigating evidence of McKinney's PTSD. In doing so, they violated *Eddings*. The trial judge in McKinney's case accepted

his PTSD diagnosis, but considered only whether McKinney's PTSD "affected" or "impaired" his conduct in committing the crimes at issue. *See* Pet. App. 187a-191a. Concluding that McKinney's PTSD did not affect his conduct, the sentencing judge weighed only "what he concluded were legally relevant aggravating and mitigating circumstances," *id.* at 29a, in clear violation of *Eddings*. The Arizona Supreme Court committed the same error on appeal: It too refused, as a matter of law, to consider the mitigating evidence of McKinney's PTSD. *See id.* at 161a-162a. That is why the Ninth Circuit, sitting en banc, found *Eddings* error. Because of these failings, no sentencer has *ever* considered the totality of McKinney's mitigating evidence in deciding whether to sentence him to death.

The State's reaction to the Ninth Circuit's decision compounded the problem instead of resolving it. At the State's request, the Arizona Supreme Court attempted to cure the *Eddings* error by conducting a new independent review of McKinney's death sentence. *See id.* at 3a-4a. But in Arizona, "sentencing authority in all criminal cases, and especially capital cases," is placed "with the trial judge." *State* v. *Bible*, 858 P.2d 1152, 1211 (Ariz. 1993) (describing Arizona's sentencing scheme in effect at that time). The Arizona Supreme Court conducts its independent review of capital cases "as an appellate court, not as a trial court." *State* v. *Rumsey*, 665 P.2d 48, 55 (Ariz. 1983), *aff'd*, *Arizona* v. *Rumsey*, 467 U.S. 203, 210 (1984) (noting that the Arizona Supreme Court has described its role as "strictly that of an appellate court, not a trial court").

As set forth below, even under the law in effect at the time McKinney's conviction first became final, appellate review is insufficient to correct *Eddings* errors. Because the Arizona Supreme Court is an appellate court, it was unable to cure the *Eddings* error in this case. It was instead required to remand McKinney's case for resentencing in the trial court. It did not do so, and its decision should be reversed.

B. This Court Has Long Held That *Eddings* Error Requires Resentencing In The Trial Court.

This Court decided *Eddings* in 1982. In the years following its decision in *Eddings*—and well before McKinney's conviction first became final—the Court identified *Eddings* errors in a number of capital cases. The Court repeatedly held that the proper remedy for those *Eddings* errors was a new sentencing proceeding in the trial court. The Arizona Supreme Court erred by failing to follow those straightforward precedents.[8]

In *Skipper* v. *South Carolina*, 476 U.S. 1 (1986), for example, the Court determined that the trial court's exclusion of evidence of the defendant's good behavior while awaiting trial had violated *Eddings*. *See id.* at 4. The Court accordingly vacated the defendant's death sentence, permitting the State to seek to impose the death penalty again, "provided that it

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[8] Regardless of whether the Court looks to the law prior to 1996—when McKinney's conviction initially became final—or to current law to determine the remedy for the *Eddings* error in this case, it is clear that the only appropriate remedy is resentencing in the trial court. This Court's precedents establishing this remedy long predate McKinney's original conviction.

does so *through a new sentencing hearing* at which petitioner is permitted to present any and all relevant mitigating evidence." *Id.* at 8 (emphasis added).

In *Penry* v. *Lynaugh*, 492 U.S. 302 (1989), *abrogated on other grounds by Atkins* v. *Virginia*, 536 U.S. 304 (2002), the Court found an *Eddings* violation based on "the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of [the defendant's] mental retardation and abused background." *Id.* at 328. To correct this error, the Court held that its "reasoning in *Lockett* and *Eddings* thus *compels a remand for resentencing* so that we do not risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.* (emphasis added and internal quotation marks omitted).

In *Mills*, Maryland's sentencing scheme permitted "a single juror's holdout vote" to prevent consideration of mitigating evidence. 486 U.S. at 375. Concluding that this scheme violated *Eddings*, the Court held that only one remedy was appropriate: "Because the sentencer's failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence," the Court held, "it is *our duty* to remand this case for resentencing." *Id.* (emphasis added and brackets omitted) (quoting *Eddings*, 455 U.S. at 117 n.* (O'Connor, J., concurring)); *see also McKoy* v. *North Carolina*, 494 U.S. 433, 435, 442-443 (1990) (reiterating that under *Mills*, resentencing is required).

In *Hitchcock*, moreover, the Court evaluated a case strikingly similar to this one: There, at sentencing, the judge permitted the introduction of mitigating evidence of the defendant's "family background and

his capacity for rehabilitation." 481 U.S. at 397-398. The judge, however, interpreted Florida law to prohibit consideration of mitigating circumstances not specifically enumerated in the relevant state statute. The judge thus instructed the jury not to consider this mitigating evidence, and the judge himself refused to consider it in sentencing the defendant to death. *Id.* at 398-399.

On review, the Court unanimously held that the exclusion as a matter of law of "mitigating evidence of the sort at issue here renders the death sentence invalid." *Id.* at 399. In fashioning a remedy, the Court did not suggest that the error could be corrected through an appellate proceeding. It instead instructed that if the State sought to again impose the death penalty, it could do so only "through a *new sentencing hearing* at which petitioner is permitted to present any and all relevant mitigating evidence that is available." *Id.* (emphasis added and internal quotation marks omitted).

This Court's precedent is clear: Where a court commits *Eddings* error, the remedy is resentencing in the trial court. As the Court explained in *Penry*, "it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." 492 U.S. at 319. That has never occurred in McKinney's case. McKinney therefore is entitled to resentencing

in the trial court to correct the *Eddings* error in his death sentence.[9]

C. This Court Has Made Clear That Only A Trial-Level Sentencer Can Provide The Consideration *Eddings* Requires.

In addition to repeatedly holding that correction of *Eddings* error requires resentencing in the trial court, the Court has explained why this is so: In *Caldwell*, the Court concluded that a capital sentencer must have the opportunity to see and hear the evidence and arguments firsthand in order to determine whether a death sentence is warranted. *See* 472 U.S. at 330-331. The Arizona Supreme Court violated that precedent by failing to remand McKinney's case for resentencing.

In *Caldwell*, comments made by the prosecutor during sentencing encouraged the jury to believe that the appellate court—rather than the jury—had ultimate responsibility for determining the appropriateness of a death sentence. *See id.* at 323. The Court concluded that in light of those comments, the risk of an erroneously imposed death sentence was

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[9] It is McKinney's position that under Arizona law, if he is resentenced in the trial court, he is entitled to resentencing by a jury. *See Styers*, 254 P.3d at 1137 (Hurwitz, V.C.J., dissenting) (noting State's concession that *Ring* applies in resentencing proceedings); *see also* Ariz. Rev. Stat. Ann. § 13-752(O) ("In any case that requires sentencing or resentencing in which the defendant has been convicted of an offense that is punishable by death and in which the trier of fact was a judge or a jury that has since been discharged, the defendant shall be sentenced or resentenced pursuant to this section by a jury that is specifically impaneled for this purpose.").

simply too great to comport with the Eighth Amendment. *See id.* at 341.

In reaching this result, the Court relied on its decision in *Eddings*. Under *Eddings*, the Court explained, a capital defendant has the constitutional right to consideration of mitigating evidence. *Id.* at 330-331. And in *Eddings*, the Court "clearly envisioned" that consideration of this mitigating evidence "would occur among sentencers who were present to hear the evidence and arguments and see the witnesses," rather than by an appellate court. *Id.* Permitting appellate sentencing without prior consideration of mitigating evidence in the trial court, the Court stated, would "deprive" the defendant of his "right to a fair determination of the appropriateness of his death." *Id.* at 330. That is because an "appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance." *Id.*

The "inability to confront and examine the individuality of the defendant," the Court continued, is "*particularly devastating*" where the defendant presents nonstatutory mitigating evidence. *Id.* (emphasis added). Moreover, "[w]hatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record." *Id.* After all, the "mercy plea is made directly to the" sentencer, and there "is no appellate mercy." *Id.* at 331 (alterations and internal quotation marks omitted); *cf. Penry*, 492 U.S. at 328 (explaining that "full consideration of evidence that mitigates against the death penalty" allows the sentencer "to give a reasoned *moral* response to the defendant's background,

character, and crime" (internal quotation marks omitted)).

Caldwell makes clear that the Arizona Supreme Court's appellate review of McKinney's constitutionally deficient sentencing hearing did not satisfy *Eddings*. The Arizona Supreme Court is not equipped to evaluate and weigh mitigating evidence in the first instance: It cannot assess the "intangibles" of the testimony from McKinney's sister and aunt; it cannot take evidence to understand the import of McKinney's PTSD diagnosis beyond its causal relationship to the crimes at issue; and McKinney can hardly make a plea for mercy on a cold record more than 20 years after the sentencing proceeding occurred. As Justice Thomas explained in his concurrence in *Glossip* v. *Gross*, 135 S. Ct. 2726 (2015), "the choice between life and death" is "left to the jurors and judges who sit through the trial" because they "have an opportunity to assess the credibility of the witnesses, to see the remorse of the defendant, [and] to feel the impact of the crime on the victim's family." *Id.* at 2751 (Thomas, J., concurring). To correct the *Eddings* error in this case, the Arizona Supreme Court was required to remand McKinney's case to the trial court for resentencing.

D. *Cabana* And *Clemons* Do Not Apply To Mitigating Evidence.

Prior to *Ring*, appellate courts were permitted to make certain factual findings in death penalty cases. In *Cabana* v. *Bullock*, 474 U.S. 376 (1986), the Court held that an appellate court could determine whether the defendant "in fact killed, attempted to kill, or intended that a killing take place," as required by

Enmund v. *Florida*, 458 U.S. 782, 797 (1982). *See Cabana*, 474 U.S. at 386. And in *Clemons* v. *Mississippi*, 494 U.S. 738 (1990), the Court held that an appellate court may reweigh the evidence where a death sentence was imposed in part based on an invalid or improperly defined aggravating circumstance. *See id.* at 741.

Neither *Cabana* nor *Clemons* governs the outcome here. *Cabana* applies only to the determination that a defendant in fact killed, attempted to kill, or intended to kill the victim—a single, threshold determination whether a defendant falls within the class of individuals eligible for the death penalty. *See* 474 U.S. at 386 (explaining that this determination is "different in a significant respect" from "the general exercise of sentencing discretion"). It does not apply to the consideration of mitigating and aggravating evidence in a death penalty case.

Clemons likewise does not apply to the consideration of mitigating evidence. Erroneously *including* an invalid aggravating circumstance is fundamentally different from erroneously *excluding* a relevant mitigating circumstance. In the first instance, the appellate court is asked to subtract something from the record; in the second, the court must weigh information never considered at all.

As the Court recognized in *Clemons*—citing *Caldwell*—"appellate courts may face certain difficulties in determining sentencing questions in the first instance." 494 U.S. at 754. Those difficulties are present, as *Caldwell* explains, where an appellate court attempts to evaluate mitigating evidence that has not been considered previously in the trial court. *See* 472 U.S. at 330-331. In McKinney's case, no

sentencer has ever weighed the mitigating evidence of McKinney's PTSD, along with his other mitigating evidence, against the aggravating evidence in his case. The Arizona Supreme Court cannot fulfill that role. Under this Court's longstanding precedent, McKinney is entitled to present that evidence, through live testimony, in the trial court.

More fundamentally, both *Cabana* and *Clemons* rely on the conclusion that a jury need not "make the findings prerequisite to imposition" of a death sentence. *Clemons*, 494 U.S. at 745; *see also Cabana*, 474 U.S. at 385-386. That logic has since been rejected in *Ring* and *Hurst*. *Compare Hurst*, 136 S. Ct. at 623 (overruling *Spaziano* v. *Florida*, 468 U.S. 447 (1984)), *with Clemons*, 494 U.S. at 746 (relying on *Spaziano* for the proposition that a jury is not necessary to impose the death penalty). Regardless of whether the Court is operating under old law or new, it should not extend the flawed reasoning of *Cabana* and *Clemons* to this case, which is not governed by either of those decisions.

E. The Record Is Insufficient To Permit Individualized Consideration Of The Mitigating Evidence In McKinney's Case.

Even if appellate courts could consider previously excluded mitigating evidence in some death penalty cases, the Arizona Supreme Court was required to remand for a new sentencing hearing in McKinney's case. Both the trial court and the Arizona Supreme Court on review applied an unconstitutional "causal nexus" test, which limited consideration of the mitigating evidence in McKinney's case to evidence determined to be causally connected to his crimes. The record evidence with respect to McKinney's

PTSD—including the psychologist's testimony—is infected by that legal error. And even if that were not a problem, the PTSD evidence in this case is over two decades old, does not comport with current scientific understanding, and cannot support the imposition of a death sentence.

1. This past Term, the Court recognized that state courts "may not rely on any arguments or evidence tainted" by legal error when reassessing whether a defendant may be executed. *Madison*, 139 S. Ct. at 731. Where "evidence in [the] record," including expert reports and testimony, "expressly reflects an incorrect view" of the law or "might have implicitly rested on those same misjudgments," additional factfinding is required. *Id.*

In this case, there is a meaningful risk that the evidentiary choices by defense counsel, the State, and the sentencing judge were influenced by the unconstitutional causal nexus test applied by the Arizona courts. Arizona courts applied this test for over 15 years, including during the period in which McKinney was sentenced. *See* Pet. App. 37a-47a. Accordingly, defense counsel and prosecutors at McKinney's sentencing hearing structured their presentation of evidence to address this test.

Defense counsel, for example, elicited testimony from the psychologist who diagnosed McKinney with PTSD to determine whether there was a relationship between McKinney's PTSD and the crimes at issue. *See, e.g.*, JA124-126, 129-130. Indeed, the psychologist went so far as to speculate that a physical altercation involving Mertens would have triggered McKinney's PTSD by reminding him of his stepmother. *Id*. at 121-125. And once his PTSD was

triggered, the psychologist repeatedly emphasized, McKinney would act in a "poorly-judged" way. *Id*. at 121-122; *see also id*. at 110-111. Prosecutors in turn argued that the "key question" for the judge was how McKinney's PTSD "affect[ed] him at the time of these two murders[.]" *Id*. at 286. And the court itself elicited testimony from the psychologist to explore the relationship between McKinney's crimes and his PTSD. *See id*. at 256 ("Q. So the possible fighting commotion triggered then the impulsive or unthinking response to the, the acts or the actions that were going on? A. Yes."). The record of McKinney's original sentencing proceeding is tainted by this focus on the causal relationship between McKinney's PTSD and the murders.

In the proceedings below, the Arizona Supreme Court explicitly relied on the psychologist's testimony that McKinney's PTSD would cause him to "withdraw from a situation in which he might encounter violence" when evaluating whether a death sentence was warranted. Pet. App. 5a-6a (alterations and internal quotation marks omitted). But this is *precisely* the testimony that was elicited to determine whether McKinney's PTSD was causally connected to his crime. The Arizona Supreme Court's continued reliance on this tainted evidence undermines McKinney's right under *Eddings* to consideration of all relevant mitigating evidence. For this reason as well, McKinney is entitled to a new sentencing proceeding.

2. The record evidence of McKinney's PTSD is tainted in yet another way. The psychologist who testified at McKinney's sentencing proceeding relied on a scientific understanding of PTSD that is now

more than 20 years old. This scientific understanding has improved significantly in the past two decades. The Arizona Supreme Court's continuing reliance on expert testimony that is almost certainly incorrect by today's standards is inconsistent with *Eddings*' direction that courts must consider all relevant mitigating evidence.

PTSD was first introduced as a psychiatric disorder in the third edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* ("*DSM*") in 1980, just 13 years before McKinney's sentencing. *See* Am. Psychiatric Ass'n, *DSM* §§ 308.30, 309.81 (3d ed. 1980). In the ensuing decades, significant research has altered the way psychiatrists understand childhood trauma and its resulting effects on mental health.

Since McKinney's sentencing, the American Psychiatric Association has twice revised the definition of PTSD in the *DSM*. *See* Am. Psychiatric Ass'n, *DSM* § 309.81 (4th ed. 1994); Am. Psychiatric Ass'n, *DSM* § 309.81 (5th ed. 2013). With each revision, "the criteria for PTSD have changed substantially." Anushka Pai et al., *Posttraumatic Stress Disorder in the* DSM-5*: Controversy, Change, and Conceptual Considerations*, 7 Behav. Sci., Issue 1, no. 7, 2017, at 1. The current *DSM* now recognizes that PTSD may lead to "reckless or self-destructive behavior," *id.* at 4, contrary to the Arizona Supreme Court's continuing emphasis on the psychologist's testimony that McKinney's PTSD would cause him to withdraw from violent situations. Pet. App. 5a-6a.

These changes in the scientific understanding of PTSD undermine the reliability of the Arizona Supreme Court's weighing of the mitigating and

aggravating evidence in McKinney's case. *See id.* McKinney should be permitted to present new evidence and expert testimony regarding his PTSD in a new sentencing proceeding. *See Hitchcock*, 481 U.S. at 399 (remanding to permit defendant to "present any and all relevant mitigating evidence that is available" (internal quotation marks omitted)); *cf. Moore* v. *Texas*, 137 S. Ct. 1039, 1048-49 (2017) (encouraging States to look to the most recent versions of "leading diagnostic manuals" in assessing intellectual disability for purposes of death penalty eligibility). That is, after all, the purpose of *Eddings*: To permit full consideration of the mitigating evidence in a particular, factbound case. For this reason too, McKinney is entitled to resentencing in the trial court.[10]

* * *

There are two constitutional errors in McKinney's death sentence. In 1993, the sentencing judge re-

[10] The Arizona Supreme Court's failure to remand for resentencing in the trial court to correct the *Eddings* error in this case is not subject to harmless error analysis because "it would be wholly inappropriate for an appellate court * * * to substitute its own moral judgment" for that of the capital sentencer. *Nelson* v. *Quarterman*, 472 F.3d 287, 314-315 (5th Cir. 2006) (refusing to apply harmless error analysis to *Eddings* error because of the nature of the error). Even if harmless error analysis applies, however, the State did not ever argue in its brief in opposition that the failure to remand to the sentencing court is harmless. *See* Sup. Ct. R. 15.2 (issues not raised in brief in opposition are waived); *see also supra* n.7. Nor would it benefit from doing so, as the Ninth Circuit has already concluded that the mitigating evidence in this case "would have had a substantial impact on a capital sentencer." Pet. App. 60a.

fused as a matter of law to consider mitigating evidence of McKinney's PTSD. That error, which requires resentencing in the trial court, has never been corrected. In 2018, the Arizona Supreme Court introduced a second error: It weighed the mitigating and aggravating evidence in McKinney's case under 20-year-old law, without considering whether current law requires resentencing by a jury. Both errors are grave, and both require reversal. McKinney seeks no more than any other capital defendant: the opportunity to present mitigating evidence in the trial court, and for that evidence to be considered by the sentencer, before he is sentenced to death. The Court should afford McKinney that opportunity.

CONCLUSION

For the foregoing reasons, the judgment of the Arizona Supreme Court should be reversed.

Respectfully submitted,

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