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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

James McKinney was sentenced to death by a judge who did not consider relevant mitigating evidence at his sentencing hearing, in violation of current law. His sentence was upheld by the Arizona Supreme Court, which did not consider relevant mitigating evidence when affirming his sentence, in violation of current law. And his sentence was reviewed more than 20 years later by the Arizona Supreme Court, which affirmed his sentence without remanding for resentencing by a jury, in violation of current law. McKinney has *never* had a sentencing proceeding that complied with the law in effect at the

time of that proceeding. That is all he seeks in this appeal.

The State asserts that McKinney can be put to death without having to comply with this Court's decisions that made his sentencing unconstitutional. The State's argument ultimately amounts to a claim that it is a matter of state law whether this Court's precedents apply in state court, so the Court cannot review the state court's ruling. *See* Resp. Br. 20-29. This Court has long held, however, that it is a matter of federal law whether a decision of the Court applies in a state court proceeding, and the proceedings below are no exception. *See, e.g.*, *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987). Under current law, McKinney is entitled to resentencing by a jury.

The State also argues that the state trial court and Arizona Supreme Court did consider the mitigating evidence of McKinney's PTSD after all, and that he is not entitled to resentencing. *See* Resp. Br. 29-41. This Court should not disturb the Ninth Circuit's considered judgment on this issue, which has preclusive effect. The Court's longstanding precedents, moreover, confirm that the only remedy for *Eddings* error is resentencing in the trial court. *See, e.g.*, *Penry* v. *Lynaugh*, 492 U.S. 302, 328 (1989), *abrogated on other grounds by Atkins* v. *Virginia*, 536 U.S. 304 (2002). The Court should remand McKinney's case for resentencing.

ARGUMENT

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

The State takes the untenable position that it is up to the Arizona Supreme Court to decide whether this Court's precedents govern state court proceedings. The Court should reject that position. First, the Arizona Supreme Court applied *federal law* to determine whether current law applied to the proceedings below, and this Court may properly review that conclusion. Second, whether this Court's precedents apply to a state court proceeding is governed by "basic norms of constitutional adjudication," not state law. *Griffith*, 479 U.S. at 322. Under federal law, the Arizona Supreme Court erred by refusing to remand McKinney's case for resentencing.

A. The Arizona Supreme Court Applied Federal Law To Determine Whether McKinney's Case Is Final.

The State argues that state law determines whether this Court's precedents applied to the proceedings below. *See* Resp. Br. 21-24. The Court need not address that question. Even if a state court is *permitted* to adopt a state-specific approach, the Arizona Supreme Court expressly applied federal law when analyzing whether McKinney was entitled to the benefit of *Ring* v. *Arizona*, 536 U.S. 584 (2002).

In the proceedings below, McKinney argued that he is entitled to resentencing by a jury under *Ring*. The Arizona Supreme Court rejected that argument,

concluding that "[i]ndependent review is warranted here because McKinney's case was 'final' before the decision in *Ring*." Pet. App. 3a-4a. To support that conclusion, the court cited its earlier decision in *State* v. *Styers*, 254 P.3d 1132 (Ariz. 2011). In *Styers*, the Arizona Supreme Court relied on *federal law* to decide whether *Ring* applies when correcting an *Eddings* error.

Styers first cited this Court's decision in *Griffith* for the proposition that new "rules of criminal procedure" apply "retroactively to non-final cases pending on direct review." *Styers*, 254 P.3d at 1133. The court then quoted *Griffith*'s statement that a case is final when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Id.* (quoting 479 U.S. at 321 n.6). Applying *Griffith*, the Arizona Supreme Court concluded that "[b]ecause Styers has exhausted available appeals, his petition for certiorari had been denied, and the mandate had issued almost eight years before *Ring* was decided, his case was final, and he therefore is not entitled to have his case reconsidered in light of *Ring*." *Id.* at 1133-34.

The decision below rests on the same federal-law analysis. *See* Pet. App. 3a-4a. To the extent there is any dispute on that issue, moreover, the Arizona Supreme Court has expressly adopted federal law on finality. In *State* v. *Slemmer*, 823 P.2d 41 (Ariz. 1991), the court held that it would be "mischievous and a disservice to principles of federalism" to "apply different retroactivity rules," depending on whether a question is governed by state or federal law. *Id.* at 49. The Arizona Supreme Court held that as a

matter of state law, it would "adopt and apply the federal retroactivity analysis." *Id.* Thus, even if the Arizona Supreme Court *could* have adopted a state-specific approach, it has not done so.

When "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law," the Court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Michigan* v. *Long*, 463 U.S. 1032, 1040-41 (1983). The most reasonable explanation (and the only explanation) for the decision below is that the Arizona Supreme Court believed that under *Griffith*, it was required to hold that *Ring* did not apply to its review of McKinney's sentence. Indeed, the State in its brief in opposition *agreed* with this interpretation of the decision below. *See* Opp. 5-7. This Court is permitted to review the decision below.

B. Finality Is A Question Of Federal Law.

Whether a new rule of federal law applies in a state or federal court proceeding has always been a matter of federal law. Chief Justice Marshall examined this issue in *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), which addressed whether a new treaty applies on appeal, or whether an appeal is instead governed by the law in effect at the time of the lower court decision. *Id.* at 109-110. Chief Justice Marshall looked to the Constitution to answer that question, concluding that the "constitution of the United States declares a treaty to be the supreme law of the land," and that the treaty's "obligation on the courts of the United States must be admitted." *Id.* at 109. "If the law be constitution-

al," Chief Justice Marshall held, "I know of no court which can contest its obligation." *Id.* at 110.

In *Linkletter* v. *Walker*, 381 U.S. 618 (1965), the Court adopted a case-by-case approach to determining whether new rules of constitutional law applied in state and federal court proceedings, concluding that it was up to the Court to "weigh the merits and demerits in each case." *Id.* at 629. Justice Harlan famously criticized this approach in his separate opinion in *Mackey* v. *United States*, 401 U.S. 667 (1971), explaining that "the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation." *Id.* at 679 (Harlan, J.).

In *Griffith*, the Court agreed with Justice Harlan, holding that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." 479 U.S. at 328. The Court explained that the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication," including Article III's limitation on the Court's jurisdiction to decide " 'cases' and 'controversies.' " *Id.* at 322.

Because the Court "cannot hear each case pending on direct review," the Court fulfills its "judicial responsibility by instructing" state and federal courts "to apply the new rule retroactively to cases not yet final." *Id.* at 323. "There is no dispute that *Griffith* is fully binding on States * * * ." *Danforth* v. *Minnesota*, 552 U.S. 264, 299 (2008) (Roberts, C.J., dissent-

ing). In *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016), the Court reiterated that point, holding that "States may not disregard a controlling, constitutional command in their own courts." *Id.* at 727 (rejecting amicus's argument that a "State's plenary control" over its own proceedings allows it to ignore federal law).

To the extent lower courts have reached contrary conclusions, *see* Resp. Br. 24-25, the Court should reject those decisions as inconsistent with the Court's precedent. As explained below, Respondents' position would permit a State to relabel a proceeding collateral, and thereby evade the dictates of Article III and this Court's decisions. Our Constitution deals in substance, not form, and a state court cannot simply slap a label onto a proceeding to deny a criminal defendant his constitutional rights.

C. As A Matter Of Federal Law, The Arizona Supreme Court Reopened Direct Review, Requiring It To Remand McKinney's Case For Resentencing By A Jury.

1. In *Griffith*, the Court held that current law applies to "all cases, state or federal, pending on direct review or not yet final." 479 U.S. at 328. A case is final when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Id.* at 321 n.6. Contrary to the State's assertions, *see* Resp. Br. 26-27, this Court has repeatedly applied this uniform federal definition of finality, rejecting "state-by-state definitions of the conclusion of direct review." *Gonzalez* v. *Thaler*, 565 U.S. 134, 152 (2012); *see Clay* v. *United States*, 537 U.S. 522, 527 (2003) (recognizing that

finality has a "long-recognized, clear meaning" under *Griffith*).

Once a case becomes final, it does not always remain final. In *Jimenez* v. *Quarterman*, 555 U.S. 113 (2009), the Court recognized that a state court may "reopen direct review," rendering a case non-final. *Id.* at 120 n.4. Whether a state court has reopened direct review depends on the character—not the label—of the state court proceedings. When it comes to finality, "[t]he designation given the judgment by state practice is not controlling." *Richfield Oil Corp.* v. *State Bd. of Equalization*, 329 U.S. 69, 72 (1946); *see also Dep't of Banking of Neb.* v. *Pink*, 317 U.S. 264, 268 (1942) (per curiam) (similar). Instead, this Court "look[s] to how a state procedure functions." *Carey* v. *Saffold*, 536 U.S. 214, 223 (2002).

In *Wall* v. *Kholi*, 562 U.S. 545 (2011), the Court noted that a state post-conviction proceeding could be "in fact part of direct review" because it *functions* as a direct appeal. *Id.* at 555 n.3. Judge Easterbrook has similarly held that "state terminology may affect how states conduct their internal processes but cannot be conclusive on a question of national law." *Teas* v. *Endicott*, 494 F.3d 580, 582 (7th Cir. 2007). That makes sense: A state court cannot avoid a controlling constitutional command by labeling a proceeding "collateral" review.[1]

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[1] The State argues that because there is no constitutional right to appeal under *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983), the State has the "power to define the contours of its own direct and collateral review proceedings." Resp. Br. 24 n.7. But *Jones* is not a death penalty case, and "meaningful appellate review" plays a "crucial role" in "ensuring that the death penalty is not

In the decision below, the Arizona Supreme Court performed the *exact same review* that it performed in its first direct review of McKinney's sentence. It addressed the same question. *Compare* JA7 (Dkt. 79), *with* Pet. App. 138a. It used the same standard of review. *Compare* Pet. App. 4a, *with id.* at 138a-139a. It heard the case on the same docket number. *See* JA1. And, after it ruled, it stayed its mandate under Arizona Rule of Criminal Procedure 31.22(c) until the time expired for filing a certiorari petition "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).[2]

By conducting a full reexamination of the mitigating and aggravating evidence in McKinney's case, the Arizona Supreme Court reopened direct review. Assessing "the weight to be given relevant mitigating evidence" is part of sentencing. *Eddings* v. *Oklahoma*, 455 U.S. 104, 115 (1982). And sentencing is undisputedly "part of the criminal case." *Mitchell* v. *United States*, 526 U.S. 314, 328 (1999). Indeed,

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imposed arbitrarily or irrationally." *Parker* v. *Dugger*, 498 U.S. 308, 321 (1991). Where a state considers the merits of a federal claim, moreover, "it has a duty to grant the relief that federal law requires." *Yates* v. *Aiken*, 484 U.S. 211, 218 (1988).

[2] The State claims that the independent review below was a collateral proceeding under state law. *See* Resp. Br. 21-22. But the Arizona Supreme Court has not taken a clear position on that issue. In *Styers*, the Arizona Supreme Court noted merely that independent review is not *limited* to "direct appeals." 254 P.3d at 1134 n.1. And neither the decision below, nor *State* v. *Hedlund*, 431 P.3d 181 (Ariz. 2018), address this issue. *See id.* at 184-185; Pet. App. 3a-4a.

without a sentence, a conviction cannot be final because "[t]he sentence is the judgment." *Burton* v. *Stewart*, 549 U.S. 147, 156 (2007) (per curiam) (internal quotation marks omitted). That is particularly true here, given that the proceeding below was the *first* to consider evidence of McKinney's PTSD as part of the sentencing calculus. Where a court exercises 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) (applying *Griffith*); *State* v. *Kilgore*, 216 P.3d 393, 398 & n.10 (2009) (applying *Jimenez*).[3]

2. The policy arguments proffered by the State's amici are not persuasive. Amici argue that if McKinney's position is correct, it would mean that every time a federal court grants habeas relief, a state court must conduct further proceedings. *E.g.*, Amicus Br. of Utah et al. 16-17. As Justice Harlan recognized, however, the *purpose* of habeas corpus is to provide an avenue in appropriate circumstances "for upsetting judgments that have become otherwise final." *Mackey*, 401 U.S. at 682-683 (Harlan, J.). In such circumstances, additional proceedings may be required.

Amici further contend that courts should not be required to conduct extensive proceedings to correct

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[3] The State claims that the Ninth Circuit's conditional writ of habeas corpus did not reopen direct review. *See* Resp. Br. 18-20. As McKinney argued, however, it was the *Arizona Supreme Court* that reopened direct review by weighing mitigating and aggravating evidence to determine whether a death sentence is warranted. *See* Pet. Br. 21-29.

sentencing errors. *See* Amicus Br. of Utah et al. 16-17. But courts are *not* required to conduct extensive proceedings when making ministerial corrections to sentences. *See Burrell* v. *United States*, 467 F.3d 160, 161 (2d Cir. 2006) (Sotomayor, J.); *cf. United States* v. *Flack*, 941 F.3d 238, 241 (6th Cir. 2019) (Kethledge, J.) (distinguishing between the correction of "technical" errors and the reevaluation of a defendant's sentence). And in any event, the question in this case is not whether courts are required to conduct proceedings to correct sentencing errors; it is instead whether courts are required to apply current law *when* correcting those errors.

Amici also argue that McKinney seeks a broad ruling that would require state courts to reconsider every aspect of a criminal proceeding once those proceedings are reopened. *See* Amicus Br. of Utah et al. 15. McKinney's position, however, is a narrow one. Here, the Arizona Supreme Court reopened direct review to reconsider McKinney's sentence. It was thus required to apply current law to that sentencing inquiry, which included reviewing the mitigating and aggravating evidence, and weighing that evidence to determine whether a death sentence is warranted. *See* Ariz. Rev. Stat. Ann. § 13-755(A)-(B); Pet. App. 4a. Under current law, a court cannot rely on aggravating evidence found by a judge as part of its sentencing calculus. *See infra* p. 12. A court similarly cannot weigh mitigating and aggravating evidence to determine whether a death sentence is warranted. *See id.* Because the Arizona Supreme Court could not conduct independent review without violating current law, it was required to remand McKinney's case for resentencing by a jury.

3. The State does not dispute that under current law, McKinney is entitled to resentencing by a jury. *See* Resp. Br. 20-29. McKinney's original sentencing did not comply with *Ring* and *Hurst* v. *Florida*, 136 S. Ct. 616 (2016), because it was conducted by a judge. *See* Pet. Br. 30-31. The proceeding below similarly did not comport with *Ring* and *Hurst*, because the Arizona Supreme Court—rather than a jury—made the "critical" finding that the mitigating evidence did not outweigh the aggravating evidence, and in doing so relied on aggravating evidence found by a judge. *Hurst*, 136 S. Ct. at 622. McKinney is thus entitled to resentencing.

The State notes, in a footnote, that it "disagree[s]" with McKinney's position that *Ring* and *Hurst* require juries to find mitigating evidence, yet it provides no explanation for its position. Resp. Br. 29 n.9. In *Hurst*, the Court held that the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." 136 S. Ct. at 619. To impose the death penalty in Arizona, the sentencer must find that the mitigating evidence does not outweigh the aggravating evidence. *See State* v. *Ring*, 65 P.3d 915, 943 (Ariz. 2003). Here, the Arizona Supreme Court made that sentencing determination, in violation of *Ring* and *Hurst*.

D. The State's Approach To Finality Undermines The Rule Of Law.

The State's position fundamentally undermines the rule of law.

First, if it is up to each State to determine when direct review is reopened, then States would have the power to flout federal law by labeling quintessential direct review proceedings "collateral" review.

The State suggests that "there is no dispute that vacating and resentencing here would require compliance with current law." Resp. Br. 19 n.3 (internal quotation marks omitted). But the State's position in this case permits exactly that result. The Arizona Supreme Court's decision to ignore current law in McKinney's case is a straightforward example of a state court refusing to apply this Court's precedents where they would otherwise govern. Amici cite numerous other examples where, under the State's reasoning, courts could conduct entirely new proceedings under overruled, obsolete law. *See* Amicus Br. of Nat'l Ass'n of Crim. Def. Lawyers 7-10; Amicus Br. of Roderick & Solange MacArthur Justice Center 11-12. The State offers no response to the prospect of such "antiquated sideshow[s]." Amicus Br. of Roderick & Solange MacArthur Justice Center 13.

Second, this Court held in *Griffith* that the "selective application of new rules violates the principle of treating similarly situated defendants the same." 479 U.S. at 323. And in *Teague* v. *Lane*, 489 U.S. 288 (1989), a plurality of the Court confirmed that an ad hoc approach to finality results in an "unfortunate disparity in the treatment of similarly situated defendants." *Id.* at 305. That disparity is on display here: If a Florida court had committed the *Eddings* error in this case, McKinney would be entitled to a new sentencing proceeding. *See Fleming*, 61 So. 3d at 406-407. To avoid this disparity, the Court should remand McKinney's case for resentencing by a jury.

II. THE PROPER REMEDY FOR *EDDINGS* ERROR IS RESENTENCING IN THE TRIAL COURT.

The State raises several arguments in its response brief that it did not raise in its brief in opposition, including the argument that *Eddings* errors are subject to harmless error review, that the *Eddings* error in this case did not occur in the trial court, and that there was no *Eddings* error at all. *See* Resp. Br. 30-41. Those arguments are waived. *See* Sup. Ct. R. 15.2; *see also* Pet. 10, 23 n.4, 31 (addressing all three issues). Even if the State could overcome that problem, however, it cannot escape this Court's longstanding precedent, which holds that the proper remedy for *Eddings* error is resentencing in the trial court. *See, e.g.*, *Mills* v. *Maryland*, 486 U.S. 367, 375 (1988).

A. The State's Discussion Of Harmless Error Review Is Irrelevant To This Case.

Rather than address the proper forum for *fixing* an *Eddings* error—which is the question before the Court—the State argues that some *Eddings* errors need not be fixed at all. *See* Resp. Br. 30-31 (asserting that *Eddings* errors may be subject to harmless error review). That question is irrelevant in this case, where the Ninth Circuit concluded that the *Eddings* error was not harmless. *See* Pet. App. 58a-60a; *see also Montana* v. *United States*, 440 U.S. 147, 153 (1979) (holding that an issue decided "by a court of competent jurisdiction cannot be disputed in a subsequent suit between the same parties" (ellipses and internal quotation marks omitted)). And in any event, harmless error review does not apply to *Eddings* errors, because an appellate court cannot make

a "reasoned *moral* judgment" about whether a defendant should be sentenced to death. *Nelson* v. *Quarterman*, 472 F.3d 287, 315 (5th Cir. 2006) (en banc).[4]

B. The Ninth Circuit Properly Held That Both The State Trial Court And The Arizona Supreme Court Committed *Eddings* Error.

1. The State acknowledges that trial court resentencing would "be an appropriate *Eddings* remedy * * * where the error occurred in the trial court and limited the sentencing record." Resp. Br. 31. The State nevertheless argues that resentencing is not appropriate here, because the *Eddings* error occurred in the Arizona Supreme Court, not the trial court. *See id.* at 33. The Ninth Circuit, however, found that the *Eddings* error occurred in the trial court. *See* Pet. App. 29a-30a; *see also Ramirez* v. *Ryan*, 937 F.3d 1230, 1250 (9th Cir. 2019) ("In *McKinney*, defendant's proffered mitigating evidence was explicitly rejected by both the Arizona trial court and the Arizona Supreme Court."). The State ignores the Ninth Circuit's straightforward finding that the trial court "gave McKinney's PTSD no weight as a mitigating factor" because it was not causally connected to the crime, and the Ninth Circuit's conclusion that the trial court's ruling "echoes the restrictive language of Arizona's causal nexus test," which "clearly violates *Eddings*." Pet. App. 29a-30a.

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[4] The State suggests in a heading that if the record in this case is inadequate, the Court should remand for harmless error review. *See* Resp. Br. 38. The Court should decline to remand where the State does not explain the basis for its request.

Moreover, the governing law in Arizona at the time of McKinney's sentencing forbade consideration of mitigating evidence unconnected to the crime. In *State* v. *Wallace*, 773 P.2d 983 (Ariz. 1989)—decided seven years after *Eddings* and four years before McKinney's sentencing—the Arizona Supreme Court held that a "difficult family background" is "not a mitigating circumstance," because "nearly every defendant could point to some circumstance in his or her background that would call for mitigation." 773 P.2d at 986. *Wallace* instead instructed that a "difficult family background is a relevant mitigating circumstance *if* a defendant can show that something in that background had an effect or impact on his behavior." *Id.* (emphasis added); *see also State* v. *Ross*, 886 P.2d 1354, 1363 (Ariz. 1994) (reaffirming the causal nexus test one year after McKinney's sentencing). "Trial judges are presumed to know the law and to apply it in making their decisions." *Walton* v. *Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds by Ring*, 536 U.S. 584. Here, the state trial court followed binding Arizona Supreme Court precedent when it refused as a matter of law to consider McKinney's PTSD, in violation of *Eddings*.

The sentencing record in McKinney's case confirms that the trial judge applied the Arizona Supreme Court's unconstitutional causal nexus test. Under *Eddings*, the trial judge was required to consider whether McKinney's PTSD was entitled to mitigating weight *regardless* of its connection to the crime. The trial judge never conducted that analysis. The judge, for example, took "into consideration" the psychologist's diagnosis of McKinney's PTSD, accepting as a factual matter that McKinney suffered from

PTSD. Pet. App. 187a-189a; *see also id.* at 29a. Yet the judge explained that he did not "find any credible evidence to suggest that, even if the diagnosis" 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 [PTSD] that it in any way affected his conduct in this case." *Id*. at 189a-190a. The State does not point to a single instance in the sentencing transcript where the trial judge stated that he was considering the mitigating weight of McKinney's PTSD *regardless* of its connection to the crime.

The State (at 35) emphasizes the sentencing judge's statement that he considered "all of the mitigating circumstances," Pet. App. 192a, but that statement does not address whether the judge considered McKinney's PTSD to be a mitigating circumstance. As the Ninth Circuit concluded, the judge was referring to, and therefore weighed, only "what he concluded were legally relevant aggravating and mitigating circumstances" when determining McKinney's sentence. *Id.* at 29a. The State also cites *Parker* v. *Duggar*, 498 U.S. 308 (1991), but in that case the court considered all mitigating evidence because it was required to do so under *both* state and federal law. *See id.* at 314-315. Here, state law *prohibited* the trial judge from considering this evidence.

2. To the extent there is any ambiguity with respect to whether the trial court considered McKinney's PTSD when sentencing him to death, the Court should remand for resentencing. This Court has

twice confronted cases where relevant mitigating evidence was presented to the sentencer, but it was unclear whether the sentencer considered it. *See Penry*, 492 U.S. at 319-323, 328; *Mills*, 486 U.S. at 370-371, 383-384. The Court remanded for resentencing in both cases. *See Penry*, 492 U.S. at 328; *Mills*, 486 U.S. at 384. As the Court explained, "*Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer." *Penry*, 492 U.S. at 319. "The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Id.* Where it is "plausible"—but not certain—that a sentencer considered relevant mitigating evidence, the "high requirement of reliability on the determination that death is the appropriate penalty in a particular case" has not been met, and "resentencing" is required. *Mills*, 486 U.S. at 377, 383-384. Even if it were "plausible" that the trial judge considered the mitigating evidence of McKinney's PTSD, it is not certain that he did so. McKinney is thus entitled to resentencing.

3. In a last-ditch effort, the State argues that the Ninth Circuit's decision is wrong, and that there was no *Eddings* error at all. *See* Resp. Br. 40-41. That issue, however, was decided by the Ninth Circuit, and this Court denied certiorari. *See Ryan* v. *McKinney*, 137 S. Ct. 39 (2016) (mem.). The Ninth Circuit's "determination is conclusive in subsequent suits," including this one, and the State is not entitled to challenge it. *Montana*, 440 U.S. at 153.

The Ninth Circuit, moreover, did not err. As set forth above, the Ninth Circuit correctly found that the trial court, bound by the Arizona Supreme

Court's causal nexus test, committed *Eddings* error. *See supra* pp. 15-17. The Ninth Circuit also correctly found that the Arizona Supreme Court committed *Eddings* error, based on that court's reliance on the sentencing judge's factual conclusion "that McKinney's PTSD did not in any way affect his conduct in this case"; its own "additional factual conclusion that, if anything, McKinney's PTSD would have influenced him *not* to commit the crimes"; and its "recital of the causal nexus test" and citation to its opinion in *Ross*, which upheld the causal nexus test. Pet. App. 54a-55a (citing *Ross*, 886 P.2d at 1363; internal quotation marks and alterations omitted). This Court has made clear that where a court imposes a "nexus" requirement on mitigating evidence, it violates *Eddings*. *See Tennard* v. *Dretke*, 542 U.S. 274, 287-289 (2004). And even if this Court were unsure if an *Eddings* error occurred in this case, it should resolve any doubt in McKinney's favor. *See Mills*, 486 U.S. at 383-384.

C. This Court Has Repeatedly Held That The Proper Remedy For *Eddings* Errors Is Resentencing.

1. This Court's precedents are clear: The proper remedy for *Eddings* error is resentencing in the trial court. An *Eddings* error occurs where a judge or jury refuses, as a matter of law, to consider relevant mitigating evidence. *See Eddings*, 455 U.S. at 113-114. To fix that error, the judge or jury must consider relevant mitigating evidence, and weigh it against the aggravating evidence, to determine whether a death sentence is warranted. *See, e.g.*, *Penry*, 492 U.S. at 327-328. This Court has repeatedly made clear that it is the trial court sentencer—rather than

the appellate court—that should make this determination. *See* Pet. Br. 36-39 (collecting cases). The State attempts to distinguish this precedent, *see* Resp. Br. 34, but this Court has never endorsed the notion that appellate reconsideration is an appropriate remedy for *Eddings* error.[5]

The State attempts to minimize *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985), *see* Resp. Br. 36-37, but that case plainly states that *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." *Caldwell*, 472 U.S. at 330-331. This statement is not dicta; it underlies the Court's conclusion that the "delegation of sentencing responsibility" from the jury to the appellate court deprives defendants of the "right to a fair determination of the appropriateness of his death." *Id.* at 330 (internal quotation marks omitted). The State also relies on *Clemons* v. *Mississippi*, 494 U.S. 738 (1990), but that case does not apply to mitigating evidence, and it has since been overruled. *See* Pet. Br. 42-43.

2. The State raises three additional arguments for why trial court resentencing is not required in this case; the Court should reject those arguments.

First, the State argues that trial court resentencing is unnecessary where mitigating evidence is already in the record. *See* Resp. Br. 31-35. But this Court

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[5] The State mischaracterizes *Hitchcock* v. *Dugger*, 481 U.S. 393 (1987), which found an *Eddings* error where the judge and jury were prohibited from considering as a matter of law mitigating evidence introduced at sentencing. *See id.* at 398-399.

has never so much as suggested, let alone held, that the appropriateness of trial-level resentencing as a remedy for *Eddings* error turns on whether mitigating evidence is present in the record. *See Hitchcock* v. *Dugger*, 481 U.S. 393, 399 (1987); *see also Penry*, 492 U.S. at 319. Further, the State does not—and cannot—show that the Arizona Supreme Court has the same "reasoned *moral* response" to mitigating evidence of PTSD as a jury (or even a sentencing judge). *Penry*, 492 U.S. at 319 (internal quotation marks omitted). The Arizona Supreme Court has repeatedly held that mitigating evidence of PTSD is entitled to "little mitigating weight." *Styers*, 254 P.3d at 1136; *see also* Pet. App. 5a-6a; *Hedlund*, 431 P.3d at 187. In contrast, in at least seven cases since 2015, juries in Arizona did *not* impose a death sentence where a defendant introduced mitigating evidence of PTSD. *See* Amicus Br. of Arizona Capital Representation Project 22, 25-29. This stark difference in outcomes demonstrates that juries may make a different "individualized assessment" of whether the death penalty is warranted than an appellate court. *Penry*, 429 U.S. at 319.

The record here, in any case, is insufficient to permit appellate reweighing of mitigating and aggravating evidence. *See* Pet. Br. 43-47. The purpose of the independent review proceeding below was to consider whether McKinney's PTSD diagnosis is entitled to mitigating weight even if it is unconnected to the crimes. *See* Pet. App. 68a. But the Arizona Supreme Court did not cite *any record evidence* that would assist the court in making that determination, indicating that the record in this case is insufficient to support appellate reweighing. *See id.* at 5a-6a. Indeed, the only evidence the court cited was the

psychologist's testimony that McKinney's PTSD would have caused him *not* to commit the crimes. *See id.* In a resentencing proceeding, McKinney's counsel would be permitted to present evidence and testimony to explain why McKinney's PTSD diagnosis is entitled to mitigating weight even if it is unconnected to the crimes—evidence that is lacking in this case. *See* Pet. Br. 43-47.[6]

Second, the State asserts that the correction of *Eddings* error in the trial court is a "waste" of resources and would lead to relitigation of "facts buried in the remote past." Resp. Br. 31 (internal quotation marks omitted). This Court, however, has remanded to correct constitutional errors in criminal proceedings, even decades later. *See Foster* v. *Chatman*, 136 S. Ct. 1737 (2016). And it has repeatedly required resentencing in cases involving *Eddings* errors. *See* Pet. Br. 36-38. The Arizona Supreme Court has similarly held that it is appropriate to remand for resentencing to correct errors in death sentences. *See State* v. *Bible*, 858 P.2d 1152, 1211 (Ariz. 1993).

Third, the State suggests that independent review is a narrowly tailored remedy for *Eddings* errors. *See* Resp. Br. 37-38. Independent review in the wake of an *Eddings* error, however, deprives death-row defendants of the many protections afforded by trial

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[6] This is not a "windfall" to McKinney, as the State suggests. Resp. Br. 39. Arizona courts permit defendants to introduce new mitigating evidence at resentencing. *State* v. *Bocharski*, 189 P.3d 403, 416-418 (Ariz. 2008). McKinney would thus be entitled to seek to introduce expert testimony reflecting the current scientific understanding of PTSD, as well as the broader mitigating value of McKinney's PTSD diagnosis.

court resentencing. Unlike an appellate court, a trier of fact has the "opportunity to confront the defendant in person" and undertake "the subjective decision of whether mercy is appropriate." Amicus Br. of ACLU et al. 7-8. A trier of fact similarly has the ability to assess the credibility of witnesses and to hear the defendant's allocution. *See id.* at 9-14. Because resentencing proceedings in Arizona take place before juries, moreover, defendants benefit from "the critical safeguard of jury unanimity." *Id.* at 18-21 (describing how the Arizona Supreme Court in both *Hedlund* and *Styers* affirmed death sentences over a dissent). And, perhaps most important, where a defendant is resentenced in a trial court, the defendant has *two* opportunities to seek a life sentence—once before the trial court and once before the appellate court. If the defendant is sentenced to life in the trial court in the first instance, moreover, the State *cannot* appeal that sentence. *See* Ariz. Rev. Stat. Ann. § 13-4032; *see also Bullington* v. *Missouri*, 451 U.S. 430, 445-446 (1981). McKinney was denied these procedural protections, which Arizona law affords to capital defendants, in the proceeding below.

* * *

McKinney has never been sentenced to death by a jury, and he has never been sentenced to death in a proceeding that complied with current law. He is entitled to those basic protections under the Constitution. The Court should remand McKinney's case for resentencing in the trial court by a jury.

CONCLUSION

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

Respectfully submitted,

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