

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICK ALLAN RHOADES,
Petitioner,

v.

LORIE DAVIS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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Capital Case

Question Presented

Is the exclusion of relevant mitigating evidence during the punishment phase of a capital murder trial structural error, when the wrongfully excluded evidence was not cumulative of evidence the jury was allowed to consider?

**List of Parties and
Corporate Disclosure Statement**

All parties to the proceeding in the court of appeals are listed in the caption.

Petitioner is not a corporate entity.

**List of All Directly Related
Proceedings in State and Federal Courts**

Trial:

State v. Rick Allan Rhoades, No. 612408 (179th Dist. Ct., Harris County, Tex. Oct. 8, 1992)

Direct appeal:

Rick Allan Rhoades v. State, No. 71,595 (Tex. Crim. App. Oct. 2, 1996)

State habeas proceeding:

Ex parte Rick Allan Rhoades, No. WR-78,124-01 (Tex. Crim. App. Oct. 1, 2014)

Federal habeas proceeding in district court:

Rick Allan Rhoades v. Lori Davis, No. 4:14-cv-03152 (S.D. Tex. July 20, 2016)

Federal habeas proceeding in court of appeals:

Rick Allen Rhoades v. Lorie Davis, No. 16-70021 (5th Cir. Jan. 28, 2019)
(rehearing denied Mar. 11, 2019)

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PETITION FOR A WRIT OF CERTIORARI

Introduction

The jury at Petitioner Rick Allan Rhoades' 1992 capital murder trial was prevented from giving effect to mitigating evidence that might have led the jury to sentence him to life in prison, instead of to death. Specifically, the jurors were not allowed to consider pictures of Rhoades which showed him engaged in normal childhood activities, such as attending a school dance, playing sports, and fishing. By showing Rhoades in contexts which would have normalized him – which showed him engaging in activities the jurors and their own children engaged in – these pictures, which were not cumulative of the evidence the jury was allowed to

consider, would have provided a sharp contrast to the State's characterization of Rhoades as a "psychopath."

In *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Skipper v. South Carolina*, 476 U.S. 1 (1986), this Court repeatedly explained that it offends the Eighth Amendment's protection against cruel and unusual punishment and the Fourteenth Amendment's Due Process Clause for a death-penalty jury to be prevented from considering relevant mitigating evidence, which could lead that jury to sentence a defendant to life instead of death. In neither *Lockett* nor its progeny has this Court conducted any prejudice analysis to determine whether the defendant was harmed by error in preventing a jury to consider mitigating evidence. Absent any prejudice analysis this Court has repeatedly found such defendants are entitled to new sentencing trials.

The fact this Court has not conducted prejudice inquiry when addressing *Lockett* error indicates that error under *Lockett* is structural; nevertheless, several of the courts of appeals, including the Court of Appeals for the Fifth Circuit in its opinion denying Petitioner relief, have found that error under *Lockett* is in fact subject to harmless error analysis. These courts seem to have grounded their decisions on two out-of-context sentences from this Court's Eighth Amendment jurisprudence – one from *Skipper* and the other from *Hitchcock v. Duggar*, 481 U.S. 393 (1987). Given that this Court conducted no prejudice analysis in either of these cases, however, they cannot support the weight the courts of appeals have placed on

them in treating *Lockett* error as a mere trial error. They have nevertheless done so, and this Court's intervention is required to correct their misreading.

Accordingly, Petitioner Rick Allan Rhoades respectfully requests this Court grant his Petition for a Writ of Certiorari and order briefing on the issue to answer whether the exclusion of relevant mitigating evidence during the punishment phase of a capital murder trial is structural error, when the wrongfully excluded evidence was not cumulative of evidence the jury was allowed to consider.¹

Opinions and Orders Below

The decision of the United States Court of Appeals for the Fifth Circuit was issued on January 28, 2019. The opinion is attached as Appendix A. The court denied Rhoades' petition for en banc rehearing on March 11, 2019. The order is attached as Appendix B. The court granted Rhoades a certificate of appealability on March 27, 2017. The order is attached as Appendix C.

The district court's order was issued on July 20, 2016. The order is attached as Appendix D.

Statement of Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

¹ Alternatively, this Court could hold Rhoades' Petition pending its decision in *McKinney v. Arizona*, No. 18-1109. See *infra* note 10.

Constitutional Provisions and Statutes Involved

The Eighth Amendment to the United States Constitution provides:

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: “...nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

Statement of the Case

A. Trial

Rhoades was charged with killing Charles and Bradley Allen in the same criminal transaction or in the course of committing or attempting to commit burglary. ROA.723.² On October 2, 1992, Rhoades was convicted of capital murder. ROA.1001.

During the punishment phase of Rhoades’ trial, his attorney offered testimony from several witnesses, including Rhoades’ adoptive parents, Donna and Ernest Rhoades. Before Mrs. Rhoades testified, the court noticed that trial counsel had pre-marked eleven pictures of Rhoades as a child and numbered these photographs Defendant’s Exhibits six through sixteen. ROA.6981-82. When asked by the court, outside the presence of the jury, what trial counsel intended to

² Citations to the Record on Appeal in the court of appeals are cited in this Petition as ROA.[page number], pursuant to that court’s rule.

demonstrate through the pictures, trial counsel explained that he intended the pictures to mitigate the dehumanizing effect of other pictures the State had offered. ROA.6982-83. The trial court ruled that the photos were irrelevant and did not admit them into the evidence. ROA.6985. The pictures at issue showed that, after being adopted, Rhoades engaged in typical childhood activities, such as attending a school dance with a date, hanging out with friends, and fishing. ROA.7921-42.

Rhoades was sentenced to death on October 8, 1992. ROA.1014-16.

B. Direct appeal

In the course of direct appeal proceedings, Rhoades exhausted his claim that the trial court erred in not admitting the photos of him as a child into evidence during the sentencing phase of his trial. ROA.513. Direct appeal counsel argued the photos were relevant to the issues at punishment because they were mitigating. ROA.514. In denying relief on the claim, the CCA explained that it interpreted this Court's opinions in *Franklin v. Lynaugh*, 487 U.S. 164 (1988), and *Penry v. Lynaugh*, 492 U.S. 302 (1989), as standing for the proposition that evidence is only mitigating if it relates to the defendant's moral culpability. ROA.435. The CCA held the trial court did not err in finding the pictures irrelevant because it believed pictures of Rhoades' childhood had no relationship to his conduct in the murders. ROA.436. Judge Clinton, in his dissent, wrote that the Supreme Court's opinion in *Skipper v. South Carolina*, 476 U.S. 1 (1986), mandated that evidence does not have to relate specifically to culpability to be mitigating. ROA.394. This Court

subsequently made it clear that the CCA's ostensible understanding of its decision in *Penry* was wrong. *Smith v. Texas*, 543 U.S. 37, 45 (2004).

The CCA affirmed Rhoades' conviction and sentence on October 2, 1996. ROA.441.

C. State habeas proceedings

In state habeas proceedings, Rhoades raised an Eighth Amendment claim pertaining to the excluded pictures that differed slightly from the one raised in direct appeal proceedings. In addition to arguing that the pictures were relevant because they humanized Rhoades, the state habeas claim argued the pictures were further relevant because they constituted visual evidence Rhoades was not a future danger when in a structured environment. ROA.8272. In denying relief on the claim, the state habeas court found that the pictures were not relevant to the issue of whether Rhoades constituted a future danger. ROA.9186 (trial court's finding); ROA.8201 (CCA order adopting trial court's findings). With respect to the portion of Rhoades' state habeas claim that was raised in direct appeal proceedings, the state habeas court deferred to that decision. ROA.9209-10.

The CCA denied Rhoades relief in state habeas proceedings on October 1, 2014. ROA.8201.

D. Federal habeas proceedings

In federal habeas proceedings in the district court, Rhoades raised his claim that the trial court erred in refusing to admit into evidence the mitigating photographs of him as a child. ROA.63. After citing the Court of Appeals for the

Fifth Circuit's opinion in *Blue v. Thaler*, 665 F.3d 647 (5th Cir. 2011), to support the proposition that mitigating evidence is only that evidence that reduces moral blameworthiness, the district court found that the state court could reasonably conclude that the photographs bore little relation to Rhoades' character, record, or circumstances of the offense – and hence did not bear on Rhoades' moral blameworthiness. ROA.273-74. Further, the court alternatively held that even if the trial court erred in refusing to admit the pictures, Rhoades was not entitled to relief because he could not show the error had a substantial or injurious effect on the jury's verdict. ROA.275. The district court denied Rhoades relief on his petition, granted Respondent's motion for summary judgment, and denied Rhoades a certificate of appealability. ROA.307.

In his application for a certificate of appealability to the court of appeals, Rhoades argued the district court had erred in finding the excluded pictures did not bear on Rhoades' character and moral culpability and in finding the pictures were irrelevant to the future danger special issue. App. for COA at 12 (citing ROA.274-75). Noting the CCA was divided on the issue of whether the excluded photographs were relevant to special issues the jury had to answer at Rhoades' trial, the Panel granted Rhoades a COA on the issue. Appendix C at a46.

At argument, the judges on the panel focused most of their questions on the issue of whether any error in excluding the photographs was structural. In the opinion issued by the Panel on January 28, the Court found that the CCA was wrong to find the photographs were not relevant to the issues before Rhoades' jury

during sentencing. Appendix A at a10. The Court found the pictures were indeed relevant, both because they humanized Rhoades and also because they rebutted the State's suggestion that Rhoades "was a psychopath who viewed society's rules as a joke." *Id.* The former consideration is relevant to the mitigation special issue Texas juries must answer.³ The latter is relevant to the future dangerousness special issue.⁴

While the Panel indicated during argument that the question of whether the wrongful exclusion of the photographs should be considered structural error might turn on whether the evidence was cumulative of other evidence the jury was allowed to consider, the Panel's decision does not address this issue – i.e., the Panel did *not* hold that an error is non-structural if the excluded evidence is cumulative. At the same time, the Panel *did* find that the excluded photographs might have cut "against other mitigating evidence ... of Rhoades' difficult childhood." Appendix A at a13. This finding implies the Court did *not* believe the wrongfully excluded evidence to be merely cumulative.

Thereafter, however, the Panel held the exclusion of the photographic evidence in Rhoades' trial was subject to harmless error review. In reaching this

³ Tex. Code Crim. Proc. art. 37.071, § 2(e)(1) ("Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment ... rather than a death sentence be imposed.").

⁴ Tex. Code Crim. Proc. art. 37.071, § 2(b)(1) ("Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.").

holding, the Panel did not identify any decision from the court of appeals that compelled this conclusion.⁵ The Panel did cite one case from this Court as authority for its holding, but that case, *Satterwhite v. Texas*, 486 U.S. 249 (1988), does not address the issue.⁶ See Appendix A at a12-a13 n.39.

Because Counsel believed Rhoades' case was the first in which a panel of the Court of Appeals for the Fifth Circuit had held that error in excluding non-cumulative, relevant mitigating evidence is not structural, and because Counsel believes the Fifth Circuit's decision conflicts with this Court's opinions in *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Skipper v. South Carolina*, 476 U.S. 1 (1986), Counsel sought rehearing from the en banc court on February 11, 2019. The court of appeals denied Rhoades' petition for rehearing on March 11, 2019. Appendix B.

Reasons for Granting the Writ

This Court has never held that the harmless error doctrine is applicable to *Lockett* error. In *Lockett*, this Court considered Ohio's death penalty statute. That state's statute allowed a sentence of life imprisonment to be imposed by a judge after the jury found the defendant guilty of capital murder only if the defendant had shown by a preponderance of the evidence that one of three mitigating

⁵ The cases from this Court cited by the Panel involve whether errors involving a trial court's submitting an invalid aggravating circumstance to the jury and involving a trial court's instructions not allowing a jury to give effect to mitigating evidence were subject to harmless error review. See Appendix A at a12-a13 n.39.

⁶ The issue in *Satterwhite* was whether it was harmless error to introduce psychiatric testimony obtained in violation of a defendant's right to consult with counsel before being subjected to a psychiatric examination. *Satterwhite v. Texas*, 486 U.S. 249, 251 (1988).

circumstances was present in her case. *Lockett v. Ohio*, 438 U.S. 586, 593 (1978). The statute did not allow the sentencer to consider any non-statutory factors, such as Lockett's intelligence or the fact that she was a recovering drug addict. *Id.* at 594. Because the statute did not allow the sentencer to consider whatever aspects of the defendant's character the defendant argued to be a mitigating factor, this Court held Ohio's statute violated the Eighth Amendment. *Id.* at 604. The Court did not engage in any prejudice analysis. There is nothing in this Court's opinion in *Lockett* (or in *Lockett*'s progeny) to suggest that *Lockett* error – the wrongful exclusion of potentially mitigating evidence – is anything but structural.

Four years after deciding *Lockett*, this Court buttressed the notion that the exclusion of mitigating evidence is structural error. Thus, in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), this Court addressed a case out of Oklahoma. Unlike the Ohio statute at issue in *Lockett*, Oklahoma's statute did not define what its juries could consider to be mitigating factors in the sentencing phase of a death penalty trial. *Eddings v. Oklahoma*, 455 U.S. 104, 106 (1982). The trial court, however, imposed its own limitation and instructed the jury that it could consider nothing about the defendant's violent background to be mitigating. *Id.* at 108. This Court granted relief, holding that by limiting the jury's ability to consider any aspect of the defendant's character to be mitigating, the trial court violated the Eighth Amendment. *Id.* at 113. Again, the Court did not engage in any prejudice analysis. There is nothing to suggest this Court believed this error to be anything but structural.

Finally, in *Skipper v. South Carolina*, 476 U.S. 1 (1986), this Court implicitly addressed the very issue presented in this case. The trial court in *Skipper* had excluded testimony from two jailers and a visitor pertaining to Skipper's good behavior in prison. *Skipper v. South Carolina*, 476 U.S. 1, 3 (1986). The trial court excluded the testimony, believing it to be irrelevant. *Id.* On review, this Court observed that "the only question" before it was whether the excluded testimony was "relevant evidence in mitigation of punishment." *Id.* at 4. After finding the excluded evidence to be relevant, the Court held the resulting death sentence could not stand. *Id.* at 8. The Court did not engage in any prejudice analysis, and its holding – that the excluded evidence was relevant, and reversal of the death sentence was therefore compelled – unmistakably implies this Court deemed the error to be structural.

In view of this unequivocal authority, the only question the court of appeals should have asked in reviewing Rhoades' claim was whether the excluded evidence was relevant. The Panel did, of course, address that question – it deemed the evidence relevant – but its analysis did not end there, as it should have. Instead, the court of appeals undertook an additional step not present in any of this Court's decisions addressing *Lockett* error and asked whether the exclusion of the relevant evidence caused harm. In so doing, the Fifth Circuit embraced an erroneous view of *Lockett* error that has also been adopted by several other courts of appeals. Although the Fifth Circuit's opinion in this case does not explain why it believes *Lockett* error can be subjected to harmless error review, the other courts of appeals

to have arrived at this apparent conclusion have cited a single sentence from one or two opinions from this Court in support of the proposition that reversal is not required when wrongfully excluded *Lockett* evidence is cumulative of other evidence before the jury. The first of these two sentences is from the decision in *Skipper*. In that case, the attorneys representing South Carolina argued the excluded evidence was cumulative of evidence that was considered by the jury and the error was therefore harmless. *Skipper*, 476 U.S. at 7-8. In response to this argument, the Court wrote, “We think, however, that characterizing the excluded evidence as cumulative and its exclusion as harmless is implausible on the facts before us.” *Id.* at 8. It is impossible to determine from this sentence, however, whether this Court meant the *facts* did not demonstrate the excluded evidence was cumulative, or whether it meant it was implausible to characterize relevant excluded evidence as harmless. Put another way, this Court’s language in *Skipper* could mean any of the following: (a) characterizing the evidence as cumulative was implausible on the facts before the Court; (b) characterizing it as cumulative was not implausible, but characterizing it as harmless was implausible; or (c) characterizing it as either cumulative or harmless was implausible on the facts before the Court. Yet, despite the ambiguity in the quoted sentence, one thing is perfectly clear: This Court did not in fact conduct any harmless error review. *Skipper* made clear that the only question that needed to be addressed was whether the excluded testimony was relevant. *Id.* at 4.

The second sentence that has been used by some of the courts of appeals to support an opinion that error in excluding relevant mitigating evidence is subject to harmless error analysis if that evidence is cumulative is from this Court's opinion in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), which addressed Florida's death-penalty statute. Like the Ohio statute at issue in *Lockett*, the Florida statute enumerated what factors could be considered to be mitigating by the jury. *Hitchcock*, 481 U.S. at 398. Because Florida law did not allow the sentencer to consider non-statutory mitigating factors, the *Hitchcock* Court held that Florida's statute did not comport with the requirements of *Skipper*, *Eddings*, and *Lockett*. The Court then wrote that the “[r]espondent ha[d] made no attempt to argue that this error was harmless, or that it had no effect on the jury or the sentencing judge.” *Id.* The Court continued, “In the absence of such a showing our cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid.” *Id.* The Court did not conduct any prejudice inquiry. None of the cases cited by the *Hitchcock* Court – i.e. *Skipper*, *Eddings*, and *Lockett* – had held that such was necessary, and the Court had conducted no such review in any of the cases.

In that it addresses a state's statutory scheme, *Hitchcock* is similar to *Lockett* and also to the *Penry* opinions, which address Texas's statute. Under Fifth Circuit precedent, *Penry I* error is not subjected to harmless error review. *Nelson v. Quarterman*, 472 F.3d 287, 314-15 (5th Cir. 2006). This does not mean, however, that every defendant who was sentenced to death before the Texas legislature amended the infirm special issue at issue in *Penry I* had his death sentence

reversed. Rather, unless that defendant introduced at trial evidence that might serve as a basis for a sentence less than death, the unconstitutional statute did not harm him. In the same way, the unconstitutional Florida statute at issue in *Hitchcock* did not prejudice every Florida defendant who was sentenced to death under it. Just as *Penry I* error is harmless if the defendant did not provide at trial any evidence that could support a life sentence, error under *Hitchcock* is harmless if the defendant did not attempt to introduce any non-statutory mitigating evidence at trial. *Clark v. Dugger*, 834 F.2d 1561, 1568-70 (11th Cir. 1987). Importantly, however, this analysis does not entail (or even permit) the conclusion that harmless error review is permitted where a defendant *did* introduce, or attempted to introduce, mitigating evidence.

In affirming the district court's opinion denying Rhoades relief, the court of appeals distinguished its decision in *Rhoades* from its decision in *Nelson v. Quarterman*, 472 F.3d 287 (5th Cir. 2006), in which it held error under *Penry I* is not subject to harmless error review. Appendix A at 11-12 n.39. The court wrote that *Nelson* is "qualitatively different" because it addressed jury instructions which prevented a jury from giving effect to admitted mitigating evidence, whereas in *Rhoades*, the jury was prevented from considering mitigating evidence because the judge refused to admit it. The court of appeals does not explain why this ostensible distinction matters. In both cases, a jury was prevented from giving effect to mitigating evidence that it should have been permitted to give effect to in determining the proper sentence for the defendant. In either case, the effect on the

jury is the same, and because the effects of the error are too difficult to measure, the error should be considered structural. *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907-08 (2017).

The Sixth and Eighth Circuits have also held that error in wrongfully excluding mitigating evidence is subject to harmless error review. *Dixon v. Houk*, 737 F.3d 1003, 1011 (6th Cir. 2013); *Sweet v. Delo*, 125 F.3d 1144, 1158 (8th Cir. 1997) (citing *Skipper* and *Hitchcock* to support holding *Lockett* error is subject to harmless error review).⁷ Those courts arrived at this conclusion, however, by citing *Hitchcock*, yet, as explained above, *Hitchcock* cannot support that conclusion. *Dixon*, 737 F.3d at 1011; *Sweet*, 125 F.3d at 1158. Moreover, as the dissent in *Dixon* recognized, this Court in *Hitchcock* did not invoke harmless error or suggest *Lockett* error should be subject to harmless error analysis. *Id.* at 1013-14 & n.1 (Merritt, J., dissenting).

The Ninth Circuit has vacillated on the issue. Initially, that court deemed *Lockett* error to be structural; subsequently, the court applied harm analysis to *Lockett* error. *See McKinney v. Ryan*, 730 F.3d 903, 929 (9th Cir. 2013), *on reh'g en banc*, 813 F.3d 798 (9th Cir. 2015) (Wardlaw, J., concurring in part and dissenting in part) (“Absent an en banc call to correct this issue, I would maintain the

⁷ The Court of Appeals for the Sixth Circuit appears to draw a distinction between cases where a trial court excluded mitigating evidence and those where the court refuses to consider mitigating evidence. While that court held in *Dixon* that a trial court’s error in refusing to admit mitigating evidence is subject to harmless-error review, the Court previously held that it is structural error when the court refuses to consider mitigating evidence. *Davis v. Coyle*, 475 F.3d 761, 774-775 (6th Cir. 2007).

uniformity of our prior precedents by remaining faithful to the numerous cases that have treated *Eddings/Lockett* errors as structural, and not following the one outlier decision that failed to do so.”).⁸

The Court of Appeals for the Tenth Circuit apparently stands alone as the sole court of appeals to hold that error similar to the error that infected Rhoades’ trial is structural. In *Paxton v. Ward*, 199 F.3d 1197 (10th Cir. 1999), that court reviewed the case of a defendant whose jury was not allowed to consider the results of a polygraph examination. The trial court relied on a state court law that polygraph examinations are not admissible for any purpose in excluding this mitigating evidence from the jury’s consideration. *Paxton*, 199 F.3d at 1211. The court held that the error in Paxton’s case was structural. *Id.* at 1220.⁹

While the Fifth Circuit is therefore not alone in deeming the wrongful exclusion of non-cumulative mitigating evidence to be an error subject to harmless error analysis, no decision from this Court supports that holding. On the contrary, the weight of authority suggests error under *Lockett* is structural. And indeed, it must be. The jury that sentenced Rhoades to death was unable to give effect to powerful mitigating evidence. The error that infected the reliability of his sentencing proceeding was precisely the same as the error that infected the

⁸ Following the Ninth Circuit’s decision in *McKinney*, the State moved for independent review by the Arizona Supreme Court. On June 10, 2019, this Court granted McKinney’s Petition for Writ of Certiorari to review the state court’s subsequent opinion. *See infra* note 10.

⁹ In addition to the exclusion of mitigating evidence, the court also found that Paxton’s jury was exposed to prejudicial evidence and argument. *Paxton*, 199 F.3d at 1220.

sentencing proceeding in *Lockett* itself. This Court should grant certiorari in this case to make explicit what its cases already implicitly hold: the exclusion of noncumulative relevant mitigating evidence is structural error and requires a new sentencing proceeding.¹⁰

Conclusion and Prayer for Relief

Petitioner requests this Court grant certiorari and schedule the case for briefing and oral argument.

DATE: June 10, 2019

Respectfully submitted,

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¹⁰ Alternatively, the Court could hold Rhoades' petition pending the resolution of *McKinney v. Arizona*, No. 18-1109, or consolidate the two cases. On June 10, 2019, the Court granted McKinney's Petition for Writ of Certiorari, which presented two questions, the second of which is: "Whether the correction of error under *Eddings v. Oklahoma*, 455 U.S. 104 (1982), requires resentencing."