No. 18-1109

In the
Supreme Court of the United States

JAMES ERIN MCKINNEY,
Petitioner,

v.

STATE OF ARIZONA,
Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Arizona Supreme Court erred in concluding that, because Petitioner's convictions and sentences on two counts of first-degree murder became final several years before this Court decided *Ring v. Arizona*, 536 U.S. 584 (2002), that *Ring* did not apply to Petitioner.

2. Whether the Arizona Supreme Court erred in conducting an independent review of Petitioner's death sentences.

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OPINION BELOW

The opinion of the Arizona Supreme Court as to which review is sought is *State v. McKinney*, 245 Ariz. 225, 426 P.3d 1204 (2018).

STATEMENT OF JURISDICTION

The Arizona Supreme Court entered its judgment on September 27, 2018. *State v. McKinney*, 245 Ariz. 225, 426 P.3d 1204 (2018). This Court has jurisdiction pursuant to § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VIII to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Due Process Clause, Amendment XIV to the United States Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT OF THE CASE[1]

Between February 28 and March 22, 1991, Petitioner, codefendant Charles Hedlund, and two of Petitioner's friends committed, in various combinations, a series of five residential burglaries. The murder charges against Petitioner and Hedlund arose out of the fourth and fifth burglaries.

The fourth burglary occurred on March 9, 1991. Both Petitioner and Hedlund were involved in this burglary; although there is some suggestion in the record that a third burglar was present, nothing in the record suggests that anyone other than Petitioner fired the fatal shot. The victim was a woman named Christene Mertens. The perpetrators decided to burglarize Mertens' home based on information they had received to the effect that she kept a large sum of money in her home. Unfortunately for Mertens, she was home alone when Petitioner and Hedlund broke in. After entering, they beat and stabbed Mertens. Mertens' struggle to save her life ended when Petitioner held her face down on the floor and shot her

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[1] This summary of the facts is taken from the Arizona Supreme Court's original opinion, in which it affirmed Petitioner's and Hedlund's convictions and sentences. *See State v. McKinney*, 185 Ariz. 567, 917 P.2d 1214 (1996).

in the back of the head while covering his pistol with a pillow. Mertens died as a result of the gunshot. Petitioner and Hedlund then searched the house for valuables, ultimately taking about $120.00 in cash.

The fifth burglary, in which only Petitioner and Hedlund were involved, took place on March 22, 1991. They chose the home of a 65-year-old retired gentleman named Jim McClain because Hedlund had bought a car from McClain several months before and believed McClain kept money in his house. During their search for valuables, they came upon a sleeping McClain. Hedlund used his sawed-off .22 rifle to shoot McClain in the head, killing him. Petitioner and Hedlund then took McClain's watch, his three handguns, and his car.

Following trial in 1992, a jury convicted Petitioner of two counts of first-degree murder. On September 20, 1993, following an aggravation-mitigation hearing, the trial court sentenced Petitioner to death in connection with each murder conviction. Petitioner appealed his convictions and sentences to the Arizona Supreme Court. That court affirmed those convictions and sentences "in all respects." *State v. McKinney*. 185 Ariz. at 587, 917 P.2d at 1234 (1996). The Arizona Supreme Court issued its mandate on February 2, 1999.

On April 24, 2003, Petitioner filed a petition for writ of habeas corpus in the United States District Court, District of Arizona. He presented 26 claims for relief, including that (1) the Arizona courts failed to consider mitigating evidence, and (2) he was entitled to have a jury determine his sentences under *Ring v. Arizona*, 536 U.S. 584 (2002). The district court denied relief on

all grounds. *McKinney v. Ryan*, 2009 WL 2432738 (2009).

Petitioner's appeal to the United States Court of Appeals, Ninth Circuit, resulted in an order affirming the district court's order denying relief. *McKinney v. Ryan*, 730 F.3d 903 (9th Cir. 2013). Petitioner's petition for rehearing en banc was granted; ultimately, the Ninth Circuit reversed the district court by a vote of 6 to 5, concluding that Petitioner was sentenced in violation of *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The court remanded the matter to the district court "with instructions to grant the writ with respect to McKinney's sentence unless the state . . . either corrects the constitutional error in his death sentence or vacates the sentence and imposes a lesser sentence consistent with law." *McKinney v. Ryan,* 813 F.3d 798, 827 (9th Cir. 2015).

This Court denied Arizona's petition for writ of certiorari seeking relief from the Ninth Circuit's disposition of the matter. *Ryan v. McKinney*, 137 S.Ct. 39 (2016). After the case came back to the Arizona Supreme Court for further proceedings, the State requested that court to conduct an independent review of Petitioner's death sentences. Following consideration of that request and Petitioner's response, the Arizona Supreme Court granted the request. After receiving detailed briefing and hearing oral argument, the court conducted an independent review and affirmed Petitioner's death sentences on September 27, 2018. *State v. McKinney*, 245 Ariz. 225, 426 P.3d 1204 (2018).

Petitioner filed his Petition for Writ of Certiorari on February 21, 2019.

REASONS FOR DENYING THE WRIT

In spite of the fact that direct review of Petitioner's case was final years before the advent of *Ring v. Arizona,* 536 U.S. 584 (2002), Petitioner urges that he is entitled to have a jury determine his sentences on both first-degree murder convictions. The Petition lacks merit and should be dismissed.

I. THE ARIZONA SUPREME COURT CORRECTLY CONCLUDED THAT *RING V. ARIZONA* DOES NOT APPLY TO PETITIONER'S CASE

Following the Ninth Circuit's en banc order remanding Petitioner's case to Arizona courts to correct the error in his death sentences, the Arizona Supreme Court granted the State's motion to conduct a new independent review. Petitioner opposed that motion, urging that he had the right to a new sentencing proceeding before a jury. Relying on *State v. Styers,* 227 Ariz. 186, 254 P.3d 1132 (2011), the court rejected Petitioner's claim and granted the State's motion.

Petitioner's opposition to the State's motion was, in all material respects, identical to the position taken by Styers when he sought to have a jury determine his sentence for first-degree murder. In analyzing Styers' claim, the Arizona Supreme Court observed that, "New rules of criminal procedure (like the rule announced in *Ring*) apply retroactively to non-final cases pending on direct review." 227 Ariz. at 187 ¶ 5, 254 P.3d at 1133, *citing Griffith v. Kentucky,* 479 U.S. 314, 328 (1987). In *Griffith*, this Court held that a case is final when "a judgment of conviction has been rendered, the

availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." 479 U.S. at 321, n. 6. Based on *Griffith* and *Schriro v. Summerlin*, 542 U.S. 348 (2004), the Arizona Supreme Court held as follows:

> Because Styers had exhausted available appeals, his petition for certiorari had been denied, and the mandate had issued almost eight years before *Ring* was decided, his case was final, and he therefore is not entitled to have his case reconsidered in light of *Ring*.

227 Ariz. at 187-88 ¶ 5, 254 P.3d at 1133-34. The court then cited *Teague v. Lane*, 489 U.S. 288, 309 (1989), for the proposition that "[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."[2] 227 Ariz. at 188 ¶ 6, 254 P.3d at 1134. The court concluded that applying *Ring* "would undermine the finality of Styers' convictions." *Id.*

From a procedural perspective, the only difference between Styers' circumstances and Petitioner's is that Styers filed a petition for writ of certiorari following his direct appeal to the Arizona Supreme Court and Petitioner did not. The fact that Petitioner did not seek certiorari at that juncture does not matter under *Griffith*, *supra.* Petitioner's convictions and sentences

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[2] Although *Teague* was not a capital case, this Court extended its rationale to capital cases in *Penry v. Lynhaugh*, 492 U.S. 302, 313-14 (1989).

were final on August 14, 1996, nearly six years before this Court decided *Ring*.

II. THE PURPORTED CIRCUIT COURT AND STATE HIGH COURT "SPLITS" IDENTIFIED BY PETITIONER DO NOT MILITATE IN FAVOR OF AN ORDER GRANTING THE WRIT

Petitioner urges that there are clear splits of authority amongst the various federal circuit courts and state high courts with respect to two issues: first, whether courts must apply "current law" when a matter is remanded for error correction, and second, whether proceedings occasioned by *Eddings* error must be conducted by the trial court.

A. Whether Courts Must Apply Current Law When Conducting Error Correction Proceedings

Petitioner asserts that, while the Arizona Supreme Court and the Seventh Circuit Court of Appeals have expressed the view that "current law" does not always apply to post-remand proceedings, two other state supreme courts and three federal circuit courts have come to the opposite conclusion. An examination of the cases relied upon by Petitioner reveals that the resulting split of authority, to the extent it exists, is not as stark as Petitioner suggests.

United States v. Pizarro, 772 F.3d 284 (1st Cir. 2014), does not assist Petitioner. Pizzaro urged that *Alleyne v. United States,* 570 U.S. 99 (2013), applied to his resentencing proceeding. The court agreed, concluding that Pizarro's "judgment of conviction was

not final at the time *Alleyne* was decided, given that we had vacated his sentence and remanded for resentencing." 772 F.3d at 291. Apparently, Pizzaro was awaiting resentencing when *Alleyne* was decided; in contrast, the error correction instruction in Petitioner's case did not issue until more than ten years had elapsed since the advent of *Ring*.

In *United States v. Hadden*, 475 F.3d 652 (4th Cir. 2007), the court noted at the outset of its analysis that "[t]he procedural posture of this case is complicated, due in large part to the fact that it was percolating up from the district court during the Supreme Court's recent interpretations of the Sixth Amendment in *Blakely v. Washington*, 542 U.S. 296 . . . (2004) and *Booker*."[3] 475 F.3d at 655. The district court sentenced Hadden in June 1999. Early in 2002, Hadden sought relief pursuant to 28 U.S.C. § 2255. Eventually, in November 2004, the Fourth Circuit affirmed Hadden's sentence. Within two weeks, Hadden requested panel and en banc rehearing. This Court decided *Booker*, which was the linchpin of Hadden's claim, before the Fourth Circuit could rule on his rehearing request. Once again, by way of contrast, *Ring* was argued and decided long after Petitioner's convictions and sentences became final and before he sought habeas relief in the district court.

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[3] *See United States v. Booker*, 543 U.S. 220 (2005).

B. Whether *Eddings* Error Can Be Remedied Only By the Trial Court

Petitioner urges that Arizona stands alone in defense of the position that *Eddings* error can be remedied without remanding to the trial court for resentencing, and that several state supreme courts and two federal circuit courts have rejected Arizona's approach. In none of the cases relied upon by Petitioner, however, was the issue the specific court to which a matter must be remanded once *Eddings* error has been found. Thus, there is no split of authority in this regard.

As noted previously, after the Ninth Circuit remanded this matter for error correction, the Arizona Supreme Court granted the State's request to conduct another independent review. That should have surprised no one, because the error identified by the Ninth Circuit occurred during the Arizona Supreme Court's first independent review, and the Arizona Supreme Court is the only court with the authority to correct the error. The details of the Arizona Supreme Court's independent review function are spelled out in statute and case law. A.R.S. § 13-755 provides as follows:

> A. The supreme court shall review all death sentences. On review, the supreme court shall independently review the trial court's findings of aggravation and mitigation and the propriety of the death sentence.
>
> B. If the supreme court determines that an error was made regarding a finding of

> aggravation or mitigation, the supreme court shall independently determine if the mitigation the supreme court finds is sufficiently substantial to warrant leniency in light of the existing aggravation. If the supreme court finds that the mitigation is not sufficiently substantial to warrant leniency, the supreme court shall affirm the death sentence. If the supreme court finds that the mitigation is sufficiently substantial to warrant leniency, the supreme court shall impose a life sentence pursuant to section 13-751, subsection A.
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> C. The independent review required by subsection A does not preclude the supreme court from remanding a case for further action if the trial court erroneously excluded evidence or if the appellate record does not adequately reflect the evidence presented.

In *State v. Prince*, 226 Ariz. 516, 250 P.3d 1145 (2011), the Arizona Supreme Court delineated its statutory obligations in the following manner:

> Because Prince committed the murder before August 1, 2002, we independently review the jury's findings on "aggravation and mitigation and the propriety of the death sentence." A.R.S. § 13-755(A)-(C);*see* 2002 Ariz. Sess. Laws, ch. 1, § 7 (5th Spec. Sess.). We review the record de novo and do not defer to the jury's findings or decisions. *Newell,* 212 Ariz. at 405 ¶ 82, 132 P.3d at 849.

> In our review, we determine whether the evidence supports the aggravating circumstances beyond a reasonable doubt. *Anderson*, 210 Ariz. at 351 ¶ 104, 111 P.3d at 393. We "consider the quality and the strength, not simply the number, of aggravating and mitigating factors." *State v. Womble*, 255 Ariz. 91, 103 ¶ 50, 235 P.3d 244, 256 (2010), quoting *State v. Kiles (Kiles II),* 222 Ariz. 25, 38 ¶ 62, 213 P.3d 174, 187 (2009). Although we do not require a nexus between the mitigating factors and the crime, the defendant's failure to establish a causal connection "may be considered in assessing the quality and strength of the mitigation evidence." *Newell*, 212 Ariz. at 405 ¶ 82, 132 P.3d at 849; *accord Ellison*, 213 Ariz. at 144 ¶132, 140 P.3d at 927.
>
> If we find the mitigation "sufficiently substantial to warrant leniency, then we must impose a life sentence." *Newell*, 212 Ariz. at 405 ¶ 81, 132 P.3d at 849 (quotation omitted). Otherwise, we must affirm the death sentence. *Id.*

226 Ariz. at 539 ¶¶ 93-95, 250 P.3d at 1168.

In conducting its independent review of Petitioner's death sentences, the Arizona Supreme Court complied in full with both the error correction instruction and its statutory mandate.

III. UNDER PETITIONER'S THEORY, THERE IS NO SUCH THING AS "FINALITY" IN CAPITAL CASES OR, INDEED, IN CRIMINAL CASES GENERALLY

Petitioner correctly observes that the definition of "finality" depends on the context in which it is used. This Court said as much in *Clay v. United States*, 537 U.S. 522, 526 (2003), in which it held that, in the context of 28 U.S.C. § 2255, "a judgment of conviction becomes final when the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction." *Id.* at 525. In reaching that conclusion, the Court rejected Clay's argument that the judgment becomes final when the appellate court issues its mandate.

By any principled measure, Petitioner's convictions and sentences for killing two blameless and essentially incapacitated victims became final years before this Court decided *Ring v. Arizona.* He did not seek federal habeas relief until nearly seven years had elapsed since his sentences were final, and another twelve years went by before habeas relief was granted. The promise of *Teague v. Lane* and other cases that express the need for finality in criminal proceedings will be rendered empty if this Court concludes that *Ring* applies in Petitioner's case.

CONCLUSION

For these reasons, the State respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted

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