No. 18-____

IN THE
Supreme Court of the United States

JAMES ERIN MCKINNEY,
Petitioner,

v.

STATE OF ARIZONA,
Respondent.

On Petition for a Writ of Certiorari to the Arizona Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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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.

PARTIES TO THE PROCEEDING

James Erin McKinney, petitioner on review, was the appellant below.

The State of Arizona, respondent on review, was the appellee below.

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PETITION FOR A WRIT OF CERTIORARI

James Erin McKinney respectfully petitions for a writ of certiorari to review the judgment of the Arizona Supreme Court in this case.

OPINIONS BELOW

The Arizona Supreme Court's *de novo* review of McKinney's sentence, which is the decision upon which certiorari is sought, 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 opinion 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 this petition to February 21, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATUTORY AND 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 public 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 * * * .

INTRODUCTION

This case asks whether a court must apply current law when deciding, *for the first time*, whether the mitigating and aggravating evidence in a capital case warrants the death sentence. In 1993, James Erin McKinney was convicted of murder and sentenced to death by a judge in Arizona. More than 20 years later, the Ninth Circuit granted McKinney a conditional writ of habeas corpus, finding that Arizona courts over a 15-year period had refused as a matter of law to consider non-statutory mitigating evidence in death penalty cases, in violation of this Court's decision in *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982). The Ninth Circuit held that no Arizona court had ever considered mitigating evidence that McKinney suffered from Post-Traumatic Stress Disorder (PTSD) as a result of his abusive childhood, which by all accounts was horrific. The Ninth Circuit specifically found that this error was not harmless, and it ordered Arizona to correct the constitutional error in McKinney's death sentence.

In response to the Ninth Circuit's ruling, Arizona sought *de novo* review of McKinney's sentence by the Arizona Supreme Court. McKinney opposed the motion on the ground that he was 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 held that juries—rather than judges—are required to make the findings necessary to

impose the death penalty. The Arizona Supreme Court granted the State's motion, concluding that *Ring* did not apply because McKinney's conviction became final in 1996, prior to this Court's decision in *Ring*. The Arizona Supreme Court then proceeded to "weigh" the mitigating and aggravating evidence in McKinney's case. Pet. App. 4a. 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 petition raises 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 correcting a defendant's sentence or conducting a resentencing. The Arizona Supreme Court's decision to apply the law as it stood in 1996 when weighing the mitigating and aggravating evidence in McKinney's death penalty case in 2018 violated McKinney's Sixth, Eighth, and Fourteenth Amendment rights, and deepened a clear split amongst the state and federal courts, warranting this Court's review.

In both the Arizona Supreme Court and the Seventh Circuit, the law in effect at the time a defendant's conviction first becomes final governs resentencing and sentence correction proceedings. *See id.* at 3a-4a; *Richardson* v. *Gramley*, 998 F.2d 463, 467-468 (7th Cir. 1993). In those two courts, once a defendant's conviction becomes final, "the federal law applicable to the defendant's case is frozen; cases decided after that point cannot help him." *Richardson*, 998 F.2d at 467.

The Florida and Washington Supreme Courts, joined by the First, Second, and Fourth Circuits, take the opposite approach. In those courts, current law applies in sentence correction and resentencing proceedings, unless a sentence correction is purely ministerial. *See State* v. *Fleming*, 61 So.3d 399, 406 (Fla. 2011); *State* v. *Kilgore*, 216 P.3d 393, 396-401 (Wash. 2009); *United States* v. *Pizarro*, 772 F.3d 284, 289-291 (1st Cir. 2014); *Burrell* v. *United States*, 467 F.3d 160, 165-166 (2nd Cir. 2006) (Sotomayor, J.); *United States* v. *Hadden*, 475 F.3d 652, 664, 670-671 (4th Cir. 2007). In any of those jurisdictions, *Ring* and *Hurst* would apply to McKinney's case, and he would be entitled to resentencing by a jury. Given this clear split—which affects at least 20 capital cases in Arizona—the Court's intervention is urgently needed.

The second question presented is whether the Arizona Supreme Court violated this Court's decision in *Eddings*, and McKinney's Sixth, Eighth, and Fourteenth Amendment rights, by declining to remand McKinney's case for resentencing in the trial court. In *Eddings*, this Court held that a "sentencer" in a death penalty case may not "refuse to consider, as a matter of law, any relevant mitigating evidence." 455 U.S. at 114 (emphasis omitted). To remedy that error, this Court has repeatedly remanded to the trial court for resentencing. *See, e.g.*, *Mills* v. *Maryland*, 486 U.S. 367, 375 (1988).

By refusing to remand McKinney's case for resentencing, the Arizona Supreme Court created a clear split with five other state and federal courts, which have each held that resentencing is required to correct *Eddings* errors. *See Harvard* v. *State*, 486

So.2d 537, 539 (Fla. 1986) (per curiam); *People* v. *Davis*, 706 N.E.2d 473, 488 (Ill. 1998); *State* v. *Roberts*, 998 N.E.2d 1100, 1115 (Ohio 2013); *Davis* v. *Coyle*, 475 F.3d 761, 774-775 (6th Cir. 2007) (*Coyle*); *Paxton* v. *Ward*, 199 F.3d 1197, 1220 (10th Cir. 1999). This Court should also grant certiorari to resolve this clear division in authority, which similarly impacts a substantial number of death-row inmates in Arizona, and which has significant implications for other capital cases across the country.

STATEMENT

A. Factual Background

McKinney is the product of 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." Pet. App. 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. Each time, James found Bobbie and brought her and the children back to Arizona. *Id*. at 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.*

When McKinney moved in with James and his new wife, Shirley Crow McKinney, conditions were "even worse" than before. *Id.* As McKinney's aunt explained, "[i]t was gross. I mean, the house was filthy, the kids were filthy, they never had clean clothes that I ever saw them in." *Id.* (internal quotation marks omitted). McKinney shared a room with his two sisters and half-brother Michael Hedlund. *Id.* There were no sheets on the beds, and dogs, cats, snakes, a goat and a monkey were kept in the children's bedroom. *Id.* The animals "regularly defecated and urinated in the bedroom." *Id.* at 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 frequently beat McKinney and his siblings, and McKinney's younger sister "could not recall a time when none of the children had a welt or bruise inflicted by" their stepmother. *Id*. On one occasion, Shirley took a garden hose and beat McKinney "on the back of the head, down his back, all over his legs, his arms; anything that moved, she hit him." *Id*. (internal quotation marks omitted). McKinney also frequently witnessed Shirley beating his siblings. *See id.* at 22a. Shirley regularly locked McKinney and his siblings out of the house for hours, often in little clothing and without food or water. *Id*. at 23a. 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." *Id*. (internal quotation marks omitted).

By age 10, "McKinney had become distant, quiet and withdrawn." *Id.* at 24a. He began drinking alcohol and smoking marijuana around age 11, and he dropped out of school in the seventh grade. *Id*. He repeatedly attempted to run away from home, and he was placed in juvenile detention. *Id*.

B. Procedural History

1. In 1991, McKinney and Hedlund committed two burglaries, resulting in the death of Christine Mertens and Jim McClain. *Id.* at 17a-18a. In the course of burglarizing Mertens's home, "[o]ne of the burglars 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.

The State tried McKinney and Hedlund before dual 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.

McKinney's capital sentencing took place before the trial judge. *Id.* at 27a. At the sentencing hearing, a

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[1] A third burglar may also have been present. *See* Pet. App. 18a. The jury did not determine the identity of Mertens's assailant. *See id.* at 27a.

psychologist testified that he had diagnosed McKinney with PTSD "resulting from the horrific childhood McKinney had suffered." *Id.* at 25a. The psychologist stated that McKinney's PTSD left him "susceptible to manipulation [and] exploitation." *Id*. at 26a (internal quotation marks omitted). The psychologist explained that he believed McKinney's PTSD would cause him to "withdraw" from violent situations, but that witnessing violence or other events reminiscent of McKinney's childhood could re-trigger his trauma and produce "diminished capacity." *Id*. (internal quotation marks omitted).

The trial judge credited the psychologist's testimony, *id.* at 29a, noting that McKinney's childhood was "beyond the comprehension of most people." *Id.* at 58a (internal quotation marks omitted). Under Arizona law at the time, however, the judge was prohibited from considering non-statutory mitigating evidence that the judge found to be unconnected to the crime. *Id*. at 29a-30a. The judge concluded that McKinney's PTSD was not causally connected to his criminal behavior, and that it accordingly did not qualify as mitigating evidence. *Id.* at 30a. The judge sentenced McKinney to death without considering McKinney's PTSD. *Id.* at 29a-30a.

The Arizona Supreme Court affirmed McKinney's death sentence on appeal. 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. McKinney did not petition this Court for certiorari.

2. In 2003, McKinney filed a habeas petition in Arizona federal court. *McKinney* v. *Ryan*, No. CV 03-

774-PHX-DGC, 2009 WL 2432738 (D. Ariz. 2009). McKinney argued that his sentence violated *Eddings* because neither the trial judge nor the Arizona Supreme Court had considered mitigating evidence of his PTSD. The district court denied relief, *id*. at *22-23, and a Ninth Circuit panel affirmed, *McKinney* v. *Ryan*, 730 F.3d 903, 921 (9th Cir. 2013).

The Ninth Circuit granted rehearing en banc, *McKinney* v. *Ryan*, 745 F.3d 963 (9th Cir. 2014), and reversed. After reviewing Arizona capital sentencing proceedings from the 1980s to the 2000s, the Ninth Circuit held that "the Arizona Supreme Court [had] repeatedly articulated" a "causal nexus test" that prohibited consideration of non-statutory 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 decided between 1989 and 2005. *Id.* at 37a-47a.

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-55a. 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 found that "the Arizona Supreme Court's refusal, as a matter of law, to give weight to [McKinney's] PTSD, requires resentencing." *Id.* at 59a. The Ninth Circuit remanded to the federal district court "with instructions to grant the writ with respect to McKin-

ney'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.

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

The Arizona Supreme Court conducted *de novo* review of McKinney's sentence. The court accorded McKinney's PTSD little weight, stating that "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 6a (internal quotation marks omitted). The court did not discuss the same psychologist's testimony that violent situations could re-trigger McKinney's PTSD and lead to reduced capacity. *See id.* After "weighing" the remaining mitigating and aggravat-

ing evidence in McKinney's case, *id.* at 6a-9a, the Arizona Supreme Court "affirm[ed]" McKinney's death sentence. *Id.* at 9a.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. THERE IS A CLEAR SPLIT WITH RESPECT TO WHETHER COURTS MUST APPLY CURRENT LAW WHEN CORRECTING A SENTENCE OR RESENTENCING.

The decision below deepens a clear split in the state and federal courts. In both the Arizona Supreme Court and the Seventh Circuit, a court correcting a defendant's sentence or conducting a resentencing must apply the law in effect at the time a defendant's conviction *first* became final. *See id.* at 3a-4a; *Richardson*, 998 F.2d at 467. In stark contrast, the Florida and Washington Supreme Courts, joined by the First, Second, and Fourth Circuits, hold that current law applies to a resentencing or sentence correction, provided that the correction is not purely ministerial. *See Fleming*, 61 So.3d at 406; *Kilgore*, 216 P.3d at 396-401; *Pizarro*, 772 F.3d at 289-291; *Burrell*, 467 F.3d at 165-166; *Hadden*, 475 F.3d at 664, 670-671. The Court should grant certiorari to resolve this clear split, which affects numerous capital cases in Arizona, and which has significant implications nationwide.

A. The Arizona Supreme Court's Decision Deepens A Clear Split.

1. The Arizona Supreme Court and Seventh Circuit both hold that the law in effect at the time a defendant's conviction *first* becomes final applies during resentencing and sentence correction proceedings.

In its opinion below, the Arizona Supreme Court examined whether it was required to apply this Court's decision in *Ring* when correcting McKinney's sentence. The court concluded that *Ring* did not apply "because McKinney's case was 'final' before the decision in *Ring*." Pet. App. 3a-4a. To support its conclusion, the court cited its earlier decision in *Styers*, which held that *Ring* did not apply on *de novo* review of a death sentence where the defendant "had exhausted available appeals, his petition for certiorari had been denied, and the mandate had issued almost eight years before *Ring* was decided." 254 P.3d at 1133-34.

The Seventh Circuit adopted the same approach in *Richardson*. There, the defendant was convicted of murder and sentenced to 60 years in prison. He appealed to the Illinois Appellate Court, which affirmed the verdict but "remanded for resentencing." 998 F.2d at 464 (internal quotation marks omitted). The defendant did not file a further appeal to the Illinois Supreme Court or seek certiorari in this Court. On remand, the defendant was resentenced to 30 years in prison. *Id.*

The defendant then sought habeas relief in federal court under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), which held that a prosecutor cannot strike a juror on the basis of race. This Court decided *Batson after* the time had expired for the defendant to seek certiorari from the Illinois Court of Appeals decision, but *before* the defendant's resentencing. *See Richardson*, 998 F.2d at 464-465. The Seventh Circuit held that *Batson* did not apply to the defendant's case, concluding that "an applicant for federal habeas corpus cannot invoke a constitutional right that was first

declared after his conviction became final and the time for seeking certiorari to review that final decision lapsed (or certiorari was denied)." *Id.* at 467. As the court stated, "[t]he fact that events occurring in the state court system after his conviction has become final might entitle him to file *another* petition for certiorari later on does not detract from the finality of his conviction." *Id.*

2. The Florida and Washington Supreme Courts, joined by the First, Second, and Fourth Circuits, take a different approach. In those courts, *current law* applies to resentencing and sentence correction proceedings, provided that the court exercises at least some discretion during those proceedings. The Arizona Supreme Court plainly exercised discretion on *de novo* review of McKinney's death sentence, and thus current law would have applied to McKinney's sentence correction in any of these five jurisdictions.

In *Fleming*, the Florida Supreme Court examined whether this Court's decisions in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 542 U.S. 296 (2004), which require a jury to find the facts necessary to increase a defendant's sentence, applied "to resentencing proceedings that became final after *Apprendi* and *Blakely* issued, where the conviction and the original sentence were final before they issued." 61 So. 3d at 400. The court answered that question in the affirmative.

The Florida Supreme Court noted that *Apprendi* and *Blakely* were not retroactive. *See id.* at 403-404. It held, however, that those cases nevertheless applied to resentencing proceedings. The court explained that "resentencings in all criminal proceedings, including death penalty cases, are de novo

in nature." *Id.* at 406. Because the court "*has discretion* at resentencing * * * to impose sentence using available factors not previously considered," the Florida Supreme Court concluded that "the decisional law in effect at the time of the resentencing or before any direct appeal from the proceeding is final applies." *Id.* at 406-407 (emphasis added).

The Washington Supreme Court adopted a similar approach in *Kilgore*. There, the defendant was convicted of seven counts of sexual abuse, and the judge imposed a sentence of 560 months on each count, to be served concurrently. 216 P.3d at 395. On appeal, the state appeals court reversed two counts and remanded for a new trial, but the State elected not to retry the defendant. *Id*. at 395-396. The trial court corrected the defendant's sentence to reflect the reversed counts, and the defendant once again appealed. *Id.*

After the time expired to seek certiorari from the first appeals court decision, but before the trial court corrected the defendant's sentence, this Court decided *Blakely*. *Id.* at 395. The Washington Supreme Court examined whether *Blakely* applied to the defendant's case and concluded that it did not. The court described "[f]inality" as "the point at which the appellate court loses the power to change its decision." *Id.* at 398. After a case becomes final, the court explained, it may be "revived" if the court has "*discretion to revisit* an issue" and elects to exercise that discretion. *Id.* (emphasis added). Where a court does *not* exercise its discretion, however, a case remains final. *See id.* at 398-399. Because the lower court corrected the defendant's sentence without exercising any discretion—it merely removed two

counts of conviction—the Washington Supreme Court held that the lower court did not revive the defendant's case, and that *Blakely* did not apply. *See id.* at 399-400.

The First Circuit reached a similar conclusion in *Pizarro*. There, the defendant was convicted on drug charges and resentenced twice—in 2006 and 2012—as a result of different sentencing errors. While Pizarro's 2012 sentence was on appeal, this Court decided *Alleyne* v. *United States*, 570 U.S. 99 (2013), which held that any fact that increases a mandatory minimum sentence must be submitted to a jury. *Id.* at 103. In determining whether *Alleyne* applied to the defendant's case, the First Circuit held that "[t]he fact that the Supreme Court denied Pizarro's petition for a writ of certiorari after his first appeal does not change the fact that his judgment of conviction was not final at the time *Alleyne* was decided, given that we had vacated his sentence and remanded for resentencing." *Pizarro*, 772 F.3d at 290-291 (internal citation omitted). Because the defendant's case was "pending on direct appeal at the time that the Supreme Court handed down *Alleyne*," the First Circuit concluded that "Pizarro can now challenge his convictions under the new rule announced in *Alleyne*." *Id.* at 291.

The Second Circuit evaluated an analogous question in *Burrell*. In that case, the defendant had been convicted on drug conspiracy and continuing criminal enterprise charges. On appeal, the Second Circuit vacated the defendant's conspiracy conviction as a lesser-included offense and remanded "solely so that the district court could correct the judgment to reflect the dismissal of only the conspiracy convic-

tion." 467 F.3d at 166 (internal quotation marks omitted). While the defendant's case was pending on remand, this Court decided *United States* v. *Booker*, 543 U.S. 220 (2005), which held that the Sentencing Guidelines were not mandatory.

To determine whether *Booker* applied to the defendant's case, the Second Circuit evaluated whether the district court on remand performed a "non-discretionary act." *Burrell*, 467 F.3d at 165. The Second Circuit concluded that because "[o]ur directions to the district court unambiguously permitted nothing more than the entry of an amended judgment reflecting the dismissal of Burrell's conspiracy conviction," the court's "remand directing the dismissal of the conspiracy count was therefore *strictly ministerial*." *Id.* at 166 (emphasis added). The Second Circuit concluded that *Booker* did not apply to the defendant's case.[2]

The Fourth Circuit has likewise examined whether *Booker* applies during sentence correction proceedings. In *Hadden*, the defendant was convicted on firearm and drug charges, and his conviction was affirmed on direct review. *See* 475 F.3d at 654. The defendant later filed a petition under 28 U.S.C. § 2255 seeking post-conviction relief. The federal district court granted the petition in part, vacating one of the defendant's convictions and entering a shorter sentence, and the Fourth Circuit affirmed. *Id.* While Hadden's petition for rehearing of the

[2] The Second Circuit held that Burrell's co-defendant, in contrast, *was* entitled to the benefit of *Booker* at a subsequent resentencing hearing. *See* 467 F.3d at 166 n.4.

Fourth Circuit's decision was pending, this Court decided *Booker*.

The Fourth Circuit granted rehearing and held that the defendant was entitled to the benefit of *Booker*. As the Fourth Circuit explained, the district court "corrected Hadden's sentence," affecting the defendant's "criminal case." *Id.* at 660. The court accordingly examined whether a *Booker* violation had occurred. *See id.* at 670-671. The Fourth Circuit concluded that although the *Booker* error was plain, it would not recognize the error given the substantial evidence against the defendant. *See id.* at 670-672.

Given this clear division between seven state and federal courts, this Court should grant certiorari.

3. Further supporting certiorari, the Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits have all addressed the issue of finality in the context of the Anti-Terrorism and Effective Death Penalty Act (AEDPA)'s one-year statute of limitations. Each of those courts has held that a conviction does *not* become final until resentencing occurs, supporting McKinney's position that a conviction is not final—and that current law applies—when the defendant's sentence remains open to correction. *See United States* v. *Messervey*, 269 F. App'x 379, 381 (5th Cir. 2008) (per curiam) (Section 2255 petition is timely if filed "within one year of the appeal from the judgment on [the defendant's] resentencing becoming final."); *Rashad* v. *Lafler*, 675 F.3d 564, 569 (6th Cir. 2012) ("The judgment became final upon the conclusion of direct review of the new sentence [the defendant] received at resentencing."); *United States* v. *LaFromboise*, 427 F.3d 680, 686 (9th Cir. 2005) ("We conclude that the one-year time bar will begin to run

after the district court enters an amended judgment * * * ."); *United States* v. *Carbajal-Moreno*, 332 F. App'x 472, 476 (10th Cir. 2009) ("[T]he judgment was not final until after the district court issued its amended judgment."); *Ferreira* v. *Sec'y, Dep't of Corrections*, 494 F.3d 1286, 1293 (11th Cir. 2007) (similar).

4. Given the clear split—and related precedent in multiple circuits addressing when a case becomes final for AEDPA purposes—this Court's intervention is warranted. The version of the Constitution in effect should not depend on geography. This Court should grant the petition.

B. The Decision Below Is Wrong.

The Arizona Supreme Court's position, on a grave constitutional matter, is wrong. When the Arizona Supreme Court granted *de novo* review of McKinney's death sentence, it rendered McKinney's conviction non-final as a matter of federal law. The Constitution, as currently interpreted by this Court, is thus fully applicable to McKinney's case.

1. Arizona applies federal law on retroactivity. *See State* v. *Slemmer*, 823 P.2d 41, 49 (Ariz. 1991) ("[W]e adopt and apply the federal retroactivity analysis * * * ."); *see also United States* v. *Howard*, 115 F.3d 1151, 1158 (4th Cir. 1997) ("The finality of a conviction is a matter of federal rather than state law."). The first step in that analysis is to pinpoint the moment of finality, since new constitutional rules apply "to all cases, state or federal, pending on direct review or not yet final." *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987).

A criminal conviction is not final until the sentence is final. As this Court explained in *Teague* v. *Lane*,

489 U.S. 288 (1989), "a criminal judgment necessarily includes the sentence imposed upon the defendant." *Id.* at 314 n.2. Thus, "[f]inal judgment in a criminal case means sentence. The sentence is the judgment." *Burton* v. *Stewart*, 549 U.S. 147, 156 (2007) (per curiam) (quoting *Berman* v. *United States*, 302 U.S. 211, 212 (1937)).

A conviction becomes final when "the availability of appeal" has been exhausted "and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith*, 479 U.S. at 321 n.6; *see also Gonzalez* v. *Thaler*, 565 U.S. 134, 152-153 (2012) (rejecting "state-by-state definitions of the conclusion of direct review"). This Court pegged finality to the conclusion of direct review because "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Griffith*, 479 U.S. at 322. As this Court explained in *Griffith*, "after we have decided a new rule * * *, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review." *Id.* at 322-323.

The finality inquiry is typically clear-cut: A conviction becomes final when direct review concludes. But finality is not always final. In *Jimenez* v. *Quarterman*, 555 U.S. 113 (2009), this Court held that where a state court *reopens* direct review, a final conviction is rendered non-final. *Id.* at 120. As this Court explained, a conviction is no longer final where it is "again capable of modification through direct appeal to the state courts and to this Court on certiorari review." *Id.* 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; *see also Thompson* v. *Lea*, 681 F.3d 1093, 1094 (9th Cir. 2012) (applying *Jimenez*).

2. In the proceedings below, the Arizona Supreme Court explicitly recognized that its task was to "correct[ ] the constitutional error in [McKinney's] death sentence," Pet. App. 3a (internal quotation marks omitted)—an error that occurred during McKinney's criminal sentencing and was repeated on appeal. *See supra* pp.9-10. To correct that constitutional error, the State requested *de novo* review of McKinney's death sentence, and the Arizona Supreme Court granted review in the *same criminal case* that the State initiated against McKinney in 1993. *Compare* Pet. App. 1a (case CR-93-0362-AP); *with State* v. *McKinney*, 917 P.2d 1214 (Ariz. 1996) (case CR-93-0362-AP).[3]

The Arizona Supreme Court's correction of McKinney's sentence, moreover, was not ministerial. By independently weighing the mitigating and aggravating evidence, the Arizona Supreme Court plainly exercised discretion over McKinney's death sentence. *See* Pet. App. 5a. Indeed, it is hard to imagine a more fundamental exercise of discretion than the weighing of mitigating and aggravating evidence to determine whether the death penalty is warranted. *See Eddings*, 455 U.S. at 112-117.

As multiple state and federal courts have held, where a court exercises discretion to correct a de-

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[3] Under Arizona law, post-conviction review may only be sought by the criminal defendant. *See* Ariz. R. Crim. P. 32.1.

fendant's sentence or conduct a resentencing, the defendant's conviction is rendered non-final for purposes of this Court's retroactivity jurisprudence. *See supra* pp.14-18. By granting *de novo* review of McKinney's death sentence, the Arizona Supreme Court rendered McKinney's conviction "again capable of modification through direct review to the state courts and to this Court on certiorari review." *Jimenez*, 555 U.S. at 686. The Arizona Supreme Court was accordingly required to apply the "decisional law effective at the time" of its review. *Fleming*, 61 So.3d at 400.

3. Newly announced constitutional rules apply "to all cases, state or federal, pending on direct review or *not yet final*." *Griffith*, 479 U.S. at 328 (emphasis added). McKinney's conviction is not yet final: It was reopened by the Arizona Supreme Court on *de novo* review, and McKinney's petition for certiorari is pending before this Court. The Arizona Supreme Court accordingly erred by refusing to apply current decisional law when addressing the *Eddings* error in McKinney's death sentence, in violation of McKinney's Sixth, Eighth, and Fourteenth Amendment rights, as well as this Court's decision in *Griffith*. *See* Pet. App. 3a-4a (holding that *Ring* does not apply to McKinney's conviction). 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 this Court made clear in *Magwood* v. *Patterson*, 561 U.S. 320 (2010), an "error made a second time is still a new error." *Id.* at 339. This Court should remand to the Arizona Supreme Court so that it may apply the

Constitutional rules in effect today—not the rules in effect two decades ago.[4]

C. The Question Presented Is Important.

As Justice Harlan recognized, this Court sits "as a court of law, not a council of revision." *Williams* v. *United States*, 401 U.S. 667, 697 (1971) (Harlan, J., concurring in the judgments in Nos. 36 and 82 and dissenting in No. 81). The Court's "powers of judicial review are judicial, not legislative, in nature." *Id.* "[I]t is the nature of judicial review that precludes" this Court "from simply 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." *Griffith*, 479 U.S. at 323 (alterations and internal quotation marks omitted).

By reopening McKinney's conviction to correct a constitutional error, the Arizona Supreme Court placed McKinney's case back in "the stream of appellate review." Once in that stream, the decisional law in effect today—and not at the time McKinney's conviction first became final—applied to McKinney's sentence. *See Williams*, 401 U.S. at 681 (The Constitution "mandates that we apply the law as it is * * *,

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[4] The Arizona Supreme Court's error is not harmless. 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." Pet. App. 60a. That evidence has never been evaluated by a capital sentencer, much less by a jury, as this Court's precedents require. *See Ring*, 536 U.S. at 606-608; *see also Hurst*, 136 S. Ct. at 619; *Murdaugh* v. *Ryan*, 724 F.3d 1104, 1115-16 (9th Cir. 2013).

not as it once was.") (Harlan, J.). The "integrity of judicial review" prohibits the Arizona Supreme Court from creating a *new* constitutional error in McKinney's death sentence in its attempt to correct an old one. *Griffith*, 479 U.S. at 323. Instead, the Arizona Supreme Court was required to apply the same rule in McKinney's case that would apply "to all similar cases pending on direct review." *Id*.

The Arizona Supreme Court's refusal to apply the rule of law—as interpreted by this Court—when conducting *de novo* review of McKinney's death sentence is worthy of the Court's attention. The *Eddings* error identified by the Ninth Circuit in McKinney's habeas appeal affects at least 19 other capital cases in Arizona. *See Poyson* v. *Ryan*, 879 F.3d 875 (9th Cir. 2018); *Washington* v. *Ryan*, No. 07-15536 (9th Cir.); *Walden* v. *Ryan*, No. 08-99012 (9th Cir.); *Salazar* v. *Ryan*, No. 08-99023 (9th Cir.); *Djerf* v. *Ryan*, No. 08-99027 (9th Cir.); *Sansing* v. *Ryan*, No. 13-99001 (9th Cir.); *Lee* v. *Schriro*, No. 09-99002 (9th Cir.); *Spreitz* v. *Ryan*, No. 09-99006 (9th Cir.); *Martinez* v. *Ryan*, No. 08-99009 (9th Cir.); *Spears* v. *Ryan*, No. 09-99025 (9th Cir.); *Kayer* v. *Ryan*, No. 09-99027 (9th Cir.); *Jones* v. *Ryan*, No. 18-99005 (9th Cir.); *Smith* v. *Ryan*, No. 10-99002 (9th Cir.); *Ramirez* v. *Ryan*, No. 10-99023 (9th Cir.); *Doerr* v. *Ryan*, No. 2:02-cv-00582 (D. Ariz.); *Detrich* v. *Ryan*, No. 4:03-cv-00229-DCB (D. Ariz.); *Rienhardt* v. *Ryan*, No. 4:03-cv-00290 (D. Ariz.); *Greene* v. *Schriro*, No. 4:03-cv-00605 (D. Ariz.); *Roseberry* v. *Ryan*, No. 2:15-cv-01507 (D. Ariz.).

The State will undoubtedly seek *de novo* review of the death sentences in these cases, and the Arizona Supreme Court is likely to grant the State's re-

quest—despite this Court's clear mandate in *Ring* and *Hurst* that courts should not be in the business of weighing aggravating and mitigating evidence in capital cases. *See Ring*, 536 U.S. at 606-608; *see also Hurst*, 136 S. Ct. at 619.

More fundamentally, the Arizona Supreme Court's decision below undermines the rule of law. If the Arizona Supreme Court and the Seventh Circuit are correct that "the federal law applicable to the defendant's case is frozen," *Richardson*, 998 F.2d at 467, at the moment direct review concludes—no matter what happens after—then courts may ignore with impunity new constitutional rules established by this Court. Thus, in *Richardson*, if the trial court had empaneled a jury to resentence the defendant following this Court's *Batson* decision—but had permitted the prosecutor to strike jurors on the basis of race in violation of *Batson*—the defendant would have had no basis for relief. And in this case, if the Arizona Supreme Court had directed the trial judge to resentence McKinney, despite this Court's clear holdings in *Ring* and *Hurst* that juries must weigh aggravating and mitigating evidence in capital cases, McKinney would have had no recourse.[5] That is not the way the Constitution works.

McKinney's request on certiorari is simple: He asks that the weighing of mitigating and aggravating evidence in his capital case—which occurred for the *first time* below—take place in accordance with the

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[5] Not even the State of Arizona would go that far. In *Styers*, the State conceded that current law applies in resentencing proceedings. *See* 254 P.3d at 1137 (Hurwitz, Vice-C.J., dissenting).

Constitution, as currently understood by this Court. The Court should grant that request.

II. THERE IS A CLEAR SPLIT WITH RESPECT TO WHETHER *EDDINGS* ERROR REQUIRES RESENTENCING.

The Arizona Supreme Court's decision to conduct independent appellate review of McKinney's death sentence creates a second split. In its opinion below, the Arizona Supreme Court held that *Eddings* error could be corrected through appellate reweighing of aggravating and mitigating evidence. *See* Pet. App. 3a-4a. In contrast, the Florida, Illinois, and Ohio Supreme Courts—joined by the Sixth and Tenth Circuits—hold that *Eddings* error must be remedied through resentencing in the trial court. *See Harvard*, 486 So.2d at 539; *Davis*, 706 N.E.2d at 488; *Roberts*, 998 N.E.2d at 1115; *Coyle*, 475 F.3d at 774-775; *Paxton*, 199 F.3d at 1220. This clear division of authority similarly warrants the Court's intervention.

The question presented, moreover, is important. This Court has repeatedly stated that where a lower court commits *Eddings* error, resentencing is required. *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). For good reason: The nature of *Eddings* error is a sentencer's failure to consider mitigating evidence. The proper remedy for that error is for the sentencer to consider mitigating evidence. An appellate court—which by nature *reviews* the trial court's judgment—does not serve the same sentencing function. The decision below is wrong, and the outcome of this case directly affects a significant number of capital cases in Arizona and

has implications for other death penalty cases around the country. The Court should grant certiorari and reverse.

A. The Arizona Supreme Court's Decision Creates A Clear Split In The State And Federal Courts.

1. On habeas review, the Ninth Circuit ordered the State to "correct[ ] the constitutional error" in McKinney's death sentence or impose a lesser sentence. *See* Pet. App. 68a. Following the Ninth Circuit's decision, the State filed a motion for independent appellate review of McKinney's death sentence. The Arizona Supreme Court granted the State's request. *See id.* at 3a. To support its ruling, the Arizona Supreme Court cited its earlier decision in *Styers*, which had concluded that "to remedy" *Eddings* error, the court "need only properly conduct independent review." 254 P.3d at 1133-34. The Arizona Supreme Court proceeded to weigh the mitigating and aggravating evidence in McKinney's case, and it "affirm[ed]" McKinney's death sentence. Pet. App. 9a.

2. The Florida, Illinois, and Ohio Supreme Courts—in addition to the Sixth and Tenth Circuits—have taken the opposite approach. In each of those courts, *Eddings* error requires resentencing.

In *Harvard*, the sentencing judge had "limited consideration of mitigating factors to those enumerated in the capital sentencing statute," in violation of *Eddings*. 486 So.2d at 538. The Florida Supreme Court held that a post-conviction court's denial of relief without a new sentencing proceeding did not correct the *Eddings* error, and that "a new sentencing hearing must be held before the trial judge with

directions that he allow [the defendant] to present evidence of appropriate nonstatutory mitigating circumstances." *Id*. at 539.

The Ohio Supreme Court adopted a similar approach in *Roberts*. There, the trial court had refused to consider the defendant's allocution—her only mitigation—when imposing the death penalty. 998 N.E.2d at 1111. The Ohio Supreme Court evaluated whether it could correct that error through "independent appellate review." *Id*. at 1115. The Ohio Supreme Court concluded that because the trial court had not considered the defendant's allocution, the trial court had not provided its "perceptions as to the weight accorded all relevant circumstances." *Id.* (internal quotation marks omitted). Without those "perceptions," the court held that the "sentencing opinion is so inadequate as to severely handicap our ability to exercise our power of independent review." *Id.* The court accordingly vacated the defendant's death sentence and remanded "for resentencing." *Id.*; *see also id.* at 1120 (O'Donnell, J., dissenting) (noting the majority's departure from prior precedent, which had held that *Eddings* "error is cured by our independent sentence evaluation").

The Illinois Supreme Court reached the same result in *Davis*. There, the trial judge had refused to consider the defendant's good behavior while awaiting trial when determining whether to impose the death penalty. 706 N.E.2d at 485-487. After finding an *Eddings* violation, the Illinois Supreme Court looked to this Court's decision in *Hitchcock* v. *Dugger*, 481 U.S. 393 (1987), which had vacated the defendant's death sentence under similar circumstances. *Davis*, 706 N.E.2d at 487, 488. The Illinois

Supreme Court held that "[i]n cases in which a capital sentencer has not considered mitigation evidence," the appropriate remedy is to vacate the death sentence and remand "for a new sentencing hearing." *Id.* at 488.

The Sixth Circuit concurred in *Coyle*. In that case, the defendant had been sentenced to death in Ohio state court by a three-judge panel. 475 F.3d at 768. After the Ohio Supreme Court vacated the defendant's sentence and ordered resentencing, the panel again imposed a death sentence. *Id*. at 769-770. During resentencing, the panel denied the defendant's request to introduce mitigating evidence of good behavior between his first and second sentencing hearings. *Id*. at 769. The Sixth Circuit concluded that the panel's refusal to consider this mitigating evidence violated *Eddings*, and it remanded for resentencing. *See id.* at 773-775. The Sixth Circuit noted that where a sentencer considers improper *aggravating* evidence, appellate reweighing may be appropriate. Where "a trial court improperly excludes *mitigating* evidence or limits the fact-finder's consideration of such evidence," however, the court concluded that resentencing is required. *Id.* at 774.[6]

The Tenth Circuit reached a similar conclusion in *Paxton*. At the defendant's capital sentencing hearing in that case, the trial judge had prohibited the defendant from introducing mitigating evidence of a polygraph, in violation of *Eddings.* 199 F.3d at 1211-

[6] The Sixth Circuit's opinion could be read to suggest (in dicta) that appellate reweighing may be permissible in some circumstances. *See id.* at 774. If so, the Sixth Circuit's decision merely deepens the split in this case.

16. On federal habeas review, the Tenth Circuit held that this error could not be corrected through "reweighing" by the "state appellate court." *Id*. at 1219-1220. As the Tenth Circuit explained, "the sentencing process here was rendered unreliable not because the jury weighed an invalid or unsupported aggravating circumstance, but because in reaching its result the jury was denied consideration of relevant mitigating evidence." *Id*. at 1220. The Tenth Circuit concluded that "reweighing does not address the nature of the constitutional violations or fully correct the errors," and that a new sentencing proceeding was required. *Id.*

Five state and federal courts have all reached the same conclusion: *Eddings* error requires resentencing in the trial court. The Arizona Supreme Court, in contrast, holds that independent appellate review can correct *Eddings* error. This straightforward division of authority is worthy of the Court's attention, and the Court should grant certiorari.

B. The Arizona Supreme Court's Decision Is Wrong.

There is a simple reason multiple courts have declined to remedy *Eddings* error through appellate review: That too would violate *Eddings*. Given the stakes in this capital case, as well as the deep error engendered that could impact other cases, the Court should grant certiorari and require resentencing in the trial court.

The Arizona Supreme Court did not—and could not—resentence McKinney, as its own precedents make clear. *See State* v. *Rumsey*, 665 P.2d 48, 55 (Ariz. 1983) ("While we have an independent duty of review, we perform it as an appellate court, not as a

trial court."). As the Arizona Supreme Court explained in *State* v. *Bible*, 858 P.2d 1152 (Ariz. 1993), it has "an appellate task in reviewing death sentences and we have placed the sentencing authority in all criminal cases, and especially capital cases, with the trial judge." *Id.* at 1211. This Court reached the same conclusion in *Arizona* v. *Rumsey*, 467 U.S. 203 (1984), noting that the Arizona Supreme Court described its role as "strictly that of an appellate court, not a trial court." *Id.* at 210. Indeed, in its decision below, the Arizona Supreme Court expressly "affirm[ed]" McKinney's death sentence, rather than conducting resentencing proceedings. Pet. App. 9a.

By refusing to grant resentencing, the Arizona Supreme Court perpetuated the *Eddings* error in McKinney's case. In *Lockett* v. *Ohio*, 438 U.S. 586 (1978), a plurality of this Court held 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 (Opinion of Burger, C.J.) (emphasis added, footnote and later emphasis omitted). In *Eddings*, this Court adopted *Lockett*'s analysis, affirming that the "sentencer" must "be permitted to focus on the characteristics of the person who committed the crime." 455 U.S. at 112 (internal quotation marks omitted).

Following *Eddings*, this Court has repeatedly considered the proper remedy for *Eddings* error. Each time, it has concluded that where the sentencer is precluded from considering mitigating evidence, *resentencing* is required. In *Skipper* v. *South Carolina*, 476 U.S. 1 (1986), this Court found *Eddings* error

where the trial court had excluded evidence of the defendant's good behavior while awaiting trial. *Id*. at 4. The Court concluded that the "resulting death sentence cannot stand, although the State is of course not precluded from again seeking to impose the death sentence, provided that it does so *through a new sentencing hearing* at which petitioner is permitted to present any and all relevant mitigating evidence that is available." *Id.* (emphasis added).

The Court followed the same approach in *Hitchcock*. There, the trial court had excluded evidence of the defendant's "family background and his capacity for rehabilitation," in violation of *Eddings*. 481 U.S. at 398-399. Once again, this Court reversed the lower court, holding that "the State is not precluded from seeking to impose a death sentence upon petitioner, provided that it does so through *a new sentencing hearing* at which petitioner is permitted to present any and all relevant mitigating evidence that is available." *Id.* at 399 (emphasis added and internal quotation marks omitted).

In *Penry*, this Court similarly 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." 492 U.S. at 328. There too, 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*, the Court made this point even more clearly. There, the state's sentencing scheme had

permitted "a single juror's holdout vote" to prevent consideration of mitigating evidence. 486 U.S. at 375. "Because the sentencer's failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence," this Court held that "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)).[7]

This Court should apply those precedents here, and hold that McKinney is entitled to resentencing in the trial court. "[T]he choice between life and death, within legal limits, is left to the jurors and judges who sit through the trial, and not to legal elites * * * ." *Glossip* v. *Gross*, 135 S. Ct. 2726, 2751 (2015) (Thomas, J., concurring). Jurors and sentencing judges "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. This "vantage point," as well as "day-to-day experience in criminal sentencing," gives trial courts "an institutional advantage over appellate courts" when it comes to sentencing decisions. *Rita* v. *United States*, 551 U.S.

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[7] In *Clemons* v. *Mississippi*, 494 U.S. 738 (1990), this Court held that appellate reweighing could correct error caused by an invalid jury instruction regarding *aggravating* evidence. *See id.* at 741. *Clemons* does not govern this case, where the sentencer was precluded from considering *mitigating* evidence. And in any event, *Clemons* is no longer good law. *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).

338, 363 (2007) (quoting *Koon* v. *United States*, 518 U.S. 81, 98 (1996)).

This institutional advantage is particularly important in a case like this one, where the trial court found that McKinney's childhood was "horrific" and "beyond the comprehension and understanding of most people." Pet. App. 58a (internal quotation marks omitted). Listening to a psychologist describe McKinney's upbringing, and its effect on McKinney's PTSD, is different than reading that testimony on a cold record. Weighing the psychologist's testimony in conjunction with testimony from McKinney's sister and aunt—who described the beatings McKinney both endured and witnessed—is different than flipping through the pages of a sentencing transcript. The Arizona Supreme Court did not, and could not, serve the same function as the trial-court judge that initially sentenced McKinney to death.

The *Eddings* error in this case is clear: No sentencer has *ever* considered the mitigating evidence of McKinney's PTSD. Although the Arizona Supreme Court "weigh[ed]" that evidence, it did so in its role as an appellate court, not a sentencing court. The *Eddings* error in McKinney's case has not been cured, and McKinney is entitled to a resentencing proceeding in the trial court that permits full consideration of all mitigating evidence in his case. This Court should grant certiorari and reverse.

C. The Question Presented Is Important.

McKinney seeks nothing more than any other defendant facing the ultimate penalty: The opportunity to present mitigating evidence in the trial court before being put to death. Prior to sentencing a defendant to death, the Eighth Amendment requires

the sentencer to evaluate the defendant's "character and record" and to consider him as a "uniquely individual human being[ ]." *Woodson* v. *North Carolina*, 428 U.S. 280, 303-304 (1976) (Opinion of Stewart, J.). This requirement ensures that the "the sentence imposed at the penalty stage * * * reflect[s] a reasoned *moral* response to the defendant's background, character, and crime." *Penry*, 492 U.S. at 319 (internal quotation marks omitted). Under the rule adopted by the Arizona Supreme Court, this evaluation never took place in McKinney's case—and never will.

By refusing to remand for resentencing, moreover, the Arizona Supreme Court turned a blind eye to *decades* of scientific advances with respect to the understanding of PTSD. Since McKinney's sentencing, the *Diagnostic and Statistical Manual of Mental Disorders* ("*DSM*") has *twice* revised its definition of PTSD. *See* Am. Pscyhiatric Ass'n, *DSM* § 309.81 (4th ed. 1994); Am. Pscyhiatric 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. For example, the current *DSM* now recognizes that PTSD may lead to "reckless or self-destructive behavior," *id.* at 4, directly contradicting the Arizona Supreme Court's conclusion that McKinney's PTSD would cause him to withdraw from violent situations, Pet. App. 6a. Under Arizona law, McKinney is entitled to seek introduction of this mitigating evidence at a resentencing proceeding—an opportunity he was denied by the Arizona Supreme Court. *See, e.g.*, *State* v. *Bocharski*, 189 P.3d 403, 418 (Ariz.

2008) (approving trial court's decision to allow new mitigating evidence at capital resentencing).

The Arizona Supreme Court's holding that *Eddings* error may be corrected through appellate review affects at least 20 capital cases in Arizona, including McKinney's. *See supra* p.24. In each of those cases, the Arizona courts failed to consider nonstatutory mitigating evidence. And in each of those cases, *no sentencing body* has ever considered whether the defendant should be sentenced to death in light of that evidence. Independent appellate review by the Arizona Supreme Court will cement—rather than cure—the *Eddings* error committed by the Arizona courts for over 15 years. *See* Pet. App. 14a.

The approach adopted by the Arizona Supreme Court in this case is directly contrary to multiple precedents of this Court. *See, e.g.*, *Mills*, 486 U.S. at 375. It is also directly contrary to the rulings of numerous state and federal courts. *See supra* pp.14-18, 27-30. This case presents a clean vehicle to decide both questions presented, which are equally worthy of the Court's attention. This Court should grant certiorari and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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