No. 18-1109

IN THE
Supreme Court of the United States

JAMES ERIN MCKINNEY,
Petitioner,

v.

STATE OF ARIZONA,
Respondent.

On Writ of Certiorari to the Arizona Supreme Court

BRIEF FOR RESPONDENT

KAYLA KATZ
JILON LI
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
3501 Sansom Street
Philadelphia, PA 19104

Counsel for Respondent

CAPITAL CASE

QUESTIONS PRESENTED

Almost thirty years ago, the petitioner, James Erin McKinney, was found guilty of two counts of murder. Since the state court found that McKinney committed the murders for pecuniary gain and in a manner that was especially heinous, cruel, or depraved, it ordered that he be sentenced to death for each count. In 2015, the Ninth Circuit, en banc, granted McKinney federal habeas corpus relief because the Arizona Supreme Court had applied an unconstitutional "causal nexus" test when reviewing McKinney's mitigating factors. At the request of the State of Arizona, the Arizona Supreme Court then conducted a new independent review of McKinney's death sentences. After considering all of McKinney's mitigating and aggravating factors, the court found that the aggravating factors outweighed any mitigation. As such, the Arizona Supreme Court affirmed McKinney's death sentences.

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

FEDERAL CIRCUIT COURT CASES

FEDERAL DISTRICT COURT CASES

STATE COURT CASES

FEDERAL CONSTITUTIONAL PROVISIONS

STATE CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES

STATE STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF THE CASE

A. Factual Background

In March 1991, James Erin McKinney and his half-brother Charles Michael Hedlund murdered Christine Mertens and Jim McClain while burglarizing their respective homes. JA 004. McKinney led the planning and implementation of these crimes. JA 007. He had boasted that he would kill anyone who happened to be home during a burglary. *State v. McKinney*, 917 P.2d 1214, 1218 (Ariz. 1996) (*McKinney I)* (en banc). After learning that Mertens kept several thousand dollars in an orange juice container in her refrigerator, the brothers broke into Mertens's home knowing that she was inside. *Id.* at 1219; JA 007. When McKinney encountered Mertens, he started to beat her. JA 007. As Mertens struggled for her life, McKinney broke her finger and started stabbing her. JA 008. McKinney then forced Mertens to the ground, placed a pillow on her head to muffle any sound, and executed her with a shot to the back of her head. *McKinney I*, 917 P.2d at 1219; JA 008. Mertens's son found her body, next to discarded knives, on a carpet soaked with blood. JA 008, 033.

Two weeks later, McKinney targeted 65-year-old Jim McClain. JA 004. Finding him asleep, the brothers approached and shot him in the head. *Id.* The defendants ransacked the bedroom taking a pocket watch and three guns. *McKinney I*, 917 P.2d at 1219. Between the murder of Jim McClain and the discovery of his body, the defendants were trying to pawn off their ill-gotten goods. JA 282. Defendants were convicted of two counts of first-degree murder

for the deaths of Mertens and McClain. *McKinney I*, 917 P.2d at 1218.

B. Proceedings Below

1. State Sentencing and Appeal

At the time of McKinney's conviction and sentencing, this Court had not yet decided *Ring v. Arizona*, 536 U.S. 584 (2002), and the trial judge permissibly acted as capital sentencer. At sentencing, McKinney called two family members and Dr. Mickey McMahon, a psychologist, to provide evidence of mitigating circumstances. JA 36, 68, 113. McKinney's family members testified that he had lived, in squalor and amongst animals, with an abusive stepmother. *See* JA 038-041, 044, 054, 057, 077, 079.

When Dr. McMahon was called to the stand, he was permitted to testify extensively about the diagnosis and effect of McKinney's alleged post-traumatic stress disorder ("PTSD"). Dr. McMahon explained that he had administered a battery of psychological tests. JA 116-17. The tests indicated, *inter alia*, that McKinney would act with poor judgment and preferred solitary activities. JA 118. Most importantly, Dr. McMahon diagnosed McKinney as suffering from PTSD likely caused by prolonged emotional and physical abuse. JA 121-22. Dr. McMahon's extensive testimony indicated that McKinney's PTSD may have prompted violent behavior, drug use, a tendency to withdraw from stressful situations, and a follower mindset. *See* JA 125, 128, 130.

Defense counsel also submitted a lengthy mitigation memorandum that spelled out McKinney's mitigating circumstances, including his PTSD

diagnosis. *See* JA 321-26. The memorandum argued that each factor required individualized consideration as required by *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). JA 313.

The trial court found beyond a reasonable doubt that McKinney had (1) committed murder with the expectation of pecuniary gain and (2) killed Mertens in an especially heinous, cruel, or depraved manner. JA 006. After determining that the mitigating circumstances did not outweigh the aggravating factors, the court sentenced McKinney to death for both murders. JA 004.

McKinney appealed. The Arizona Supreme Court then conducted an independent review of McKinney's case, as required by A.R.S. § 13-755, and affirmed his sentences on May 16, 1996 in *State v. McKinney*, 917 P.2d 1214 (Ariz. 1996) (*McKinney I*) (en banc).

2. Federal Habeas Review

Three years after McKinney's case became final on direct review, in 1999, McKinney filed for state post-conviction relief. JA 013-15. On February 26, 2003, in *State v. Towery*, the Arizona Supreme Court denied McKinney's request. 64 P.3d 828 (Ariz. 2003); JA 015.

Subsequently, McKinney filed a petition for federal habeas corpus relief, which was denied by the United States District Court for the District of Arizona on August 10, 2009. *McKinney v. Ryan*, No. CV 03-774-PHX-DGC, 2009 WL 2432738, at *30 (D. Ariz. Aug. 10, 2009). This denial of habeas relief was affirmed by the Ninth Circuit Court of Appeals on

September 16, 2013. *McKinney v. Ryan*, 730 F.3d 903, 921 (9th Cir. 2013).

However, on December 29, 2015, the Ninth Circuit reheard the case en banc and reversed the Arizona Supreme Court's decision in *McKinney I*, finding that the state court erred in applying an unconstitutional "causal nexus" test when reviewing McKinney's mitigating factors. *McKinney v. Ryan*, 813 F.3d 798, 827 (9th Cir. 2015) (en banc) (*McKinney V*). The Ninth Circuit then remanded McKinney's case to the federal district court "with instructions to grant the writ [of habeas corpus] with respect to McKinney's sentence unless the state, within a reasonable period," either corrected the constitutional error or vacated the sentence and imposed a lesser sentence. *Id.*

3. The Arizona Supreme Court's Independent Review

In accordance with the Ninth Circuit's order to correct the constitutional error in McKinney's death sentences, the State of Arizona requested that the Arizona Supreme Court conduct an independent review. JA 005. While McKinney opposed this motion, arguing that he was entitled to a new sentencing hearing before a jury under *Ring v. Arizona*, the Arizona Supreme Court held that it was properly entitled to conduct its own independent review of the matter because McKinney's case became final before *Ring* was decided. JA 005. The Arizona Supreme Court adopted the findings of the trial court regarding the aggravating circumstances surrounding the Mertens murder, namely that he (1) committed the murder with the expectation of pecuniary gain; and (2) killed Mertens in a manner especially heinous,

cruel or depraved. JA 006. For the McClain murder, the Arizona Supreme Court found two aggravating circumstances beyond a reasonable doubt: (1) McKinney was convicted of more than one capital punishment eligible offense; and (2) he committed murder with expectation of pecuniary gain. JA 009.

The Arizona Supreme Court then reviewed the trial court's previous findings and the federal courts' findings on aggravating and mitigating factors, and in weighing them, held that the aggravating factors outweighed any mitigating factors that were present. JA 006, 008. The Arizona Supreme Court affirmed both of McKinney's death sentences. JA 010.

Subsequently, McKinney petitioned this Court for certiorari, which was granted on June 10, 2019. *McKinney v. Arizona*, 149 S. Ct. 2692 (2019).

SUMMARY OF THE ARGUMENT

This Court should affirm the Arizona Supreme Court's independent review because *Ring v. Arizona* was not applicable to Petitioner's case, and the court's reweighing of Petitioner's aggravating and mitigating circumstances cured the *Eddings* error.

I. The Arizona Supreme Court correctly held that McKinney was not entitled to the new rule promulgated in *Ring v. Arizona*. Under this Court's decision in *Teague v. Lane*, new constitutional rules of criminal procedure are not applicable to matters that were final at the time that the new rule was announced. This Court already held in *Schriro v. Summerlin* that the decision in *Ring* constituted a new rule. Thus, the only question before the Court on this issue is whether McKinney's case was final at the time.

Under this Court's precedent on the meaning of finality for retroactivity purposes, McKinney's case became final in 1996, six years before the new rule in *Ring* was decided. At that point, McKinney had already exhausted his direct appeal and failed to petition for a writ of certiorari. Not only does McKinney's case meet the definition of finality under federal case law, the Arizona Supreme Court also adopted this understanding of finality when it held that McKinney's case was final for purposes of *Teague*. Since the Arizona Supreme Court did not veer from the general understanding of finality under *Teague*, this Court should respect the state court's determination that McKinney's case is final.

While Petitioner has claimed that his cited authorities support his contention that his case became non-final at some point, these references miss the mark. None of the cases cited by Petitioner in support of this argument are comparable to his case. On the contrary, the cases cited by Petitioner were decided under the backdrop of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), which is not the situation here. AEDPA cases necessarily involve questions of statutory interpretation, and AEDPA and *Teague* have distinct policy goals. For those reasons, AEDPA cases are not a relevant source for deciding McKinney's case. Additionally, the main case proposed by Petitioner in support of his case is not only an AEDPA case but is also distinguishable from his own case in relevant respects.

Finally, accepting Petitioner's interpretation of finality would undermine the principle of finality, thereby disrupting the deterrent effect of capital punishment and evidencing a lack of respect for the

States' interests. Instead, the Court should find that McKinney's case was final at all relevant times.

II. The Arizona Supreme Court cured its prior *Eddings* error when it independently reviewed Petitioner's sentences and reweighed his aggravating and mitigating circumstances. When this Court decided *Clemons v. Mississippi*, it concluded that "meaningful appellate review" is adequate "to evaluate any evidence relating to mitigating factors . . . ." 494 U.S. 738, 750 (1990) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 110-11 (1982)). As a result, when appellate courts review a capital sentence and reweigh the defendant's aggravating and mitigating circumstances, they provide the individualized treatment required by *Eddings*. The Arizona Supreme Court complied with *Clemons*, reviewed the trial court and Ninth Circuit's findings, and considered all mitigating circumstances found. As a result, the *Eddings* error was cured.

The Arizona Supreme Court is permitted latitude to structure its capital sentencing system within legitimate constitutional constraints. The court is not required to weigh aggravating and mitigating factors in any specific way nor ascribe any factor a particular weight. This Court has also been highly deferential when assessing whether a judge claims to have considered a mitigating circumstance. These Eighth Amendment parameters are long established, and the Court should reject Petitioner's invitation to invent new requirements.

This Court has consistently recognized that critical appellate review plays an essential role in the constitutionality of capital punishment. The Arizona Supreme Court has fully embraced its role and has

nullified a number of death sentences when it has determined that there was error or doubt that death was appropriate.

In reviewing this case, the Court should respect the decisions of the people of Arizona who chose to reinstate the death penalty, retain the Arizona Supreme Court judges who oversee its implementation, and protect the families of victims. It should bring peace to the families of Christine Mertens and Jim McClain.

ARGUMENT

I. THE ARIZONA SUPREME COURT CORRECTLY CONCLUDED THAT *RING V. ARIZONA* DOES NOT APPLY TO MCKINNEY'S CASE BECAUSE HIS CASE BECAME FINAL OVER TWENTY YEARS AGO AND HAS REMAINED FINAL SINCE.

Under *Teague v. Lane*, new constitutional rules of criminal procedure do not apply retroactively to cases that became final before the new rule was announced, unless they fall into a limited subset of exceptions. 489 U.S. 288, 310 (1989). The Court has previously held that the rule requested by McKinney, articulated in *Ring v. Arizona*, is a new rule that does not fit within a *Teague* exception, making it inapplicable to cases that were final at the time it was decided. *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004). Thus, the only question before the Court on this issue is whether McKinney's case is final for the purposes of *Teague*. Under both the standard definition of finality in the *Teague* context and the Arizona Supreme Court's understanding of finality, McKinney's case became final when his time for seeking further direct review expired. While

Petitioner argues that his case was reopened on direct review, the cases referenced in support of this conclusion are all drawn from foreign contexts that are factually distinguishable from his case. Permitting the petitioner to incorporate those cases from outside of the realm of *Teague* into this context would only serve to disrupt the important goals that the concept of finality was designed to protect. Therefore, the Court should find that McKinney's case remained final for the purposes of *Teague*.

A. Under Decades Of Precedent, McKinney's Case Is Final For The Purposes Of *Teague*.

In *Teague v. Lane*, this Court formally established what has now become a well-known rule: that, absent two very narrow exceptions, "new constitutional rules of criminal procedure [are] not applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310. While the petitioner has implied that the definition of finality is malleable, *see* Pet. Br. 10, finality for the purposes of a retroactivity analysis has been defined in a consistent manner.

Under *Teague* and its progeny, a case becomes final in this context when a judgment has been rendered, direct appeal has been exhausted, and the time to petition for a writ of certiorari to this Court has either elapsed, or a petition for writ of certiorari has been finally denied. *Teague*, 489 U.S. at 295. *See also Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). This definition of finality can be traced even further back than *Teague*. In *Griffith v. Kentucky*, this Court explained that, for the purposes of "retroactivity of new constitutional rules of criminal procedure[,] . . .

'[b]y final,' we mean a case 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." 479 U.S. 314, 320, 321 n.6 (1987).

McKinney's case falls within the bounds of finality under *Teague*. McKinney was convicted and sentenced in 1993, and his conviction and sentences were affirmed on appeal by the Arizona Supreme Court on July 2, 1996. JA 012, 302-07. At this point, his availability of direct appeal was exhausted. McKinney then failed to petition for a writ of certiorari before this Court, *State v. Towery*, 64 P.3d 828, 832 (Ariz. 2003) (en banc), causing his conviction and sentences to become final on October 1, 1996, when his time for seeking a writ of certiorari expired. *See* Sup. Ct. R. 13.1 ("[A] petition for a writ of certiorari to review a judgment in any case . . . entered by a state court of last resort . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment."). Thus, McKinney's case has been final for more than twenty-three years.

B. The Meaning Of Finality Under *Teague* Cannot Be Gleaned From AEDPA Cases.

Despite the uniform definition of finality applied in the retroactivity analysis, the petitioner has argued that his case was placed back onto direct review, thereby breaking the chain of finality. Pet. Br. 14. However, all of the cases that Petitioner has referenced for the proposition that cases can be reopened on direct review were decided in the context of AEDPA. Pet. Br. 9-11, 17-18. AEDPA cases are not binding as to the definition of finality in this case. As this Court has explicitly stated, "[f]inality is variously

defined; like many legal terms, its precise meaning depends on context." *Clay v. United States*, 537 U.S. 522, 527 (2003). *See also Caspari*, 510 U.S. at 390 (emphasis added) (explaining that, when conducting a retroactivity analysis, "[f]irst, the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague purposes*."); *Losh v. Fabian*, 592 F.3d 820, 825 (8th Cir. 2010) ("*Jimenez* concerned the definition of finality in the context of AEDPA's statute of limitations, it would not necessarily affect our review of the supreme court decision in [the petitioner's] case which concerned finality for purposes of determining retroactivity."). Further, because of two key differences between the AEDPA statute of limitations inquiry and the *Teague* retroactivity analysis, AEDPA cases are not applicable in this context.

First, when faced with questions how to interpret finality under AEDPA, this Court has based the bulk of its decisions on the statutory language of AEDPA and legislative intent. For example, in the Court's explanation of finality under AEDPA in *Clay*, it relied on the fact that "'it is generally presumed that Congress acts'" in particular ways and considered both how "Congress expects its statutes to be read" and "'Congress' design'" for the statute. 537 U.S. at 527-28, 532. Similarly, in *Jimenez v. Quarterman*, 555 U.S. 113 (2009), another case interpreting finality within the AEDPA context, the Court based its conclusion entirely on statutory interpretation. The Court began its analysis by explaining that "[a]s with any question of *statutory interpretation*, our analysis begins with the plain language of the statute." *Id.* at 118 (emphasis added). The Court also reiterated that finality's "'precise

meaning depends on context'" – but then went on to state that "here, the finality of a state-court judgment is *expressly defined by statute* . . . ." *Id.* at 119 (emphasis added). Finally, the Court based its holding on its interpretation of the statute, finding that "*[u]nder the statutory definition*, therefore, . . . petitioner's conviction was no longer final for purposes of § 2244(d)(1)(A)." *Id.* at 120. Since the *Teague* retroactivity analysis involves no statutory law, the primary reasoning relied upon by the Court in AEDPA cases is inapplicable to the *Teague* analysis. Hence, AEDPA cases are unsuitable for comparison to matters like McKinney's, which revolve entirely around the *Teague* analysis of retroactivity.

Second, AEDPA and *Teague*'s differing policy goals and implications necessitate that the two contexts utilize distinct approaches to finality. Determining finality under AEDPA § 2244(d)(1)(A) merely affects the statute of limitations period for bringing a federal habeas claim. Under AEDPA, the statute of limitations for bringing habeas claims runs for one year after the latest of four possible dates, one being "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). When courts interpret a statute of limitations in a lenient fashion, they are often motivated, at least in part, by the desire to prevent unsophisticated parties from inadvertently losing their ability to bring a claim based on a misunderstanding of how the statute of limitations ran. *See, e.g.*, *Stieberger v. Sullivan*, 738 F. Supp. 716, 727 (S.D.N.Y. 1990) ("[T]he Court must therefore strike a balance between the concerns underlying the statute of limitations and the equitable interest in not

extinguishing otherwise valid complaints of unrepresented and unsophisticated parties."); *Monroe v. Williams*, 705 F. Supp. 621, 627-29 (D.D.C. 1988) ("[S]ince plaintiff appeared to be an 'unsophisticated employee,' the court held that the statute of limitations should be tolled . . . ."). Using an expansive definition of finality under § 2244(d)(1)(A), such as in *Jimenez*, helps support that policy goal by protecting unsophisticated prisoners from missing the deadline for bringing a claim.

On the other hand, the chief policy goal of the *Teague* analysis is ensuring that those who are "similarly situated" are treated equally. *Teague*, 489 U.S. at 300. This notion of "evenhanded justice" was significant to the Court's decision in *Teague* and should not be taken lightly when considering McKinney's attempt to expand retroactivity under *Teague*. When the new rule in *Ring v. Arizona* was announced in 2002, McKinney was not "similarly situated" to the petitioner in *Ring*. The petitioner in *Ring v. Arizona* came before the Court on a petition for writ of certiorari directly after his case was reviewed by the state court of last resort. 536 U.S. 584, 596 (2002). However, in 2002, McKinney's case was already final for six years since his time to petition for a writ of certiorari expired. *Towery*, 64 P.3d at 832. Further, McKinney already filed for state post-conviction relief at this point. JA 015. To argue that the review of McKinney's sentence by the Arizona Supreme Court *sixteen years after Ring was decided*, regarding an issue unrelated to *Ring*, somehow puts McKinney in the same position as the petitioner in *Ring* is completely ludicrous. In fact, allowing McKinney to benefit from the new rule in *Ring* would controvert the goal in *Teague* of treating

like defendants alike. Any other defendant whose case completed direct review before 2002, like McKinney, but whose case is not later reviewed due to another error, will not be able to benefit from the new rule announced in *Ring*. Applying *Ring* to McKinney's case would not be in line with the vision of "evenhanded justice" imagined in *Teague*.

Additionally, the petitioner has argued that the Court's mention of *Clay*, an AEDPA case, in the context of the retroactivity analysis in *Beard v. Banks*[1] somehow indicates that the meaning of finality is interchangeable within these contexts. Pet. Br. 9. This argument fails to consider what the Court actually referenced from the opinion in *Clay*. In fact, the Court's reference to *Clay* was in support of the standard definition of finality under *Teague* – that is, "that finality attaches when [the Supreme Court] affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Beard*, 542 U.S. at 411; *Clay*, 537 U.S. at 527. In effect, Petitioner is equating the use of a portion of an AEDPA case that merely referenced a long-standing rule from the *Teague* context to contend that AEDPA's understanding of finality then applies under *Teague*. This is a substantial logical leap. Simply because the Court included a brief citation to *Clay*, an AEDPA case, in its retroactivity analysis in *Beard* does not mean that finality is the same in both contexts. Instead, due to the differences between AEDPA and the *Teague* analysis, the two approaches to finality are distinct.

---

[1] 542 U.S. 406 (2004).

C. *Jimenez* Only Applies When Certain Narrow Conditions Are Met, And McKinney's Case Does Not Meet Those Conditions.

The only case that Petitioner cites in direct support of the concept that a case that previously became final can be reopened on direct review, *Jimenez v. Quarterman*, Pet. Br. 10, was meant to apply to a narrow subset of cases and is not applicable to McKinney's case. When announcing its holding in *Jimenez*, this Court expressly stated that its decision was a "narrow one" and that it was merely holding that "where a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review, but before the defendant has first sought federal habeas relief, his judgment is not yet final for purposes of § 2244(d)(1)(A)." 555 U.S. at 121. Here, McKinney's case does not fall within this narrow exception. First, the Arizona Supreme Court did not grant McKinney an out-of-time direct appeal. Rather, he had the full opportunity to exhaust his direct appeal when the Arizona Supreme Court first reviewed his conviction and sentences. JA 011-12. Second, even if the Court were to consider the Arizona Supreme Court's second independent review of McKinney's case to be comparable to a grant of an out-of-time appeal, this new independent review took place *after* McKinney first sought federal habeas relief, not before. JA 005. And third, finality in McKinney's case is a matter of retroactivity and does not involve § 2244(d)(1)(A), which is not comparable to the *Teague* retroactivity analysis. *See supra* 11-14.

These differences between the facts in *Jimenez* and McKinney's case should be considered dispositive. In fact, the Eighth Circuit has twice

refused to apply *Jimenez* to cases where the facts are not exactly mirrored to those found in *Jimenez*. For example, in *Losh v. Fabian*, soon after the petitioner received a stayed prison sentence, conditioned on successful completion of probation, the petitioner's probation was revoked due to a violation of its terms. 592 F.3d at 821. The petitioner appealed the revocation of her probation and was granted a form of review under a Minnesota state case, *State v. Fields*,[2] that allowed her to challenge an aspect of her sentence. *Id.* at 822. The petitioner then argued that this *Fields* review put her case back onto direct review, entitling her to a new rule decided after her case initially went final, but before her *Fields* review. *Id.* at 824. Despite the petitioner's attempts to compare her case to the situation presented in *Jimenez*, the Eighth Circuit distinguished their cases because "[i]n *Jimenez*, the Supreme Court specifically relied upon the fact that under prevailing state law 'the order granting an out-of-time appeal restored the pendency of the direct appeal.' Here, on the other hand, the [state] supreme court ruled definitively that under state law [the petitioner's] appeal was not direct." *Id.* at 825.

Here too, McKinney's case is distinguishable from the petitioner's in *Jimenez*. Unlike in *Jimenez*, where the state court expressly indicated that it considered its grant of an out-of-time appeal to reopen direct review, the Arizona Supreme Court has consistently held that its independent review of McKinney's sentence did not disturb the finality of his case. JA 005. On the one hand, Petitioner claims that *Jimenez*, a case in which the Court based its decision

[2] 416 N.W.2d 734 (Minn. 1987).

on the state court's understanding of finality, supports his case. Nonetheless, on the other hand, the petitioner has argued that the Court should disregard the state court's interpretation of finality here in his own case. Pet. Br. 10-11. Petitioner cannot have it both ways.

Similarly, in *O'Neal v. Kenny*, an AEDPA case, after the petitioner's case finalized on direct review, he filed for state post-conviction relief. 579 F.3d 915, 916 (8th Cir. 2009). While waiting on his state post-conviction relief, the petitioner also filed for federal habeas relief, which was not granted. *Id.* Years later, the state trial court granted the petitioner's post-conviction relief in the form of "'a new direct appeal.'" *Id.* After this new direct appeal, the petitioner filed a second petition for federal habeas relief, arguing that, under *Jimenez*, the new direct appeal reset the clock for the purposes of the AEDPA statute of limitations. *Id.* at 917. The Eighth Circuit ultimately held that *Jimenez* did not apply to the petitioner's case. This is because the petitioner in *Jimenez* had never filed for federal habeas relief before he was granted a new direct appeal by the state court. *Id.* at 919. In contrast, in *O'Neal*, the petitioner filed a federal habeas petition before the state court granted him a new direct appeal. *Id.* "In fact, over three years passed between [the petitioner's] filing of his first habeas petition and the [] state trial court's grant of a new direct appeal." *Id.* Because the petitioner had first sought federal habeas relief before the state court granted him a new direct appeal, the Eighth Circuit found that *Jimenez* did not apply.

This same logic applies in McKinney's case. Here, like in *O'Neal*, the Petitioner filed for federal

habeas corpus relief in 2009, years before his case was reviewed again by the Arizona Supreme Court. JA 005. Further, while in *O'Neal*, only three years passed between that petitioner's first habeas petition and the state court's grant of a new appeal, here, the gap of time was even larger – as nine years passed between McKinney's filing for federal habeas relief in 2009 and the Arizona Supreme Court's review of his sentence in 2018. JA 003. Therefore, due to the factual differences between the situation in *Jimenez* and McKinney's case, *Jimenez* should not be used to interpret finality here.

D. The Court Should Defer To The Arizona Supreme Court's Conclusion That McKinney's Case Remained Final.

According to the Arizona Supreme Court, and under Arizona law, McKinney's case has been final since 1996, when the time for petitioning this Court for a writ of certiorari expired. *See State v. McKinney*, 426 P.3d 1204, 1205-06 (Ariz. 2018) (finding that "McKinney's case was 'final' before the decision in *Ring*"); ABA, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Arizona Death Penalty Assessment Report 35 (2006) (explaining that, under Arizona law, "if neither party files a writ of certiorari with the United States Supreme Court, the conviction and sentence become final once the time to file a writ of certiorari has expired."). While Petitioner claims that the Arizona Supreme Court's new independent review of his sentence reopened his case, Pet. Br. 18, the Arizona Supreme Court did not consider their independent review to function this way and held that Petitioner's case remained final even after the independent review. *McKinney*, 426 P.3d at 1205-06. To gain a broader understanding of

the Arizona Supreme Court's reasoning, in *State v. Styers*, 254 P.3d 1132 (Ariz. 2011) (en banc), the court was faced with the exact same question facing this Court today. There, after the Ninth Circuit found that the Arizona Supreme Court's independent review of the petitioner's death sentence wrongly applied the "causal nexus" test to the mitigating factors, the Arizona Supreme Court conducted a new independent review. *Id.* at 1133. There, the Arizona Supreme Court also rejected the petitioner's argument that the new independent review reopened his case on direct review. *Id.* at 1134. The court determined that, to fix the error as required by the Ninth Circuit, it only needed to review the petitioner's *mitigating factors*. *Id. Ring*, on the other hand, involved the finding of *aggravating factors*, which was not at issue in the new independent review and were thus deemed established. *Id.* Accordingly, the court held that there was "no reason or need to have a jury consider this issue." *Id.*

McKinney's case directly mirrors the facts in *Styers*; therefore, one can assume that the Arizona Supreme Court applied the same logic in its determination that McKinney's case is final. *See McKinney*, 426 P.3d at 1205-06 (citing *Styers* in support of its conclusion that McKinney's case remained final). Since the new independent review of McKinney's sentence was only required to review mitigating factors, not the aggravating factors that would bring *Ring* into play, the Arizona Supreme Court considered McKinney's case to be final for the purposes of *Ring*. *Id.*

Further, while Petitioner claims that federal courts need not yield to state court decisions about

finality, Pet. Br. 8-9, this argument assumes that finality is a matter of federal law. However, this Court has thus far been "silent on whether the finality of a conviction or sentence, for *Teague* purposes, is a question of federal law . . . ." *Styers v. Ryan*, 811 F.3d 292, 298 n.6 (9th Cir. 2015). Instead of adopting Petitioner's suggestion to look at the Arizona Supreme Court's semantic choices and rules of procedure to *infer* what the Arizona Supreme Court meant to do, Pet. Br. 13, the Court should look to what the Arizona Supreme Court *explicitly said* about McKinney's independent review – that it did not disrupt the finality of his sentence. *McKinney*, 426 P.3d at 1205-06. To imply that the Arizona Supreme Court is intentionally hiding the ball and mislabeling its review demonstrates a lack of respect for the State's courts. And while Petitioner claims that, under *Carey v. Saffold*,[3] finality must be determined based on how the state court procedure functioned, not the state court's own interpretation of what occurred, Pet. Br. 11, the Court in *Carey* only stated this proposition "for purposes of applying a federal statute [the AEDPA tolling statute] that interacts with state procedural rules." *Id.* at 223. Here, there is no federal statute at play and *Carey* does not apply.

Additionally, although Petitioner uses *Gonzalez v. Thaler*[4] as support for the idea that a State's understanding of finality need not be followed, Pet. Br. 9, yielding to Arizona's understanding of finality in this context would not pose the same policy concerns as in *Gonzalez*. In *Gonzalez*, the petitioner was arguing in favor of a definition of finality that was

---

[3] 536 U.S. 214 (2002).
[4] 565 U.S. 134 (2012).

more expansive than the uniform federal standard in which finality attaches when direct review is completed, or the time for further review expires. 565 U.S. at 150-51. In holding against the petitioner, the Court explained that it wanted to protect exactly that uniform definition of finality. *Id.* at 152-53. Here, Arizona's understanding of finality is not more expansive than the uniform federal interpretation. To the contrary, it aligns with the existing federal law definition of finality in retroactivity cases. Therefore, the Court should allow the Arizona Supreme Court's understanding of finality in McKinney's context to preside.

E. Adopting Petitioner's Approach To Finality Would Completely Undermine The Essential Interests That The Notion Of Finality Was Designed To Protect.

"Finality is an institutional value and it is tempting to subordinate such a value to the equities of the individual case. But there are dangers [in doing so] . . ." *Hawkins v. United States*, 724 F.3d 915, 918 (7th Cir. 2013). This Court has consistently stressed that the *Teague* retroactivity analysis is meant to protect the finality of prior judgments. *Teague*, 489 U.S. at 306. This is because the "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Id.* at 309. The Court should heed this maxim from *Teague* and prevent McKinney from undermining the principle of finality.

"Without finality, the criminal law is deprived of much of its deterrent effect." *Id.* When an individual considers performing a criminal offense

that may result in capital punishment, such as murder, the knowledge that he may be subjected to death serves as a strong deterrent. *Gregg v. Georgia*, 428 U.S. 153, 185 (1976). However, allowing the finality of a death sentence to be disrupted or delayed severely debilitates the deterrent effect of a capital sentence. *See Furman v. Georgia*, 408 U.S. 238, 302 (1972) (Brennan, J., concurring) (arguing that when the risk of capital punishment is very much "in the distant future," this undercuts the deterrent effect of the death penalty); *see generally McCleskey v. Zant*, 499 U.S. 467, 492 (1991) ("Perpetual disrespect for the finality of convictions disparages the entire criminal justice system."). *Cf. Kuhlmann v. Wilson*, 477 U.S. 436, 452-53 (1986) ("Availability of unlimited federal collateral review to guilty defendants frustrates the State's legitimate interest in deterring crime, since the deterrent force of penal laws is diminished to the extent that person[s] contemplating criminal activity believe there is a possibility that they will escape punishment through repetitive collateral attacks."). Here, allowing McKinney to possibly overturn, or at least further delay, his death sentence, would send a signal to future bad actors that there are loopholes to avoiding the finality of their sentence, thereby disrupting the deterrent effect of capital punishment.

Further, embedded in this Court's retroactivity analysis are notions of comity, federalism, and respect for the States' interest in finality. *Cf. Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) ("The reason most frequently advanced in our cases for distinguishing between direct and collateral review is the State's interest in the finality of convictions that have survived direct review within the state court system."); *Teague*, 489 U.S. at 308 ("[W]e have

recognized that interests of comity and finality must also be considered in determining the proper scope of habeas review."); *Engle v. Isaac*, 456 U.S. 107, 134 (1982) ("Federal habeas challenges to state convictions, however, entail greater finality problems and special comity concerns."). When the federal government is allowed to disturb the finality of state-proclaimed final judgments, this intrusion "frustrate[s] both the States' sovereign power to punish offenders and their good faith attempts to honor constitutional rights." *Brecht*, 507 U.S. at 635.

Here, deciding in McKinney's favor will force the State of Arizona to needlessly expend more time, energy, and resources reviewing a case that was already properly reviewed under the law that governed at the time the case became final. *Cf. Teague*, 489 U.S. at 310 (explaining that the application of new rules to cases on collateral review is particularly intrusive "for it continually forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then existing constitutional standards."). Even though McKinney is not requesting another trial, it is "costly for government[s] to have to defend sentences and resentence defendants long after the original sentences were imposed." *Hawkins*, 724 F.3d at 919.

Although Petitioner claims that following his proposed method of determining finality "leaves states in the driver's seat," Pet. Br. 19-20, in actuality, deciding in Petitioner's favor would present the State with a lose-lose situation. Petitioner has proposed that the State remained in control because it could have decided not to motion for a new independent review, thereby allowing Petitioner's case to remain

final. Pet. Br. 19. However, choosing this option would have required the State to vacate McKinney's death sentences, a result that would leave McKinney with a windfall and the State unable to protect its punitive interests. This solution certainly does not protect the State's finality interests, nor its interests overall.

Additionally, were the Court to require that McKinney receive a new sentencing hearing before a jury, now *twenty-eight years* after his crimes were committed, this would unduly prejudice the State of Arizona. With the passage of time, it will be increasingly difficult for the State to prove the aggravating factors needed to order a death sentence for Petitioner. *Cf. McCleskey*, 499 U.S. at 491 ("[W]hen a habeas petitioner succeeds in obtaining a new trial, the 'erosion of memory' and 'dispersion of witnesses' that occur with the passage of time prejudice the government and diminish the chances of a reliable criminal adjudication.").

While Petitioner has argued that these finality concerns do not play a role in capital cases because "death is different," Pet. Br. 20, this Court has explicitly stated that "the finality concerns underlying Justice Harlan's approach to retroactivity are applicable in the capital sentencing context . . ." *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989) (abrogated on other grounds) (adopting the *Teague* analysis for capital punishment cases). Further, when this Court decided in *Schriro v. Summerlin* that *Ring v. Arizona* would not be applied retroactively to cases that already became final, it again rejected the "death is different" argument in this context. 542 U.S. at 357 ("The dissent also advances several variations on the theme that death is different . . . . Much of this

analysis is not an application of *Teague*, but a rejection of it . . . . Even were we inclined to revisit *Teague* in this fashion, we would not agree with the dissent's conclusions.").

Therefore, the Court should find that McKinney's case remained final at the time that *Ring v. Arizona* was decided, making *Ring* inapplicable to Petitioner's case. *See Schriro*, 542 U.S. at 358 ("*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review.").

II. THE ARIZONA SUPREME COURT'S REVIEW OF MCKINNEY'S SENTENCES CURED THE *EDDINGS* ERROR.

A. *Clemons* Permits The Arizona Supreme Court To Conduct Appellate Reweighing Of Aggravating And Mitigating Circumstances Or Harmless Error Analysis To Cure *Eddings* Error.

When an appellate court reweighs aggravating and mitigating circumstances based on a review of the record, it provides defendants the individualized treatment required to cure *Eddings* error.

1. When a state appellate court reweighs aggravating and mitigating circumstances or conducts harmless error analysis, the individualized consideration requirement of Eddings *is satisfied.*

Appellate review of a death sentence rendered invalid by a lack of individualized consideration of mitigating circumstances may be rectified by reweighing aggravating and mitigating circumstances or by conducting harmless error

analysis. Indeed, Petitioner concedes that appellate reweighing or independent review may cure *Eddings* error. *See* Pet. Br. 33.

In *Lockett v. Ohio*, Justice Burger wrote for a plurality of the Court holding that the Eighth and Fourteenth Amendments require a sentencer "not be precluded from considering, *as a mitigating factor*," the circumstances of the offense or the defendant's character or record as a basis for a sentence less than death. 438 U.S. 586, 604 (1978) (emphasis in original). The Court adopted this holding by majority opinion in *Eddings v. Oklahoma*, adding that a sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. 455 U.S. 104, 114 (1982). Further, a sentencer, or court of appeals on review, may determine the weight given mitigating evidence. *Id.* at 114-15. A sentencer may be an appellate court to the extent it independently reweighs mitigating and aggravating evidence when considering the appropriateness of capital punishment. *Strickland v. Washington*, 466 U.S. 668, 695 (1984).

In *Clemons v. Mississippi*, the petitioner requested this Court to remand his case for trial level resentencing arguing that: (1) the sentencing jury relied on an unconstitutionally vague aggravating factor; and (2) the Mississippi Supreme Court did not and could not consider mitigating evidence in violation of the Eighth Amendment, as interpreted by *Lockett* and *Eddings*. Brief for Petitioner, Clemons v. Mississippi, 494 U.S. 738 (1990) (No. 88-6873), 1989 WL 1127046, at *7-*9, *35-*36.

In this case, Petitioner argues that reliability and accuracy in capital cases is essential, and that individualized consideration of mitigating

circumstances is a needed protection against arbitrary imposition of death. Pet. Br. 25-27. Respondent agrees. This Court addressed those concerns directly in *Clemons* stating that "meaningful appellate review of death sentences promotes reliability and consistency" and aligns with the "twin objectives" of the Eighth Amendment including the "measured consistent application" of death penalty procedures and "fairness to the accused." 494 U.S. at 748-49 (citing *Eddings*, 455 U.S. at 110-11). The Court concluded that "state appellate courts can and do give each defendant an individualized and reliable sentencing determination based on the defendant's circumstances, his background, and the crime." *Id.* These considerations are the exact ones required by *Lockett*. 438 U.S. at 604. Thus, appellate courts are "able adequately to evaluate any evidence relating to mitigating factors . . . ." *Clemons*, 494 U.S. at 750.

The Court thus held that, where a death sentence is based on invalid or improperly defined aggravating circumstances, the Federal Constitution does not prevent a state appellate court from upholding that sentence through reweighing of the valid aggravating and mitigating evidence. *Clemons*, 494 U.S. at 741. Subsequently, Justice White addressed the petitioner's claim that the Mississippi Supreme Court failed to consider his mitigating circumstances in violation of the Eighth Amendment. The Court found that reweighing the mix of mitigating and aggravating circumstances would give defendants the individualized treatment required by *Lockett* and *Eddings*. *Id.* at 752.

Even if state law does not permit the state's appellate courts to reweigh aggravating and

mitigating circumstances, those courts are still allowed to find that a constitutional error in a sentencing proceeding was harmless. *Clemons*, 494 U.S. at 752. *See also Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987) (holding that *Eddings* error may be cured by appellate harmless error review).

2. Clemons *permits a state appellate court to cure constitutional error through re-weighing if it considers all mitigating factors based on the trial court's findings.*

A state appellate court may cure constitutional error through *Clemons* reweighing after it has considered all relevant mitigating factors found after review of the defendant's record.

In *Hopkins v. Reeves*, this Court vacated the defendant's first death sentence for further consideration in light of *Clemons*. 524 U.S. 88, 92 (1998). The Court approved the Nebraska Supreme Court's approach to *Clemons* reweighing. *Id.* at 92-93. On remand, the Nebraska Supreme Court enunciated the rule in *Clemons* that, "when an appellate court invalidates one or more of the aggravating circumstances, or finds . . . that any mitigating circumstance exists not considered by the sentencing panel in its balancing, the appellate court may, consistent with the U.S. Constitution, reweigh the remaining circumstances or conduct a harmless error analysis." *State v. Reeves*, 476 N.W.2d 829, 836 (Neb. 1991). In structuring its review, the Nebraska Supreme Court conducted an independent examination of the trial record, presentence investigation, and sentencing panel findings to

determine whether aggravating or mitigating factors existed; it also reweighed all of those factors. *Id.*

That is not to say that *Clemons* should be read to require consideration of all of the documents reviewed by the Nebraska Supreme Court in the aforementioned case. A State has considerable freedom to structure its capital sentencing system as it sees fit. *Cabana v. Bullock*, 474 U.S. 376, 386-87 (1986). However, if *Eddings* error is to be cured by an appellate court's reweighing of the evidence, that process requires more than an opinion "virtually silent with respect to the particulars of the allegedly mitigating evidence presented by [the defendant]." *Clemons*, 494 U.S. at 752. *See also*, *Wiley v. Puckett*, 969 F.2d 86, 92 (5th Cir. 1992) (reweighing aggravating and mitigating circumstances requires consideration of all mitigating evidence). Further, the *Clemons* cure requires the appellate court to review either the individual record in the case or to rely on the trial judge's findings. *Parker v. Dugger*, 498 U.S. 308, 321 (1991). After this review, the state appellate court then must list and consider the particulars of the mitigating evidence—especially the ones that previously went unconsidered—in order to properly cure constitutional error.

3. The Arizona Supreme Court satisfied all of the requirements of Clemons *and cured the* Eddings *error by re-weighing the aggravating and mitigating circumstances in its independent review process.*

The Arizona Supreme Court conducted an independent review of the trial court's findings and the findings by the Ninth Circuit to find aggravating

and mitigating circumstances. The court then reweighed those circumstances and affirmed McKinney's death sentences, thus curing the *Eddings* error. If this Court finds that the Arizona Supreme Court did not cure the *Eddings* error through *Clemons* reweighing, this Court should remand to the Arizona Supreme Court to conduct harmless error analysis. However, the available evidence demonstrates that the *Eddings* error was cured.

Under Arizona law, the state supreme court shall review all death sentences and shall "independently determine if the mitigation the supreme court finds is sufficiently substantial to warrant leniency in light of the existing aggravation." A.R.S. § 13-755. The court may also conduct harmless error review. A.R.S. § 13-756. In *State v. Roseberry*, the Arizona Supreme Court held that independent review serves as a constitutional means to cure sentencing errors. 353 P.3d 847, 850 (Ariz. 2015) (citing *Clemons*, 494 U.S. at 748-50).

This Court has clearly stated that, following *Clemons*, a reviewing court is not compelled to remand to the trial court when a constitutional error is present at sentencing and mitigating circumstances exist; instead, it may reweigh the evidence or conduct harmless error review. *Parker*, 498 U.S. at 320-21. This Court has given appellate courts the choice of curing the constitutional error themselves or remanding to the trial courts for resentencing. *See Clemons*, 494 U.S. at 754 (citing *Caldwell v. Mississippi*, 472 U.S. 320, 330-31 (1985)). When a sentencing proceeding has been rendered invalid by constitutional error, "insofar as the Federal Constitution is concerned, a state appellate court may

determine for itself whether a capital sentence is warranted [under *Clemons*]." *Walton v. Arizona*, 497 U.S. 639, 702 (1990) (Blackmun, J., dissenting).

Here, the Arizona Supreme Court is permitted to conduct an independent review and reweighing under state law. The court reviewed the trial court's findings and the Ninth Circuit's findings. JA 005-06. It identified two aggravating factors for each murder. JA 006, 009. It also found that McKinney proved several mitigating circumstances including that he endured a horrific childhood, that he suffered from PTSD at the time of the murders caused by the abuse and trauma he experienced as a child, and that he was twenty-three at the time of the crimes. JA 006-07.

While Petitioner complains that these findings were based on a 25-year old cold record, Pet. Br. 29, there is significant evidence that memory distortions occur with the passage of time and repeated recounting of events. *See* Joyce W. Lacy & Craig E.L. Stark, *The Neuroscience of Memory: Implications for the Courtroom*, 14 Nat'l Rev. Neuroscience 649, 653 (2013). There is great risk that a new trial level sentencing would be less accurate than review of the original record. In any event, the Constitution does not require it. Equally unavailing is Petitioner's claim that a new sentencing hearing may provide different PTSD evidence. Pet. Br. 35-36. Given Dr. McMahon's extensive testimony, any new evidence would likely be cumulative, and cumulative evidence cannot support a new trial proceeding. *See Barber v. United States*, 179 A.3d 883, 894 (D.C. Cir. 2018).

After the Arizona Supreme Court considered all of the mitigating factors and weighed them in light of the aggravating factors, the Arizona Supreme

Court noted that the aggravating circumstances weighed "heavily in favor of a death sentence." JA 008. There is no evidence, and the petitioner can point to none, that the court applied an unconstitutional "causal nexus" test or failed to consider any proffered mitigation. As a result, the *Eddings* error was cured.

B. The Arizona Supreme Court May Freely Structure Its Capital Punishment Procedures Within Legitimate Constitutional Constraints.

Within legitimate constitutional bounds, the Arizona Supreme Court is permitted to structure its capital sentencing as it sees fit including how it considers and balances aggravating and mitigating circumstances. *See Cabana*, 474 U.S. at 386-87. This Court should reject Petitioner's invitation to invent new rights previously unknown to the Constitution.

1. The Arizona Supreme Court need not balance aggravating and mitigating circumstances in conformance with any specific standard nor assign them any particular weight.

The Constitution does not require a State, in capital sentencing, to give specific weights to aggravating and mitigating factors or to conform its balancing of those factors to any specific standard.

This Court has consistently held that specific standards for balancing aggravating against mitigating circumstances are not constitutionally required. *Kansas v. Marsh*, 548 U.S. 163, 175 (2006); *Harris v. Alabama*, 513 U.S. 504, 512 (1995). Also "settled is the corollary that the Constitution does not require a State to ascribe any specific weight to

particular factors, either in aggravation or mitigation, to be considered by the sentencer." *Harris*, 513 U.S. at 512 (1995). Petitioner contends that the Ninth Circuit ascribed great mitigating weight to McKinney's PTSD, so it is odd that the Arizona Supreme Court did not grant it the same weight. *See* Pet Br. 31. However, as then Justice Rehnquist recognized in *Barclay v. Florida*, "[a]ny sentencing decision calls for the exercise of judgment." 463 U.S. 939, 950 (1983). Sentencers may base their judgment on moral, factual, and legal concerns. *Id.* The experienced judges on the Arizona Supreme Court were constitutionally permitted to assign any weight they deemed appropriate to McKinney's aggravating and mitigating factors. "[T]he Eighth Amendment cannot and should not demand more." *Id.* at 951.

2. The question of what constitutes adequate "consideration" in capital sentencing is not properly before the Court, and should otherwise be interpreted broadly.

Petitioner claims that the Arizona Supreme Court did not properly consider McKinney's mitigating evidence. Pet. Br. 30-31. To the extent Petitioner is arguing that the court committed another *Eddings* error in its second independent review, that question is not properly before this Court. Alternatively, if Petitioner simply objects to the number of pages the Arizona Supreme Court devoted to McKinney's mitigating factors, the court need not lucubrate at length or in a particular way to "consider" a factor.

First, this Court's Rule 14.1(a) provides in relevant part: "Only the questions set forth in the

petition [for certiorari], or fairly included therein, will be considered by the Court." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27, 30-31 (1993). A question that is merely "complementary" or "related" to the question presented is not "fairly included therein." *Id.* at 32 (citing *Yee v. Escondido*, 503 U.S. 519, 537 (1992)). Whether the Arizona Supreme Court committed another *Eddings* error is a question of fact that is in no way fairly included in the petition's constitutional law question on the procedural requirements for curing constitutional error.

Second, the verb "consider" is defined as "to think about." *Consider*, *Black's Law Dictionary* (2d ed. 1910). This Court has been extremely deferential when assessing whether consideration has occurred. A mere statement that a judge has considered is enough for the Court to assume it happened. *Parker*, 498 U.S. at 314. There is no doubt that, at least since 2004, the Arizona Supreme Court has not placed any unconstitutional restriction on their consideration. *See McKinney v. Ryan*, 813 F.3d 798, 817-18 (9th Cir. 2015) (en banc); *see also State v. Newell*, 132 P.3d 883, 849 (Ariz. 2006) ("We do not require that a nexus between the mitigating factors and the crime be established before we consider the mitigation evidence."). This Court has not put any parameters around how a sentencer should "consider" aggravating and mitigating factors because, once a sentencer finds that the defendant falls "within the legislatively defined category of persons eligible" for death, she may exercise her discretion to consider any myriad of factors to determine whether or not death is appropriate. *Barclay*, 463 U.S. at 950 (citing *California v. Ramos*, 103 S. Ct. 3466, 3456 (1983)).

3. The Court should reject Petitioner's invitation to fabricate new constitutional rights in its Eighth Amendment jurisprudence.

Petitioner presents a number of arguments, central to his contention that only a trial court may cure *Eddings* error, that invite this Court to invent constitutional rights previously unknown to the Eighth Amendment. This invitation should be rejected.

First, Petitioner contends that the centrality of a jury in the assessment of death penalty eligibility under *Apprendi*, *Ring*, and *Hurst* should extend to the evaluation of circumstances, especially mitigating ones, that determine whether a death sentence should be imposed. Pet Br. 34-35. Next, Petitioner asserts that consideration of mitigating factors requires that the defendant be permitted to confront witnesses. Pet. Br. 28, 31-32. These claims are constitutionally inert. Specifically, they suffer the fatal flaw of trying to graft Sixth Amendment rights onto the Eighth Amendment.

The Eighth Amendment prohibits "cruel and unusual punishments . . . ." U.S. Const. amend. VIII. This Court has articulated that, once a defendant is eligible for capital punishment, the Eighth Amendment permits a judge, acting alone, to impose the death penalty. *Harris*, 513 U.S. at 515. In contrast, the Sixth Amendment gives defendants "the right to a speedy and public trial, by an impartial jury of the State . . . ." U.S. Const. amend. VI. This right has made it so "any fact that increases the penalty for a crime . . . must be submitted to a jury." *Apprendi v.*

New Jersey, 530 U.S. 466, 490 (2000). In *Ring v. Arizona*, this Court held that aggravating circumstances necessary for the imposition of the death penalty must be found by the jury because they are the functional equivalent of an element of a greater offense. 536 U.S. 584, 609 (2002) (citing *Apprendi*, 530 U.S. at 494 n.19). *Hurst v. Florida* applied *Ring* in Florida. 136 S. Ct. 616, 619 (2016).

The aforementioned cases show that the Sixth Amendment applies when a defendant is contesting her eligibility for punishment, whereas the Eighth Amendment applies to a defendant who has already been found eligible. *Ring* highlighted this distinction in a key footnote that clarified that the case did *not* consider "mitigating circumstances" nor did it affect the Arizona Supreme Court's authority to reweigh aggravating and mitigating circumstances as permitted by *Clemons*. 536 U.S. at 597 n.4. In essence, the Constitution distinguishes between "aggravating-factor determination (the so-called 'eligibility phase')" which "is a purely factual determination" implicating the Sixth Amendment jury-trial right and "the ultimate question whether mitigating circumstances outweigh aggravating circumstances" which "is mostly a question of mercy" implicating the Eighth Amendment. *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016). These rights should not be conflated where this Court has clearly delineated them.

The Sixth Amendment also bestows on defendants the right to be "confronted with the witnesses against him . . . ." U.S. Const. amend. VI. This Court has never held that the Eighth Amendment requires confrontation. Just the opposite is true. In *Williams v. New York*, this Court held that

there is no requirement of confrontation, cross-examination, or rebuttal to the presentation of evidence during capital sentencing. 337 U.S. 241, 243, 250-52 (1949); *United States v. Urmana*, 750 F.3d 320, 346 (4th Cir. 2014) ("Courts have long held that the right to confrontation does not apply at sentencing, even in capital cases."). Petitioner's newly discovered rights have no basis in the case law or the Constitution. This Court should reject them.

C. The Arizona Supreme Court's Critical Appellate Review Ensures That Capital Punishment Is Constitutionally Imposed.

This Court has long recognized that critical appellate review plays an essential role in the constitutionality of death sentences. The Arizona Supreme Court has enthusiastically adopted this role.

When imposition of the death penalty was deemed cruel and unusual punishment in violation of the Eighth Amendment in 1972, the States scrambled to enact capital sentencing statutes that would withstand constitutional challenge. Srikanth Srinivasan, *Capital Sentencing Doctrine and the Weighing-Nonweighing Distinction*, 47 Stan. L. Rev. 1347, 1347-48 (1995). In upholding subsequent capital sentencing statutes, this Court consistently called attention to the importance of meaningful appellate review. *See*, *e.g.*, *Zant v. Stephens*, 462 U.S. 862, 876 (1983) (approving of a sentencing procedure that required a state supreme court to review every death penalty proceeding to determine whether the sentence was "arbitrary or disproportionate"); *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (noting that "meaningful appellate review" is a safeguard against

imposition of death sentences in a capricious or freakish manner); *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (arguing that prompt judicial review promotes an evenhanded, consistent, and rational application of the death penalty). This Court has particularly applauded critical state supreme courts that have demonstrated a willingness to vacate improper death sentences. *Proffitt*, 428 U.S. at 253. *See also Barclay*, 463 U.S. at 958 (citing, as favorable, cases where Florida has nullified death sentences).

The Arizona Supreme Court has fully embraced its role as a critical reviewer of death sentences and has demonstrated its willingness to invalidate capital sentences imposed by its trial courts based on a wide variety of infirmities. The court has explained that, in its independent review, it does not defer to trial court findings nor does it afford evidence the same weight it received at trial. *State v. Grell*, 291 P.3d 350, 352 (Ariz. 1989). In *Grell*, the Arizona Supreme Court nullified a death sentence after reviewing educational and medical records and finding that, despite the trial jury's assessment to the contrary, the defendant did suffer from a mental disability. *Id.* at 356-57. In *State v. Rockwell*, the court invalidated two aggravating factors and found that the mitigating evidence outweighed the one remaining aggravating factor. 775 P.2d 1069, 1079 (Ariz. 1989). Finally, in *State v. Marlow*, the Arizona Supreme Court found a mitigating factor previously undiscovered by the trial court or the defendant that raised doubt about whether death should be imposed. 786 P.2d 395, 402 (Ariz. 1989). Where there is doubt, the court will resolve the case in favor of a life sentence. *Id.* These examples show that the Arizona Supreme Court carefully considers the imposition of

death and that no doubts were raised regarding the appropriateness of McKinney's sentences.

D. The Court Should Respect The Choices Of The People Of Arizona To Enact Capital Punishment And Protect Victim's Families.

The people of Arizona, through their elected representatives, have made the decision that capital punishment protects their interests. That choice deserves respect.

As relevant here, the people of Arizona made their voices heard on two aspects of Arizona's capital punishment system. First, the Arizona legislature reinstated the death penalty after the Supreme Court struck it down. 1973 Ariz. Sess. Laws 138, § 5. Second, every six years, Arizona voters will vote to retain or retire Arizona Supreme Court judges. Ariz. Const. art. 6, § 38(C); Ariz. Const. art. 6, § 4; Ariz. Rev. Stat. 12-120.01(B) (2018). As a result, both the death penalty and the judges that review its implementation represent the will of Arizonians.

The legislature in Arizona has also paid particular attention to the rights of victims and their immediate families. *See* Ariz. Rev. Stat. 13-4403 (2018). *See generally* Ariz. Const. art 2, § 2.1. Protecting victim's families, when a murder has occurred, is of vital concern. Not only must they suffer through the trauma of having a loved one killed,[5] but they are forced to relive that trauma every time there is another appeal or delay. Marilyn Peterson Armour

[5] This includes the inability to find meaning even years after the murder and a lifetime of post-homicide distress that prompts psychiatric, psychological, and physical harms.

& Mark S. Umbreit, *The Ultimate Penal Sanction and "Closure" for Survivors of Homicide Victims*, 91 Marq. L. Rev. 381, 381-82, 408 (2007). This Court has itself recognized that the victim's death is a unique loss both to society and to the victim's family. *Payne v. Tennessee*, 501 U.S. 808, 825, 827 (1991). These concerns should weigh heavily in the Court's decision.

The Arizona Supreme Court's decision to affirm McKinney's death sentences followed constitutional requirements and was sanctioned by the people of Arizona. This Court should respect their judgment and bring peace to the families of Christine Mertens and Jim McClain.

CONCLUSION

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

Respectfully submitted,

/s/ Counsel for Respondent

KAYLA KATZ
JILON LI
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
3501 Sansom Street
Philadelphia, PA 19104

Counsel for Respondent

November 8, 2019

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(g) and (h), as modified by the Keedy Cup Rules, counsel for Respondent certifies that this document contains 10,248 words in 40 pages, excluding the parts exempted by Supreme Court Rule 33.1(d).

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

/s/ Counsel for Respondent

KAYLA KATZ
JILON LI
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
3501 Sansom Street
Philadelphia, PA 19104

Counsel for Respondent

Dated: November 8, 2019