

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

JAMES ERIN MCKINNEY,)
)
 Petitioner,)
)
 v.) No. 18-1109
)
 ARIZONA,)
)
 Respondent.)

Pages: 1 through 69
Place: Washington, D.C.
Date: December 11, 2019

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JAMES ERIN MCKINNEY,)

Petitioner,)

v.) No. 18-1109

ARIZONA,)

Respondent.)

- - - - -

Washington, D.C.

Wednesday, December 11, 2019

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:11 a.m.

APPEARANCES:

NEAL K. KATYAL, ESQ., Washington, D.C.; on behalf of the Petitioner.

ORAMEL H. SKINNER, Solicitor General, Phoenix, Arizona; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (11:11 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 18-1109, McKinney versus
5 Arizona.

6 Mr. Katyal.

7 ORAL ARGUMENT OF NEAL K. KATYAL

8 ON BEHALF OF THE PETITIONER

9 MR. KATYAL: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 The State seeks to put James McKinney
12 to death even though he's never once had a
13 sentencing proceeding that complies with current
14 law. There are two separate paths for McKinney
15 to win. The path in question 1 argues that the
16 Arizona Supreme Court reopened McKinney's
17 sentencing proceeding. The Ninth Circuit had
18 earlier granted a conditional writ of habeas
19 corpus and gave the State the option of either
20 imposing a life sentence or seeking the death
21 penalty again.

22 The State chose the latter, which
23 required brand new state action in the form of
24 new sentencing. The Arizona Supreme Court then
25 did everything itself just as it had in 1996.

1 That was wrong. This Court's decisions in Ring
2 and Hurst require a jury sentencing. If
3 McKinney were sentenced today, no one doubts
4 he'd be entitled to a jury trial.

5 The State claims this would open the
6 floodgates. But McKinney is not seeking to use
7 Ring retroactively as a sword to challenge his
8 earlier proceedings. Rather, he's saying that
9 when the State conducts a new proceeding, that
10 sentencing must comply with current law.

11 Otherwise, the implications would be
12 frightening. For example, a state could run a
13 re-sentencing today in 2019 with a pre-Batson
14 jury, with race-based jury strikes. That can't
15 be right.

16 And the second path, set out in
17 question 2, is for this Court to simply say that
18 the Eddings violation in this case requires a
19 remand to the trial court for sentencing and
20 that the appellate court was wrong to perform
21 that delicate task itself. This breaks no new
22 ground. Indeed, this Court has, on five
23 separate occasions since the 1982 Eddings
24 decision, ordered resentencing for Eddings
25 violations.

1 Both paths get McKinney to the same
2 destination, but they are separate. Question 2
3 is limited to the small universe of Eddings
4 violations and how to fix them. And question 1,
5 by contrast, is about when sentencing
6 proceedings lose their finality and are
7 reopened.

8 I'm fine waiving the rest of my time
9 if there are questions.

10 JUSTICE KAVANAUGH: Well, what -- what
11 about Clemons? Because Clemons is a precedent
12 of this Court that says that the appellate court
13 can do reweighing. Is that still good law?

14 MR. KATYAL: So we're on question 2.
15 And --

16 JUSTICE KAVANAUGH: Yes.

17 MR. KATYAL: -- and with respect to
18 question 2, Clemons is not an Eddings case at
19 all. Clemons is a case about whether or not an
20 aggravating circumstance can be subtracted from
21 -- in a -- in a resentencing proceeding. That's
22 a much easier case than what the --

23 JUSTICE KAVANAUGH: Right. You say in
24 your brief, erroneously including an invalid
25 aggravating circumstance is fundamentally

1 different from erroneously excluding a relevant
2 mitigating circumstance. Why? I don't
3 understand that.

4 MR. KATYAL: Because what the Arizona
5 Supreme Court task had to deal with here was a
6 full-blown reweighing of everything, mitigating
7 and aggravating circumstances, whereas
8 subtracting one element is very different.

9 And, indeed, we know this from Clemons
10 itself, Justice Kavanaugh, because the very end
11 of Clemons actually brackets this case. It
12 says, in a circumstance in which the -- there --
13 in which the appellate court is asked for the
14 first time to weigh and determine evidence,
15 that's different. And what case do they cite
16 there? They cite this Court's decision in
17 Caldwell.

18 And in Caldwell, there's language
19 after language saying appellate courts are ill
20 suited to making these determinations about a
21 defendant and whether mercy should be given.
22 They want to see the defendant in person.

23 JUSTICE KAVANAUGH: That's a lot of
24 the argument that Justice Blackmun raised in
25 dissent in Clemons, of course, that the

1 appellate court wasn't well suited to do this,
2 that this was really a mistake.

3 MR. KATYAL: Correct. And our point
4 to you is twofold. Number one, you can just
5 take Clemons as existing law. I do think it's
6 -- my second point is that it's undercut by Ring
7 and Hurst, but just it may be existing law, but
8 it's only existing law with respect to the
9 subtraction of one aggravating circumstance, and
10 Clemons itself, as I say, brackets this.

11 And then the second thing is -- is
12 this Court, I think, has really changed the
13 rules since Clemons because of Ring and Hurst.
14 And we're not saying that Ring and Hurst
15 overrule Clemons. That's not our position. But
16 just that I don't think it should be extended
17 any further than its facts and that's what --

18 JUSTICE SOTOMAYOR: Mr. Katyal --

19 JUSTICE ALITO: Let me give you a --

20 JUSTICE SOTOMAYOR: -- the -- the
21 court below only reached your first issue,
22 whether this was a new proceeding or not. It
23 didn't reach the second. If it had, what does
24 it have to do? Shouldn't we be remanding for
25 that second question?

1 MR. KATYAL: We --

2 JUSTICE SOTOMAYOR: You -- you have
3 presumed that it would have to do Ring, but my
4 colleague, Justice Kavanaugh, has raised a
5 question of why not. Shouldn't we be letting
6 that be aired below? Shouldn't we just reach
7 the first question and leave the second open and
8 let it be completely aired?

9 I mean, there is at least one Arizona
10 case, Styles, where the court, following
11 Clemons, basically said it's only the appellate
12 process that was at issue in the decision below;
13 we can redo the appellate process without
14 applying Ring and Hurst.

15 I don't know if it would choose to do
16 that again with new argument, but shouldn't we
17 give it an opportunity to do that?

18 MR. KATYAL: Justice Sotomayor, I
19 don't think you have to here. I mean, either
20 way, whether you viewed question 2 or question
21 1, the result would be a jury trial because
22 Arizona law --

23 JUSTICE SOTOMAYOR: Well, that's your
24 argument. I'm just saying, shouldn't we let the
25 appellate court make that decision?

1 MR. KATYAL: Well, I think the
2 appellate court here has pronounced on question
3 1 and said --

4 JUSTICE SOTOMAYOR: No, if we disavow
5 it over that pronouncement. I -- I take your
6 argument, as I did in your brief, that finality
7 is not up to the state court or reopening --
8 finality is not up to the state court, that it's
9 up to federal law. We have to define it for
10 everybody.

11 And if we told it to go through a new
12 procedure, I don't know how that can't be a
13 reopening. We told it -- the only thing they
14 say we said, and I take your argument is broader
15 than that, but assuming I accept their position
16 that what they were told to do was to reopen the
17 appellate process, then they were wrong.

18 MR. KATYAL: So, Justice Sotomayor --

19 JUSTICE SOTOMAYOR: And we -- that --
20 that's your argument, right?

21 MR. KATYAL: Absolutely. Justice
22 Sotomayor --

23 JUSTICE SOTOMAYOR: That it was a new
24 proceeding. So now shouldn't we remand it for
25 them to decide what new law they apply, if any?

1 Or what law --

2 MR. KATYAL: If you want to rule for
3 us on question 1, we're obviously not going to
4 be opposed to that. I don't think you have to
5 rule on question 1 and not reach question 2
6 because the Arizona Supreme Court here did make
7 a decision on question 2.

8 Indeed, there was a whole dispute
9 between us about what should the Arizona Supreme
10 Court do, and briefs were filed. There's Joint
11 Appendix pages 385 to 89. You have the State's
12 brief on this saying: Do this in the Arizona
13 Supreme Court.

14 And what we said is no, Eddings
15 requires, under Caldwell, Clemons, all of those
16 cases, a resentencing --

17 JUSTICE SOTOMAYOR: But they decided
18 the question on a narrow ground that this was
19 not a new procedure. If we disavow them -- that
20 this was not a reopening. If we disavow their
21 belief of that, then shouldn't we get an answer
22 to the question they left open?

23 MR. KATYAL: I'm not sure that they
24 left it open, Your Honor. What they did was
25 arrogate to themselves the power to conduct this

1 resentencing proceeding --

2 JUSTICE ALITO: Well, at what stage of
3 the -- of the direct appeal was there an error
4 according to the Ninth Circuit?

5 MR. KATYAL: The -- there was an error
6 -- if we're talking about -- there was an error
7 both at the trial court and at the Arizona
8 Supreme Court.

9 JUSTICE ALITO: But the Arizona
10 Supreme Court conducted de novo review --

11 MR. KATYAL: Correct.

12 JUSTICE ALITO: -- was it not? So
13 wasn't the error identified by the Ninth Circuit
14 an error committed by the Arizona Supreme Court?

15 MR. KATYAL: And more. So there's
16 four answers here, Justice Alito. First, I know
17 my friend has made this argument in the red
18 brief at page 38 that this is the Arizona
19 Supreme Court's error only. That's not the
20 argument in the brief in opposition. And I'm
21 not sure 15.2 allows them to make the argument
22 when it wasn't in the brief in opposition. And
23 that's particularly true here because they told
24 you in this -- 2016, when they filed a cert
25 petition from the Ninth Circuit, at page 30,

1 they said that the error was actually in the
2 trial court.

3 JUSTICE ALITO: All right. Well, I
4 mean, put -- put aside these preservation
5 issues, which we can sort out for -- for
6 ourselves.

7 If the Arizona Supreme Court in the
8 decision on direct appeal had made it clear, if
9 it did not already, but assuming that the Ninth
10 Circuit majority was right, if they -- if they
11 had made it clear that they were taking into
12 account the mitigation evidence, irrespective of
13 whether there was a causal connection with the
14 commission of the offense, would there have been
15 an error?

16 MR. KATYAL: If there were no trial
17 court error on Eddings, we wouldn't be here.
18 Our position is --

19 JUSTICE ALITO: What if there was --
20 all right. Assume there was a trial court
21 error, but the Ninth Circuit said we're
22 conducting de novo review, and we're going to do
23 it the right way, and we take the mitigation
24 evidence into account in the way that Eddings
25 allow -- requires us to do.

1 MR. KATYAL: And I don't think this
2 Court's precedents allow the appellate court to
3 fix the trial court error. Decisions like
4 Caldwell say that that's a decision for the
5 sentencer at the trial court where they can see
6 the defendant, confront the witnesses. And in
7 cases like Arizona, there's a double circuit
8 breaker function served by the scheme because
9 they have to win both no death sentence -- they
10 have to win a death sentence both at the trial
11 court and at the Arizona Supreme Court.

12 And what they're seeking to do here is
13 fuse that into one thing. Just as long as it
14 can be fixed on appeal, that's enough. And what
15 decisions like Caldwell say is, uh-uh, for
16 juries -- sorry, for Cald -- for Eddings errors,
17 you need to have a trial court consideration of
18 that.

19 JUSTICE BREYER: Why -- maybe I must
20 have the facts wrong, but -- maybe. But, look,
21 there are -- the trial court says, a long time
22 ago, there are two aggravating factors, A and B.

23 And then it looks at the mitigation,
24 and the mitigation is he had a terrible
25 childhood. And the trial court says, well, that

1 only counts if it's causally connected. That's
2 a mistake.

3 Then it goes to Arizona Supreme Court,
4 and they say the same thing. They say one and
5 two, aggravating, and now we independently say
6 this causal thing.

7 MR. KATYAL: Yeah.

8 JUSTICE BREYER: You're wrong about
9 the causal, says the Ninth Circuit. Back to the
10 Supreme Court. Supreme Court says we will redo
11 our reweighing. We will now not use causal.

12 Why does it have to go back to the --
13 if their law really is -- if it really is the
14 Supreme Court can do this way, why does it have
15 to go back to the trial court?

16 MR. KATYAL: Because, in Eddings cases
17 and in particularly Caldwell, this Court has
18 said the trial court has to confront all this in
19 the first place.

20 At page 331, for example, you said:
21 Whatever intangibles a jury might consider in
22 its sentencing determination, few can be gleaned
23 from an appellate record. The mercy plea is
24 made directly to the sentencer. There is no
25 appellate mercy --

1 JUSTICE BREYER: Well, in Arizona, the
2 sentencer is the appellate court. You could say
3 there's something wrong with that. It does say
4 the sentencer is the appellate court.

5 MR. KATYAL: And what this Court's
6 decisions --

7 JUSTICE BREYER: Can't do that --

8 MR. KATYAL: -- from Eddings on have
9 said, no, you've got to remand to the trial
10 court for a determination and not to the
11 appellate court. And, by the way --

12 JUSTICE BREYER: Okay. I -- I got
13 that point.

14 MR. KATYAL: And, Justice Breyer, in
15 Arizona, State versus Bible says appellate
16 courts can't take evidence and can't assess that
17 kind of stuff. They're not institutionally
18 equipped to do that.

19 JUSTICE BREYER: All right. Okay.
20 But we don't have to send it back because of
21 Ring. Is that true? I mean, Ring, if it's now
22 current law that applies, can they do this. Can
23 they say, yes, it applies, correct, correct, but
24 not to the aggravating part because the
25 aggravating part was done correctly under old

1 law --

2 MR. KATYAL: So --

3 JUSTICE BREYER: -- and that's not
4 what's at issue. Only the mitigating part is at
5 issue.

6 MR. KATYAL: So our --

7 JUSTICE BREYER: Can they say that?

8 MR. KATYAL: -- position on question

9 1 --

10 JUSTICE BREYER: Yeah.

11 MR. KATYAL: -- is that they've
12 conducted a brand new sentencing proceeding and,
13 therefore, current law applies. That means Ring
14 applies. And Ring --

15 JUSTICE BREYER: Well, Ring would make
16 you say that.

17 MR. KATYAL: And they haven't really
18 gotten into, except for just saying, oh, there's
19 no Ring violation, what the possible violations
20 are.

21 Our brief at pages 30 to 34 does
22 outline that --

23 JUSTICE ALITO: Counsel, why --

24 MR. KATYAL: -- and says, you know,
25 the weighing and the mitigating circumstance and

1 the taking of an aggravating circumstance
2 without a jury determination, any of those are
3 separate Ring problems.

4 JUSTICE KAGAN: So, on question 1, why
5 would Ring apply? I mean, I guess the -- the
6 issue is, is the defendant getting a kind of
7 windfall if Ring applies?

8 The error here has nothing to do with
9 Ring. And Ring only comes into the picture
10 because the -- the court is trying to create --
11 is trying to correct a different error.

12 Why is it that, you know, a -- a
13 non-retroactive rule should all of a sudden pop
14 up and the defendant get the benefit of that
15 rule?

16 MR. KATYAL: We -- we don't think that
17 there's a windfall here, and I'll explain why,
18 but, if you do, that would just push you in the
19 direction of question 2, in which you don't have
20 that feature.

21 But, with respect to a windfall, I
22 don't think that exists here.

23 All our argument is, is that the State
24 is conducting a brand new proceeding, and that
25 new proceeding has to comply with current law.

1 So we're not trying -- trying to use
2 the flaw, the Eddings flaw, to reopen old
3 grievances and say, oh, there was this problem
4 in the trial or that problem in the trial. It's
5 just that the fact after the Ninth Circuit
6 granted the conditional writ, the State
7 affirmatively, you need a brand new state action
8 in order to sentence McKinney to death.

9 And our problem is with that brand new
10 action, not with something that happened back
11 before in 1993 --

12 JUSTICE KAVANAUGH: You're requiring
13 --

14 MR. KATYAL: -- but with what happened
15 later.

16 JUSTICE KAVANAUGH: -- you're
17 requiring a new jury sentencing 28 years after
18 the murders and after the victims' families have
19 been through this for three decades. And that's
20 not required by Clemons, I take your point on
21 that, but the whole point of Clemons -- and I --
22 I understand your argument -- was the appellate
23 court can do this.

24 And there was a passionate dissent,
25 you've read it, by Justice Blackmun saying this

1 was really quite wrong to allow the appellate
2 court to do this.

3 But the Arizona Supreme Court,
4 presumably aware of that law, did it itself.
5 And why -- why go back to a jury resentencing 28
6 years later?

7 MR. KATYAL: Justice Kavanaugh, I
8 think in many of the Eddings cases you have done
9 exactly that. In cases in which there's a doubt
10 as to whether or not the jury consider -- or the
11 trial court considered mitigating evidence,
12 you've sent it back to the trial court for a
13 resentencing and, indeed, for a jury
14 determination.

15 You did it in Eddings itself. You did
16 it in Penry. You did it in Mills. Case after
17 case, that is the result of this Court's
18 precedents.

19 And I think it's right because we're
20 not talking about some technical violation here
21 or something. We're talking about the heart of
22 what capital punishment sentencing is all about,
23 the weighing of mitigating and aggravating
24 circumstances.

25 JUSTICE KAVANAUGH: Well, that was

1 true in Clemons, correct?

2 MR. KATYAL: Correct. And, again, but
3 in Clemons, it was just the subtraction of that
4 one factor.

5 JUSTICE KAVANAUGH: I know.

6 MR. KATYAL: And, indeed, they
7 bracketed that.

8 JUSTICE KAVANAUGH: But the big point
9 of the dissent in Clemons was, look, this is
10 something a fact finder should do, the jury --
11 the fact finder, the trial court should do,
12 which is hear all the evidence and do that
13 weighing.

14 MR. KATYAL: Right.

15 JUSTICE KAVANAUGH: And that seems
16 quite similar, and I still take your point, but
17 quite similar.

18 MR. KATYAL: Right. I -- I think it's
19 still different because it's just a much more
20 limited question on appeal in that circumstance.

21 Here, you are asking -- and Arizona
22 has a de novo, brand new, you know, full
23 reweighing procedure -- you're asking them in
24 that circumstance to -- to -- to decide
25 something that a jury has never seen or a trial

1 court's never seen.

2 And, you know, cases like Caldwell
3 say, for mitigating evidence, mercy is really
4 important. And, you know, to have the appellate
5 court decide this really fundamental question
6 without even having the defendant before it,
7 without having the witnesses, you know, that's
8 -- that's something, I think, that's new.

9 At least in Cald -- at least in
10 Clemons -- I should have said this, Justice
11 Kavanaugh -- at least in Clemons there was a
12 trial court determination at some point of the
13 mitigating and aggravating circumstances.

14 JUSTICE SOTOMAYOR: But the problem --

15 JUSTICE ALITO: Why are you really --
16 why are you not asking for a windfall? Indeed,
17 maybe a double windfall. You are effectively
18 getting retroactive application of Ring, which
19 is not retroactively applicable to anybody else.

20 And not only that, what you really
21 want, I gather, is a jury -- is -- is not the
22 correction of a Ring error. It is the -- it is
23 another shot at convincing a jury to hold that
24 somebody who is going to be found death-eligible
25 in all likelihood should, nevertheless, not get

1 the death penalty.

2 MR. KATYAL: So it's a limited
3 correction to -- because the Ninth Circuit's
4 invalidated this -- this sentence. So it
5 requires a new sentencing if they want the death
6 penalty.

7 It doesn't allow us to, for a
8 windfall, for example, reopen guilt or innocence
9 or anything like that. That was not touched by
10 it. So it's limited to that. And in that
11 sense, Justice -- Justice Alito, it's kind of
12 like when the Court decides an ineffective
13 assistance of counsel claim in a capital case.
14 Yes, in one sense, I guess it's a windfall
15 because lots of issues are reopened there, not
16 just one.

17 But that is, I think, the result of a
18 precedent that says, hey, you need a full
19 resentencing.

20 JUSTICE ALITO: No, but, I mean, there
21 the ineffective assistance of counsel can have
22 all kinds of effects. I mean, you have a very
23 -- you have an entirely formalistic argument,
24 and maybe it's right, but why don't you just
25 admit it's entirely formalistic. You want a

1 retroactive -- you want effectively a
2 retroactive application of Ring and your real
3 beef is not with a -- the -- the lack of a jury
4 finding on -- on -- on eligibility. It's with
5 the actual sentence that the jury decided to
6 impose.

7 MR. KATYAL: I -- I couldn't disagree
8 more profoundly with that. That is, that what
9 we're not seeking here is not formalistic; what
10 we're saying is that there is new state action
11 as a result of the Ninth Circuit's decision.
12 We're not saying Ring allows you to reopen, for
13 example, the jury trial rights on guilt and
14 innocence or anything like that.

15 It's simply that they need it to come
16 in and have affirmative state action. If they
17 wanted to have a death sentence, if they wanted
18 to have a final judgment, they needed to come in
19 and do a new proceeding --

20 JUSTICE GORSUCH: Mr. Katyal --

21 MR. KATYAL: -- in 2016. And our
22 problem is with the new 2016 proceeding.

23 JUSTICE GORSUCH: At the risk of a
24 formalistic question, normally, states are the
25 definers of their own procedures, their own

1 state law. And I would have thought that,
2 normally at least, a state gets to define when
3 its proceedings are final, for state law
4 purposes at least.

5 What federal law and what standard of
6 review would apply to determine whether that
7 state law violates the federal Constitution?

8 MR. KATYAL: So, Justice Gorsuch, two
9 big answers here. One is we're not in that
10 circumstance because Arizona borrows from
11 federal law. There's no state law --

12 JUSTICE GORSUCH: Let's -- let's just
13 say we are, okay? Let -- let's -- stick with my
14 hypothetical, if you don't mind.

15 MR. KATYAL: Sure. Okay. And with
16 respect to your hypothetical, I think this Court
17 has said from *Richfield Oil* on in 1946 that it
18 is -- it is a federal question, not a state
19 question. In cases like *Gonzalez*, you've said
20 you don't want to have state-by-state
21 definitions --

22 JUSTICE GORSUCH: I -- I accept --

23 MR. KATYAL: -- of finality.

24 JUSTICE GORSUCH: -- that there could
25 be a federal rule of decision for vindicating

1 some federal constitutional principle, but what
2 would be that federal constitutional principle?
3 And wouldn't, whatever it is -- you're going to
4 say due process or -- I -- I'm looking forward
5 to that. But whatever it is, I would have
6 thought that it would have been a pretty
7 deferential standard of review by this Court to
8 -- to maybe assess whether there are efforts to
9 evade a federal interest.

10 MR. KATYAL: I think this Court has
11 said that the -- that -- that it is purely a
12 federal question and hasn't deferred in all of
13 these different cases.

14 JUSTICE GORSUCH: Is it federal common
15 law? I mean, I'm -- what's your source of law?

16 MR. KATYAL: I think -- it's Article
17 III in the Supremacy Clause because --

18 JUSTICE GORSUCH: Well, the Supremacy
19 Clause vindicates --

20 MR. KATYAL: Exactly, but --

21 JUSTICE GORSUCH: -- other --

22 MR. KATYAL: Right, but if I could --

23 JUSTICE GORSUCH: -- federal laws.

24 MR. KATYAL: Right.

25 JUSTICE GORSUCH: And so I'm -- I'm

1 still waiting for what that other federal law
2 is.

3 MR. KATYAL: It is that, if you allow
4 state-by-state definitions of finality, allow
5 them to define around the problem, then you
6 have, for example, Batson problems and a return
7 to the Linkletter world where Justice Harlan was
8 so worried about the idea that you could just
9 pick and choose when a state could apply current
10 law and when they could say, oh, no, it's much
11 more --

12 JUSTICE GORSUCH: Right. I give up on
13 that one. How about the standard of review?

14 MR. KATYAL: So we -- you know, we
15 don't have a beef really with the standard of
16 review. I don't think this Court has ever given
17 any deference. But even if you were to give
18 deference in this case, you'd be giving
19 deference to actually a state using a federal
20 definition because they never cite -- the
21 Arizona Supreme Court when they say --

22 JUSTICE GORSUCH: Well, they say --

23 MR. KATYAL: -- this is a final --

24 JUSTICE GORSUCH: -- it's an
25 independent procedure and that that's different

1 --

2 MR. KATYAL: Citing --

3 JUSTICE GORSUCH: -- in Arizona, and
4 it's kind of an unusual procedure.

5 MR. KATYAL: No, no, no. They cite,
6 Justice Gorsuch, this Court's decision in
7 Griffith and federal law entirely through and
8 through. There is no cite to anything in
9 Arizona.

10 JUSTICE GORSUCH: All right. Well,
11 let's --

12 MR. KATYAL: Michigan versus Long.

13 JUSTICE GORSUCH: Just suppose I
14 disagree with you on that for a moment. You
15 still want to win, right? So what standard of
16 review would you have this Court apply in these
17 circumstances?

18 MR. KATYAL: Well, we would say --

19 JUSTICE GORSUCH: Something stronger
20 than rational basis review?

21 MR. KATYAL: We -- we would say that
22 it doesn't -- that there is no reason for it to
23 be deferential because you are talking about
24 federal constitutional commands. So you would
25 just apply, you know, a de novo standard. But,

1 even if you wanted deferential, rational
2 basis --

3 JUSTICE GORSUCH: Right.

4 MR. KATYAL: -- whatever it is, here,
5 this is met. Here, they are having a brand-new
6 sentencing proceeding, the heart of what capital
7 sentencing is all about --

8 CHIEF JUSTICE ROBERTS: Mr. Katyal --

9 MR. KATYAL: -- weighing the --

10 CHIEF JUSTICE ROBERTS: -- in a lot of
11 your -- your argument, you've talked -- you've
12 talked about ineffective assistance examples,
13 Batson examples, but not every violation of
14 federal law cuts across the entire proceeding,
15 as ineffective assistance or Batson.

16 MR. KATYAL: Correct.

17 CHIEF JUSTICE ROBERTS: Do you have a
18 line to draw between those that do and those
19 that don't?

20 MR. KATYAL: Our -- our line, Mr.
21 Chief Justice, is -- is, if the new proceeding
22 violates current law, in that circumstance and
23 in that circumstance only is there a
24 constitutional -- our argument is limited to
25 that. So you can be --

1 CHIEF JUSTICE ROBERTS: So there's no
2 difference between sort of a surgical mistake
3 that could be corrected and an entirely
4 comprehensive mistake that infects the whole
5 proceeding?

6 MR. KATYAL: No. That's a separate
7 kind of safeguard against their
8 open-the-floodgates argument, because, as
9 Justice Sotomayor, when she was on the Second
10 Circuit, said in Burrell and many other courts,
11 like the Florida Supreme Court, have said, if
12 it's just a technical correction, if it's
13 ministerial, then you're not reopening the final
14 judgment.

15 We absolutely agree with that. This
16 is the polar opposite.

17 CHIEF JUSTICE ROBERTS: Well, but
18 somewhere between ministerial and entirely
19 comprehensive, there are things that are
20 discrete and focused --

21 MR. KATYAL: Yes.

22 CHIEF JUSTICE ROBERTS: -- that
23 suggest that a -- the -- the new -- new
24 proceeding, to give you the benefit of that, is
25 not one that can't be -- is one that can be

1 cured relatively easily.

2 MR. KATYAL: Right, and our point, the
3 line is -- and this is what Burrell and other
4 cases say -- if the new proceeding requires an
5 exercise of discretion, then current law applies
6 to that new proceeding. And, yes, you know, I
7 agree, you know, that there can be difficult
8 cases in the middle, but this is the outlier.
9 This is a brand-new full-blown, 100 percent redo
10 --

11 JUSTICE KAVANAUGH: Can I --

12 MR. KATYAL: -- of what happened in
13 1996.

14 JUSTICE KAVANAUGH: So the part of
15 Clemons that you say may still be good law,
16 suppose that the appellate reweighing occurred
17 not on direct review but on state habeas in the
18 state supreme court. Is that a possibility in
19 your view?

20 MR. KATYAL: So we don't think
21 anything turns on the label state habeas or
22 direct review or anything. It's fundamentally a
23 substantive question, what's going on. And
24 if --

25 JUSTICE KAVANAUGH: Could -- could

1 they do that, though, the Clemons reweighing, in
2 -- in the state habeas proceeding?

3 MR. KATYAL: If -- if they did the
4 same thing here but called it collateral or
5 habeas, it would make no difference whatsoever
6 because, ultimately --

7 JUSTICE KAVANAUGH: So I think your
8 answer is no, they couldn't do that.

9 MR. KATYAL: It's ultimately a
10 substantive test.

11 JUSTICE KAVANAUGH: And why -- why
12 not? Why can't a state do it in that fashion?

13 MR. KATYAL: Because then you'd give
14 the state the power to relabel something
15 collateral and evade Batson and things like
16 that. And that's a return to Linkletter and
17 allowing different and dis- -- disuniformity
18 between cases. And that's fundamentally what I
19 think the -- this Court's finality jurisprudence
20 in Jimenez is all about trying to avoid.

21 I reserve.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 General Skinner.

25

1 ORAL ARGUMENT OF ORAMEL H. SKINNER

2 ON BEHALF OF THE RESPONDENT

3 MR. SKINNER: Mr. Chief Justice, and
4 may it please the Court:

5 I believe there's actually only one
6 path forward here for Petitioner. Effectively,
7 QP 1 resolves the resolution of this case no
8 matter which way it goes. If there's
9 retroactive application of Ring and Hurst and
10 all current law applies, Arizona does not
11 contend that we have Ring-compliant aggravators
12 here, and this would be a case that we would
13 take back to the trial court.

14 To the extent that there is no
15 retroactive application, Clemons is the
16 governing law, and what Arizona did fits
17 entirely within Clemons. All of the cases
18 involving trial court remands under Eddings from
19 this Court the Petitioner has cited predate
20 Clemons. Caldwell predates Clemons. All of
21 them do.

22 And there is no difference -- to pick
23 up on something that Justice Kavanaugh
24 mentioned, we don't believe that where the
25 record is built, which is critical here, where

1 the record is built, credibility determinations
2 have been made, the expert for the defendant has
3 been credited in the trial court over the
4 State's expert, that there would be any problem
5 with the trial -- with the appeals court
6 conducting its own independent review.

7 Caldwell and these cases discuss some
8 sort of new evidence that was never heard. And
9 counsel keeps mentioning things as if never
10 seen, the evidence was never seen, the evidence
11 has never been heard. But the PTSD expert
12 testimony was credited. The existence of PTSD
13 has been credited. These are determinations
14 that have been made, and the only allegation
15 coming out of the Ninth Circuit is that there
16 was an error of law in how those facts and
17 evidence were treated.

18 Turning to Question Presented 1, the
19 language of the writ that was issued is critical
20 here. It is a conditional writ that does not
21 require vacating the sentence. The parade of
22 horrors that comes forward out of Petitioner
23 and amici really turns on the idea that somehow
24 a state could -- could -- all of them are
25 answered by the idea that we admit, if a

1 sentence is vacated, that undoes the final
2 judgment in a criminal case. That is the
3 touchstone of what a criminal case is.

4 Petitioner keeps mentioning that he
5 doesn't want to challenge anything earlier in
6 the case, but yet he cites cases in which this
7 Court has held that the sentence is the judgment
8 and that if you undo the sentence, then you undo
9 the finality.

10 JUSTICE SOTOMAYOR: So, if the Court
11 had done this proceeding -- it says it's not a
12 reopening of the judgment, but if it had done
13 this proceeding and changed its mind and said,
14 you know, it wasn't causally connected and we
15 were following our old rule, but it was fairly
16 powerful evidence and we think he shouldn't be
17 subjected to death, could they, unless they
18 reopened the judgment, have modified the
19 judgment?

20 MR. SKINNER: They can -- they can
21 modify the judgment in the same manner that a
22 2255 court can modify a judgment, which, you
23 know, even in --

24 JUSTICE SOTOMAYOR: How? You have to
25 open it to modify it, don't you? You have to

1 undo it to change it. I've never heard of
2 changing a judgment by not undoing it first.

3 MR. SKINNER: There are -- Petitioner
4 cites, for example, the Burrell case out of the
5 Second Circuit, and that's an example where this
6 Court has recognized that even in the context of
7 a direct appeal, where you are making a change
8 and it's the only change that can be made, and,
9 here, there's only two sentences available, we
10 believe that if the Arizona Supreme Court had
11 decided that the mitigation was sufficiently
12 substantial --

13 JUSTICE SOTOMAYOR: But it -- it used
14 a well-known exception in the law, a ministerial
15 exception, and defined ministerial as being --
16 since I wrote it, I know what I said -- it
17 defined ministerial as being with no discretion.
18 You know, you enter the wrong date or you
19 accidentally enter the wrong amount.

20 If you had no choice but to enter X as
21 opposed to Y, that's ministerial. But I've have
22 never heard of changing a judgment that's
23 substantive unless you've reopened a proceeding.

24 MR. SKINNER: The 2255 context has
25 cases that discuss -- the 2255 court is tasked

1 with correcting a sentence and may well correct
2 a sentence in connection with a collateral
3 proceeding.

4 JUSTICE SOTOMAYOR: But that
5 supercedes the old one, right?

6 MR. SKINNER: We agree that it would
7 supersede. I don't know --

8 JUSTICE SOTOMAYOR: All right. So let
9 -- let's go to the ultimate question. You can't
10 -- if something can be modified, if a judgment
11 can be modified, it seems like more than
12 semantics to say I didn't reopen it for
13 reconsideration. You can't reconsider what I
14 won't change.

15 MR. SKINNER: That -- that standard
16 would change 2255 proceedings into direct
17 proceedings for purposes of retroactivity. And
18 in a 2255 proceeding, a sentence can be
19 modified.

20 And yet this Court has been very clear
21 that a 2255 proceeding doesn't include
22 application of current law. It is --
23 retroactive rules aren't applicable. So this is
24 a -- this is a -- an aspect that requires
25 balancing the technical and the reality but it

1 is pretty clear that in charting modern
2 retroactivity --

3 JUSTICE SOTOMAYOR: Could you go to my
4 -- another question? It will be my last of you.
5 Assuming that we say that this was a reopening
6 of the appellate procedure, do you lose
7 automatically?

8 MR. SKINNER: To the extent that this
9 is a reopening of the direct appeal, we believe
10 --

11 JUSTICE SOTOMAYOR: Of the direct
12 appeal.

13 MR. SKINNER: Of the direct appeal,
14 then we would be back on direct appeal, and the
15 Court would be overturning the State's
16 conclusion about the nature of the proceedings,
17 but that would place us into the realm of what
18 this Court discussed potentially in Jimenez. So
19 -- but that would require looking past what the
20 State has said about its own proceedings and
21 even, as this Court has said in cases like Wall,
22 the entire definition of what is collateral is a
23 judicial reexamination of something.

24 JUSTICE GINSBURG: But -- but General
25 Skinner, the Ninth Circuit found that the

1 Arizona Supreme Court erred on direct review of
2 the trial court judgment. If they made an error
3 on direct review, how can that error be cured
4 without reopening the direct review?

5 And they said you did the direct
6 review wrong, do the direct review over. I
7 think that one of the -- was it Justice Hurwitz
8 who said it was a do over. It was a do over of
9 direct review. There was nothing collateral
10 about it.

11 It was -- it was an error on direct
12 review, so we sent it back for a new direct
13 review.

14 MR. SKINNER: Two examples that come
15 to mind, Justice Ginsburg, of where a collateral
16 proceeding can resolve a constitutional
17 violation. Here, for example, to the extent
18 that the Ninth Circuit en banc engaged in
19 harmless error analysis as to the Eddings error,
20 we recognize that they did not hold it to be
21 harmless, but to the extent that they did that,
22 if they had reached the opposite conclusion,
23 that is a resolution, it's an identification of
24 a constitutional violation and a resolution of
25 that violation in an entirely collateral

1 proceeding.

2 Similarly, when there's appellate
3 ineffective assistance of counsel brought up in
4 a collateral proceeding, the second --

5 JUSTICE GINSBURG: I don't understand
6 how it's collateral when the Ninth Circuit said
7 you erred not in a collateral proceeding, you
8 erred in direct review, so do direct review
9 over.

10 MR. SKINNER: So they didn't say do
11 direct review over, but my point was that the
12 Ninth Circuit in engaging in harmless error
13 analysis is, itself, attempting to resolve a
14 constitutional violation in a collateral
15 proceeding.

16 The Ninth Circuit is sitting in
17 habeas. It's not a direct proceeding. They've
18 identified an error in the direct proceedings,
19 but they are demonstrating that in certain
20 circumstances this Court and other courts will
21 --

22 JUSTICE KAGAN: Well, just on the same
23 line, General, I mean, yes, it's a federal
24 habeas proceeding, but federal habeas courts
25 only have authority over state direct

1 proceedings. They don't have authority over
2 state collateral proceedings.

3 They were reviewing a state direct
4 appeal, and they said the sentencing was not
5 done right. You have to do the sentencing
6 again. So which sentencing are we talking
7 about? We're talking about the sentencing in
8 the state's direct appeal.

9 So whatever you call it, you know,
10 people have talked about formalism, whatever you
11 call it, you're redoing, aren't you, the state
12 direct appeal sentencing?

13 MR. SKINNER: So there's a couple of
14 responses to that. The first one I would point
15 out is to the extent that the Ninth Circuit
16 believed that a new direct proceeding had to be
17 engaged in, and the state instead engaged in a
18 more narrow -- which I will get to -- and
19 collateral proceeding, the answer wouldn't be
20 that that proceeding has now become direct for
21 purposes of retroactivity.

22 The answer would be, just as occurred
23 in the *Styers* case, for Petitioner to return to
24 the habeas court and say the conditional habeas
25 writ was not complied with. You asked them to

1 do X, and they only did Y, which is inadequate.
2 It doesn't change the nature of the proceeding
3 in the --

4 JUSTICE KAVANAUGH: The Ninth Circuit
5 allowed that, right?

6 MR. SKINNER: The Ninth Circuit
7 allowed that, exactly, in *Styers*. Petitioner in
8 *Styers* returned. The District of Arizona, the
9 Ninth Circuit both said this is a valid
10 correction. This is not something that we
11 believe contravenes the conditional writ. And
12 that was in 2011. And Arizona followed the
13 exact procedure here.

14 CHIEF JUSTICE ROBERTS: Well, you're
15 -- you've mentioned the language of the writ
16 several times. Under your approach, I suppose
17 that would be a focus of litigation, exactly
18 what the language of the writ was going to be?

19 MR. SKINNER: Indeed it was in *Styers*.
20 Petitioner returned to the District of Arizona
21 and said you said these words in your
22 conditional writ -- the exact words here, I
23 might add -- and that was inadequate to satisfy
24 the writ. And so I need to have an
25 unconditional writ granted.

1 And that is exactly -- if there is a
2 concern that the Ninth Circuit demanded --

3 JUSTICE KAVANAUGH: But just -- sorry
4 to interrupt. But to be clear, and then the --
5 that went to the Ninth Circuit, right?

6 MR. SKINNER: Correct, and it was
7 affirmed.

8 JUSTICE KAVANAUGH: And the Ninth
9 Circuit said that it was not a violation of the
10 conditional writ?

11 MR. SKINNER: Correct. Correct. So
12 that is -- that, again, just goes to if there is
13 a concern about correcting a direct -- an error
14 that occurred in the direct appeals process
15 through the collateral process, first the
16 existence of harmless error analysis for
17 questions like Eddings in the habeas court
18 acknowledges that there is some resolution and
19 ineffective assistance in the Strickland
20 prejudice prong. So that's --

21 JUSTICE SOTOMAYOR: Sorry, so are you
22 arguing that we should DIG this case, that we
23 granted cert when we shouldn't have, that they
24 should have done what they did in Styers and
25 gone back to the Ninth Circuit to find out if

1 there was a violation first and that we
2 shouldn't be deciding that ourselves?

3 MR. SKINNER: The Court certainly is
4 in a position to dismiss the case as
5 improvidently granted. I should note that by
6 granting cert here, the Court has jurisdiction
7 over post-collateral -- post-conviction
8 proceedings, but I do believe that that is an
9 inherent problem here.

10 Well, I think that is at a basis for
11 why this Court must accept the collateral -- the
12 holding by the Arizona courts that the
13 proceedings here were collateral. To the extent
14 that there is a concern that a collateral
15 proceeding is insufficient, that is not a
16 question that is properly before the court.

17 The Court can't use that to
18 second-guess the Arizona state court's
19 conclusion.

20 JUSTICE KAGAN: When you say that the
21 proceedings were collateral, and putting aside
22 the question of whether that gets you out of the
23 obligation to apply new rules of constitutional
24 law, is the labeling collateral, does that make
25 a difference in terms of what the State Supreme

1 Court actually does?

2 MR. SKINNER: It does, Your Honor.

3 The -- there are two chief categories of
4 differences. First, as to the aggravation and
5 mitigation analysis itself, the collateral
6 second independent review is very different.

7 In the first independent review, the
8 Arizona Supreme Court engages in a searching
9 analysis as to the basis of the aggravators and
10 the mitigators. That leads, for example, in the
11 *Styers* case, and in the consolidated opinion
12 here, for the *Hedlund* --

13 JUSTICE KAGAN: That may be -- I think
14 you're answering a question I didn't ask.

15 Assume that this had gone back to the state
16 appeals court on direct review. In other words,
17 it had gone up, the Ninth Circuit said that
18 there was a mistake, the appeals court says:
19 Okay, we have to correct our mistake.

20 Would it look any different if you
21 labeled it "direct" as opposed to "collateral"?

22 MR. SKINNER: I think -- I think I'm
23 trying to get at that, which is on direct, the
24 Court would look through and has in multiple
25 cases, in the *Styers* case, in the consolidated

1 opinion here, will reject an aggravator and will
2 go through and -- and make differences in terms
3 of what is the aggravation and mitigation coming
4 out of the trial court.

5 But on the second time around, it has
6 been very clear in *Styers* and in the *Hedlund*
7 opinion and here, there is no revisiting of the
8 aggravation and mitigation. And I will point
9 out that here --

10 JUSTICE KAGAN: I guess I'm -- I'm
11 asking you to do it the second time around both
12 ways. In other words, it's gone up. The Ninth
13 Circuit has said: It's in error. One way the
14 Ninth Circuit has said you have to reopen the
15 direct proceedings.

16 On that reopening, the direct
17 proceedings, after the finding of error, would
18 you go through the entire analysis all over
19 again or would you just make the correction in
20 the exact same way that you made it in the
21 collateral proceedings?

22 MR. SKINNER: I -- we don't have an
23 example of that. All I can tell you is that
24 when independent review is done in the context
25 of direct, there's a searching analysis,

1 aggravators will be rejected. And in the three
2 cases in which a collateral independent review
3 has been used, the court has been clear that
4 they will not revisit aggravators and
5 mitigators, even when they are challenged.

6 Here, Petitioner challenged the
7 existing aggravators, and the court said we're
8 not going there.

9 JUSTICE KAGAN: I guess the intent of
10 my question is to suggest that the -- the
11 correction -- the -- the analysis by which you
12 say, okay, we have to correct the error and now
13 that we correct the error, we have to decide
14 whether that does or does not mean that we need
15 to change the sentence, that you would -- you
16 just have to do that either way.

17 And the label is not what makes a
18 difference, that you're essentially redoing what
19 the direct -- what the state supreme court did
20 on direct with the error corrected.

21 MR. SKINNER: So I -- I'm trying to
22 get at the idea that in -- in a first direct
23 independent review, there is much more done --

24 JUSTICE KAGAN: I know.

25 MR. SKINNER: I -- I -- I --

1 JUSTICE KAGAN: But the question is
2 not the first one.

3 MR. SKINNER: Yeah.

4 JUSTICE KAGAN: The question is what
5 happens after the Ninth Circuit says go correct
6 the error. Okay? And if all you're doing in
7 this supposedly collateral review is correcting
8 the error as any other state supreme court would
9 do when they're told to go correct their mistake
10 on -- in -- in -- in the direct appeal, then the
11 fact that you label it collateral does not seem
12 to make all that much of a difference.

13 MR. SKINNER: If the court had -- if
14 the court were to engage in the type of specific
15 correction that occurred here and they said that
16 it was really indirect, it's possible they would
17 do that. I do think that, based on past
18 practice, if the Arizona Supreme Court believes
19 that they are engaging in a full, direct,
20 independent review as they would the first time
21 around, then they will do -- they will go in a
22 far more searching analysis. They will address
23 arguments that weren't even raised in the
24 Hedlund companion case, here in the consolidated
25 opinion, an aggravator was struck for not even

1 the reason that the Petitioner -- that that
2 defendant had identified.

3 It's possible that they could just go
4 back and say we're going to do a narrow
5 correction, but we're going to do it in the
6 direct context. We've never seen that. And I
7 -- I don't know that that's necessarily how they
8 would approach it. They would view it as
9 redoing from start to finish the independent
10 review with all of the steps --

11 JUSTICE KAVANAUGH: Could --

12 MR. SKINNER: -- including going to
13 the aggravators --

14 JUSTICE KAVANAUGH: -- could I ask, I
15 think, maybe the same question? But if this had
16 come up on -- to this -- this Court on direct,
17 we'd said what the Ninth Circuit said, Eddings
18 error, and sent it back to the Arizona Supreme
19 Court, would that remand proceeding at the
20 Arizona Supreme Court have looked different, I
21 think, from the collateral proceeding that
22 occurred here?

23 MR. SKINNER: I --

24 JUSTICE KAVANAUGH: I think that's
25 getting at the question as well.

1 MR. SKINNER: Yeah. And -- and this
2 -- this is a --

3 JUSTICE KAVANAUGH: Same answer?

4 MR. SKINNER: It's a hard one. I
5 think it's the same answer. I believe -- we
6 believe the State's position would be that that
7 would require a full-blown independent review of
8 all the steps --

9 JUSTICE KAGAN: But why -- why would
10 that be?

11 JUSTICE KAVANAUGH: Why?

12 JUSTICE KAGAN: I mean, usually, when
13 we say go correct your error, we just mean go
14 correct that error. We don't mean you have to
15 do everything else.

16 MR. SKINNER: I think it partly stems
17 from the idea that there would have never been a
18 -- it's possible that they would have done a
19 more narrow analysis, but just because of how
20 many steps Arizona has put in place as
21 safeguards in the death penalty context, an
22 independent review the first time around will
23 address issues not even raised.

24 If a defendant stands -- counsel
25 stands up and says there are no sentencing

1 issues, there will still be an analysis. I just
2 suspect that's what they would do because there
3 would have been no finality.

4 If it comes up on direct and this
5 Court finds an error and it goes back down, I
6 think they would have felt very much like there
7 was no finality that needed to be deferred to,
8 there was no aspect of the case that would have
9 -- would have counseled toward a more narrow
10 aspect of correcting the error. Here, when it
11 returned 20 years later, it's different.

12 JUSTICE BREYER: Still back at
13 Clemons, trying to figure this out. As I see
14 it, I'm imagining we have two scale pans, all
15 right? And over here in the A pan are a whole
16 bunch of aggravators, and over here in the B pan
17 are a whole bunch of mitigators.

18 And now does the law in Arizona
19 imagine that this weighing can take place in the
20 Supreme Court of Arizona, period. Okay?
21 Suppose that's the law. It's all fine. But
22 they make a mistake about the B pan. There's
23 some mistake which is found out later.

24 So it's sent back to them. And you
25 say, well, they can do the weighing anyway under

1 -- under Arizona law. That's it. They just
2 have to redo it. But wait, in the meantime, a
3 new constitutional principle has been announced.
4 And the new one is, when you see what's in the A
5 pan, that has to be found with a lawyer present.
6 You see what's in the B pan? A lawyer has to be
7 present.

8 And, lo and behold, this person had no
9 lawyer at sentencing. Wouldn't it be obvious in
10 that case that you can't do the weighing in the
11 Supreme Court of Arizona without sending it back
12 for a hearing where there's a lawyer?

13 MR. SKINNER: That --

14 JUSTICE BREYER: You see where I'm
15 going?

16 MR. SKINNER: I see where you're -- it
17 begins with the question of whether the new rule
18 that's announced applies. If -- we have not
19 disputed --

20 JUSTICE BREYER: The new rule that is
21 announced is that the A pan factors and the B
22 pan factors have to be found with a lawyer
23 present. All right?

24 I mean, a lawyer has to -- you
25 understand what I'm saying. Gideon v.

1 Wainwright, step 2 or something. I don't know.

2 MR. SKINNER: If Ring and Hurst apply
3 to this case, we do not dispute --

4 JUSTICE BREYER: All right. I know,
5 and now I'm saying --

6 MR. SKINNER: -- that we don't have
7 reasonable parameters --

8 JUSTICE BREYER: -- but why in heavens
9 name wouldn't they? I mean, of course, that's
10 going to be the next thing I'd ask. But -- but
11 if I take your view that they don't apply, it
12 sounds as if we'll -- I'm trying to make it as
13 basic as I can. Hey, you have to have a lawyer.
14 And, by the way, when you do that reweighing,
15 you're going to reweigh factors that were found
16 without a lawyer.

17 And I think it's obvious you couldn't
18 do that. And if it's obvious you couldn't do
19 that, Ring says about the same thing. And
20 Hurst. It doesn't say you have to have a lawyer
21 present, but it does say a jury has to find
22 those bits that are there in the A pan, and --
23 and -- you see that's -- that -- and I -- and I
24 want you to -- you don't want me to reason that
25 way, and so I want you to tell me why not.

1 MR. SKINNER: A critical component
2 here is the idea of what the Ninth Circuit
3 identified, what the Ninth Circuit asked Arizona
4 to do. Arizona followed from a conditional
5 habeas writ that did not require vacating the
6 sentence, that allowed the sentence to stand,
7 engaged in new proceedings exactly as were done
8 in *Styers* and were -- were found to be
9 acceptable by the federal courts at the District
10 of Arizona and the Ninth Circuit.

11 And, here, when the Arizona Supreme
12 Court says that the error correction process
13 we're engaging in is collateral in nature, the
14 Court here, federal courts don't get to
15 second-guess that. There may be consequences
16 from that.

17 JUSTICE BREYER: And that's still true
18 if it's *Gideon v. Wainwright*?

19 MR. SKINNER: There may be --

20 JUSTICE BREYER: Ahh, I see --

21 MR. SKINNER: There is an exception to
22 the --

23 JUSTICE BREYER: -- you're a little
24 pushed there.

25 MR. SKINNER: -- there's a -- there's

1 --

2 CHIEF JUSTICE ROBERTS: Well, I
3 suppose it depends on the underlying
4 determination whether those new rules are
5 retroactive or not.

6 JUSTICE BREYER: Yeah.

7 CHIEF JUSTICE ROBERTS: In the one
8 circumstance, you -- you would be evading the
9 rule against -- or the -- your friend would be
10 evading the rule against retroactivity, and in
11 the other situation, I assume the State would
12 not.

13 MR. SKINNER: Yeah, to the -- yes.
14 Going back to the Gideon versus Wainwright
15 example, there is an exception to the modern
16 retroactivity framework for certain rules that
17 may be so essential. And -- and setting that
18 aside, the-- there may be consequences from the
19 State of Arizona, the Arizona Supreme Court,
20 labeling the procedure as collateral.

21 JUSTICE BREYER: Yeah.

22 MR. SKINNER: It may be that that is
23 insufficient to satisfy the court that granted
24 the habeas writ.

25 JUSTICE BREYER: All right. So that's

1 why you say -- I think -- look, I'm -- I'm
2 getting this much better. I mean, I thought --
3 the Gideon v. Wainwright example I thought
4 distinguishes Clemons because Clemons, there was
5 no intervening rule that said the things in the
6 two pans had to be found in a certain way.

7 But there is here. But maybe this new
8 thing doesn't apply in collateral. I think
9 that's the --

10 MR. SKINNER: Well, 100 percent.

11 JUSTICE BREYER: So that's why you --

12 MR. SKINNER: Yeah. I mean --

13 JUSTICE BREYER: All right.

14 MR. SKINNER: Like going to Ring.
15 Ring is not retroactive. If we are -- if -- if
16 we are in a collateral proceeding, which we are,
17 then it doesn't apply. Just like it doesn't
18 apply in a 2255. There may be -- there may be
19 other issues that arise from us using a
20 collateral proceeding.

21 JUSTICE BREYER: Uh-huh.

22 MR. SKINNER: That -- any of those
23 issues are properly before other courts and
24 don't allow this Court to second-guess the
25 nature of Arizona's proceedings.

1 JUSTICE KAGAN: I guess --

2 JUSTICE KAVANAUGH: I think that --

3 JUSTICE KAGAN: -- General Skinner,
4 that the real question that Justice Breyer is
5 asking is, call it reopening, call it redoing,
6 call it whatever you want, but you're correcting
7 what happened on direct appeal, and we -- and --
8 and -- and you're doing that now. You have to
9 do it now.

10 And now we know that Ring would apply,
11 and it's -- it's a -- it's a little bit strange
12 to have a new proceeding where a rule that's
13 been around for 20 years is not being applied.

14 MR. SKINNER: I -- going back to the
15 harmless error, had the Ninth Circuit remanded
16 to the Arizona Supreme Court for harmless error
17 analysis, it is not obvious to me at all that
18 that would be an inadequate resolution of a
19 non-structural constitutional violation and that
20 you couldn't engage in a collateral harmless
21 error analysis and -- and thereby correct the
22 problem. It is -- again, this goes --

23 JUSTICE KAGAN: Well, possible, but
24 maybe the reason that you're going to the
25 harmless error case instead of your own case is

1 that, in your own case, the error had to do with
2 the fundamental question of sentencing, which is
3 weighing the aggravating and mitigating
4 circumstances and coming up with the right
5 sentence.

6 And that you're having to do again
7 because the initial inquiry had a constitutional
8 defect. And whether you say that you're doing
9 it in a collateral proceeding or you say that
10 you're doing it in a direct proceeding, I mean,
11 essentially you're -- you're having a new
12 proceeding to correct the constitutional error,
13 and you're having it in the year 2019, when Ring
14 would apply to any other new proceeding.

15 And the question is, why does your new
16 proceeding not also have to comply with Ring?

17 MR. SKINNER: It would apply to any
18 new proceeding that is part of a direct review
19 process. To the extent that there was a third,
20 fourth, fifth state post-conviction motion, to
21 the extent that there is a long pending -- as
22 this occurred here -- many years in the District
23 of Arizona and the Ninth Circuit, collateral
24 proceeding, Ring wouldn't apply to any
25 reanalysis or reexamination.

1 JUSTICE KAGAN: Yes, but it's a
2 reanalysis of an analysis that was done in the
3 direct proceeding. So it's a redo of the direct
4 proceeding. Whatever you want to call that,
5 it's a redo of the direct proceeding.

6 MR. SKINNER: I -- I -- the -- any --
7 the -- as this Court noted in Wall, any
8 collateral proceeding is going to invariably
9 entail a reexamination of something that
10 occurred in a direct proceeding.

11 JUSTICE KAVANAUGH: On the -- on the
12 harm -- keep going, I'm sorry.

13 MR. SKINNER: And so -- and then
14 crucially here, once -- our position is once a
15 case is final on direct review, as this was 23
16 years ago, the touchstone for how you would undo
17 that finality is to vacate the sentence.

18 The Ninth Circuit in the District of
19 Arizona knew exactly how to tell us that we had
20 to vacate the sentence --

21 JUSTICE KAVANAUGH: On -- on the
22 harmless error point, to pick up on Justice
23 Kagan's question, I think you were saying that
24 harmless error could have been done by the Ninth
25 Circuit on habeas, and so, too, a state habeas

1 court could do the harmless error analysis.

2 Is that correct so far?

3 MR. SKINNER: Yes.

4 JUSTICE KAVANAUGH: Okay. And then I
5 think Justice Kagan's point gets at the question
6 of what's -- is this different in essence on
7 some fundamental way from harmless error
8 analysis. I think your answer is no. And can
9 you -- if that's true, can you explain that?

10 MR. SKINNER: I think it is different
11 to the extent that we are providing additional
12 process to the defendant, and in -- in
13 particular, but I think as a matter of type. To
14 the extent that a harmless --

15 JUSTICE KAVANAUGH: It's very similar,
16 I think, is what you're arguing.

17 MR. SKINNER: Yes. As a type it is
18 very similar, but I would never say that what we
19 did was --

20 JUSTICE KAVANAUGH: In -- in Clemons,
21 they -- they are analyzed back to back.

22 MR. SKINNER: Yes. Both options were
23 left open by the court as available paths for
24 appellate correction of trial court error in
25 Clemons. And we believe --

1 JUSTICE GINSBURG: May --

2 JUSTICE SOTOMAYOR: I'm sorry, could

3 --

4 JUSTICE GINSBURG: May I ask you a
5 question about the -- the -- the error wasn't
6 saying we won't count this mitigator, because
7 there was no causal connection. And then the
8 Arizona Supreme Court says the causal connection
9 still counts. It doesn't mean you can't
10 consider the evidence. But it gets very little
11 weight because there's no causal connection.

12 They're not taking the causal
13 connection out of it. They're saying this
14 mitigator is affected by the absence of causal
15 -- causal connection is still playing a factor.

16 MR. SKINNER: Yes. And -- and this
17 goes to what Eddings does and doesn't require.
18 Eddings specifically says that minimal weight or
19 low weight can be given, that the court was not
20 saying how much weight needed to be given, but
21 that something must be considered.

22 And -- and that's -- and that we
23 believe is entirely satisfied by the second
24 independent review here.

25 There's no standalone new Eddings

1 error.

2 JUSTICE SOTOMAYOR: Could you -- you
3 resisted Justice Kavanaugh a little bit when he
4 was trying to equate the harmless error to this.
5 And I think you started to say this was
6 something more than harmless error review. Is
7 that correct?

8 MR. SKINNER: My argument was that it
9 was -- this is -- we believe this gives more
10 process than harmless error review, but that as
11 a type this is very similar to harmless error,
12 and to the extent that harmless error is an
13 available correction --

14 JUSTICE SOTOMAYOR: So what's the more
15 process?

16 MR. SKINNER: The --

17 JUSTICE SOTOMAYOR: What's your
18 definition of "more process"?

19 MR. SKINNER: The more process is not
20 analyzing, as a part of harmless error, not
21 analyzing what would an imaginary person have --
22 have done -- what would an imaginary set of
23 judges or a jury done if this evidence had been
24 considered but, instead, allow briefing and say
25 we're going to now look at the evidence and make

1 our determination.

2 JUSTICE SOTOMAYOR: And that's what
3 happened. So it was a whole -- how would it
4 have differed from the original appeal?

5 MR. SKINNER: In an original appeal --

6 JUSTICE SOTOMAYOR: In a direct --

7 MR. SKINNER: Yeah. In -- in
8 independent review on direct, there is two
9 significant categories of differences. The
10 first one that I didn't get to earlier is the
11 scope of the sentencing issues that will be
12 addressed in independent review.

13 In the initial independent review
14 here, the Petitioner challenged the nature of
15 the special verdict, that it was read instead of
16 written.

17 And the second independent review, the
18 Petitioner brought up a new standalone Eighth
19 Amendment claim. That second time around,
20 that's not revisited because the only analysis
21 goes to the narrow aggravation and mitigation
22 issue.

23 The aggravators are still accepted,
24 for example, for the co-defendant, the striking
25 of the existing aggravator before stays, and all

1 that's done is a --

2 JUSTICE SOTOMAYOR: How would the
3 process have differed for the issue that was
4 identified as an error?

5 MR. SKINNER: If you focus down all
6 the way on the consideration of the mitigation,
7 there is a consideration of the mitigation in
8 the same manner as the first time around, but
9 that's zooming in past all the rest of the
10 independent review and acknowledging that when
11 you get down, that means we fixed it.

12 We went back and looked at the thing
13 that was identified as a problem, conducted the
14 analysis without a causal nexus, and corrected
15 the identified problem that the Ninth Circuit
16 had said occurred in the Arizona Supreme Court.

17 It's an appellate court correcting an
18 appellate error on a built record. There has
19 never been an allegation of something that was
20 excluded from the record that might make this
21 case very different.

22 And this is, we think, a
23 straightforward application of Clemons and that
24 this entire case is driven by question presented
25 one.

1 And I would point out that Petitioner
2 has offered no grounding principle for what
3 would replace direct versus collateral as the
4 measure for retroactivity, if this Court were to
5 upend modern retroactivity.

6 He has cited the phrase "any time
7 something is again subject to modification," but
8 I don't think that's a fair statement of the
9 Court's opinion in Jiminez.

10 But, more importantly, it would turn
11 any 2255 proceeding, in which a sentence was
12 again at risk, could again be corrected or
13 vacated into a direct proceeding for
14 retroactivity purposes.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Five minutes, Mr. Katyal.

18 REBUTTAL ARGUMENT OF NEAL K. KATYAL
19 ON BEHALF OF THE PETITIONER

20 MR. KATYAL: Thank you. I would like
21 to begin with Clemons, which is, of course, is
22 only about question 2. It doesn't answer
23 question 1 for reasons Justice Sotomayor has
24 said. So four things about Clemons:

25 Number 1, it's a very limited

1 decision. It's a subtraction of one aggravating
2 factor. As I was saying to Justice Kavanaugh,
3 this is the opposite. This is everything
4 happened. The Ninth Circuit, this is at
5 Petition Appendix page 59A, required a
6 resentencing.

7 And then the state came in and asked
8 for a full-blown independent review, using that
9 phrase four times. That's at Joint Appendix
10 pages 385 to 89.

11 And that's exactly what the Arizona
12 Supreme Court did. My friend said, oh, it was a
13 limited proceeding, this and that. Absolutely
14 not. It was more extensive, actually, than the
15 1996 first independent review when they came
16 back in 2016 and did it.

17 They considered, for example, the
18 aggravators and weighed them, at Petition
19 Appendix pages 4A and 7A.

20 Now, Justice Kavanaugh, you asked me
21 about Justice Blackmun's dissent, which I had an
22 occasion to look at again just now. And Justice
23 Blackmun's dissent is about one thing, which is
24 the consideration of aggravating factors.

25 And he said that's something that

1 should be done by the trial court. And, you
2 know, whether he was right or wrong about that,
3 that was only about aggravating factors.

4 Our point to you in all of the
5 decisions are about the consideration at the
6 trial court of mitigating circumstances.

7 So, for example, Mills at page 375
8 says, "because the sentencers' failure to
9 consider all of the mitigating evidence risks
10 erroneous imposition of the death sentence, it's
11 our duty to remand for resentencing."

12 And there is case after case about
13 that. Why is an aggravating circumstance
14 different than a mitigating one? Because
15 mitigating ones go to mercy, in which this court
16 in Caldwell has said that's the thing in which
17 you need the jury to see, or -- or at least the
18 trial court, to see upfront and personal as
19 opposed to on a cold record.

20 And that's why we don't think, you
21 know, you should extend Clemons, particularly
22 given this Court's decisions in Ring and Hurst
23 and Haymond, all of which suggest that really
24 juries have a fundamental role here.

25 Now, with respect to question 1, our

1 point to you is that resentencing was required
2 by the Ninth Circuit. They got a full-blown
3 resentencing.

4 We're not challenging -- he has some
5 argument about a DIG. We're not -- it wasn't in
6 the briefs in opposition or below. We're not
7 challenging the Ninth Circuit's determination.
8 We're challenging the Arizona Supreme Court's
9 decision here to not comply with the law of this
10 Court, Eddings and Jiminez, which reopened the
11 conviction.

12 Now, if you accept their view, you're
13 going to basically license a state to slap the
14 label of collateral review on and allow them to
15 -- to conduct new sentencing proceedings that
16 will evade Batson, that will undermine
17 everything that Justice Harwin tried to do when
18 he tried to overrule -- when he overruled
19 Linkletter. And they will be able to pick cases
20 and say, oh, this time it won't be final. That
21 time it will. That's a very dangerous thing.

22 I agree there are difficult cases, and
23 my friend ended with this, so there will be some
24 difficult cases in the middle, but this is not
25 that. Eddings is the heart of what capital

1 sentencing is about.

2 And so, if you allow a reweighing for
3 the first time on an appellate court when
4 there's never been one in the trial court, you
5 are -- you know, you're basically doing
6 everything at that second stage. And that, I
7 think, is -- is profoundly -- profoundly against
8 what this Court's precedents are.

9 He's right to say Jimenez doesn't
10 directly control this case. That's not our
11 argument. Our argument is Jimenez states a
12 truism, that when a case is final, as it was in
13 1996 when the Court ruled, it can be reopened by
14 voluntary action by the state.

15 And, here, that action happened. The
16 state reopened and set the clock back to 1996,
17 and they -- you see when you look at and compare
18 side-by-side the 2016 -- 2018 opinion to the --
19 to the 1996 one, there's actually more extensive
20 analysis. It's the opposite of harmless error
21 review and the stuff he was talking about in --
22 in his remarks.

23 If there are any questions.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel. The case is submitted.

1 (Whereupon, 12:11 p.m., the case was
2 submitted.)
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