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 SUPREME COURT OF ARIZONA

BRIEF FOR PETITIONER

MAURA HALLISEY
JONATHAN WILT
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
3501 Sansom Street
Philadelphia, PA 19104

Counsel for Petitioner

October 25, 2019

QUESTIONS PRESENTED

James Erin McKinney ("McKinney") was first sentenced to death by an Arizona state court judge, sitting without a jury, in 1993. In 2015, the Ninth Circuit ordered that he be granted a conditional writ of habeas corpus. That court, sitting en banc, had found that McKinney's death sentence was infected by constitutional error, as the original judge had refused to consider critical mitigating evidence as a matter of law. Subsequently, the Arizona Supreme Court conducted a new independent review of the case and again decided that McKinney must die, without ever facing a jury or presenting his case in mitigation to a legally sound sentencer.

The Questions Presented are:

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, or, instead, whether the Arizona Supreme Court correctly concluded that *Ring v. Arizona*, 536 U.S. 584 (2002), did not apply to Petitioner's case.

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

PARTIES TO THE PROCEEDING

Petitioner, Appellant below, is James Erin McKinney.

Respondent, Appellee below, is the State of Arizona.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

OTHER AUTHORITIES

OPINIONS BELOW

The judgment of the Arizona Supreme Court affirming McKinney's death sentence (JA 003-010) is reported at 245 Ariz. 225 (Ariz. 2018). The judgment of the Ninth Circuit ordering that the conditional writ be granted is reported at 813 F.3d 798.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257. The Supreme Court of Arizona entered final judgment on October 23, 2018. Petition for the writ of certiorari was filed February 26, 2019 and granted June 10, 2019.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury…." U.S. const. amend. VI.

The Eighth Amendment of the United States Constitution provides, in relevant part: "Excessive bail shall not be required . . . nor cruel and unusual punishments inflicted." U.S. const. amend. XIII.

Ariz. Rev. Stat. Ann. § 13-755(A) provides: "The supreme court shall review all death sentences. On review, the supreme court shall independently review the trial court's findings of aggravation and mitigation and the propriety of the death sentence." A.R.S § 13-755(A).

STATEMENT OF THE CASE

1. McKinney's Childhood

James Erin McKinney's childhood was characterized by abuse, trauma, and neglect. JA006. His sister, Diana McKinney, described it as a perverse "Cinderella story" with no happy ending. JA058.

McKinney is one of six, a mix of full, half and step-siblings. JA037. For a brief period while he was a toddler, McKinney lived with his mother Bobbie Morris and father James McKinney, Sr. in Arizona. JA038. Their house was kept in squalor, with dirty furniture and diapers strewn across the floors. JA071. The marriage did not last, and eventually McKinney's mother divorced his father. *Id.* She took the children, including McKinney, and "ran," traveling across the Southwest to California, Texas, Kansas, and New Mexico. JA072. At this time, McKinney was two or three years old. JA071. McKinney's father and mother then began to engage in a back-and-forth, where the father would chase after the mother to return the children to Arizona, only to have the mother then take them again to a new state and home. JA074. Much of McKinney's early life was spent in transition from household to household. *Id.*

Eventually, McKinney's father took custody of the children and settled with them in Arizona with his new wife, Shirley Crow. *Id.* Though no longer in transition from house to house, McKinney's circumstances did not improve. *Id.* Once again, McKinney lived in a home of squalor. JA075. In the words of Susan Sesate, McKinney's aunt and next-door neighbor in Arizona, "the house was filthy. The

kids were filthy, they never had clean clothes that I saw them in." *Id.*

Animals were a constant presence in the household, as McKinney's step-mother brought home dogs, cats, a monkey, a goat, and a boa constrictor. JA077. The step-children were solely responsible for the animals and the house was often covered in animal feces and urine. *Id.* McKinney and his three full and half-siblings shared a small room, with all of the animals, while the daughter of Crow, enjoyed her own room. JA080. Beyond the animals, the step-children, not Crow's daughter, were responsible for all household chores—cleaning, cooking, and washing clothes. JA078. McKinney was as young as four when he was forced to handle this responsibility. *Id.*

McKinney's father, a heavy drinker, was either absent from the house or drunk. JA076. As a result, the step-mother controlled all discipline. JA078. Once, after McKinney was suspended for fighting a student who had mocked McKinney's filthy appearance, his step-mother reacted by beating him brutally with a water hose. *Id.* His step-mother cut a piece of the water hose and used it to beat him "any[where] that moved." JA079. McKinney suffered welts and bruises which lasted for weeks. *Id.* Such beatings occurred with frequency, every two to three days. JA092. McKinney and his full and half-siblings were often deliberately locked out of the house in the Arizona heat, with no water, for hours on end. JA080. Despite McKinney's aunt and grandmother living next door, the children rarely got any relief from this regime of abuse. JA091.

This extensive childhood trauma caused McKinney to develop Post-Traumatic Stress Disorder

(PTSD), with which he still struggles today. JA121. He formerly self-medicated with drugs and alcohol, starting as young as thirteen, as is common amongst those with PTSD. JA122.

In response to these conditions, McKinney "ran away constantly," once traveling for days on his own. JA086. At some point in their childhood, every one of McKinney's full and half-siblings ran away from home. *Id.*

2. McKinney's Conviction and Sentencing

In 1993, following two burglaries-turned-homicide, McKinney and his half-brother Charles Michael Hedlund, were jointly tried and convicted of first-degree murder. JA004. The offenses in question occurred two years earlier, when McKinney and Hedlund burglarized and subsequently killed Christine Mertens, and then weeks later, burglarized and killed Jim McClain. *Id.* At the sentencing phase, the judge found several aggravating and mitigating circumstances. JA005. Despite the existence of mitigating circumstances, the judge sentenced McKinney to death. *Id.* As is customary in Arizona, the Supreme Court of Arizona conducted an independent review of the record and affirmed the sentence on subsequent direct review. *Id.*

3. Proceedings Below

Following the capital sentence, and after exhausting all state post-conviction relief proceedings, McKinney sought relief in federal court.

See State v. Towery, 204 Ariz. 386 (Ariz. 2003); JA015. McKinney filed a petition for a writ of habeas corpus which was denied by the District Court of Arizona. JA005. McKinney then appealed to the 9th Circuit and was denied again. *Id.* Finally, after a rehearing en banc, the 9th Circuit reversed and remanded McKinney's case on the grounds that the Supreme Court of Arizona used an unconstitutional "causal nexus" test when evaluating the proffered mitigating evidence. *McKinney v. Ryan*, 813 F.3d 798, 819 (9th Cir. 2015) (*McKinney V*). The Supreme Court of Arizona, under this test, determined that because McKinney's PTSD did not relate to the crime, the PTSD could be given no weight in mitigation. *Id.* The 9th Circuit ordered the District Court to grant the writ, unless the State of Arizona corrected the constitutional error or imposed a lesser sentence consistent with the law. JA005.

In response, the State of Arizona requested that the Supreme Court of Arizona conduct a second independent review of the trial court's record. *Id.* McKinney opposed this motion and argued that he was entitled to resentencing by a jury pursuant to this Court's decision in *Ring v. Arizona* in 2002. *Id.* The Supreme Court of Arizona granted the motion for the second independent review, declaring that McKinney's conviction was final in 1996 and therefore *Ring* did not apply. *Id.* This time, the Supreme Court of Arizona did not employ the "causal nexus" test to exclude McKinney's PTSD. JA006. Instead, they used the test to give McKinney's PTSD "minimal weight" as a mitigator. JA009. After determining that the mitigating circumstances were not substantial enough to warrant lesser punishment, the Supreme

Court of Arizona again affirmed McKinney's death sentence. JA010.

SUMMARY OF THE ARGUMENT

James Erin McKinney, standing before the Arizona Supreme Court on its second independent review, was entitled by both the Sixth and Eighth Amendments to resentencing in the trial court.

I. The Arizona Supreme Court erred in concluding that *Ring* did not apply to McKinney's case at the time of the second independent review. This conclusion was based on the faulty premise that McKinney's conviction became final for federal retroactivity purposes in 1996 and remained so despite all subsequent events. In reality, the original finality of the conviction was later dissipated, rendering the case nonfinal once more. The state court's conclusion to the contrary does not bind this Court, as federal courts applying federal law do not simply yield to state determinations regarding conviction finality.

The nonfinal nature of McKinney's conviction at the time of the second independent review is clear under two intertwined, but differentiable, aspects. First, federal law takes a functional approach to classifying state procedure. Here, such a functional analysis of the state proceeding yields the result that the Arizona Supreme Court embarked on a second round of direct review in McKinney's case. Second, the granting of a conditional writ followed by a state discretionary proceeding, as occurred here, renders a subject judgment of conviction nonfinal, as this posture gives rise to a new, appealable judgment.

Further, new rules of constitutional criminal procedure apply to all cases pending on direct review

or nonfinal at the time such rules are handed down. As McKinney's case was rendered nonfinal at a time long after this Court decided *Ring*, McKinney was entitled to the benefit of that case's Sixth Amendment rule. Because he has never had the privilege of a jury determining the facts necessary to sentence him to death, the Arizona courts must remand his case for resentencing if they wish to execute him. That was not done below and so the judgment of the Arizona Supreme Court must be reversed.

II. The Arizona Supreme Court's second independent review failed to cure the constitutional error in McKinney's sentence. The Eighth Amendment is the only buffer between convicted citizens and the wanton and unlimited discretion of the sentencer. At the core of this constitutional protection is the concept of the defendant's human dignity. *Eddings* interpreted the Eighth Amendment as centering a defendant's humanity in a capital case. As such, a capital sentencer must consider all mitigating circumstances. This requirement is only meaningful if the sentencer is given the opportunity to fully examine and confront the mitigating evidence.

Here, the Supreme Court of Arizona's independent review of the 25-year old record from McKinney's 1993 sentence does not satisfy the rule of *Eddings* or meet the demands of the Eighth Amendment. A far cry from a resentencing hearing, where witnesses would be called, McKinney would appear, and a new record would be created, the Supreme Court of Arizona's closed-door, re-reading of a stale record plainly failed to create a context in which mitigating evidence could be properly considered. Such review undermines and restrains the ability of the sentencer

to consider all mitigating evidence and the full humanity of McKinney.

In a capital case, where a sentencer faces the gravest question in law—whether a defendant lives or dies—only procedures that permit full consideration of mitigating circumstances can be upheld. McKinney is entitled to a resentencing hearing in the trial court, which is capable of recognizing his humanity as the Eighth Amendment requires.

ARGUMENT

I. THE ARIZONA SUPREME COURT'S REFUSAL TO REMAND FOR RESENTENCING BEFORE A JURY WAS ERRONEOUS BECAUSE *RING* APPLIED TO MCKINNEY'S CASE AT THE TIME OF THE SECOND INDEPENDENT REVIEW.

A. The Finality of McKinney's Conviction Was Dissipated By The Granting Of The Conditional Writ And Subsequent Discretionary Review In The Arizona Supreme Court.

McKinney's conviction initially became final following the first affirmance of his death sentence by the Arizona Supreme Court and the subsequent lapsing of the time to file for a writ of certiorari, in 1996. *State v. McKinney*, 185 Ariz. 567 (Ariz. 1996) (*McKinney I*) (affirming the death sentence); JA013. But, his conviction's finality was later *dissipated* by definite events in the state and federal courts.

The issue of a conviction's finality in the state courts is, for the purposes of applying federal law

thereto, *itself* a federal issue. It is therefore for this Court to decide whether McKinney's conviction remained final at the time of the second independent review. In applying federal law to the state conviction, this Court's precedents make clear that it does not simply *yield* to the conclusion of the state courts regarding finality. Rather, the Court must apply federal law's own uniform understanding of finality to the context of the particular state procedure involved. The *actual functioning* of that procedure, rather than its *characterization* by the state courts, dictates the outcome. Here, the inescapable conclusion is that the State of Arizona functionally put McKinney's case back on direct review, dissolving its prior finality.

Moreover, this conclusion is buttressed by a clear understanding of the nature of the conditional writ which the second independent review was a response to. The substance of that writ, in tandem with the state's retort, made McKinney's case nonfinal before the Arizona Supreme Court. This is so because the purpose of a conditional writ is to allow for the *replacement* of an old, invalid judgment with a new, valid one via state discretionary proceedings. Such circumstances are comparable in all relevant respects to non-ministerial remands within a single court system, which render convictions nonfinal for retroactivity purposes, hence the nonfinality of McKinney's conviction in the case at bar.

1. In applying federal law, federal courts do not simply yield to state finality determinations.

A "final" case in federal law is one "in which 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." *Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6 (1987). In *Clay v. United States*, this "uniform federal rule" for the postconviction context was read into the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 537 U.S. 522, 531 (2003). As AEDPA is consistently applied to state court procedures (*see* 28 U.S.C § 2254; 2244(d)(1)(A)), this area has generated case law explicating how the federal 'uniform definition' is to be applied to state law, which may internally define 'finality' differently. The result is that, while state law is *relevant* to dating finality, the application of federal law must not *yield* to "state-by-state definitions." *Gonzales v. Thaler*, 565 U.S. 134, 152 (2012). Moreover, this Court has indicated that its construal of finality in the AEDPA realm involves the same meaning of that term as in retroactivity cases. *See Beard v. Banks*, 542 U.S. 406, 411 (2004) (citing *Clay*, an AEDPA case, for the definition of finality in a retroactivity question).

In *Gonzales*, the petitioner sought to establish the timeliness of his habeas petition by arguing that his state conviction was not final under the law of the state in which he had been convicted (Texas) at the relevant times. 565 U.S. at 150-51. Texas considered a case final only when the appellate mandate was issued, rather than when the time for seeking further direct review expired, the difference between these two dates in Gonzales's case being determinative of his federal petition's timeliness. *Id.* This Court emphatically rejected the petitioner's invitation to "usher in state-by-state definitions of the conclusion of direct review" as doing so would "be at odds with the uniform definition" that was adopted in *Clay* and would "pose serious administrability concerns." *Id.* at

152-53. Responding to the petitioner's argument that this approach gives short-shrift to state-law, the Court stated that it still respected a state's ability to "reset" the limitations period by "reopening" direct review in a case that had previously become final. *Id*. at 152 (citing *Jimenez v. Quarterman*, 555 U.S. 113, 121 (2009)).

In *Jimenez*, this Court held that "where a state court has in fact reopened direct review, the conviction is rendered nonfinal" for purposes of applying AEDPA. 555 U.S. at 120 n. 4. There, the petitioner's state conviction "initially became final" in the state courts after the dismissal of his first direct appeal. *Id*. at 119. But, after this first finality, the state courts granted the petitioner the right to pursue a subsequent, out-of-time appeal. *Id*. The Court reasoned that because direct review had not in fact been exhausted until the conclusion of this second appeal, that therefore the petitioner's conviction was not final for AEDPA purposes. *Id*. at 120 (focusing on the fact that "petitioner's conviction was again capable of modification"). This result was construed as advancing federalism interests by "giving state courts the first opportunity to review [the] claim, and to correct any constitutional violation in the first instance." *Id*. at 121 (citing *Carey v. Saffold*, 536 U.S. 214, 220 (2002)) (internal quotation marks omitted).

Here, it is for this Court to determine whether McKinney's conviction was in fact nonfinal. The *Jimenez* Court was focused on determining when direct review *ended* in a state court, but that issue is, of course, inseparable from the issue of what *is* direct review in a state court. Consequently, there must be a uniform federal approach to addressing both. *See Wall v. Kohli*, 562 U.S. 545, 511 (2011) (determining

what is collateral review in a state court). In such cases, reaching the federal law conclusion does require some resort to analysis of state procedural law, to which Petitioner now turns.

2. Federal law's functional approach to interactions with state law shows the second independent review was effectively direct review.

The *Jimenez* Court's approach exemplifies a broader line of precedent explicating how federal law is to be applied to the great diversity of state procedure. *Jimenez* cited *Carey v. Saffold*, in which the Court had to determine when a criminal case in California was 'pending' on state collateral review for the purposes of applying AEDPA. 536 U.S. at 217. To carry out this analysis, the Court determined it must look to how a "state procedure functions, rather than the particular name that it bears." *Id.* at 223 (citing *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 72 (1946)); *see also Ring v. Arizona*, 536 U.S. 584, 602 (2002) (requirement of jury fact-finding triggered by role a fact plays in sentencing "no matter how the state labels it"); *Department of Banking, State of Nebraska v. Pink,* 317 U.S. 264, 268 (1942) ("The designation given [a] judgment by state practice is not controlling."). This Court warned against taking a state court's word for what it was doing "as an absolute bellwether" for what it *actually did*. *Carey*, 536 U.S. at 226.

Here, the question of whether Arizona functionally reopened direct review compels an analysis that looks beyond the mere 'designation' the state has given to the type of review at hand. Notably, Arizona sanctions a cognate approach within its own court system:

Arizona treats what their law nominally classifies as a 'post-conviction relief' proceeding as the "functional equivalent" of direct review for retroactivity purposes. *See State v. Ward*, 211 Ariz. 158, 162 (Ariz. Ct. App. 2005) (retroactively applying *Blakely* to a case on 'post-conviction' review).

This inquiry reveals that McKinney's second independent review before the Arizona Supreme Court was the functional equivalent of direct review and must be treated as such for the purposes of applying federal law.

First, the review here was conducted "de novo" on all fronts. *See State v. Prince*, 226 Ariz. 516, 539 (Ariz. 2011) (describing the pre-2002 capital sentencing scheme that was applied in both of McKinney's independent reviews). It is natural to regard such review as direct, because collateral and direct review are mutually exclusive and exhaustive categories, with the latter usually being associated with greater deference to a previous court's determinations. *See Woods v. Donald*, 135 S.Ct. 1372, 1376 (2015) (explaining AEDPA collateral deference); *Wall*, 562 U.S. at 553 (giving an exclusive definition of collateral review); *State v. Watton*, 164 Ariz. 323, 325 (Ariz. 1990) (stating that review is for abuse of discretion in granting or denying collateral relief). Further, the Arizona Supreme Court has recognized that it at least "normally" conducts independent review only on "direct appeal." *State v. Styers*, 227 Ariz. 186, 188 n. 1 (Ariz. 2011) (explaining the application of A.R.S § 13-755(A)). And, as the dissent in *Styers* argued, "independent review is the paradigm of direct review." *Id.* at 191 (Hurwitz, V.C.J., dissenting).

Second, the language used throughout the Arizona Supreme Court's decision demonstrates that this was an instance of direct review. For example, they refer to McKinney as the "appellant" in the caption, rather than as the 'petitioner' and state that the "sentence" is "affirm[ed]," rather than that the 'denial of relief' is affirmed: These terms contrast to their practice in *actual* collateral proceedings. JA003, 010; *see State. v. Towery*, 204 Ariz. 386, 394 (Ariz. 2003) (McKinney's sole actual collateral proceeding before the Arizona State Supreme Court).

Third, Arizona's own Rules of Criminal Procedure give added significance to the language of the Arizona Supreme Court's judgment here. Rule 31.22, for example, commands that "[i]n an appeal in which the [Arizona] Supreme Court has *affirmed* a death sentence, the Supreme Court clerk will issue the mandate . . . when the time expires for filing a petition for writ of certiorari in the Unites State Supreme Court challenging the decision affirming the defendant's conviction or sentence on *direct appeal*…." Ariz. R. Crim. P. 31.22(c)(1) (emphasis added); *see also* Ariz. R. Crim. P. 32.4(a)(2)(B) (also assuming that the affirmance of a death sentence occurs on "direct appeal"). The Rules plainly assume that the Arizona Supreme Court 'affirms' death sentences *on direct appeals*.

Fourth, the Arizona Supreme Court's categorization of this posture as something other than direct review drew a strong dissent in *State v. Styers*, which argued that the majority there was seriously mischaracterizing the nature of its "do over." 227 Ariz. at 191 (Hurwitz, V.C.J., dissenting). The dissent's position was that Styers's sentence was "plainly not final" before the court, thus entitling him

to have *Ring* applied to his case. *Id.* This demonstrates that there was serious disagreement even within the state court regarding how to classify a review of the sort that occurred in McKinney's case.

The upshot of this review of the state procedure and decisions is plain enough: After Arizona's motion for a new independent review was granted, the Arizona Supreme Court put McKinney's case back on direct review. That court then proceeded to perform virtually the same analysis as it had in the first appeal. There is no dispute that at least the first was 'direct' review. So, given their twin natures, the successive review ought to be regarded in the same way, as a new direct review of McKinney's case.

The fact that McKinney's second independent review occurred after the granting of a conditional writ of habeas corpus by a federal court does not support Arizona's claims and, in fact, confirms McKinney's argument that he was entitled to the retroactive application of *Ring* to his case.

3. Contextualizing the new independent review as the result of a conditional writ confirms that McKinney's case was not final before the Arizona Supreme Court.

Examining McKinney's second independent review in the full context of the orders and motion that preceded it makes clear that his conviction had been rendered nonfinal. Those procedural steps can be fruitfully compared to a non-ministerial remand, an order that delays the finality of a judgment for retroactivity purposes. *See, e.g., Burrell v. United States*, 467 F.3d 160, 166 (2d Cir. 2006) (Sotomayor, J.,). McKinney's case was not literally remanded of course. The Ninth Circuit ordered that a conditional

writ be issued, in response to which Arizona motioned for and was granted the subsequent new independent review. JA004; *McKinney v. Ryan*, 813 F.3d 798, 827 (9th Cir. 2015) (*McKinney V*). But this posture shares the relevant features of non-ministerial remands that delay finality: discretionary review generating a new judgment. Consequently, the same logic that renders remanded cases nonfinal for retroactivity purposes applies with equal force to McKinney's related circumstances.

The remanding of a case for further discretionary proceedings concerning guilt or sentence delays the finality of a conviction for retroactivity purposes. *Burrell*, 467 F.3d at 166. Other federal circuit and state supreme courts to have considered the question have arrived at the same or cognate conclusions. *See United States v. Pizarro*, 772 F.3d 284, 290-91 (1st Cir. 2014)*; State v. Fleming*, 61 So.3d 399, 408 (Fla. 2011); *State v. Kilgore*, 167 Wash.2d 28, 37 (Wash. 2009); s*ee also United States v. Dodson*, 291 F.3d 268, 275 (4th Cir. 2002) (applying this same reasoning in the context of AEDPA timing); *United States v. Colvin*, 204 F.3d 1221, 1224 (9th Cir. 2000) (coming to the same conclusion, but via a broader test than the other circuits have employed).

In *Burrell*, the Second Circuit had to determine whether a defendant's conviction was nonfinal at the time this Court decided *Booker*, thus entitling him to the application of that decision. 467 F.3d at 161. When the judgment initially came up from the District Court, the Circuit had affirmed one of its component convictions (and the attendant sentence), but vacated a second conviction and sentence. *Id.* at 162. The Circuit remanded, instructing the District Court to "correct" the judgment to reflect the vacated

portions, but before this could be carried out, *Booker* was decided, which the defendant argued he was entitled to have applied to his case. *Id*. The Second Circuit rejected that argument by distinguishing between remands involving "some discretion" left for the district court and those that are merely "ministerial." *Id*. at 164-65. Only the former effectively delay the finality of a case, because the use of discretion could "give rise to a valid appeal," whereas no such appeal could flow from a ministerial entry of an amended judgment. *Id*. at 164; *see also Gonzalez v. United States*, 792 F.3d 232, 236 (2d Cir. 2015) (stating that the resultant amended judgment is a "new judgment").

In order to understand the nature of the 'judgment' at issue, the Second Circuit in *Burrell* relied on this Court's rule that "[a] judgment of conviction includes both the adjudication of guilt and the sentence." *Deal v. United States*, 508 U.S. 129, 132 (1993); *see also Teague v. Lane*, 489 U.S. 288, 314 n. 2 (1989) ("As we have often stated, a criminal judgment necessarily includes the sentence imposed upon the defendant."). So, while in *Burrell* the 'judgment' initially reviewed was composed of multiple 'guilt-sentence' units, one of which was affirmed and one vacated, the same logic applies where the judgment's constituent *sentence alone* is vacated, followed by a remand for discretionary review.

In *Fleming* for example, the petitioner had been convicted on three counts in the trial court and was given consecutive sentences, which first became final in 1997. 61 So.3d at 400. Later, after this Court's decisions in *Apprendi* and *Blakely*, the petitioner was granted a resentencing and his case remanded. *Id*. The Florida Supreme Court ultimately determined

that at this new sentencing proceeding, the petitioner was entitled to the application of *Apprendi* and *Blakely*, because his sentence had been *rendered nonfinal*. *Id*. at 408 ("Fleming's conviction was final in 1997, as was his sentence. Fleming's sentence, however, did not remain so…."). The court reasoned that because the new sentencing proceeding was "de novo in nature" it gave rise to a "new sentence" after *Apprendi* and *Blakely* had been decided, and to which they therefore applied. *Id*. at 404-06.

Moving closer to the case at bar, while it is true that a conditional writ is not literally a remand, here the conditional writ's *being followed by* the new independent review led the case's posture to take on the relevant characteristics which delay finality in a non-ministerial remand: subsequent discretionary review generating a new, appealable judgment. The lower court approach to the latter situation thus applies with equal force in the context of the former.

The comparison is borne out well by this Court's decision in *Magwood v. Patterson*, 561 U.S. 320 (2010). There, the petitioner was convicted of murder and sentenced to death in state court. *Id*. at 323. After exhausting his state remedies, he petitioned for and was granted a conditional writ of habeas corpus by a federal district court as to his death sentence. *Id*. In response, the state court conducted a new sentencing proceeding and again sentenced the petitioner to death. *Id*. This proceeding was conducted in the state trial court and it involved "reweighing the aggravating and mitigating circumstances. . . ." *Magwood v. State*, 548 So.2d 512, 513 (Ala. Crim. App. 1988). This reweighing was performed with consideration of "the original record of the trial and sentence." *Magwood v. Patterson*, 561 U.S. at 339.

When the petitioner returned to federal habeas to challenge the new death sentence, this Court found that his second petition was not 'successive' for AEDPA purposes, because the second state court proceeding had generated "*a new judgment*." *Id*. at 331 (emphasis added). This result was based in part on the nature of § 2254 proceedings in general: "A § 2254 petitioner is applying for something: His petition seeks invalidation (in whole or in part) of the judgment authorizing [his] confinement." *Id*. at 332 (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 83 (2005)) (internal quotation marks omitted). This goal is reflected in the consequence of a successful application: "[If a] petition results in a district court's granting of the writ, the State may seek a *new* judgment (through a new trial or sentencing proceeding)." *Id*.; *see also Wilkinson*, 544 U.S. at 87 (Scalia, J., concurring) (stating that a conditional writ gives a state the chance to "replace an invalid judgment with a valid one").

Here, consideration of the remand and conditional writ caselaw together compels the conclusion that McKinney's conviction was not final at the second independent review. In his § 2254 petition, McKinney sought and was granted the invalidation of his sentence, as it was infected by *Eddings* error. This invalidated his 'judgment of conviction' because the sentence is an integral part of a criminal conviction (along with the guilt determination). Arizona then exercised its prerogative to seek a new, valid sentence (and thus, a new judgment of conviction) via a repeat discretionary proceeding in the state courts. At that point, the posture of McKinney's case shared the same features that make for a delay of finality in the

remand context: Arizona was seeking to obtain a new judgment via a fresh discretionary proceeding.

The state's own *choice* substitutes for the appellate court mandate here. Proceeding in this manner was Arizona's right, as an available response to the conditional writ, but the State cannot escape the constitutional consequences of that decision: That McKinney's conviction was rendered nonfinal for retroactivity purposes, entitling him to the application of any relevant rule of constitutional criminal procedure that had been decided at the time by this Court. *See Griffith*, 479 U.S. at 328 (holding that new rules of constitutional criminal procedure apply retroactively to "all cases, state or federal, pending on direct review or not yet final").

4. Holding that McKinney's conviction was not final poses no threat to state finality interests.

This Court has recognized the importance of finality in criminal judgments. *See Danforth v. Minnesota*, 552 U.S. 264, 279 (2008); *but see Teague*, 489 U.S. at 321 n. 3 (Stevens, J., concurring in part and concurring in the judgment) (arguing that finality interests are "wholly inapplicable to the capital sentencing context"). Here, however, that general concern does not counsel any doubt regarding the conclusion that McKinney's conviction was rendered nonfinal.

First, the understanding of when finality is undone which Petitioner advances leaves states in the driver's seat: If Arizona had chosen not to motion for (and been granted) a new independent review, then McKinney's conviction may well have remained final for retroactivity purposes. This Court has recognized

that the interest in the finality of a state conviction is a *state, not a federal*, interest. *Danforth*, 552 U.S. at 280. Thus, a conception of finality that leaves states with control over whether to take the actions that will reopen convictions sufficiently respects the interest.

Second, Petitioner in no way questions the rule that the mere possibility of a conviction later becoming nonfinal renders it nonfinal at all prior times. *Jimenez*, 555 U.S. at 120 n. 4. Petitioner contends only that, where a state has actually reopened direct review or otherwise rendered a conviction nonfinal, then *Griffith* retroactivity applies.

Third, in considering the import of finality interests for McKinney, it must not be forgotten that this is a *capital* case. Consequently, the oft-repeated maxim that 'death is different' ought to have serious ramifications for how much weight is assigned to generic 'finality' considerations. *See Schriro v. Summerlin*, 542 U.S. 348, 365 (2004) (Breyer, J., dissenting) (arguing that the Court "should discount ordinary finality interests in a death case, for those interests are comparative in nature").

B. New Rules of Constitutional Criminal Procedure Apply Retroactively to All Nonfinal Cases In The State Courts.

The retroactive applicability of new rules of constitutional criminal procedure to nonfinal cases in the state courts is well-settled in this Court's jurisprudence. A new rule "is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final . . . ." *Griffith*, 479 U.S. at 328. As demonstrated above, McKinney's case fell

within the ambit of this command at the time of the second independent review, entitling him to the application of any rules already-decided.

Griffith's foundational requirement is animated by two principles that Justice Harlan articulated in his critiques of the Court's earlier retroactivity cases. First, that the "integrity of judicial review" is undermined by any failure to "resolve all cases before [the Court] on direct review in light of our best understanding of governing constitutional principles." *Id*. at 323 (quoting *Mackey v. United States*, 401 U.S. 667, 679 (1971) (Harlan, J., concurring)). Second, denying defendants whose cases are nonfinal the benefit of new rules, "violates the principle of treating similarly situated defendants the same." *Id*. (citing *Desist v. United States*, 394 U.S. 244, 258-59 (1969) (Harlan, J., dissenting)). These twin concerns for judicial integrity and equity make clear that *Griffith*'s retroactivity command is based on something much deeper than mere policy. The significance of these jurisprudential values must also be given serious consideration in weighing the strength of any contrary finality interest arguments advanced by the State of Arizona.

Reflecting that importance, later decisions of this Court have more or less explicitly construed *Griffith*'s rule as being of constitutional dimensions. *See Montgomery v. Louisiana*, 136 S.Ct. 718, 728-29 (2016) (rejecting the proposition that the Court's retroactivity precedents are not "a constitutional mandate"); *Id*. at 737 (Scalia, J., dissenting) (stating that "the *Griffith* rule is constitutionally compelled"); *Teague*, 489 U.S. at 317 (White, J., concurring in part and concurring in the judgment) (stating that *Griffith* "appear[s] to have constitutional underpinnings").

Griffith's status supports the strength of the command "*all* cases, *state or federal*" and justifies its bindingness. *Griffith*, 479 U.S. at 327 (emphasis added). But if this mandate is to retain its vitality, this Court must be vigilant for attempts to evade its application by means of creative 'labeling' of state criminal procedure. *See Ring*, 536 U.S. at 602 (stating that the requirement of jury fact-finding is triggered by the role a fact plays in sentencing "no matter how the state labels it").

C. McKinney Was Entitled To Have *Ring* And *Hurst* Applied To His Case, Requiring That He Be Re-Sentenced Before A Jury.

The Arizona Supreme Court affirmed McKinney's death sentence in his first direct appeal on May 16, 1996 and he did not petition this Court for a writ of certiorari. *McKinney I*, 185 Ariz. at 567; *Towery*, 204 Ariz. 386 at 390. That lapsed period marks the point at which his conviction first became final. *Griffith*, 479 U.S. at 321 n. 6. However, that finality was dissipated as a result of the state's response to the conditional writ. Arizona motioned for a new round of direct review before the Arizona Supreme Court and this motion was granted on April 19, 2017. JA016-17. The Arizona Supreme Court handed down its second affirmance on September 27, 2018. JA003.

Whichever of the latter two dates one selects to mark the exact point at which McKinney's conviction became nonfinal once more (a question that need not be decided here), *Ring* and *Hurst* both were applicable to McKinney's case, having already been decided. This Court handed down *Ring* on June 24, 2002 and *Hurst v. Florida* on January 12, 2016. 536 U.S. at 584; 136 S.Ct. 616 (2015).

McKinney's death sentence plainly violates the command of *Ring*. There, this Court applied the *Apprendi* line of cases to determine that the Sixth Amendment forbids "a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 608; *see also Hurst*, 136 S.Ct. at 619 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."). To hold otherwise would have been inconsistent with *Apprendi* and have "senselessly diminished" the right to trial by jury enshrined in the Constitution. *Ring*, 536 U.S. at 609. In McKinney's case, no jury has ever heard the evidence that supposedly qualifies him for the death penalty, nor has a jury ever been charged with and found an aggravating circumstance applicable to him beyond a reasonable doubt. Arizona's *judges alone* have twice stated that such aggravators are present, without input from even an advisory jury.

Further, the *Ring* error in McKinney's sentence was not harmless. Arizona would have to demonstrate that the *Ring* error was "harmless beyond a reasonable doubt," an impossible bar for them to vault. *Chapman v. California*, 386 U.S. 18, 24 (1967). Arizona cannot make that showing because of the depth and power of the mitigating evidence in this case and the special evaluative role that juries play in relation to such evidence. *See supra* 1-3 (describing the extreme child abuse McKinney endured and his resultant PTSD); *infra* 35 (describing the uniqueness of a jury's evaluation of mitigating evidence). That being said, Petitioner recognizes that it has generally been the practice of this Court to "leave it to state courts to consider whether [such] error is harmless"

in the first instance, and Petitioner does not oppose a remand for that purpose here. *Hurst*, 136 S.Ct. at 624. But what we do ask this Court to do is to ensure that McKinney's Sixth and Eighth Amendment rights are finally vindicated. His conviction was rendered nonfinal by the time of the second independent review. New rules of constitutional procedure apply to all cases, state and federal, that are nonfinal. Thus, McKinney was entitled to the benefit of *Ring*, which he was unjustifiably denied.

II. EVEN IF *RING* DOES NOT APPLY, RESENTENCING IS REQUIRED BECAUSE THE ARIZONA SUPREME COURT'S REVIEW OF A COLD RECORD FAILED TO CURE THE *EDDINGS* ERROR AND VIOLATED MCKINNEY'S RIGHT TO A FAIR SENTENCE UNDER THE EIGHTH AMENDMENT.

For decades, this Court's approach to capital jurisprudence has been based on the simple premise that *death is different*. Unlike any other punishment scheme, the imposition of a death sentence requires particular considerations and protections that meet the Eighth Amendment's demand of recognizing the humanity of the defendant. On that basis, this Court has repeatedly held that the sentencer in a capital case must consider all mitigating evidence. *Lockett v. Ohio*, 433 U.S. 586, 605 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 113 (1982). In McKinney's case, the independent review conducted by the Supreme Court of Arizona undermined the ability of the sentencer to consider all mitigating evidence. For that reason, resentencing by the trial court is the only viable

solution that will meet the requirements of *Eddings* and the Eighth Amendment.

A. The Eighth Amendment Commands A Capital Sentencer To Consider The Individual Character Of A Capital Defendant.

Death is "qualitatively different." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). The severity and irrevocability of death, in comparison to every other punishment scheme, demands heightened procedural safeguards to protect defendants against arbitrary sentences. *See Lockett*, 433 U.S. at 604 (asserting difference between capital punishment and other penalties and the greater protections required when death is imposed). Eighth Amendment jurisprudence is accordingly oriented toward enhancing reliability and accuracy in capital sentencing. *See Sawyer v. Smith*, 497 U.S. 227, 243 (1990) ("Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy"); *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985) (stating that the Eighth Amendment requires "heightened need for reliability" in death cases); *Lockett*, 433 U.S. at 604 (noting the need for a greater degree of reliability in death sentencing).

This Court's precedent teaches that reliability and accuracy in death cases is essential. Every capital case this Court has decided since *Furman v. Georgia* is imbued with the notion that discretion should be sufficiently cabined and limited to avoid arbitrary and unreliable sentences. 408 U.S. 238, 256 (1972) (Marshall, J., concurring); *see also Maynard v.*

Cartwright, 486 U.S. 356, 362 (1988) ("Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action."). In *Furman*, this Court concluded that the states' discretionary capital punishment schemes violated the Eighth Amendment because "[they] imposed the death penalty with 'great infrequency' and afforded 'no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not.'" *Lockett*, 433 U.S. at 599 (quoting *Furman*, 408 U.S. at 313 (White, J., concurring)).

In *Gregg v. Georgia*, this Court determined that to comply with the rule of *Furman*, discretion in sentencing should be "limited and directed" to ensure a more consistent and rational capital punishment scheme. 428 U.S. 153, 189 (1976). This Court applied that principle in *Woodson* when it struck down North Carolina's mandatory death sentence for first-degree murder, because it failed to curtail arbitrary and wanton discretion. 428 U.S. at 302

In particular, *Woodson* ordered that any sentencing scheme must permit consideration of the character of the defendant and the circumstances of the offense. *Id.* at 304. This Court made clear that individual consideration was necessary to ensure the non-arbitrary imposition of the death penalty and to realize the "fundamental respect for humanity" that underlies the Eighth Amendment. *Id.* (recognizing assessment of character and circumstances is a "constitutionally indispensable" part of the capital sentencing process). Thus, individualized consideration of the defendant's character,

background, and life circumstances is the bedrock protection against arbitrary, capricious, and discretionary death sentences. For it follows that capital punishment must be imposed fairly, with recognition of the defendant's character, or not at all.

B. Consideration Of Mitigating Evidence Is A Fundamental Part Of A Capital Sentencer's Individual Consideration Of A Capital Defendant.

At the core of any individualized consideration of a defendant's character is the acknowledgement of mitigating circumstances. *Lockett*, 438 U.S. 586 at 604. The recognition of mitigators is so important that this Court has repeatedly held that failure to consider mitigating evidence contravenes the Eighth Amendment. *Id.*; *Eddings*, 455 U.S at 113. This Court set forth a rule in *Lockett* that held a sentencer in capital cases must be permitted to consider any mitigating factor. That rule was applied and expanded in *Eddings*, where this Court held that just as the State cannot preclude the sentencer from considering any mitigating factor, the sentencer herself cannot refuse to consider, as a matter of law, any relevant mitigating evidence. *Id.* at 114.

Lockett, *Eddings*, and their progeny, affirm that more than any other decision in law, the choice to impose the death penalty requires consideration of the defendant as an individual and acknowledgement of mitigating evidence. Moreover, the case law compels the sentencer to actually address mitigation in the imposition of a sentence. Following, "it is not enough simply to allow the defendant to present mitigating evidence to the sentencer." *Poyson v. Ryan*,

711 F.3d 1087, 1098 (9th Cir. 2013) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 308 (1989)). "The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Id*.

Consideration demands confrontation. In order for a sentencer to give effect to mitigating evidence, they must be able to evaluate, critique, and assess what is presented in its totality. In evaluating the rigor with which mitigating evidence must be considered, this Court has put a premium on the sentencer's proximity to the presentation of mitigating evidence. In *Caldwell v. Mississippi*, this Court stressed that the command of *Lockett* and *Eddings* was a command for the sentencer to be in position to fully evaluate the evidence: "When we held that a defendant has a constitutional right to the consideration of such factors [citing *Eddings*, 455 U.S. 104 and *Lockett*, 438 U.S. 586], we clearly envisioned that that consideration would occur among sentencers who were present to hear the evidence and arguments and see the witnesses." 472 U.S. at 330-331. This evidence is often testimony about the past circumstances of the defendant, medical expert testimony on mental or physical illnesses, or remorse. In other words, evidence that "cannot adequately be conveyed through the medium of a written record." *Clemons v. Mississippi*, 494 U.S. 738, 770 (1990) (Blackmun, J., concurring in part, dissenting in part).

Accordingly, to "trea[t] each defendant in a capital case with that degree of respect due the uniqueness of the individual," the sentencer must be positioned in a way that truly facilitates the effect of mitigating evidence. *Lockett*, 438 U.S. at 605. It is only then that the Eighth Amendment's call to recognize the

humanity of the defendant by the sentencer is fulfilled.

C. The Arizona Supreme Court's Independent Review Impermissibly Undermines The Sentencer's Ability To Consider Mitigating Factors Necessary To Recognize McKinney's Humanity.

The Arizona Supreme Court's independent review does not meet the command of *Eddings* and the Eighth Amendment. In *McKinney V*, the 9th Circuit, en banc, held the Supreme Court of Arizona applied an unconstitutional casual nexus test to McKinney's post-traumatic stress disorder and refused, as a matter of law, to treat it as a nonstatutory mitigating factor. 813 F.3d at 819. In response, the 9th Circuit ordered the Arizona Supreme Court to fix this error.

Rather than send the case back to the trial court for resentencing, the Supreme Court of Arizona initiated an independent review of the 25-year old cold record. That court, sitting 25-years away from the testimony of the witnesses and without the presence of McKinney, read the record and arrived at the same conclusion: death.

For over 15 years, in clear violation of *Eddings*, the Arizona Supreme Court applied an unconstitutional "causal nexus" test, by which mitigating evidence was given no weight if it was not causally connected to the crime. *McKinney V*, 813 F.3d at 802. McKinney was sentenced to death during the height of this period. Notwithstanding this Court's clear order to consider all mitigating evidence, the Arizona Supreme Court articulated, applied, and affirmed record after record in which this unconstitutional test appears. Now, the

Arizona Supreme Court attempts to correct this history solely by examining a record infected by a constitutional infirmity that persisted for nearly two decades. Just as the trial court initially erred, so too here, does the Arizona Supreme Court fail to consider the mitigating evidence and by extension, McKinney's humanity, as required by the Eighth Amendment.

Although the term 'consideration' eludes precise definition, nothing in this Court's jurisprudence suggests that mere invocation of the word 'consider' with no analysis satisfies the constitutional command. Yet, that is largely what the Supreme Court of Arizona's independent review turns on. In approximately two paragraphs of their entire decision, that court addresses the mitigating factors at issue, namely McKinney's PTSD. JA007; JA009. Those paragraphs note that the Court affords "minimal weight" to the PTSD on the basis that it is not connected to the crime. JA007. Cherry-picking a single line from Dr. McMahon's trial testimony, the Supreme Court of Arizona in independent review arrives at the same destination as the trial court and initial Arizona Supreme Court decision—except instead of affording no weight to the mitigators, the court gives "minimum weight." *Id*.

The first and second independent reviews are mirror images of one another in all respects, including their shared constitutional errors. The 9th Circuit faulted the Supreme Court of Arizona for rejecting mitigating evidence and repeatedly including pin cites to *State v. Ross*, 180 Ariz. 598 (Ariz. 1994), a case which detailed the unconstitutional causal nexus test. In the second independent review the Arizona Supreme Court again paid little attention to the mitigators, but excluded any reference to *Ross*.

Eliminating the pin cite does not eliminate the error. If the Arizona Supreme Court did consider mitigating factors, as they were constitutionally compelled to, there is nothing in the record to reflect their consideration. There is no detailed discussion of McKinney's childhood, severe abuse, or life circumstances. Instead, there is just the repeated claim that "there is little or no connection between McKinney's mitigation and his behavior during the murder." JA009. Such a claim by the court, the same claim as in the first independent review, does not constitute a meaningful consideration of McKinney's mitigating circumstances. The court's superficial and one-dimensional look at McKinney's PTSD is far below the constitutional threshold and repeats, rather than corrects, the constitutional errors below.

The 9th Circuit concluded "that 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." *McKinney V*, 813 F.3d at 823. It is more than curious that the evidence had no impact on the Supreme Court of Arizona in independent review. It is an indictment of a process that fails to meet the constitutional threshold.

In other circumstances, this Court has attached "constitutional significance" to an individual's ability to directly confront the trier of fact with their case as opposed to relying on written statements or records. *See Clemons*, 494 U.S. at 769 (Blackmun, J., concurring in part, dissenting in part) (arguing for the importance of an in-person presentation by the defendant to the fact finder in capital cases). In the criminal context, for example, this Court has declared

that the defendant's right to be heard can "be vindicated only by affording a defendant to testify before the factfinder." *Id.* (quoting *Rock v. Arkansas,* 483 U.S. 44, 51 n. 8 (1987)). Similarly, when considering the Confrontation Clause, this Court has emphasized the privilege of a criminal defendant to "compe[l] [the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Clemons*, 494 U.S. at 769 (Blackmun, J., concurring in part, dissenting in part) (quoting *Mattox v. United States*, 156 U.S. 237, 242 (1895)).

And even beyond the criminal context and into the realm of public benefits, this Court has held that a face-to-face proceeding is constitutionally required. *See Clemons*, 494 U.S. at 769 (Blackmun, J., concurring in part, dissenting in part) (quoting *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970)) ("[p]articularly where credibility and veracity are at issue . . . written submissions are a wholly unsatisfactory basis for decision."). These cases establish the importance of a party's ability to directly speak to the trier of fact. For if a decision on the papers in a public benefits case is constitutionally lacking, then surely, a decision based on a stale record in a death penalty case is too.

In analyzing the second independent review below, this Court ought to take serious guidance from the above cases. For, while they are directly concerned with prescribing trial procedure, the review below sounds more in that realm than generic appellate review would. This is so because, the previous two decisions—the trial court's initial death sentence and the first independent review's

affirmance—were constitutionally flawed. The findings of fact there were infected by error. Consequently, the second independent review of necessity represented the findings of fact in the first instance. Therefore, all of the protections discussed above in the trial context ought to have been applied here. Petitioner does not suggest that an appellate court can never engage in reweighing or an independent review. We argue only that on the facts of McKinney's case, where the procedural history has stretched for over two decades and been infected with *Eddings* errors throughout, demand that the only way for McKinney to get a fair sentence is through resentencing by the trial court.

D. Without Resentencing By The Trial Court, The *Eddings* Error Cannot Be Cured.

At this point in the case's history, only resentencing by the trial court can meet the rigors demanded in any capital case. In *Lockett*, the precursor to *Eddings*, Chief Justice Burger summarized the stakes of the death penalty:

> There is no perfect procedure for deciding in which cases government authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, the risk is unacceptable

> and incompatible with the commands of the Eighth and Fourteenth Amendments.

Abdul-Kabir v. Quarterman, 550 U.S. 233, 264 (2007) (quoting *Lockett*, 438 U.S. at 605). Similar logic applies here. In McKinney's case, it is not a statute at issue, but an independent review process that by its nature prevents any real analysis of a defendant's mitigating evidence. Devoid of any assessment of witness testimony, the review process consists of a stale-record of a doctor's opinions from 1993. Compared with what would necessarily occur at a resentencing hearing by a trial court, the independent review process fails to create a context where the sentencer can give a "reasoned moral response" to mitigating evidence. *Abdul-Kabir*, 550 U.S. at 264.

Resentencing by the trial court would also adhere to this Court's acknowledgment of the centrality of the jury in capital cases. Unlike the closed door, internal process of the independent review, resentencing would require the paneling of a jury to hear any proffered aggravating and mitigating circumstances. Since the turn of the 21st-Century, this Court has issued a series of decisions, beginning with *Apprendi*, and followed by *Ring* and *Hurst,* that emphasize and affirm the role of the jury in determining the facts that make a defendant eligible for death. It follows that if the jury is required to determine death-eligibility, then so too must they determine whether in fact death ought or ought not to be imposed. *See Jurek v. Texas*, 428 U.S. 262, 271 (1976) ("A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it *should not* be imposed.") (emphasis added).

In particular, the jury has a heightened role in relation to the weighing of mitigating evidence. As a cross-section of the community, a jury is in the best position to make "community-based judgments" as to whether death constitutes proper retribution. *Schriro*, 542 U.S. at 360 (Breyer, J. dissenting). It is only these community-based judgments that can fulfill the obligation under the Eighth Amendment to consider the capital defendant's humanity. Therefore, McKinney's case demands jury resentencing, a procedure in which community members hear, evaluate, and assess the mitigating circumstances.

Moreover, the critical inquiry into the relationship between McKinney's PTSD and the crime turns on scientific testimony that is 25-years old. The facts on McKinney's PTSD bear repeating. McKinney suffered severe abuse and neglect from early childhood. JA075; JA077-078. Dr. McMahon, a clinical psychologist, served as the chief medical witness for McKinney and performed a battery of tests on him. JA113; JA116. These tests, paired with his medical training and observations of McKinney, formed the basis for his analysis, which at one point concluded that PTSD would not cause the crime at issue. Yet, in the 25-years since Dr. McMahon provided his testimony, PTSD science has developed and the medical community's understanding of PTSD has deepened. *See* Kerry J. Ressler, MD, PhD, *Recent Advances in Understanding and Treatment of Posttraumatic Stress and Trauma-Related Disorders*, 26 Harv. Rev. Psychiatry 97, 98 (2018) (discussing recent trends and changes in the understanding of PTSD science and treatment).

At resentencing, where new witnesses would be convened, the PTSD science would be reflective of

contemporary standards. And while there is no way to be certain that contemporary research would lead to different testimony, the risk that it might demands resentencing. The Arizona Supreme Court's refusal to create a new record violated well-founded principles in capital jurisprudence: that the sentencer give meaningful consideration to mitigating evidence when the defendant's life is at stake.

CONCLUSION

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

Respectfully submitted,

/s/ Counsel for Petitioner

MAURA HALLISEY
JONATHAN WILT
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
3501 Sansom Street
Philadelphia, PA

Counsel for Petitioner

Dated: October 25, 2019

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(g) and (h) as modified by the Keedy Cup Rules, counsel for Petitioner certifies that this document contains 9254 words in 36 pages, excluding the parts exempted by Supreme Court Rule 33.1(d).

Petitioner declares under penalty of perjury that the foregoing is true and correct.

/s/ Counsel for Petitioner

MAURA HALLISEY
JONATHAN WILT
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
3501 Sansom Street
Philadelphia, PA

Counsel for Petitioner

Dated: October 25, 2019