No. 19-5247

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES MICHAEL HEDLUND,
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

1. Is there is a per se rule that correction of error under *Eddings v. Oklahoma*, 455 U.S. 104 (1982), must always occur through a trial court resentencing?

2. Should new rules of criminal procedure apply where a state's highest court has made a state-law determination that its proceedings were not part of direct review?

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INTRODUCTION

There is no compelling basis to grant certiorari here given that the issues presented should be resolved by the decision in *McKinney v. Arizona*, No. 18-1109, which is set for argument on December 11. Arizona agrees with Hedlund: this Court should hold Hedlund's petition in abeyance pending the resolution of McKinney's case. *See* Pet. at 2-3, 31-32 (recognizing that *McKinney* presents identical issues; asking Court to hold petition in abeyance pending the resolution of *McKinney*). Hedlund and McKinney are brothers who engaged jointly in the same crime spree, which resulted in each of their pertinent convictions as well as closely related prior appellate and post-conviction proceedings in each case. An affirmance in *McKinney* would resolve the issues here and extinguish any reason for granting certiorari. And any opinion short of a full affirmance would at most warrant granting the petition here solely for purposes of vacating the opinion below and remanding for further proceedings consistent with the opinion in *McKinney*.

McKinney is not the only reason that the petition presents no compelling reason to grant certiorari here. Hedlund fails to demonstrate that the remedy for an appellate *Eddings* violation is a recurring national issue warranting this Court's intervention. This question seems unlikely to occur outside the unique procedural context presented here, limiting the utility of certiorari. And, in any event, Hedlund's argument fails on the merits because a trial-level resentencing is not always necessary to correct an *Eddings* error, as demonstrated by the appellate-focused *Eddings* issue here. Moreover,

the Arizona Supreme Court's post-writ independent review cured any potential trial court error. *See Clemons v. Mississippi*, 494 U.S. 738 (1990).

Hedlund fairs no better on the retroactivity question given that there is a conclusive Arizona Supreme Court determination on point that cannot be reviewed by the Court. The Arizona Supreme Court—in an interpretation of state law that binds this Court—has determined that under state law the post-writ, error-correction procedure used here does not reopen direct review. *See* Pet. App. 3a-4a; *State v. Styers*, 254 P.3d 1132, 1133-1134 & n.1 (Ariz. 2011) (*Styers III*). Hedlund's death sentence accordingly remains final and is therefore governed by *Teague v. Lane*, 489 U.S. 288 (1989), which confirms that no new rules of criminal procedure will apply to cases that have already become final.

Put simply, neither question warrants certiorari, especially in light of the pending proceedings in McKinney, which should foreclose a path forward for this petition.

STATEMENT OF THE CASE

I. Murders of Christine Mertens and Jim McClain

In February 1991, Hedlund and his half-brother McKinney resolved to commit a string of burglaries. Pet. App. 104a. The men planned their crimes well in advance and vowed to use violence if needed: "McKinney boasted that he would kill anyone who happened to be home … and Hedlund stated that anyone he found would be beaten in the head." *Id.* McKinney and Hedlund learned from friends that Christine Mertens's home would make an attractive burglary target. Pet. App. 104a-105a. The

brothers attempted to burglarize Mertens' home on February 28, but fled when she arrived home. Pet. App. 105a. Hedlund and McKinney selected another home to burglarize that night, but left empty-handed. *Id.* They burglarized two other homes the following evening, obtaining miscellaneous items of value. *Id.*

But Hedlund and McKinney did not give up on Mertens' home, as they believed she kept a significant amount of money hidden in her refrigerator. *Id.* The men returned to the home on March 9, when Mertens was there alone. *Id.* In keeping with their prior vows of violence, Hedlund and McKinney beat and stabbed Mertens multiple times as she struggled against them. *Id.* McKinney eventually pinned Mertens to the floor, covered his pistol with a pillow to muffle the noise, and shot Mertens in the back of the head. *Id.* McKinney and Hedlund left with only $120. *Id.*

The brothers next targeted the home of 65-year-old Jim McClain on March 22. *Id.* McClain restored used cars as a hobby, and Hedlund had previously purchased a car from him. Pet. App. 105a-106a. Hedlund believed that McClain kept money in his home. Pet. App. 106a. The brothers entered the home through a window while McClain was sleeping; Hedlund was armed with a sawed-off, .22 rifle. *Id.* After ransacking the house, McKinney and Hedlund went into the bedroom, and one of them shot McClain as he slept. *Id.* Although it is unclear which man shot McClain, the evidence points to Hedlund. Pet. App. 125a. The men took additional valuables from the bedroom and stole McClain's car. Pet. App. 106a.

II. Trial and sentencing

Arizona tried McKinney and Hedlund simultaneously to dual juries. Pet. App. 104a. McKinney's jurors found him guilty of two counts of first-degree murder and the sentencing judge sentenced him to death for each count. *Id.* However, Hedlund's jurors found him guilty of first-degree murder only for killing McClain; the jurors found him guilty of second-degree murder for killing Mertens. *Id.* Hedlund's jurors further found him guilty of a number of additional non-capital counts, including burglary and theft. *See* Pet. App. 150a-151a.

Arizona law at the time of Hedlund's trial required the sentencing judge to conduct an aggravation/mitigation hearing in determining whether to sentence a defendant to death for first-degree murder. *See* A.R.S. § 13-703(B) (1991). At this hearing, the State was required to prove the existence of death-qualifying aggravation beyond a reasonable doubt and both parties were permitted to introduce, in support of several statutory mitigating factors and an unlimited, catch-all mitigation category, any evidence relevant to whether to impose a sentence less than death. *Id.* At the conclusion of the hearing, the judge was to return a special verdict listing the aggravation and mitigation he or she had found, and was to impose death if he or she found at least one aggravating factor and no mitigation sufficiently substantial to call for leniency. A.R.S. § 13-703(C) (1991).

Hedlund offered a number of mitigating factors at the aggravation/mitigation hearing in this case, including, as relevant here, that he was abused as a child and had a long history of alcohol use. Pet. App. 81a-82a, 121a-125a. After making the requisite

degree-of-participation findings, *see Tison v. Arizona*, 481 U.S. 137 (1987); *Enmund v. Florida*, 458 U.S. 782 (1980), the judge found two death-qualifying aggravating factors: that Hedlund's second-degree murder conviction for killing Mertens constituted a prior conviction involving the use or threat of violence, A.R.S. § 13-703(F)(2) (1991), and that Hedlund killed McClain for pecuniary gain, A.R.S. § 13-703(F)(5) (1991). Pet. App. 153a-164a.

With respect to mitigation, the sentencing judge expressly recognized that *Eddings* and *Lockett v. Ohio*, 438 U.S. 586 (1978), "require individualized sentences and consideration of all mitigating evidence offered," and compel a judge to "weigh carefully, fairly, [and] objectively, all of the evidence offered at sentencing, recognizing that not everyone who commits murder should be put to death." Pet. App. 161a. To this end, the judge carefully analyzed all of Hedlund's proffered mitigation. In particular, the judge determined that Hedlund's alcohol use at the time of the crime did not qualify as statutory mitigation, but that his alcohol use "nevertheless should be considered as mitigating evidence." Pet. App. 166a-168a.[1] The judge later emphasized that he had considered both Hedlund's alcohol use and his childhood abuse, although those factors did not qualify as statutory mitigation, and found as a fact that Hedlund experienced an abusive childhood:

> The defendant's dependent personality traits, *his past drug and alcohol abuse, and child abuse have been considered by the Court*. If not demonstrating the existence of the mitigating factors under (G)(1), they have nevertheless *been given consideration by the Court*. I have

[1] *See* A.R.S. § 13-703(G)(1) (1991) (establishing statutory mitigating factor where the defendant's capacity to appreciate his conduct's wrongfulness or conform his conduct to the law was significantly impaired, but not sufficiently impaired to constitute a defense to prosecution).

> concluded, as in Mr. McKinney's case, that the evidence regarding Mr. Hedlund's childhood can be considered as truthful by the Court, *that there were significant aspects of his childhood which were clearly abusive*.

Pet App. 171a (emphasis added); *see id.* (noting impact of child-abuse testimony and again stating, "*I have considered it. I think it is the Court's obligation to consider it, whether or not it complies with the requirements in (G)(1).*") (emphasis added); Pet. App. 171a-172a (judge affirming that he had read and considered all defense sentencing pleadings and finding that none of the mitigating factors affected Hedlund's ability to control his behavior or appreciate his conduct's wrongfulness). Before pronouncing sentence, the judge *again* affirmed that he had considered all mitigation: "[H]aving reviewed all of this evidence, your past character, I've concluded that none of the mitigation considered by the Court in this case, either individually or cumulatively, are sufficiently substantial to call for leniency." Pet. App. 173a-174a. The judge accordingly sentenced Hedlund to death. Pet. App. 174a.

III. Direct appeal and state post-conviction proceeding

Direct appeal from a death sentence in Arizona is mandatory and automatic to the Arizona Supreme Court, bypassing the Arizona Court of Appeals. A.R.S. § 13-4031; *State v. Brewer*, 826 P.2d 783, 789-794 (Ariz. 1992). At the time of Hedlund's appeal, the Arizona Supreme Court independently reviewed the record to determine whether the death penalty was appropriate. *See* A.R.S. § 13-703.01 (1994).[2] The court for years had conducted this review as part of a self-imposed procedure. *State v. Richmond*, 560 P.2d 41, 51 (Ariz. 1976), *abrogated by State v. Salazar*, 844 P.2d 566 (Ariz. 1992). The

court's goal was to further the measured and consistent death-penalty application this Court has required. *See State v. Watson*, 628 P.2d 943, 946 (Ariz. 1981) (citing *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980); *Proffitt v. Florida*, 428 U.S. 242 (1976), and *Gregg v. Georgia*, 428 U.S. 153, 189 (1976)).

The Arizona Legislature codified the independent-review procedure in 1994, two years before the Arizona Supreme Court's decision in Hedlund's case. *See* A.R.S. § 13-703.01 (1994). The statute requires the Arizona Supreme Court to "independently review the trial court's findings of aggravation and mitigation and the propriety of the death sentence." A.R.S. § 13-703.01(A) (1994). The court reviews the entire record and does not defer to the factfinder. *State v. Roseberry*, 353 P.3d 847, 849-850 (Ariz. 2015). The Court independently determines whether the mitigation is sufficiently substantial to warrant leniency in light of the aggravation. A.R.S. § 13-703.01(B) (1994). If the mitigation warrants leniency, the court reduces the sentence to life; if it does not warrant leniency, the court affirms the death sentence. *Id.* If the court harbors doubt about the death penalty's propriety, it errs on the side of a life sentence. *Roseberry*, 353 P.3d at 850.

The Arizona Supreme Court consolidated Hedlund's direct appeal with McKinney's. Pet. App. 103a-148a. After rejecting Hedlund's conviction-related claims, Pet. App. 106a-120a, the court, complying with its statutory mandate, independently reviewed both the aggravation and mitigation and the propriety of a death sentence. Pet. App. 120a-136a. The court struck as legally erroneous the sentencing judge's

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[2] Now located, with no material changes, at A.R.S. § 13-755.

finding of the A.R.S. § 13-703(F)(2) (1991) prior-conviction aggravating factor, but affirmed the judge's finding of the A.R.S. § 13-703(F)(5) (1991) pecuniary-gain factor. Pet. App. 126a-134a.

With respect to mitigation, the Arizona Supreme Court rejected Hedlund's argument that the sentencing judge had discounted his expert mental-health testimony. Pet. App. 122a-124a. The court expressly stated the rule derived from *Eddings* and *Lockett*: that a "trial judge *must consider* any aspect of [the defendant's] character or record and any circumstance of the offense relevant to determining whether a sentence less severe than the death penalty is appropriate." Pet. App. 123a (emphasis added). The court continued, "In considering such material, however, the judge has broad discretion to evaluate expert mental health evidence and to determine the weight and credibility given to it." *Id.* The court found no evidence that the sentencing judge failed to consider Hedlund's expert testimony, "only that he found some of the factual evidence for the experts' opinions lacking in credibility." Pet. App. 124a.

Like the sentencing judge, the Arizona Supreme Court credited testimony that Hedlund had an abusive childhood, but noted the judge's finding that the abuse had occurred years before McClain's murder and was not causally connected thereto. *Id.* The court then determined that neither Hedlund's childhood nor his alcohol abuse warranted leniency:

> A difficult family background, including childhood abuse, *does not necessarily have substantial mitigating weight* absent a showing that it significantly affected or impacted a defendant's ability to perceive, to comprehend, or to control his actions. *See State v. Ross*, 180 Ariz. 598,

> 607, 886 P.2d 1354, 1363 (1994), *cert. denied*, __ U.S. __, 116 S. Ct. 210 (1995). No such evidence was offered, and the judge did not err in concluding that Hedlund's family background was not sufficiently mitigating to require a life sentence.
>
> Additionally, there was little evidence corroborating Hedlund's allegation that alcohol impaired his judgment, his ability to tell right from wrong, or his ability to control his behavior. Given the substantial conflicting evidence and nothing other than Hedlund's self-report to one of the psychiatric experts regarding his intoxication at the time of the murders, the judge did not err in rejecting alcoholic impairment as a mitigating circumstance. *See State v. Bible*, 175 Ariz. 549, 605-06, 858 P.2d 1152, 1208-09 (1993), *cert. denied*, __ U.S. __, 114 S. Ct. 1578 (1994).

Pet. App. 124a-125a (emphasis added). The court reweighed the aggravation and mitigation, without the erroneous (F)(2) aggravating circumstance, noting in the process that reweighing (rather than remand) was appropriate because the evidentiary record was complete: "the judge did not improperly exclude mitigating evidence at sentencing and the mitigating evidence is not of great weight." Pet. App. 134a-135a. The court found that the remaining (F)(5) aggravating factor outweighed the "minimal mitigating evidence," and affirmed Hedlund's death sentence. *Id.*

Following direct appeal, Hedlund pursued state post-conviction relief. *See* Pet. App. 3a. The post-conviction court denied relief, and the Arizona Supreme Court denied Hedlund's petition for review. *Id.*

IV. Federal habeas proceedings

After his state-court proceedings had concluded, Hedlund filed a habeas petition alleging, among other things, that the state courts had violated *Eddings* by refusing as a matter of law to consider expert testimony Hedlund presented at sentencing. *See Hedlund v. Ryan (Hedlund II)*, 2009 WL 2432739 *15-*18 (D. Ariz. Aug. 10, 2009). The

district court found it "amply clear from the record that the trial court and the Arizona Supreme Court, in its independent review of the sentence, considered the mitigation evidence presented by [Hedlund's] expert witnesses.... There is simply no indication that either court refused to consider the mitigating evidence these experts provided with respect to [Hedlund's] traumatic childhood and alcohol abuse." *Id.* at *18. The fact that the state court assigned this evidence little weight, the district court concluded, did not violate *Eddings*. *Id.*

Initially, a three-judge panel of the Ninth Circuit agreed with the district court. *Hedlund III*, 750 F.3d at 813-820. The same three-judge panel had, the year before, affirmed the district court's denial of habeas relief to McKinney on a similar causal-nexus claim. *See McKinney v. Ryan (McKinney I)*, 730 F.3d 903, 914-921 (9th Cir. 2013), *on reh'g en banc*, *McKinney II*, 813 F.3d at 798. In Hedlund's case, the panel majority determined that the "Arizona Supreme Court did not exclude any of Hedlund's mitigating evidence. Nor did it employ an unconstitutional nexus test." *Hedlund III*, 750 F.3d at 815-820. Specifically, the majority found that the state supreme court complied with *Eddings* by considering all proffered mitigation, without excluding anything Hedlund offered, and used the lack of a causal nexus only as a constitutionally permissible weighing mechanism. *Id.*

The Ninth Circuit thereafter took McKinney's case en banc. Ultimately, the court issued a sharply divided decision granting habeas relief to McKinney and, in the process, determining that the Arizona Supreme Court had routinely violated *Eddings* for 15 years when independently reviewing death sentences. *McKinney II*, 813 F.3d at

802-04, 813-818. The majority accused the Arizona Supreme Court of silently applying an unannounced test under which it refused, as a matter of law, to consider non-causally connected mitigation. *Id.*; *see also id.* at 827-850 (Bea, J, dissenting). According to the majority, the Arizona Supreme Court first articulated the causal-nexus test in *State v. Wallace*, 773 P.2d 983, 986 (1989), and recited the test again in *Ross*, 866 P.3d at 1363, where the state court remarked, "A difficult family background is not a relevant mitigating circumstance unless a defendant can show that something in that background had an effect or impact on his behavior that was beyond the defendant's control." *McKinney II*, 813 F.3d at 814. In the en banc majority's view, the Arizona Supreme Court continued applying the unconstitutional test until 2005, when it abandoned the test in the wake of *Tennard v. Dretke*, 542 U.S. 274 (2004). *McKinney II*, 813 F.3d at 813-818. The en banc decision also overruled a swath of Ninth Circuit opinions, including *Hedlund III*, that had rejected similar causal-nexus claims on AEDPA review after finding no "clear indication" that the state court had refused to consider mitigation. *Id.* at 818-819.

After finding systemic state-court error, the en banc panel examined McKinney's direct-appeal opinion (which, as previously noted, was combined with Hedlund's) and confirmed that the state supreme court had committed prejudicial causal-nexus error with respect to McKinney's PTSD mitigation. *Id.* at 820-824. The court cited the state supreme court's 1) adoption of the sentencing judge's factual finding that McKinney's PTSD did not affect his conduct, 2) additional factual finding that McKinney's PTSD would have influenced him not to commit the murders, and 3) recitation of the

purported causal-nexus test in the joint *Hedlund/McKinney* opinion, combined with a pin citation "to the precise page in *Ross* where it had previously articulated the test." *Id.*

At the time *McKinney II* was issued, Hedlund's three-judge panel had not yet ruled on his petition for en banc rehearing. *See Hedlund v. Ryan (Hedlund IV)*, 815 F.3d 1233, 1236 (9th Cir. 2016). The panel withdrew its 2014 opinion and issued a superseding one, which granted Hedlund relief based on *McKinney II*. *Id.* at 1237, 1257-1261. The court thereafter amended the opinion on rehearing but still awarded relief to Hedlund. Pet. App. 32a-102a. The panel reasoned that, because the Arizona Supreme Court had intertwined its analysis of McKinney's and Hedlund's mitigation in its joint opinion, the en banc finding of causal-nexus error as to McKinney also constituted a finding of causal-nexus error as to Hedlund, specifically regarding his childhood-abuse and alcohol-use mitigation. Pet. App. 81a-89a. The court in particular noted the state supreme court's citation to *Ross* in discussing Hedlund's mitigation, as well as its adoption of the sentencing judge's factual finding that Hedlund's mitigation was not causally connected to the offense. *Id.* at 86a-89a. The panel also considered itself bound by the en banc finding of prejudice under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), in *McKinney II*., and therefore remanded to district court with instructions to grant the habeas writ. Pet. App. 89a-90a.

Subsequently, the district court issued a conditional writ of habeas corpus. Resp. App. 1a-2a. The conditional writ read, "IT IS ORDERED that Hedlund's Writ of Habeas Corpus is granted unless the State of Arizona, within 120 days from the entry

of this Judgment, initiates proceedings either to correct the constitutional error in Hedlund's death sentence or to vacate the sentence and impose a lesser sentence consistent with the law." *Id.*

V. Post-writ independent review

To satisfy the conditional writ, the State asked the Arizona Supreme Court to conduct a new independent-review proceeding. Pet. App. 177a-183a. The court had followed this procedure in *McKinney* and *Styers III*, each of which had also involved a Ninth Circuit habeas grant based on appellate *Eddings* error. The Arizona Supreme Court granted the State's motion and ordered the parties to brief "[w]hether the proffered mitigation is sufficiently substantial to warrant leniency in light of the existing aggravation." Pet. App. 3a.

Following oral argument, the Arizona Supreme Court again affirmed Hedlund's death sentence. Pet. App. 1a-16a. The court emphasized that its review was "focused on correcting the constitutional error identified by the Ninth Circuit," and was thus "limited to considering the mitigating factors without the causal nexus requirement and reweighing them against the established aggravator." Pet. App. 3a. In response to Hedlund's argument that he was entitled to a jury sentencing under *Ring v. Arizona*, 536 U.S. 584 (2002), the court reaffirmed its holding in *Styers III* that independent review following an *Eddings*-based, conditional federal habeas order is not part of state court direct review and does not reopen a conviction. Pet. App. 3a-4a. The court also rejected Hedlund's argument that *Hurst v. Florida*, 136 S. Ct. 616 (2016), requires a jury to weigh aggravation and mitigation and impose sentence, and refused his request

to consider during the new independent review mitigation not presented at trial but developed during state and federal collateral-review proceedings. Pet. App. 4a-5a. The court reviewed Hedlund's proffered mitigation, without excluding any evidence based on the lack of a causal connection or otherwise, and again found the mitigation insufficient to warrant leniency.[3] Pet. App. 5a-16a.

REASONS FOR DENYING THE WRIT

As stated above, McKinney's petition for writ of certiorari, which this Court has granted, presents the same questions as Hedlund's. *See* No. 18-1109. This Court's decision in *McKinney* will therefore control the outcome of Hedlund's case. Accordingly, Arizona agrees with Hedlund that this Court should hold his case in abeyance pending this Court's decision in *McKinney*.

In the alternative, the questions Hedlund presents do not warrant certiorari. "Review on a writ of certiorari is not a matter of right, but of judicial discretion." Rule 10, Rules of the United States Supreme Court. This Court consequently grants certiorari "only for compelling reasons." *Id.* Hedlund has presented no such reason. He has not established that a genuine conflict or important issue exists, or that this is the case to resolve any existing conflict or issue. Hedlund's first question presented does not involve a conflict in the law, impacts only a limited set of cases, and in any event fails both factually and legally. His second question presented turns on the Arizona Supreme Court's interpretation of state law, which is beyond this Court's

[3] Court of Appeals Judge Garye Vasquez, sitting by designation, dissented, opining that Hedlund's mitigation warranted a life sentence.

reach. This Court should therefore deny Hedlund's petition if it does not hold it in abeyance pending the outcome in *McKinney*.

I. Correction of appellate *Eddings* error does not require trial-level resentencing

Hedlund argues that the Arizona Supreme Court erred by not remanding his case to the trial court for a full resentencing. Pet. at 19-23. He contends that the Arizona Supreme Court's failure to remand conflicted with various decisions from this Court and that the state supreme court is ill-equipped to consider mitigation in the first instance. *Id.* His arguments are unpersuasive.

A. *Hedlund has not identified a genuine conflict in the law or an important federal question*

Hedlund asserts that this Court and others have held that resentencing is the only remedy to correct *Eddings* error. Pet. 20-22. He is incorrect. In the authority Hedlund cites, unlike here, the error being corrected occurred at the trial level. *Id.*; *see* § II, *infra*. In some of the cases, mitigation was erroneously excluded or withheld, and thus never considered by the factfinder. *See Hitchcock v. Dugger*, 481 U.S. 393, 395 (1987) (petitioner argued that "additional evidence of mitigating circumstances had been withheld" due to reasonable belief it would not be considered); *Skipper v. South Carolina*, 476 U.S. 1, 3-4 (1986) (trial court excluded witness testimony regarding defendant's good behavior, ruling it inadmissible). In other authority Hedlund cites, erroneous jury instructions or defective forms prevented jurors from considering all mitigation. *See Penry v. Lynaugh*, 492 U.S. 302, 320 (1989) (jury form prohibited jurors from considering all proffered mitigation evidence); *Mills v. Maryland*, 486 U.S.

367, 385 (1988) (jury form and court instructions may have prevented jurors from considering all mitigation). These cases are inapposite to the present circumstances.

Hedlund also purports to cite a handful of cases in which courts have ordered resentencing based on appellate *Eddings* error. Pet. 21-22. These cases, too, are inapposite. *Cole v. Dretke*, 265 F. App'x 380 (5th Cir. 2008), is an unpublished order from the Fifth Circuit, granting the habeas writ and ordering a resentencing after this Court reversed the Fifth Circuit's decision denying habeas relief to a death-row inmate in *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007). *Abdul-Kabir* did not involve a pure appellate error as Hedlund implies. Rather, the prisoner (named Cole) alleged that the "special issues" submitted to his jurors under Texas law restricted the jurors' consideration of mitigation. *Id.* at 237-238. The Texas trial judge, considering the claim on collateral review, framed the issue erroneously and failed to apply this Court's decision in *Penry*. *Id.* at 257-258. Ultimately, this Court found that Cole's *jury* had been unable to give his mitigation meaningful consideration. *Id.* at 269-265. Accordingly, the error in *Cole/Abdul-Kabir*, like the errors in *Skipper*, *Hitchcock*, *Penry*, and *Mills*, occurred at the trial level. Nothing in *Cole/Abdul-Kabir* suggests that an appellate court cannot correct its own error.

Hedlund's citation to an order from the Texas Court of Criminal Appeals, *Ex Parte Smith*, 2007 WL 1839892, * 1 (Tex. Ct. Crim. App. June 27, 2007), is likewise unavailing. The order in *Smith* states in its entirety, "Pursuant to the decision rendered by the United States Supreme Court in this case, *Smith v. Texas*, No. 05-11304 (April 25, 2007), we remand the cause to the trial court for a new sentencing

trial." 2007 WL 1839892, at * 1. In *Smith v. Texas*, 550 U.S. 297, 299 (2007), as in *Abdul-Kabir*, this Court addressed the effect of Texas' "special issues" on the jury's consideration of mitigation, finding that the jurors' ability to consider mitigation had been restricted and that the Texas state courts had erroneously framed the issue in rejecting Smith's claim. *Id.* at 299-316. Again, the error in *Smith* originated at the trial court—not the appellate court.

Nor does *State v. Roberts*, 998 N.E.2d 1100 (Ohio 2013), help Hedlund. Pet. 22-23. There, the defendant alleged that the trial judge had failed to consider the defendant's allocution in imposing sentence because the judge did not cite the allocution in his written opinion imposing the death penalty. *Id.* at 1111. The Ohio Supreme Court determined, based on the "particular circumstances" of Roberts' case, that the court had in fact failed to consider the allocution. *Id.* at 1111-1115. The court declined to reweigh the evidence and instead remanded for resentencing, after finding the judge's statutorily required sentencing opinion "so inadequate as to severely handicap our ability to exercise our power of independent review." *Id.* at 1115. Accordingly, in *Roberts*, there was a defect in the development of the trial-level record and the state supreme court decided in its discretion to remand to the trial court without establishing a per se rule. That situation contrasts sharply with this case, in which the Arizona Supreme Court, during the first independent review, expressly found the record adequate for appellate reweighing in part because "the judge did not improperly exclude mitigating evidence at sentencing." Pet. App. 134a. And, again, there was no causal-nexus error at the trial level. *See* § II(B), *infra*.

Finally, Hedlund contends that the first question presented is an important federal one in need of resolution. Pet. at 4-5, 19. He proposes that, absent this Court's intervention, there will be "extended litigation in both state and federal courts" concerning the remedy for future appellate *Eddings* errors. *Id.* But the available state-court remedy in Arizona has been settled by *Styers III* and its progeny. Additionally, the Ninth Circuit has held that the Arizona Supreme Court's post-writ independent-review procedure is sufficient to correct appellate *Eddings* error. *See Styers v. Ryan (Styers VI)*, 811 F.3d 292, 298-299 (9th Cir. 2015); *see also, e.g., Lair v. Bullock*, 798 F.3d 736, 745 (9th Cir. 2015) ("[T]hree-judge panels are normally bound by the decisions of prior three-judge panels."). Given that the issue has been settled at both the state and federal levels, there is little threat of extended litigation.

Perhaps most critically, the type of error at issue here, and the corresponding need for a remedy, does not arise often, as evidenced by Hedlund's failure to identify any authority directly on point. This problem is in fact unlikely to arise outside of the limited number of Arizona capital cases affected by the *McKinney II* decision. Hedlund's claim does not warrant certiorari.

B. *Hedlund presents no reason to reverse the Arizona Supreme Court as to the merits*

The error for which the Ninth Circuit granted relief occurred in the Arizona Supreme Court as part of the independent review process.[4] The Ninth Circuit did not

[4] To the extent Hedlund suggests otherwise, the Ninth Circuit's identified *Eddings* error impacted only the Arizona Supreme Court's consideration of Hedlund's childhood-abuse and long-term alcohol use mitigation. Pet. App. 81a-82a; *see* Pet. at 3, 15-16 (referring to brain-impairment mitigation). Further, Hedlund considers it significant that the Ninth Circuit found *Brecht* prejudice, *see* Pet i,19, but does not clearly explain this point, or how it prevented the Arizona Supreme Court from curing that error.

find *Eddings* error by the sentencing judge and, in fact, the judge committed no such error. Regardless, the Arizona Supreme Court's post-writ independent review cured not only the appellate error the Ninth Circuit identified, but also any error by the sentencing judge. Finally, the Arizona Supreme Court did not violate *Eddings* in the first place.

1. The identified error occurred in the Arizona Supreme Court

The Ninth Circuit granted habeas relief based on a perceived error by the Arizona Supreme Court. *See* Pet. App. 37a ("[T]he Arizona Supreme Court applied a 'causal nexus' test, whereby not all mitigating evidence was considered."); *id.* 82a ("The Arizona Supreme Court applied an unconstitutional causal nexus test to Hedlund's mitigating evidence."); *id.* 84a (noting Arizona Supreme Court's purported 15-year causal-nexus test); *id.* 86a ("The question (whether the Arizona Supreme Court applied the unconstitutional causal nexus test in sentencing Hedlund) has already been answered in the affirmative by our en banc court in *McKinney*.... Because we are bound by our court's decision in *McKinney*, we follow its conclusion that the Arizona Supreme Court applied the unconstitutional causal nexus test in affirming Hedlund's sentence."); *id.* 86a-88a (analyzing Arizona Supreme Court opinion); *id.* 88a ("[W]e adopt our en banc court's conclusion in *McKinney* that the Arizona Supreme Court's decision of Hedlund's claims was contrary to *Eddings*."); *id.* 89a ("Having determined that the Arizona Supreme Court committed *Eddings* error, we must decide whether such error was harmless."). Thus, the only identified "constitutional error" in

Hedlund's sentence that needed to be corrected to satisfy the conditional writ, *see* Resp. App. 1a, occurred in the Arizona Supreme Court's independent reweighing.[5]

Nonetheless, throughout his petition, Hedlund argues that the error being corrected originated with the sentencing judge. However, he conflates the concepts of *considering* proffered mitigation and giving that mitigation *weight* in the sentencing calculus. *Eddings* requires only the former: "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." 455 U.S. at 113-114 (emphasis in original). However, the sentencer "may determine the weight to be given relevant mitigating evidence." *Id.* at 114-115; *see also Kansas v. Marsh*, 548 U.S. 163, 175 (2006) ("[O]ur precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here."); *Harris v. Alabama*, 513 U.S. 504, 512 (1995) ("[T]he Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer.").

Here, the sentencing judge—the actual sentencer under then-governing Arizona law[6]—did not deny Hedlund the opportunity to present any mitigating evidence, *see*

[5] This is particularly true here because the Arizona Supreme Court struck an aggravating factor and performed a new sentencing calculus under *Clemons*. The perceived *Eddings* error occurred during this exercise.

[6] Arizona agrees with Hedlund that the Arizona Supreme Court is not a "sentencer." Pet. 22-23. However, this concession by Hedlund undermines the *McKinney* en banc decision, which treated the

Pet. App. 134a, or affirmatively *refuse to consider* any mitigation that did not bear a causal nexus to the offense. Rather, he declined to give certain mitigation significant weight because it did not explain the offense. In imposing sentence, the judge specifically referenced both *Eddings* and *Lockett*, and the individualized-sentencing requirement. Pet. App. 161a. He also repeatedly recognized the requirement that he *consider* Hedlund's mitigation. Pet. App. 166a-168a. He found as a fact that Hedlund had endured an abusive childhood. Pet. App. 171a. He repeatedly affirmed that he had *considered* all mitigation. Pet. App. 171a-172a. The judge mentioned the absence of a causal nexus for two valid reasons: 1) to determine whether the A.R.S. § 13-703(G)(1) (1991), substantial-impairment *statutory* mitigating factor existed,[7] and 2) as a permissible mechanism by which to determine the appropriate *weight* for Hedlund's mitigation. Pet App. 161a-174a; *see McKinney II*, 813 F.3d at 817-818 (approving use of causal-nexus test as weighing mechanism). The court did not refuse to consider any mitigation based on the lack of a causal nexus or otherwise.

Finally, Hedlund speculates that, regardless what he said on the record, the Arizona Supreme Court's purported causal-nexus test constrained the sentencing judge from considering the proffered mitigation. Pet. at 3. This speculation does not rebut

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Arizona Supreme Court as a sentencer. *E.g. McKinney II*, 813 F.3d at 810 ("In sentencing McKinney to death, the Arizona Supreme Court gave no weight to McKinney's PTSD."). The panel in Hedlund also erroneously referred to the Arizona Supreme Court as a sentencer. Pet. App. 86a (referring to supreme court's use of causal-nexus test in "sentencing Hedlund"). Additionally, Hedlund's related concern that the Arizona Supreme Court could not perform a meaningful review on a "cold" record is unpersuasive where no mitigation was excluded and, as discussed above, the sentencing judge made detailed findings for the appellate court to review. Pet. 22-23.

[7] "When applied solely in the context of statutory mitigation under § 13-703(G)(1), the causal nexus test does not violate *Eddings*." *McKinney II*, 813 F.3d at 810.

the sentencing judge's on-the-record affirmation—complete with references to *Eddings* and *Lockett*—that he considered all mitigation. Moreover, since *McKinney II*, Ninth Circuit panels have recognized that Arizona courts did not universally apply the alleged causal-nexus test (contra *McKinney II*). *See Ramirez v. Ryan*, 937 F.3d 1230, 1250 (9th Cir. 2019) ("Though the Arizona Supreme Court reviewed Ramirez's convictions in 1994, during the period that the Arizona Supreme Court was applying a causal nexus requirement, the record here indicates that mitigating evidence was not rejected as a matter of law. In fact, the record compels the opposite conclusion."); *Greenway v. Rya*n, 866 F.3d 1094, 1095 (9th Cir. 2017) ("We said in *McKinney* that the Arizona courts had 'consistently' applied the causal-nexus test. 813 F.3d at 803. We did not say, however, that Arizona had always applied it.").[8]

2. The Arizona Supreme Court corrected the error the Ninth Circuit identified, as well as any error by the sentencing judge

As stated above, the Ninth Circuit recognized in *Styers* that the procedure used here cured the identified appellate *Eddings* error. *See Styers VI*, 811 F.3d at 298-299. Permitting the Arizona Supreme Court to correct its own error is consistent with this Court's emphasis on efficiently tailoring post-writ remedies in order to place

[8] Hedlund observes in a footnote that the Arizona Supreme Court's refusal to remand for resentencing prevented consideration of "scientific advancement" concerning child abuse and its effects. Pet. 23 n.5. But Hedlund has offered no explanation for how allowing this ex-post supplementation in light of a historical legal error would not be a windfall. To the contrary, courts have rejected this approach in related contexts. *See Commonwealth v. LeFave*, 714 N.E.2d 805, 813 (Mass. 1999) ("Undoubtedly, recent research has broadened the scientific community's understanding of the effects of suggestive questioning. We are faced, however, with the conflict between the constantly evolving nature of science and the doctrine of finality. In weighing these competing factors along with the interests of justice, we have concluded that expert testimony may not be considered newly discovered for purposes of a new trial motion simply because recent studies may lend more credibility to expert testimony that was or could have been presented at trial."); *see also State v. Harper*, 823 P.2d 1137, 1143 (Wash. App. 1992) (quotations omitted) ("[T]his strikes us as a classic case: the defendant loses, then hires a new lawyer, who hires a new expert, who examines the same evidence and produces a new opinion.

defendants in the same position they would have been in absent the prior error. Habeas remedies are supposed to "be 'tailored to the injury suffered from the constitutional violation,'" while not "'unnecessarily infring[ing] on competing interests.'" *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). The "remedy must 'neutralize the taint' of a constitutional violation, … while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution." *Id.* While *Lafler* was a Sixth Amendment case, courts are increasingly expanding the narrow-tailoring approach beyond that context. *See Lujan v. Garcia*, 734 F.3d 917, 933-934 (9th Cir. 2013) (finding "it sensible that the Court's [Sixth Amendment tailoring] guidance apply equally to a Fifth Amendment remedy, as well"); *Woods v. Ryan*, 2015 WL 4555251, at *8 (D. Ariz. July 28, 2015) (quoting Sixth Amendment remedy guidance in the context of an Eighth Amendment error); *Styers v. Ryan (Styers V)*, 2012 WL 3062799, *3 (D. Ariz. July 26, 2012) (same).

Further, to the extent the sentencing judge also committed *Eddings* error, the Arizona Supreme Court's independent review cured it. This Court has long held that independent appellate reweighing can cure trial-level errors in capital sentencing. *Clemons*, 494 U.S. at 748. *Clemons*' reasoning applies to the type of legal error being corrected here—where the record is fully formed and the error was failure to consider mitigation in the record, the appellate court is no less capable of properly weighing aggravation and mitigation than when the Court is asked to exclude aggravation. *See, e.g., Goff v. Bagley*, 601 F.3d 445, 479 (6th Cir. 2010) (independent reweighing by Ohio

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We cannot accept this as a basis for a new trial.").

supreme court satisfies *Clemons* and permits appellate cure of trial-court error in both aggravation and mitigation). And if an appellate court can cure a trial court's errors under *Clemons*, appellate reweighing can certainly cure *the same appellate court's* errors.

Hedlund argues at length that *Hurst* overrules *Clemons*. Pet. 24-27. But this Court in *Hurst* did not mention *Clemons*, let alone overrule that opinion. *See Hohn v. United States*, 524 U.S. 236, 252-253 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."); *see also Castillo v. State*, 442 P.3d 558, 561 n.2 (Nev. 2019) (rejecting argument that *Hurst* invalidates *Clemons*). The mere fact that this Court in *Hurst* overruled two cases cited within *Clemons* does not call *Clemons* into question, *see* Pet. 24-27, particularly where this Court overruled those cases only "in relevant part": their allowance for judicial fact-finding of death-qualifying *aggravation*. *Hurst*, 136 S. Ct. at 623 (overruling *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Spaziano v Florida*, 468 U.S. 447 (1984)).

3. The Arizona Supreme Court did not err in the first place

The Ninth Circuit believed that the *McKinney II* opinion controlled Hedlund's case and required relief. Pet. App. 81a-89a. *McKinney II*, however, was erroneously decided. The Ninth Circuit there concluded that, when the Arizona Supreme Court referred to the "weight" of mitigation as measured by its causal nexus to the offense, that constituted treating the pertinent mitigation as irrelevant as a matter of law. 813 F.3d at 802-04, 813-818. The Ninth Circuit's slim en banc majority did this over a

vigorous dissent. *See generally id.* at 827-850 (Bea, J., dissenting). And it did so notwithstanding that the Arizona Supreme Court's language made clear by its own terms that the absence of a causal nexus related only to *weight* for the mitigation (e.g., substantial or insubstantial) and was not a bar to consideration as a matter of law. *Id.* at 802-804, 813-818.

As the en banc dissent noted, the Arizona Supreme Court did not categorically exclude mitigation when it diminished the mitigation's weight based on the lack of a causal nexus. *Id.* at 827-850 (Bea, J., dissenting). As such, there was never any *Eddings* problem in this case (or in McKinney's) and there is no need to remand for a trial-court resentencing. The Eighth Amendment, as previously discussed, requires only that mitigation be considered and does not dictate the weight it should receive. *See Harris*, 513 U.S. at 512; *Eddings*, 455 U.S. at 114-115.

II. The Arizona Supreme Court's determination that, as a matter of state law, its post-writ independent review did not reopen direct appeal is dispositive of all retroactivity claims

Hedlund next argues that the Arizona Supreme Court disturbed his sentence's finality and, as a result, *Ring* applies and entitles him to have a jury determine the aggravating factor.[9] Pet. 23-31. This question turns on a state-law interpretation outside of this Court's reach. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) (Supreme Court is bound by the state court's construction of state law). For this reason alone, this Court should deny certiorari.

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[9] He also erroneously interprets *Hurst* to require jury weighing and sentence-selection, but this Court need not reach

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A. *Hedlund's claim turns on a threshold state-law determination, which this Court lacks jurisdiction to reconsider.*

The Arizona Supreme Court has made two salient state-law conclusions in the precise procedural posture presented here. *First*, A.R.S. § 13-755 (former A.R.S. § 13-703.01) permits Arizona-Supreme-Court independent review in collateral proceedings, not just direct proceedings. *Styers III*, 254 P.3d at 1134 n.1 ("[N]othing in § 13-755 limits our review to direct appeals."); see also Pet. App. 3a-4a, ¶¶ 5-6 (confirming jurisdiction to conduct a second independent review in the post-writ, collateral error-correction context under A.R.S. § 13-755). *Second*, the type of post-writ, *Eddings*-related independent review at issue is a collateral proceeding under state law that does not reopen direct appeal. *See Styers*, 254 P.3d at 1134 n.1; *see also* Pet. App. 3-4, ¶¶ 5-6.

In *Styers III*, the Arizona Supreme Court interpreted A.R.S. § 13-755 as permitting a second, collateral independent review following a conditional, *Eddings*-based habeas writ. 254 P.3d at 1134 n.1. Given this conclusion, Styers returned to federal habeas after the Arizona Supreme Court's post-writ independent review, and sought unconditional habeas relief. *Styers V*, 2012 WL 3062799. The district court denied relief, accepting the Arizona Supreme Court's conclusion as to the contours of state criminal procedure and explaining that, in light of the Arizona Supreme Court's decision "that a new independent review was authorized under state law, this Court concludes that such review constituted 'an adequate proceeding before an appropriate

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this issue.

tribunal.'" *Id.* at *5. The Ninth Circuit affirmed, nothing that the Arizona Supreme Court had determined not only "whether an independent review under A.R.S. § 13-755 is limited to direct review," but also "that Styers's sentence remained final at the time of the second independent review." *Styers VI*, 811 F.3d at 297 n.5, 298. The state supreme court reaffirmed these state-law conclusions in the opinion below. Pet. 3a-4a.

"This Court … repeatedly has held that state courts are the ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975); *see also Johnson v. Fankell*, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State."); *Schad v. Arizona*, 501 U.S. 624, 636 (1991) ("[W]e are not free to substitute our own interpretations of state statutes for those of a State's courts."). This refusal to second-guess a state supreme court's conclusions as to that state's own law is a "proposition, fundamental to our system of federalism," that applies equally in procedural and substantive contexts. *Johnson*, 520 U.S. at 916; *see also Clemons*, 494 U.S. at 747 (this Court has no basis to dispute state court's interpretation of state law to decide whether to affirm a death sentence).

The decisions flowing from *Styers III* illustrate the proper federal response to the Arizona Supreme Court's state-law conclusions. *See Styers VI*, 811 F.3d at 297 n.5 ("the question whether an independent review under A.R.S. § 13-755 is limited to direct review is a question of statutory interpretation of an Arizona statute," "determined by Arizona's highest court," which "held that 'nothing in § 13-755 limits our review to direct appeals.'"); *Styers V*, 2012 WL 3062799 at *5 (noting Arizona Supreme Court's

construction of § 13-755 and stating, "This Court is bound to follow the decisions of a state supreme court on state law matters."). Likewise, the Eighth Circuit has reached the appropriate conclusion in a related context. *Losh v. Fabian*, 592 F.3d 820, 824-825 (8th Cir. 2010) (accepting Minnesota Supreme Court's determination as to whether a particular type of state court criminal procedure was part of direct or collateral review); *see also Foxworth v. St. Amand*, 570 F.3d 414, 436-437 (1st Cir. 2009) (certifying to state court the question of "the date of finality").

Jimenez v. Quarterman, 555 U.S. 113, 120 (2009), does not hold otherwise. Pet. 28, 31. In fact, *Jimenez* is consistent with Arizona's position here. There, this Court considered finality under 28 U.S.C. § 2244(d)—AEDPA's statute of limitations. This Court reached a "narrow" decision—when a state court grants "an out-of-time direct appeal during state collateral review, but before the defendant has first sought federal habeas relief, his judgment is not yet 'final' for purposes of § 2244(d)(1)(A)." *Id.* at 121. This Court specifically held: "where a state court has *in fact reopened* direct review, the conviction is rendered nonfinal for purposes of § 2244(d)(1)(A) during the pendency of the reopened appeal." *Id.* at 120 n.4 (emphasis added). This Court accepted the state court's conclusion as to whether the case was proceeding on direct appeal. Here, the Arizona Supreme Court has confirmed that the post-writ independent review was *not* part of direct review. Therefore, under *Jimenez*'s approach, this Court should accept that conclusion and confirm that Hedlund's sentences remain final and *Ring* does not apply to them.

Nor does *Thompson v. Lea*, 681 F.3d 1093 (9th Cir. 2012), avail Hedlund. Pet. at 29-30. *Thompson* also involved § 2244(d). *Id.* at 1093. The Ninth Circuit cited *Jimenez* and recognized that, if a state court reopens direct review, that action may reset AEDPA's limitations period. *Id.* at 1094. In *Thompson*, the California Supreme Court had denied the defendant's petition for review "without prejudice to any relief to which [he] might be entitled" after this Court decided a pending case. *Id.* The California Supreme Court thereafter granted review of Thompson's case. *Id.* The Ninth Circuit concluded that the state court had reopened direct appeal for purposes of § 2244(d). *Id.* That decision is in line with *Jimenez* (and differs from the posture here) given the state court's order denying Thompson's petition for review without prejudice, combined with its subsequent order granting review. Here, the Arizona Supreme Court made an express determination that direct appeal was not reopened in the course of post-writ error correction proceedings in this exact procedural posture. Because this Court lacks jurisdiction to reconsider that ruling, it should deny Hedlund's petition.

B. *The conditional writ did not disturb finality*

Citing *Magwood v. Patterson,* 561 U.S. 320 (2010), Hedlund contends that the conditional writ rendered Hedlund's sentence non-final "as a matter of law." Pet. at 28-29. But *Magwood* does not support Hedlund's argument. In *Magwood*, this Court addressed whether, when an inmate files a habeas petition challenging a resentencing procedure held pursuant to a conditional writ, that petition is second or successive under 28 U.S.C. § 2244(b). *Id.* at 323-324. This Court did not address finality for

retroactivity purposes, nor did it hold that a conditional writ renders a state-court conviction non-final as a matter of law.

And any such holding would have conflicted with the nature and purpose of conditional writs. A conditional habeas writ can never itself reopen state direct review. *See Douglas v. Jacquez*, 626 F.3d 501, 504 (9th Cir. 2010) ("a habeas court 'has the power to release' a prisoner, but 'has no other power'"; "'it cannot revise the state court judgment.'"). Federal courts reviewing state convictions have "broad discretion" to "delay the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court." *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987). This differs from a federal court's review of a federal conviction, which includes "unlimited power to attach conditions to the criminal proceedings on remand." *Henderson v. Frank*, 155 F.3d 159, 168 (3d Cir. 1998). "'Other than granting the writ of habeas corpus and imposing time limits in which the state must either release the petitioner or correct the problem, the precise remedy is generally left to the state.'" *Woodfox v. Cain*, 789 F.3d 565, 569 (5th Cir. 2015).

The conditional writ in this case was particularly permissive—it offered Arizona the chance to initiate proceedings to "correct the constitutional error," Resp. App. 1a, without mentioning mandatory resentencing or new direct review. This omission is significant because courts often condition writs on resentencing. *See, e.g., Phillips v. White*, 851 F.3d 567, 583 (6th Cir. 2017) (requiring state to resentence within 90 days or release); *Libberton v. Ryan*, 583 F.3d 1147, 1174 (9th Cir. 2009) (remanding with

instructions "to grant the state a reasonable amount of time in which to resentence" petitioner). And this Court should "not infer … conditions from silence." *Jennings v. Stephens*, 135 S. Ct. 793, 799 (2015); *see also id.* ("Construing every federal grant of habeas corpus as carrying an attendant list of unstated acts (or omissions) that the state court must perform (or not perform) would substantially transform conditional habeas corpus relief from an opportunity 'to replace an invalid judgment with a valid one,' … to a general grant of supervisory authority over state trial courts."). Arizona elected to satisfy the writ not through a resentencing, but through a previously adopted post-writ independent-review proceeding, that fell well within the writ's contours.

CONCLUSION

Based on the foregoing authorities and arguments, Arizona respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

* U.S. District Court for the District of Arizona Order in *Charles Michael Hedlund v. Ryan, et al*, No. CV–02–00110–PHX–DGC, dated July 3, 2017.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Charles Michael Hedlund, Petitioner, v. Charles L. Ryan, et al., Respondents.	No. CV-02-00110-PHX-DGC DEATH PENALTY CASE **ORDER**

In 2009, this Court entered judgment denying Hedlund's Writ of Habeas Corpus. (Doc. 148.) A three-judge panel of the Ninth Circuit Court of Appeals reversed in part, granting the petition with respect to Hedlund's death sentence, and remanded the case "with instructions to grant the writ with respect to Hedlund's sentence unless the state, within a reasonable period, either corrects the constitutional error in his death sentence or vacates the sentence and imposes a lesser sentence consistent with law." *Hedlund v. Ryan*, 854 F.3d 557 (9th Cir. 2017). The mandate issued June 27, 2017. (Doc. 156.)

IT IS ORDERED that Hedlund's Writ of Habeas Corpus is granted unless the State of Arizona, within 120 days from the entry of this Judgment, initiates proceedings either to correct the constitutional error in Hedlund's death sentence or to vacate the sentence and impose a lesser sentence consistent with the law.

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment accordingly.

IT IS FURTHER ORDERED that the Clerk of Court forward a courtesy copy of this Order to Janet Johnson, Clerk of the Arizona Supreme Court, 1501 W. Washington Street, Phoenix, Arizona 85007-3329.

Dated this 3rd day of July, 2017.

David G. Campbell
United States District Judge