No. 18-1109

IN THE
Supreme Court of the United States

JAMES ERIN MCKINNEY,
Petitioner,

v.

STATE OF ARIZONA,
Respondent.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

This petition not only involves the ultimate sanction in our system of justice, it also presents two clear splits on grave matters of constitutional law. The questions presented affect at least 20 death penalty cases, including this one, and the State has identified no vehicle problems. *See* Arizona Capital Representation Project and Arizona Attorneys for Criminal Justice Amicus Br. 3. This Court's intervention is warranted.

For more than two decades, James Erin McKinney has been sentenced to death. And for more than two decades, he has sought consideration of mitigating

evidence of his horrific childhood before the court that sentenced him to death. Despite numerous appeals—and the grant of habeas corpus relief by the Ninth Circuit—McKinney's straightforward request for the same treatment as any other capital defendant has once again been denied by the Arizona Supreme Court.

The State of Arizona does not dispute that under current law, McKinney is entitled to resentencing by a jury, with full consideration of the mitigating evidence in his case. It instead argues that McKinney is not entitled to a jury sentence because his conviction became final in 1996, prior to this Court's decision in *Ring* v. *Arizona*, 536 U.S. 584 (2002). As five state and federal courts have held, however, where a court resentences a defendant or corrects his sentence—as occurred in this case—current law applies. *See infra* pp. 3-4. Only the Seventh Circuit joins the Arizona Supreme Court in applying abrogated precedent in sentence correction proceedings. *See* Pet. App. 3a-4a; *Richardson* v. *Gramley*, 998 F.2d 463, 467-468 (7th Cir. 1993). This clear split is plainly certworthy. *See* Phillips Black, Inc. Amicus Br. 6-12.

There is a further problem with the decision below. Under *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982)—which this Court decided long before McKinney's sentencing—a "sentencer" in a capital case may not "refuse to consider, as a matter of law, any relevant mitigating evidence." *Id.* at 114 (emphasis omitted). McKinney's sentence violated *Eddings*. *See* Pet. App. 50a. Five state and federal courts have held that the remedy for *Eddings* error is resentencing in the trial court. *See infra* pp. 5-6. The Arizona Su-

preme Court refused to grant McKinney resentencing and instead conducted its own review of the mitigating evidence in his case. *See* Pet. App. 4a. This straightforward division in authority likewise requires the Court's attention.

The Court should grant certiorari and reverse.

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

The State does not contest that the decision below deepens a split between at least five state and federal courts. *See* Opp. 7-8. The Arizona Supreme Court and the Seventh Circuit hold that the law in effect at the time a defendant's conviction first becomes final governs resentencing and sentence correction proceedings. *See* Pet. App. 3a-4a; *Richardson*, 998 F.2d at 467-468. In contrast, the Florida Supreme Court, Washington Supreme Court, and Second Circuit hold that current law applies in sentence correction and resentencing proceedings, unless a sentence correction is purely ministerial. *See State* v. *Fleming*, 61 So.3d 399, 406 (Fla. 2011); *State* v. *Kilgore*, 216 P.3d 393, 396-401 (Wash. 2009); *Burrell* v. *United States*, 467 F.3d 160, 165-166 (2d Cir. 2006) (Sotomayor, J.). That division in authority—which is not in dispute—is reason enough to grant certiorari.

The State nevertheless argues that the split "is not as stark" as McKinney suggests because it does not extend to the First or Fourth Circuits. Opp. 7. According to the State, *United States* v. *Pizarro*, 772 F.3d 284 (1st Cir. 2014), is distinguishable because

in that case, the defendant was "awaiting resentencing when *Alleyne* was decided," whereas "the error correction instruction in Petitioner's case did not issue until more than ten years had elapsed since the advent of *Ring*." Opp. 8. But that is precisely the point: In both *Pizarro* and the case at bar, the defendant's sentence was reconsidered *after* a change in the law. In that situation, the First Circuit applies current law, while the Arizona Supreme Court does not, creating a clear split that requires this Court's intervention.

The same is true of *United States* v. *Hadden*, 475 F.3d 652 (4th Cir. 2007). There, the defendant's sentence became final on direct review. *See id.* at 654. The defendant then sought post-conviction relief, and the federal district court entered a corrected sentence without conducting a resentencing hearing. *See id.* The defendant appealed his corrected sentence to the Fourth Circuit, which denied relief. *Id.* at 658. While the defendant's rehearing petition was pending, this Court decided *United States* v. *Booker*, 543 U.S. 220 (2005). On rehearing, the Fourth Circuit concluded that because the district court had "corrected" the defendant's sentence—and the appeal of the sentence correction was still pending—*Booker* applied to the defendant's case. *See Hadden*, 475 F.3d at 660, 670-671.

Hadden is directly on point: The Fourth Circuit held that where a defendant's sentence becomes final, and is later "corrected" through post-conviction proceedings, current law applies to the corrected sentence. In contrast, the Arizona Supreme Court held below that where a defendant's sentence becomes final, and is later "corrected" through further

proceedings, current law does *not* apply to the corrected sentence. The Court should resolve this clear division in authority.

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

1. The State does not contest that in at least five courts, McKinney would be entitled to resentencing to correct the *Eddings* error in his death sentence. *See, e.g.*, *Harvard* v. *State*, 486 So.2d 537, 539 (Fla. 1986 (per curiam); *People* v. *Davis*, 706 N.E.2d 473, 488 (Ill. 1998); *State* v. *Roberts*, 998 N.E.2d 1100, 1115 (Ohio 2013); *Davis* v. *Coyle*, 475 F.3d 761, 774-775 (6th Cir. 2007) (*Coyle*); *Paxton* v. *Ward*, 199 F.3d 1197, 1220 (10th Cir. 1999). Instead, the State asserts that there is no split with respect to *which* court may correct an *Eddings* error. *See* Opp. 9. Each of the cases cited by McKinney, however, states that the correction of *Eddings* error requires resentencing *in the trial court*.

In *Harvard*, the Florida Supreme Court stated that "a new sentencing hearing must be held before the trial judge." 486 So.2d at 539. In *Roberts*, the Ohio Supreme Court remanded "for resentencing" so that "the trial court" can "review the entire record." 998 N.E.2d at 1115. And in *Davis*, the Illinois Supreme Court remanded "to the circuit court for a new sentencing hearing." 706 N.E.2d at 488. The Sixth Circuit concluded in *Coyle* that "reweighing" of the evidence by "the state appellate court" would not correct the *Eddings* error and that "the case must be remanded for a new sentencing hearing." 475 F.3d at 774-775. The Tenth Circuit similarly held in

Paxton that reweighing of evidence on appeal "does not address the nature of the constitutional violations or fully correct the errors." 199 F.3d at 1220. The State does not cite or discuss these cases, which plainly cut against its position.[1]

The decision below departed from the established precedent of five other courts. Whether a defendant in a capital case is entitled to resentencing in the trial court to correct a constitutional error in his death sentence should not be a matter of geography. This Court's intervention is warranted.

2. The State asserts that the "Arizona Supreme Court is the only court with the authority to correct" the *Eddings* error in McKinney's conviction. Opp. 9. That misses the point. The question in this case is not whether the Arizona Supreme Court had authority to address the Ninth Circuit's habeas ruling; it is instead whether the Arizona Supreme Court was required as a matter of federal law to remand McKinney's case for resentencing in the trial court.

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[1] The State suggests that the *Eddings* error occurred during the Arizona Supreme Court's independent review of McKinney's death sentence. *See* Opp. 9. The Ninth Circuit, however, concluded that the trial court applied the Arizona Supreme Court's unconstitutional causal nexus test for mitigating evidence, *see* Pet. App. 51a-52a, and that the Arizona Supreme Court "accepted the conclusion of the sentencing judge that, as a factual matter, McKinney had not shown that his PTSD had causally contributed to the murders," *id.* at 53a. In any event, multiple courts have held that appellate reweighing cannot correct *Eddings* error, creating a split on this issue. *See Paxton*, 199 F.3d at 1220 (citing *Skipper* v. *South Carolina*, 476 U.S. 1, 8 (1986)); *Roberts*, 998 N.E.2d at 1115; *Coyle*, 475 F.3d at 774-775.

That question has a straightforward answer. As this Court has repeatedly stated, the "reasoning in *Lockett* and *Eddings* * * * compels a remand for resentencing so that we do not risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Penry* v. *Lynaugh*, 492 U.S. 302, 328 (1989) (internal quotation marks omitted); *see also Mills* v. *Maryland*, 486 U.S. 367, 375 (1988) ("Because the sentencer's failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence * * *, it is our duty to remand this case for resentencing." (brackets omitted)).

To the extent the State is arguing that the Arizona Supreme Court was prohibited as a matter of state law from remanding McKinney's case for resentencing, that is incorrect. The independent review statute cited by the State provides that the Arizona Supreme Court may "remand[ ] a case for further action if the trial court erroneously excluded evidence or if the appellate record does not adequately reflect the evidence presented." Opp. 10 (quoting Ariz. Rev. Stat. Ann. § 13-755(C)). Indeed, the Arizona Supreme Court has acknowledged that it has the authority to "remand for resentencing" where the "trial judge erred with respect to aggravating or mitigating circumstances." *State* v. *Bible*, 858 P.2d 1152, 1211-12 (Ariz. 1993); *see also State* v. *McMurtrey*, 664 P.2d 637, 646 (Ariz. 1983).

Even if Arizona's independent review statute precluded remand to the trial court—and it plainly does not—it would not affect the outcome of this petition. McKinney's death sentence is unconstitutional. Pet. App. 67a-68a. Whether the *Eddings* error in McKinney's sentence can be corrected through appellate

reweighing of the mitigating and aggravating evidence is a matter of federal law. *See* U.S. Const. art. VI, cl. 2; *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015) (Courts "must not give effect to state laws that conflict with federal laws."). The Court should grant certiorari and address that federal question, which has divided the state and federal courts.

III. THIS CASE IS AN IDEAL VEHICLE TO ADDRESS THE IMPORTANT QUESTIONS PRESENTED.

This case presents a clean vehicle to resolve the questions presented. The Arizona Supreme Court passed on both questions below, concluding that McKinney is not entitled to the benefit of current law and that the correction of *Eddings* error does not require resentencing in the trial court. *See* Pet. App. 3a-4a. Numerous state and federal courts have reached the opposite conclusion. For good reason: When a court exercises discretion in sentence correction or resentencing proceedings, it is required to apply current law. *See supra* p. 3. That is certainly true here, where the Arizona Supreme Court weighed the mitigating evidence of McKinney's horrific childhood *for the first time* below. *See* Pet. 21-23.

Evidence of childhood trauma, moreover, has a significant impact on capital sentencers. *See* Promise of Justice Initiative and National Association for Public Defense Amicus Br. 25-27 (cataloguing cases). Indeed, "the Arizona Supreme Court has been dismissive about mitigation that jurors find powerful and as a reason to sentence to life." Arizona Capital Representation Project and Arizona Attorneys for

Criminal Justice Amicus Br. 15-18. As multiple courts have held, McKinney is entitled to present this evidence in the trial court, where it will be considered by the sentencing body. *See supra* p. 5-6.

The decision below is wrong, the splits are entrenched, and the resolution of this petition will affect at least 19 other death penalty cases. *See* Pet. 24; *see also* Arizona Capital Representation Project and Arizona Attorneys for Criminal Justice Amicus Br. 3, 6-7. The State does not identify any vehicle problems, and there are none. The Court should grant certiorari and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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