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

REPLY BRIEF FOR PETITIONER

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If Arizona wishes to obtain a death sentence, then the Constitution requires that it do so before a proper sentencer. Because James Erin McKinney has never faced such a constitutionally adequate sentencer, the decision below must be reversed. McKinney established in the opening brief that *Ring* applied to his nonfinal case at the second independent review and that said review failed to cure the *Eddings* error which had infected his sentence. In response, Arizona argues that this Court ought to simply defer to the decision below regarding *Ring*'s applicability and that independent review of the record was adequate to properly cure any issue in mitigation. The State's contentions fail on both fronts. First, among many other problems, Arizona would permit states to *evade* the Constitution's commands by creative relabeling of their criminal procedure. Second, the particularity of *Eddings* errors, which involve consideration of intangible mitigating factors, require more procedural safeguards to cure than independent review alone can provide.

I. *RING* APPLIED TO MCKINNEY'S CONVICTION AT THE SECOND INDEPENDENT REVIEW.

Arizona has by turns conceded or failed to adequately respond to McKinney's arguments on the retroactivity issue. The finality of his conviction at the time of the second independent review is a question of federal law, a point the State at one point even seems to agree with. *See* Resp. Br. 9-10 (applying *Teague* finality definition to McKinney's case). Federal law

answers that the case was nonfinal for retroactivity purposes. This is so because the case was effectively put back on direct appeal (Pet. Br 11-14) and as that appeal generated a new judgement via discretionary review (Pet. Br 14-19). Arizona offers no response to the substance of the latter argument. So applying the rule of *Griffith v. Kentucky*, that new rules of constitutional criminal procedure apply to all nonfinal cases, *Ring v. Arizona* demonstrably applied to McKinney's case. 479 U.S. 314 (1986); 536 U.S. 584 (2002). The state court's conclusion otherwise was an error which Arizona's efforts do not salvage.

A. The Finality Status Of McKinney's Conviction Is A Matter of Federal Law.

McKinney argues that his conviction's nonfinal status is a matter of federal law. Pet. Br. 7-8 (citing *Gonzalez v. Thaler*, 565 U.S. 134, 152 (2012) (rejecting reliance on "state-by-state definitions" of finality)). At one point, Arizona seems to agree that the finality question here is a matter of applying federal law, rather than just yielding to whatever the state court concluded. *See* Resp. Br. 9-10 (applying *federal* finality definition to McKinney's case). Later, the State shifts to arguing that this Court ought simply to defer to the state court. Resp. Br. 18. These two tacks are inconsistent. If conviction finality is for the state court alone to decide in retroactivity analysis, then asking what they said *must be the only step* and no need to invoke the federal definition can arise.

Putting that apparent concession to one side, the State argues that cases like *Gonzalez* were decided against the backdrop of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) and so

are "not binding as to the definition of finality" here. Resp. Br. 10. But the State's arguments for that conclusion all fail, for reasons laid out below.

1. This Court's construal of finality under AEDPA informs retroactivity analysis.

Seeking to cut off the effect of cases such as *Gonzalez*, Arizona argues that decisions construing finality under AEDPA's limitations provision are irrelevant to the retroactivity context. Resp. Br. 10-14. The State presents three arguments to this end: that AEDPA's text drives those decisions, that AEDPA has distinct policy goals, and that this Court's cross-citation between the two contexts is simply misleading. All three contentions are wanting.

First, the State identifies nothing in the relevant text of AEDPA that differs in a significant way from the language used in the retroactivity context. That is because this Court employs *substantively similar terms* to AEDPA's text in retroactivity cases. *Compare* 28 U.S.C. § 2244(d)(1)(A) (one year period for state convictions begins with "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review") *with Caspari v. Bohlen*, 510 U.S. 383, 390 (1994) (for retroactivity purposes, state convictions are final when "the availability of direct appeal to the state courts has been exhausted"). If there is a difference in these formulations grounding a relevant distinction, Arizona does not say what it is.

Nor is the State able to persuade via differing policy considerations, as it plainly *invents* statutory objectives for AEDPA at odds with this Court's precedent. Resp. Br. 12-13. In reality, the policy

objectives of AEDPA limitations and retroactivity law substantially overlap. *Compare Carey v. Saffold*, 536 U.S. 214, 222 (2002) (stating that AEDPA's goals are the promotion of "comity, finality, and federalism") *with Beard v. Banks*, 542 U.S. 406, 412-13 (2004) (stating that this Court's retroactivity rules act as "a limitation on the power of the federal courts" which serve to respect "the States' interest in finality"). Ignoring this Court's clear statement of AEDPA's policy goals, Arizona argues that the actual statutory objectives should be divined by consulting district court cases interpreting the Social Security Act and state law. Resp. Br. 12-13. Looking to this unrelated case law, the State concludes the true point of the statutory provisions as interpreted is "lenien[cy]" towards "unsophisticated parties". Resp. Br. 12. The State cites no AEDPA case supporting this claim. Indeed, case law declares *the contrary*, that time leniency is *not* a consideration in interpreting AEDPA. *See Gonzalez*, 565 U.S. at 150-51 (refusing to adopt a more lenient "later-in-time" rule of AEDPA timing application). Further, the difficulty in *administrability* inherent to any approach which relies on divining state law is a policy concern common to AEDPA and retroactivity contexts. *See id*.

Moreover, this Court has cited AEDPA case law for the rule of finality to be applied in the retroactivity context, thus indicating the mutual relevance of the two areas. *Beard*, 542 U.S. at 411 (citing *Clay v. United States*, 537 U.S. 522, 527 (2003)). Arizona counters that *Beard* was really only using *Clay* to indirectly cite *Teague* (Resp. Br. 14), but that interpretation is belied by the simple fact that the Court chose *not* to cite *Teague*. *Id*. The State's interpretation would render the citation awkward

and misleading, especially as *Beard* had already cited *Caspari* for the finality rule. *See id*. (citing *Caspari*, 510 U.S. at 390). The preferable reading is that consistent with the above-explained AEDPA-retroactivity overlap: that the construal of finality in either context is relevant to the other.

2. Federal courts do not simply yield to state finality determinations.

Moving from the general relevance of AEDPA case law to specific instances, Arizona's unpersuasive efforts to distinguish *Gonzalez* (Resp. Br. 20-21) leave a critical hole in the State's position. *Gonzalez* rejected reliance on "state-by-state definitions" of finality for AEDPA purposes. 565 U.S. at 152. The close entwinement of AEDPA and retroactivity case law is laid out in the opening brief and reconfirmed above**.** Pet. Br. 9-11; *supra* 3-5. That link militates for rejecting reliance on state determinations in both contexts. The State contends that *Gonzalez* is irrelevant because, unlike the state there, Arizona's construal of finality here supposedly aligns with federal law. Resp. Br. 21. This reply is unavailing for two reasons. First, *Gonzalez* emphasized that it would not "usher in" reliance on potentially varied state definitions in applying federal law. 565 U.S. at 152. So at present, the finality of a state conviction (for federal law application purposes) just *is* a federal issue, whether the state's internal rules of finality happen to differ or not. *Id*. Second, as McKinney has argued, Arizona's conception of finality in this case *is* effectively out of step with every other court to consider the issue. Pet. Br. 15. So even on the State's take *Gonzalez* still applies here, confirming

McKinney's conclusion that the finality of his conviction is a federal law matter.

Because Arizona is unable to argue *Gonzalez* away, the State's invocation of *Losh* and *O'Neal* is seriously undermined. Resp. Br. 15-18 (citing *Losh v. Fabian*, 592 F.3d 820 (8th Cir. 2010); *O'Neal v. Kenny*, 579 F.3d 915 (8th Cir. 2009)). First, *Gonzalez* (decided 2012) post-dates those cases: The Eighth Circuit was working from a body of precedent that did not include it. This fact explains why that court misread *Jimenez v. Quarterman*, 555 U.S. 113 (2009) as being reliant on the state court's determination, a construal effectively disclaimed by *Gonzalez's* refusal to rely on state finality definitions. Arizona repeats this error. Second, the Circuit in *Losh* relied on the premise that this Court had never sought "to classify state appellate review methods (other than direct appeal from judgment of conviction) as either 'direct review' or 'collateral review'." 592 F.3d at 824 (internal citation omitted). But this proposition is also now outdated, as McKinney has pointed out. Pet. Br. 10-11 (citing *Wall v. Kohli*, 562 U.S. 545, 553 (2011) (classifying state appellate review method as collateral review)). Third, the State does not face up to the deference the Circuit owed there to the state court determinations. *See Losh*, 592 F.3d at 823 (explaining the great deference owed under 2254(d)). No such deference is owed here. Finally, *Losh* implicitly backs *Petitioner's* argument that 2244(d) precedent is relevant to the retroactivity context. *See id.* at 825 (discussing both contexts *just* after one another in the *same paragraph*). Thus, *Losh* and *O'Neal* provide the State no shelter.

Turning to Arizona's commentary on *Jimenez*, it is worth re-emphasizing how the State misunderstands

the role this case plays in McKinney's argument. *Jimenez* is invoked principally for the proposition that the finality of McKinney's conviction at the second independent review is an issue of federal law. Pet. Br. 10. *Jimenez* also confirms that federal law recognizes the potential for state conviction finality to dissipate. 555 U.S. at 120 n. 4 ("where a state court has in fact reopened direct review, the conviction is rendered nonfinal…."). Arizona seems to believe *Jimenez* is put to a broader use and so attempts to distinguish its exact facts. Resp. Br. 15-18. This is spilled ink, because the nonfinality of McKinney's conviction is established by functional analysis of state procedure and the conditional writ, *not* by direct comparison to *Jimenez* itself. Pet. Br. 11-19.

B. Arizona Has Effectively Conceded Federal Law's Response: That McKinney's Case Was Not Final.

McKinney advances two intertwined arguments demonstrating that his conviction was nonfinal at the time of the second independent review. Pet. Br. 11-19. Arizona has failed to convincingly counter either. Indeed, the State *does not offer a single word* against his argument from the nature of the conditional writ and its interaction with the subsequent de novo review. Pet. Br. 14-19. Arizona has thus effectively conceded the substance of this rationale. Further, as though that were not damaging enough, Arizona offers only token resistance to the claim that this Court should take a functional approach to classifying the state appellate procedure at issue here.

First, McKinney's conviction was nonfinal for retroactivity purposes at the time of the second

independent review because that review was a de novo proceeding conducted to generate a new judgment: The conviction was again capable of modification, from which a valid appeal could be taken. Pet. Br. 18-19. When a conditional writ is followed by a de novo review before a state court, that proceeding gives rise to a new, appealable judgment. *Magwood v. Patterson*, 561 U.S. 320, 332 (2010). Analogously, when a discretionary or de novo proceeding follows remand, that also generates a new, appealable judgement; a process which *undoes or postpones finality* for retroactivity purposes. Pet. Br. 14-17. Every state and federal court to consider the matter has concurred with this latter conclusion. Pet. Br. 15. Thus, on a simple analogy between the writ and remand situations, McKinney's conviction was rendered nonfinal for retroactivity purposes. Arizona effectively concedes this argument by failing to respond directly to its logic. Consequently, if this Court believes that the finality of McKinney's conviction is a question of federal law, then the law's answer is at present undisputed in his favor.

Second, McKinney's conviction was nonfinal at the time of the new independent review because that proceeding was functionally direct review. Pet. Br. 12-14 (explaining that the review below was de novo, state rules call it "direct appeal", the state court used language exclusive to direct review, and state law recognizes functional equivalents of direct review). Arizona insists that this Court ought to ignore the compelling evidence of what truly occurred below and instead "[d]efer" to the state court's conclusion. Resp. Br. 18. Arizona has two arguments on this front. First, that to even *inquire* whether the state court aptly classified its review is to show a "lack of respect"

for that court and, second, that functional analysis is only relevant to statutory application. Resp. Br. 20. Both arguments are defective and can be conveniently dealt with by a single response: This Court has prescribed functional analysis of state procedure in the application of *federal constitutional* rules thereto. Pet. Br. 11 (citing *Ring*, 536 U.S. at 602 (stating that requirement of jury fact-finding is triggered by *function* a fact plays in sentencing "no matter how the state labels it")); *see also United States v. Haymond*, 139 S. Ct. 2369, 2379 (2019) (rejecting state efforts to evade *Apprendi* and its progeny "by the simple expedient of relabeling"). This is of course *outside* of the statutory application context, and if there is any inherent 'disrespect' to this approach vis-à-vis the state courts, then Arizona's complaint is with the case law, rather than with McKinney.

Moreover, the State finds itself arguing here for the anomalous principle that federal courts ought to be *less searching* and *less rigorous* when applying constitutional rules, than when they apply statutes. Instead, this Court ought to hew to its precedent and take a clear-eyed approach to understanding state procedure, looking beyond mere labels. Here, that means recognizing the second independent review was functionally direct review.

Arizona also invokes *State v. Styers*, 254 P.3d 1132, 1134 (Ariz. 2011) (en banc). Resp. Br. 18-19. The State describes an argument given therein that, even if Styers's case was nonfinal for retroactivity purposes, *Ring* would still not require remand. *Id*. The idea is that the conditional writ issued only because of constitutional error in the mitigation, so the aggravators can be held in a kind of quarantined stasis and treated as assumed in a new review. *Id*. It

is left unclear whether Arizona actually endorses this analysis. If the State does press the point, then it needed to do a lot more groundwork than simply rehashing this rationale, as that reasoning has been deemed "conceptually untenable" by the Ninth Circuit. *Murdaugh v. Ryan*, 724 F.3d 1104, 1116 (9th Cir. 2013). Arizona does not answer that critique, nor does the State cite a single case from any other jurisdiction supporting this notion of preserved aggravators. Thus, they have no viable argument in the alternative to evade *Ring*'s force, given the nonfinality of McKinney's conviction.

C. Judgment For McKinney Would Have No Appreciable Impact On Finality Interests.

Arizona contends that a judgment favorable to McKinney would "[c]ompletely [u]ndermine" state finality interests. Resp. Br. 21. This claim is false for two reasons. First, McKinney seeks only a *narrow* holding. Second, such a holding would preserve the *agency* of the states, while also respecting this Court's commitment to *judicial integrity* in constitutional adjudication, a value Arizona wholly ignores.

Convictions like McKinney's are only nonfinal under very specific circumstances. *See* Pet. Br. 11-19. The claim that such a narrow rule would mean the effective end of finality is plainly exaggerated. Indeed, despite this grand claim, Arizona fails to cite *even one other* pending case that would be considered reopened by a judgment for McKinney. Any effect on finality would be negligible and this Court has recognized the relative nature of that interest. *See Teague v. Lane*, 489 U.S. 288, 309 (1989) (recognizing that the strength of finality interests varies by context).

Further, the finality of state convictions is a *state* interest; McKinney's approach respects this by preserving state *agency*. Pet. Br. 19-20 (citing *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008)). Only decisions made by the states themselves can undo the finality of their own convictions. Here, that was done principally by the motioning for a new independent review. Pet. Br. 19. Arizona replies that what really matters is not state choice, but instead whether a state is presented with attractive options. Resp. Br. 23. This argument goes astray by proving too much, for the state *inevitably* had to choose between expending scarce resources to preserve a death sentence or giving up on that sentence, once the writ issued. JA005. The State's contention is in tension with the very practice of granting conditional writs, which consistently present such hard choices.

Moreover, there is a competing value at play here. It is the duty of the courts to resolve all cases "in light of our best understanding of constitutional governing principles." *Teague*, 489 U.S. at 304. Judicial integrity is implicated whenever a court chooses not to apply established constitutional law to the case before it. Pet. Br. 21. Arizona leaves this value out of their account and instead focuses exclusively on the notion of equity as between similarly situated criminal defendants. Resp. Br. 13-14. But their argument flounders. Courts have seen no equity problem with applying new rules to cases in which finality was dissipated or exceptionally delayed by an *independent legal error*. *See United States v. Pizarro*, 772 F.3d 284, 290-91 (1st Cir. 2014) (applying *Alleyne* and ordering a fourth resentencing, where each prior delay was the result of a distinct error), *State v. Fleming*, 61 So.3d 399, 408 (Fla. 2011) (applying *Apprendi* to a case

rendered nonfinal by prior finding of state law error). As the case here was nonfinal, it directly falls within *Griffith*'s retroactivity rule. Pet. Br. 20. The Arizona Supreme Court's failure to recognize this fact calls for reversal.

II. ONLY RESENTENCING BY THE TRIAL COURT CAN CURE THE *EDDINGS* ERROR AND PROVIDE MCKINNEY THE INDIVIDUALIZED TREATMENT REQUIRED BY THE EIGHTH AMENDMENT.

Arizona's brief is founded on a superficial analysis of what constitutes an *Eddings error*. To err under *Eddings v. Oklahoma*, 455 U.S. 104 (1982) is to fail to meet the particular requirements of the Eighth Amendment in capital sentencing: acknowledgement and consideration of the defendant's character and background. The State grounds its argument on the notion that meaningful appellate review helps ensure the constitutionality of death sentences. Resp. Br. 37. But even meaningful appellate review cannot cure all constitutional errors in all cases. For McKinney, this was not a standard situation of appellate review. 25-years ago, he was first sentenced to death by a trial judge who ignored mitigating factors surrounding McKinney's PTSD. The Arizona Supreme Court on independent review made the same *Eddings* error. Now, Arizona argues that a second independent review is enough to ensure the constitutionality of McKinney's death sentence. But given the particular function of mitigating circumstances and the unique consequences of an *Eddings* error, only resentencing by the trial court can give McKinney the opportunity to have his mitigation evidence properly considered.

A. *Eddings* Error Deprives The Sentencer Of The Opportunity To Express A Reasoned, Moral Response To The Defendant's Background and Crime.

The State fails to grapple with what precisely an *Eddings* error entails. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978), *Eddings*, and their progeny make clear that a death sentence is in contravention of the Eighth Amendment when rendered without consideration of mitigating circumstances. Pet. Br. 27. Mitigating circumstances, as classified in *Eddings*, are statutory and non-statutory. 455 U.S. at 114. Both must be considered in order to allow for leniency in light of an individual's unique background and circumstances. *Id*. at 112. This consideration calls for a "reasoned moral response" to the defendant's circumstances and is unlike other calculations a sentencer faces. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 264 (2007).

An *Eddings* error is therefore different from other constitutional errors that occur in death sentencing. Whereas an error surrounding an invalid or unsupported aggravating factor can be corrected through review of the statute and inspection of evidence, an error in considering mitigators requires the reviewer to generate a moral response to the circumstances that the sentencer was unable to make.

The importance of a moral response to mitigating circumstances cannot be overstated. It is this response that enables the bedrock protection against arbitrary death sentences: individualized consideration of the defendant's background and life circumstances. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); Pet. Br. 25. When a sentencer is

denied the opportunity to render a "reasoned, moral response," they are prevented from giving a truly individualized response—that is, they are prevented from doing what the Eighth Amendment commands. *Abdul-Kabir*, 550 U.S. at 264; *Eddings*, 455 U.S. at 110 (quoting *Lockett*, 438 U.S. at 606). It follows that the unique character of an *Eddings* error requires a particular cure where moral consideration can be generated and given effect.

B. Appellate Review Serves A Different Function Than Trial Sentencing And Appellate Reweighing Is Not An Adequate Cure For *Eddings* Errors.

Appellate reweighing and trial sentencing are fundamentally different. This Court acknowledged so in *Clemons v. Mississippi*, 494 U.S. 738, 750 (1990), holding that when a state appellate court conducts an independent review of the record and reweighs aggravating and mitigating factors, the court can uphold a death sentence even though it was based on an invalid aggravating circumstance. Despite permitting appellate reweighing, this Court maintained that there are some circumstances that make reweighing "extremely speculative or impossible." *Id*. at 754.

In acknowledging situations where appellate reweighing would not be appropriate, this Court specifically called attention to mitigating circumstances via a pin cite to *Caldwell v. Mississippi*. *Id*. (citing 472 U.S. 320, 330-31 (1985)). This Court in *Caldwell* expressed clear doubt about the ability of an appellate court to fully consider "intangibles," based solely on a cold record:

> Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed "[those] compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson*, 428 U.S. at 304. When we held that a defendant had a constitutional right to the consideration of such factors, *Eddings*, 455 U.S. 104; *Lockett*, 438 U.S. 586, we clearly envisioned that consideration would occur among sentencers who were present to hear the evidence and arguments and see the witnesses.

Caldwell, 472 U.S. at 330-31. Though the State uses *Clemons* throughout their argument and references *Caldwell*, not once do they address its warning regarding appellate review of mitigating factors.

Moreover, the State leans on *Clemons* to a fault. First, this Court's reasoning in *Clemons* relied in part on *Spaziano v. Florida*, 468 U.S. 447 (1984) a decision that this Court overruled in *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016). In *Spaziano*, the majority upheld Florida's death penalty scheme, which allowed a judge to override a jury's recommendation of a life sentence. 468 U.S. at 460. *Clemons* used *Spaziano* to reason that because a judge could just as well declare death as a jury, a panel of judges in appellate review could do the same. 494 U.S. at 745-46. Post-*Hurst*, this reasoning is seriously undermined. This Court should take the opportunity to clarify *Clemons* and appellate reweighing in light of *Hurst*.

Second, McKinney's case and *Clemons* are distinguishable in several ways. In *Clemons*, the errors requiring correction were two invalid *aggravating circumstances*, not *Eddings* errors. *Clemons*, 494 U.S. at 746. The sentencer, which was a jury, was still given a list partially composed of valid aggravating factors to guide its decision and to weigh against mitigating circumstances. Thus, in reweighing, the state appellate court only needed to eliminate the invalid aggravators from the jury's findings to arrive at a constitutionally sound decision. And in appellate review, the outcome of the reweighing would largely be similar to that of the jury, as most of the jury's decision relied upon valid factors. By contrast, the error here was more than just two improperly defined aggravators. Instead, the sentencer at trial and the Arizona Supreme Court in the first independent review completely excluded all mitigating circumstances related to McKinney's childhood and PTSD. JA005. To cure the error in a second independent review would require the Arizona Supreme Court to consider mitigating factors for the first time and, as is the nature of appellate review, only from the record of what happened below. Unlike in *Clemons*, reweighing here requires consideration of the "intangibles," which *Caldwell* cautioned were not amenable to such review. 472 U.S. at 330.

Contrary to Arizona's claim, at no point does McKinney concede that appellate reweighing can cure an *Eddings* error. *See* Resp. Br. 26. McKinney merely acknowledges that an appellate court *can* engage in review and reweighing in at least some circumstances. Pet. Br. 33. McKinney highlights the unique and inevitable difficulties that arise when an appellate court attempts to review and reweigh

mitigating circumstances from a cold record after an *Eddings* error. Pet. Br. 33.

The State attempts to recast McKinney's argument as asking this Court to "fabricate new constitutional rights" under the Eighth Amendment. Resp. Br. 25. McKinney argues for no such thing. In centering the Eighth Amendment's command against arbitrary decisions in death cases, McKinney highlights the importance of the context in which mitigating circumstances are considered. Pet. Br. 32-33. As both *Clemons* and *Caldwell* contend, this context needs to be one conducive to considering what are often intangible and unapparent factors relating to childhood and trauma. McKinney uses examples outside the context of the Eighth Amendment—criminal cases involving the Confrontation Clause and public benefits cases—to show instances where this Court has constitutionally compelled in-person testimony, as opposed to written arguments, as a procedural safeguard against arbitrary decisions. Pet. Br. 32-33. Just as there are certain situations at the trial level that require in-person testimony, so too here, this Court should recognize that an *Eddings* error on appellate review requires some form of in-person testimony to cure it. Here, that would entail resentencing by the trial court.

Given this Court's concern with reliability in death sentencing, there must be procedural safeguards in place to ensure the consideration of mitigating factors, notwithstanding a state's ability to structure death procedures as they see fit.

Even more, this case's own procedural history shows the need for resentencing to cure *Eddings* errors. On the first independent review, the Arizona

Supreme Court repeated the trial court's *Eddings* error in reviewing the record of McKinney's sentence. JA005. To let stand the decision of the Arizona Supreme Court on its second independent review would be to ignore the serious doubts regarding this process and the lack of procedural safeguards in relying solely on cold, written records.

C. For McKinney, Appellate Reweighing On A Cold Record After 25-Years Was Speculative And Did Not Provide The Appropriate Forum To Cure the *Eddings* Error.

In McKinney's case, the task of reweighing mitigating factors after repeated *Eddings* error, first occurring decades ago, is a responsibility better served by resentencing at the trial court. To reweigh here involves projecting a moral decision about McKinney's character from a stale record without the benefit of hearing witness testimony. For McKinney, the second independent review was the first time his mitigating circumstances had the *chance* to be properly considered. It follows that after 25-years, McKinney should be able to present mitigating evidence in a forum with the procedural safeguards of trial sentencing.

The State attempts to show the strength of Arizona's independent reweighing process by citing three cases. Resp. Br. 38. It is both curious and telling that of all the cases Respondent cites where the Arizona Supreme Court vacated a death sentence on review, none involved *Eddings* errors and all are from 1989. Even more revealing, recent independent reviews involving the weighing of mitigating

circumstances by the Arizona Supreme Court result in the *affirmance* of death sentences, not vacated sentences or remands. The Arizona Supreme Court makes sure to include language about *considering* mitigating factors, but in each case any consideration amounts to little impact. *See State v. Prince*, 250 P.3d 1145, 1170 (Ariz. 2011) (giving "consider[ation]" to defendant's childhood, but affording it little weight and affirming death sentence); *State v. Harrod*, 183 P.3d 519, 535 (Ariz. 2008) (en banc) (giving minimal weight to mitigating evidence presented by defendant of father's mental abuse, parents' divorce, and defendant's good character); *State v. McCray*, 183 P.3d 503, 511 (Ariz. 2008) (finding that evidence of difficult family history to constitute mitigating factor, but affording it little weight); *State v. Hoskins*, 14 P.3d 997, 1020 (Ariz. 2000) (noting defendant's traumatic childhood but finding that it does not outweigh aggravating circumstances).

These cases suggest more than mere coincidence and raise serious doubt about the efficacy of appellate courts in reviewing mitigating evidence. Indeed, they reflect a structure unavailing towards reviewing mitigating circumstances, especially factors related to family history, childhood, and trauma.

This Court should take the opportunity to do what the 6th Circuit, 10th Circuit, and state courts of Florida, Illinois, and Ohio have already done—declare that *Eddings* errors, where courts have not considered mitigating circumstances as intended, should be cured by resentencing. *See Davis v. Coyle*, 475 F.3d 761, 770 (6th Cir. 2007); *Paxton v. Ward*, 199 F.3d 1197, 1202 (10th Cir. 1999); *Harvard v. State*, 486 So.2d 537, 538 (Fla. 1986); *People v. Davis*, 185 Ill.2d 317, 348 (Ill. 1998); *State v. Long*, 138 Ohio

St.3d 478, 479 (Ohio 2014). Given the unique nature of the constitutional violation here, McKinney is entitled to resentencing by the trial court in order to properly cure the *Eddings* error.

CONCLUSION

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

Respectfully submitted,

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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 5,041 words in 20 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

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