No. 18-1109

In the Supreme Court of the United States

JAMES ERIN MCKINNEY, PETITIONER,

v.

STATE OF ARIZONA, RESPONDENT.

ON WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION AND ACLU FOUNDATION OF ARIZONA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately two million members dedicated to the principles of liberty and equality embodied in the Constitution. Through litigation, legislation, and advocacy, the ACLU strives to ensure the constitutional administration of the death penalty and ultimately to seek

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of Court. Amici affirm that no counsel for any party authored this brief in whole or in part and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici, their members, or their counsel made a monetary contribution to its preparation or submission.

its abolition. The ACLU has participated as amicus curiae in previous capital cases before this Court, including in *Hurst v. Florida*, 136 S. Ct. 616 (2016).

The ACLU Foundation of Arizona, the state affiliate of the national ACLU, is a statewide nonpartisan, nonprofit organization of over 14,000 members throughout Arizona dedicated to protecting the constitutional rights of all. Among other things, the ACLU Foundation of Arizona engages in a statewide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of the accused. Accordingly, it has a strong interest in the proper resolution of this case.

Amici respectfully submit this brief to assist the Court in resolving whether the Arizona Supreme Court violated *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and Mr. McKinney's Sixth, Eighth, and Fourteenth Amendment rights when it independently affirmed Mr. McKinney's death sentence without remanding the case to the trial court for resentencing after the Ninth Circuit found constitutional error in the sentence under *Eddings*. In light of amici's strong interest in the protections contained in the Constitution—including the Sixth Amendment's guarantee to a jury trial and the Eighth Amendment's prohibition against cruel and unusual punishment—the proper resolution of this case is a matter of substantial importance to amici, their affiliates, and their members. As set forth below, when an *Eddings* error occurs, the Constitution requires a resentencing by the trier of fact that takes into account the full range of mitigating circumstances.

SUMMARY OF ARGUMENT

I. There is no dispute that the trier of fact who sentenced Mr. McKinney to death erroneously did not consider relevant mitigation evidence, in violation of *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Lockett v. Ohio*, 438 U.S. 586 (1978). The Arizona Supreme Court's decision to weigh the aggravating and mitigating evidence itself following the *Eddings* error, rather than remand the case to the trier of fact, violated Mr. McKinney's Eighth Amendment right to reliable capital sentencing. Only the trier of fact can ensure the non-arbitrary imposition of the death penalty, because only the trier of fact can consider fully the individualized mitigating factors that bear on whether to extend mercy or sentence to death. This is a subjective inquiry that cannot be replicated on a cold record. It is the trier of fact who confronts the defendant, sees the evidence and witnesses firsthand, and reflects the community's conscience. Research demonstrates that confronting an individual in person substantially affects decisionmakers' subjective exercise of mercy. Limiting the consideration of mitigating evidence in the first instance to a cold record unacceptably curtails the sentencer's consideration of a defendant's humanity.

Further, the Arizona Supreme Court's decision deprives Mr. McKinney of critical protective features of Arizona's capital-sentencing scheme. That scheme, as it currently exists, requires two constitutionally adequate sentencing decisions to impose the death penalty—first, by a unanimous jury, and second, by an appellate panel. By circumventing this process, the State deprived Mr. McKinney of the safeguards of jury unanimity, his right to allocution, and meaningful appellate review. At a minimum, denial of these core protections casts doubt on the reliability of Mr. McKinney's resulting death sentence.

To restore him to the position he would have occupied absent the *Eddings* error, he must be resentenced by the trier of fact, armed with a full picture of the mitigating circumstances in his favor.

II. Although this Court need not reach the question to resolve this case, the Sixth and Eighth Amendments require a jury, not a judge, to weigh the aggravating and mitigating circumstances at sentencing. Only a jury can ensure that death sentences are consistent with the moral views of the community and "evolving standards of decency," *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (internal quotation marks omitted), as the Eighth Amendment requires. And the logical outgrowth of this Court's Sixth Amendment decisions in *Apprendi*, *Ring*, and *Hurst* is that a jury—not a judge—must consider the mitigating factors in determining whether a defendant should be sentenced to death.

ARGUMENT

I. THE EIGHTH AMENDMENT REQUIRES RESENTENCING BY THE TRIER OF FACT AFTER AN *EDDINGS* ERROR

Mr. McKinney was sentenced to death by a judge who erroneously failed to consider significant mitigating evidence concerning Mr. McKinney's PTSD. After the Ninth Circuit Court of Appeals held that this violated *Eddings*, it sent the case back to the state courts for appropriate relief. Rather than remand the matter to the trial court for resentencing on a constitutionally complete record, the Arizona Supreme Court reweighed the aggravating and mitigating evidence itself on a cold record, and voted to sentence Mr. McKinney to death. That decision violates the Eighth Amendment because it subverts the

critical role of the trier of fact in ensuring the reliability of capital sentencing.

A. Eighth Amendment Reliability Necessarily Entails Full Consideration of Mitigation by the Trier of Fact

As this Court has repeatedly acknowledged, "the imposition of death by a public authority is [] profoundly different from all other penalties." *Lockett*, 438 U.S. at 605. For this reason, the Eighth Amendment's prohibition against cruel and unusual punishment imposes particularly rigorous limitations in the context of the death penalty. Because of the unique finality and severity of the death penalty, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). This Court has repeatedly "invalidated procedural rules that tended to diminish the reliability of the sentencing determination." *Beck v. Alabama*, 447 U.S. 625, 638 (1980).

In *Lockett*, the Court linked the Eighth Amendment reliability requirement to the rule that the sentencer must consider all relevant mitigating circumstances. The Court explained that a capital sentencer must be able to consider the "'character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death,' . . . in order to ensure . . . reliability" in the determination that "'death is the appropriate punishment in a specific case.'" *Lockett*, 438 U.S. at 601 (quoting *Woodson*, 428 U.S. at 304-05).

The Court accordingly held that "a statute that prevents the sentencer in all capital cases from giving

independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk" of execution "in spite of factors which may call for a less severe penalty." *Id.* at 605. Such a statute, the Court held, creates a "risk . . . unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Id.*

The Court reaffirmed that ruling in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), holding that "[j]ust 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." *Id.* at 113-14. In so holding, the Court characterized *Lockett* as "the product of a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." *Id.* at 110. As the Court explained, the rule in *Lockett* derived "from the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all." *Id.* at 112.

B. Only the Trier of Fact Can Produce Reliable Sentences in Capital Cases

By considering the improperly excluded mitigating evidence in Mr. McKinney's case for the first time on a cold appellate record, and precluding him from appearing before a trier of fact for resentencing on a constitutionally complete record, the Arizona Supreme Court violated the Eighth Amendment. Only the trier of fact considering all the mitigating evidence can produce the reliable sentence required in capital cases.

The trier of fact has myriad advantages over the appellate court in carrying out the constitutional mandate to consider all relevant mitigation. The limited nature of appellate review necessarily means that the appellate court cannot possess "'the fullest information possible concerning the defendant's life and characteristics.'" *Lockett*, 438 U.S. at 603 (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)).

1. a. First, the trier of fact's opportunity to confront the defendant in person renders it uniquely capable of undertaking the subjective decision of whether mercy is appropriate in a given case. The Eighth Amendment "require[s] that the sentencer be permitted to focus 'on the characteristics of the person who committed the crime.'" *Eddings*, 455 U.S. at 112 (quoting *Gregg*, 428 U.S. at 197). This rule "recognizes that 'justice . . . requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender.'" *Id.* (quoting *Pennsylvania v. Ashe*, 302 U.S. 51, 55 (1937)).

Weighing individualized factors reflecting on personal character is an inherently subjective inquiry involving consideration of mercy—an inquiry that requires that a sentencer "confront and examine the individuality of the defendant." *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985). Only the trier of fact actually *confronts* the defendant; thus, only the trier of fact can carry out this constitutionally indispensable aspect of imposing the death penalty. The appellate court, in stark contrast, operates at a distance, limited to the cold appellate record. It never directly confronts the individual who may be sentenced to die.

In *Caldwell*, this Court thus explained that an appellate court is "wholly ill-suited" to determine whether

mercy is appropriate in a particular case. *Id.* The Court held that the appellate court's "inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of . . . '[those] compassionate or mitigating factors stemming from the diverse frailties of humankind.'" *Id.* (quoting *Woodson*, 428 U.S. at 304); *see also id.* ("Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record."). As discussed *infra*, Part I.C, the appellate court's proper role is distinct: to police death sentences on appellate review and thereby serve as "an essential safeguard against the arbitrary and capricious imposition of death sentences by individual juries and judges." *Pulley v. Harris*, 465 U.S. 37, 59 (1984) (Stevens, J., concurring in judgment).

There can be little doubt that seeing a criminal defendant in person may affect the evaluation of mitigating circumstances. "Whether mitigation exists . . . is largely a judgment call (or perhaps a value call)," and "the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy." *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016). The Arizona Supreme Court similarly characterizes the capital-sentencing determination required by its state law as an "inherently subjective" inquiry. *State v. Bible*, 858 P.2d 1152, 1211 (Ariz. 1993) (en banc). The inquiry the jury undertakes is not a mechanical balancing, comparison, or weighing of aggravating versus mitigating factors. *See State v. Carlson*, 351 P.3d 1079, 1094 n.6 (Ariz. 2015). "[W]hether mitigation is sufficiently substantial to warrant leniency," the Arizona Supreme Court instructs, "is a sentencing decision to be made by each juror based upon the juror's assessment of the quality and significance of the mitigating evidence that the juror has found to exist."

State ex rel. Thomas v. Granville, 123 P.3d 662, 667 (Ariz. 2005) (en banc).

b. The common-law right of allocution, which underlies Federal Rule of Criminal Procedure 32(i)(4) and state analogues, confirms the powerful connection between the exercise of discretionary sentencing authority and the sentencer's confrontation of the defendant. The Federal Rule requires that "[b]efore imposing sentence, the court *must . . . address the defendant personally* in order to permit the defendant to speak or present any information to mitigate the sentence." Fed. R. Crim. P. 32(i)(4)(A)(ii) (emphasis added). Arizona also recognizes the right of allocution and codifies it in the context of capital sentencing, giving a capital defendant the right to allocute before the sentencing jury. *See* Ariz. R. Crim. P. 19.1(e).

This Court discussed the common-law roots of the defendant's right to address the court in *Green v. United States*, 365 U.S. 301 (1961).[2] "As early as 1689, it was recognized that the court's failure to ask the defendant if he had anything to say before sentence was imposed required reversal." *Id.* at 304. And, as a historical matter, where the sentence to be imposed could be death, the defendant's right to address the sentencer was at its apex. *See* Kimberly A. Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 Fordham L. Rev. 2641, 2645 (2007) ("At common law, allocution was a right given largely to persons convicted of capital felonies."). In *Green*, the Court explained that, notwithstanding "changes that have evolved in criminal procedure since the seventeenth century," the "reasons for the right . . .

[2] *Green* involved former Rule 32(a), which codified the right of allocution before the 1987 amendments and was substantially similar in pertinent part to the present rule.

remain." 365 U.S. at 304. As the Court recognized, only the defendant himself can fully convey his own humanity. *See id.* ("The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.").

To be sure, this Court has "reserved the issue whether silencing a defendant who wishe[s] to speak would rise to th[e] level" of constitutional error, *McGautha v. California*, 402 U.S. 183, 218 n.22 (1971), *vacated sub nom. Crampton v. Ohio*, 408 U.S. 941 (1972), and the Court need not reach that question here. But the historical protection of this right at a minimum confirms the commonsense proposition that the physical connection between the trier of fact and the criminal defendant affects the trier of fact's exercise of mercy.

c. Social science research shows that confronting individuals in person, rather than remotely, substantially affects decisionmakers' subjective exercise of mercy. Face-to-face interaction "provides individuals with a full array of verbal and nonverbal cues that create social presence and visceral immersion in the interaction, supply important social and contextual information, [and] permit nuanced and coordinated interaction." Judee K. Burgoon, et al., *Testing the Interactivity Principle: Effects of Mediation, Propinquity, and Verbal and Nonverbal Modalities in Interpersonal Interaction*, 52 J. Commc'ns 657, 658 (2002). As such, "[p]hysical proximity promotes psychological closeness, and physical distance conveys psychological distance." *Id.* at 662. "[S]heer proximity between two people . . . creates a sense of mutuality, of connection, common ground, and shared understandings that . . . promote higher levels of credibility, trust, and influence." *Id.* (internal citations omitted).

Whether a decisionmaking body views individuals in person has a significant effect on the outcomes of legal proceedings. A study of initial bail hearings for felony cases in Cook County, Illinois contrasting outcomes before and after the implementation of videoconferenced proceedings is instructive. *See* Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. Crim. L. & Criminology 869 (2010). The study showed that videoconferenced bail proceedings "significantly disadvantaged" defendants: average bond amounts rose substantially immediately after implementation of videoconferencing, by an average of 51% for cases that used videoconferencing. *Id.* at 891-900. The study authors attributed the change to a number of factors, including "aspects of live presence that affect the believability of an individual." *Id.* at 900; *see also* Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 Geo. Immigr. L.J. 259 (2008) (examining over 500,000 asylum cases and finding that use of video teleconference in asylum removal hearings roughly doubled to a statistically significant degree the likelihood that an applicant would be denied asylum).

Other studies have shown that the trier of fact's perceptions of a defendant's demeanor during trial strongly influence outcomes in capital cases in particular. In one study, interviews with Florida jurors from ten capital murder cases established that 32% of the jurors interviewed in the death recommendation cases "mentioned demeanor of the defendant as a contributing factor in the sentence recommendation." William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 Am. J. Crim. L. 1, 8-9, 51 (1988).

A study of jurors from 37 California capital-sentencing proceedings examined how jurors rely on a defendant's degree of remorse when choosing between sentences of death and life without parole. *See* Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L. Rev. 1557, 1558-59 (1998). The authors found that "[a]bove all else, . . . the defendant's demeanor and behavior during the actual trial shaped the jurors' perceptions of the defendant's remorse." *Id.* at 1561-62. The jurors' perceptions of demeanor affected their capital sentence decisionmaking: demeanor perceived as "disturbingly inconsistent with what they considered would be a typical human reaction to having committed such a horrible crime" led jurors to believe that the defendant lacked remorse. *Id.* at 1565-66. "In turn, jurors often then relied upon the defendant's remorselessness as a primary reason for imposing the death sentence." *Id.* at 1566. The reverse was also true: jurors reported "that they likely would have voted for a life sentence instead of death had the defendant expressed remorse." *Id.*; *see also* Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 Cornell L. Rev. 1599, 1600 (1998) (finding—based on interviews of over 150 capital jurors in South Carolina—that "[t]he defendant's demeanor during trial . . . influences jurors' beliefs about remorse").

Thus, resentencing before a trier of fact who can observe the defendant's demeanor in determining whether to exercise mercy is critical to a full and fair consideration of whether to take Mr. McKinney's life or spare him. Under the Eighth Amendment, the sentencer cannot give proffered mitigation the fullest consideration possible when reviewing it on a cold record where such observations are impossible.

2. The trier of fact has a second advantage that renders it essential to returning reliable sentences in capital cases—it sees the witnesses and hears their testimony and other evidence firsthand. As a general matter, "[t]he trial is the main event at which a defendant's rights are to be determined." *Davila v. Davis*, 137 S. Ct. 2058, 2066 (2017) (internal quotation marks omitted). It is "not simply a tryout on the road to appellate review." *Id.* (internal quotation marks omitted).

The trier of fact, viewing live testimony, is better able to assess the credibility of witnesses and evaluate the evidence than appellate judges reading cold records. This is because demeanor is "wordless language." *Broadcast Music v. Havana Madrid Rest. Corp.*, 175 F.2d 77, 80 (2d Cir. 1949) (internal quotation marks omitted). As the Second Circuit has explained,

> [t]he liar's story may seem uncontradicted to one who merely reads it, yet it may be contradicted in the trial court by his manner, his intonations, his grimaces, his features, and the like- all matters which cold print does not preserve and which constitute lost evidence so far as an upper court is concerned.

Id. (internal quotation marks omitted). For this reason, this Court has recognized the importance of a trier of fact, rather than an appellate court, in considering mitigating evidence. When this Court "held that a defendant has a constitutional right to the consideration of [mitigating factors in *Eddings* and *Lockett*], [it] clearly envisioned that that consideration would occur among sentencers who were present to hear the evidence and arguments and see the witnesses." *Caldwell*, 472 U.S. at 330-31. That holding, occasioned by improper comments by the prosecutor

urging the jury to believe that the appellate court had ultimate responsibility for determining the appropriateness of a death sentence, should extend *a fortiori* to Mr. McKinney's case, where the appellate court itself usurped the role of the trier of fact.

Arizona courts likewise recognize this comparative advantage of the trier of fact. In *Bible*, the Arizona Supreme Court concluded that, in capital cases where the appellate court determines on direct review that the aggravating and mitigating evidence must be reweighed, remand to the trial court "is the better rule." 858 P.2d at 1211.[3] The court gave numerous justifications for its conclusion, including the "many valuable intangibles accompanying live testimony," and the trial court's firsthand experience of all the evidence:

> Other than the defendant and the attorneys, the trial judge—the one individual who received every single exhibit and heard every word uttered in court—is by far a better tool of justice to determine the appropriate sentence.

Id. at 1211-12. An appellate court, it explained, was not in a position to reweigh accurately the aggravating and mitigating factors based only on a cold record:

> On appeal, in many cases it is simply impossible to determine how the trial judge—who heard the evidence and saw the witnesses—evaluated and weighed that evidence and testimony. Without

[3] The Arizona Supreme Court did not acknowledge *Bible* in holding that it need not remand to the trier of fact following a conditional grant of habeas relief from the federal courts. *See State v. Styers*, 254 P.3d 1132, 1133-34 (Ariz. 2011) (en banc).

> these imperative determinations, the aggravating and mitigating factors cannot be balanced.

Id. at 1211.

3. A third reason the trier of fact must consider proffered mitigation in the first instance is to ensure that death sentences reflect the conscience of the community. Capital sentences are constitutionally legitimate only if the sentencer "maintain[s] a link between contemporary community values and the penal system." *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968). Without this link, "the determination of punishment would hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

The jury is best situated to maintain this link: "The jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved." *Gregg*, 428 U.S. at 181; *see also infra* Part II. But even a trial judge has a comparative advantage over an appellate court in this respect, as the judge sees criminal defendants and other litigants in person day in and day out. A trial judge has greater interaction with and exposure to criminal defendants and sentencing matters. The trial court thus is better able to express the conscience of the community than is a panel of appellate judges who see only a fraction of those cases, and only on a paper record.

The trier of fact's role as the conscience of the community is particularly crucial when it comes to weighing mitigating evidence. While aggravating factors serve the purpose of narrowing the class of death-eligible defendants, mitigating factors ensure that the "'sentence imposed . . . reflect[s] a reasoned *moral* response to the defendant's background, character, and crime.'" *Penry v.*

Lynaugh, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). That value-laden judgment must reflect contemporary standards of decency, which the trier of fact can best apply. As the Fifth Circuit aptly stated in rejecting a State's invitation to "apply harmless error in cases where the jury has been precluded from giving effect to a defendant's mitigating evidence," "[t]he entire premise of the *Penry* line of cases rests on the possibility that the jury's reasoned moral response might have been different . . . had it been able to fully consider and give effect to the defendant's mitigating evidence." *Nelson v. Quarterman*, 472 F.3d 287, 314, 315 (5th Cir. 2006) (en banc). The appellate court cannot replicate this moral assessment of the trier of fact. *See id.* at 315 ("[I]t would be wholly inappropriate for an appellate court, in effect, to substitute its own moral judgment for the jury's in these cases.").

For this reason, it is imperative that Mr. McKinney receive a resentencing proceeding in the trial court. His case has narrowed to the issue whether particular mitigating evidence warrants mercy. The key issue arising out of the Ninth Circuit's decision is whether the mitigating evidence of Mr. McKinney's PTSD renders a death sentence inappropriate. *See McKinney v. Ryan*, 813 F.3d 798, 823-24 (9th Cir. 2015) (en banc). The Ninth Circuit found his previous sentence unconstitutional because both the sentencing judge and the Arizona Supreme Court had refused to consider the mitigating effects of his history of trauma when imposing the death penalty. *Id.* at 808-10, 823-24. The Ninth Circuit held that the "evidence of PTSD resulting from sustained, severe childhood abuse would have had a substantial impact on a capital sentencer who was permitted to evaluate and give appropriate weight to it as a nonstatutory mitigating factor." *Id.* at

823. This is exactly the type of moral judgment as to which triers of fact have maximal advantage over appellate judges. Only the trier of fact can make the moral judgment regarding whether Mr. McKinney's PTSD, considered in conjunction with all other mitigating features of his character and conduct, warrants mercy in a manner that accurately reflects contemporary values.

C. The Arizona Supreme Court's Decision Further Deprives Mr. McKinney of Critical Procedural Safeguards of Arizona Law That Ensure the Reliability of Capital Sentences

The necessity for resentencing by the trier of fact is reinforced by the fact that appellate resentencing short-circuits the capital-sentencing process and denies Mr. McKinney key procedural safeguards of the Arizona capital scheme afforded to other capital defendants.

Following *Furman v. Georgia*, 408 U.S. 238 (1972), a number of States rewrote their capital-sentencing laws to address the concern of the *Furman* plurality that the death penalty was imposed in an arbitrary and capricious manner. Arizona was no exception. *See Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 Harv. L. Rev. 1690 (1974) (analyzing, among other statutes, Ariz. Rev. Stat. Ann. § 13-454 (Supp. 1973), enacted in response to *Furman*). The safeguards the Arizona legislature set out in its new capital-sentencing law were meant to address the arbitrariness and reliability problems recognized in *Furman*. *See State v. Richmond*, 560 P.2d 41, 50 (Ariz. 1976) (en banc) (reviewing Arizona's newly enacted death penalty statute and upholding its constitutionality post-*Furman*), *cert. denied sub nom.*, *Richmond v. Arizona*, 433 U.S. 915 (1977), *abrogated on other grounds by State v. Salazar*, 844 P.2d 566 (Ariz. 1992).

In assessing the constitutionality of Arizona's newly enacted capital-sentencing scheme, the Arizona Supreme Court explained that critical features of Arizona's new system—namely, the trier of fact's consideration of aggravating and mitigating circumstances and the availability of appellate review of the death sentence—"insure[] that the sentencing authority is given adequate information and guidance" to meet the concerns expressed in *Furman*. *Id.* at 49-51.

By resolving in the first instance whether Mr. McKinney's PTSD diagnosis and other mitigating circumstances were sufficiently substantial to warrant leniency, the Arizona Supreme Court deprived Mr. McKinney of important protective features of Arizona's capital-sentencing scheme. Denial of these safeguards at a minimum raises a question as to whether the resulting system, taken as a whole, produces an unacceptable risk of unreliable, arbitrary death sentences in violation of the Eighth Amendment. *See Pulley*, 465 U.S. at 45 (explaining that, when examining the constitutionality of a state's death penalty scheme, this Court "take[s] statutes as [it] find[s] them"); *Gregg*, 428 U.S. at 195 (under *Furman*, "each distinct [capital-sentencing] system must be examined on an individual basis"). To avoid confronting that question, the Court should hold that only the trier of fact can rectify the *Eddings* error in Mr. McKinney's case.

1. The decision below deprived Mr. McKinney of the critical safeguard of jury unanimity to impose a death verdict. Amici agree with Mr. McKinney that, under current Arizona law, a jury would conduct resentencing at the trial level. Pet'r Br. 39 n.9. Only a unanimous jury can impose a death sentence in Arizona. Ariz. Rev. Stat. Ann. § 13-752(H). If the jury is unable to reach a unanimous

verdict in favor of either death or life, the court must dismiss the jury and impanel a new jury. *Id.* § 13-752(K). If the new jury likewise cannot reach a unanimous verdict, the court must impose a life sentence on the defendant. *Id.*

Mr. McKinney never had the opportunity of a unanimous sentencing verdict based on all the mitigating evidence in his case. An appellate court's consideration of mitigation in the first instance deprives him of that safeguard, and permits him to be sentenced to death by a mere majority vote, without ever being so sentenced by a unanimous jury armed with all the evidence.

The Arizona capital-sentencing scheme does not require jurors to agree unanimously on which mitigating circumstance has been established. *Id.* § 13-751(C). Instead, in determining the appropriate penalty, each juror may consider any mitigating circumstance that he or she individually has found to exist. *Id.* As the Arizona Supreme Court has explained, a juror "*must* vote against death if he or she individually determines there are any mitigating circumstances sufficiently substantial to warrant leniency." *State v. Tucker*, 160 P.3d 177, 197 (Ariz. 2007) (en banc) (emphasis added).

As Justice Kennedy has observed, "[j]ury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." *McKoy v. North Carolina*, 494 U.S. 433, 452 (1990) (Kennedy, J., concurring in judgment). This Court has "long been of the view that '[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves.'" *Jones v. United States*, 527 U.S. 373, 382 (1999) (quoting

Allen v. United States, 164 U.S. 492, 501 (1896)). Requiring unanimity in order to impose a capital sentence encourages jurors to engage in meaningful debate and deliberation, empowering those jurors with a minority view to participate openly and fully in the process.

The protective nature of the jury unanimity requirement has tangible effects in Arizona. In the past nearly ten years, Arizona juries have produced approximately ten life verdicts. An even greater number of juries have hung, prompting a second penalty phase. And in that latter circumstance, Arizona prosecutors often have withdrawn requests for death sentences following the first hung jury, resulting in life sentences. In other words, there are many cases in which prosecutors have failed to convince all twelve jurors to impose the death penalty.

Unlike the statutory procedures that govern the jury's role in imposing a capital sentence, there is no requirement that the Arizona Supreme Court's decision affirming a capital sentence be unanimous. *See* Ariz. Rev. Stat. Ann. § 13-755. In other words, under Arizona law, the Arizona Supreme Court conducting a new, independent review of a death sentence invalidated due to a constitutional error may affirm the original death sentence by mere majority vote.

The prospect of divided decisions affirming death sentences infected by *Eddings* error is not a hypothetical concern. In addition to the decision below, the Arizona Supreme Court recently reviewed two additional death sentences that the Ninth Circuit deemed unconstitutional under *Eddings*: *State v. Hedlund*, 431 P.3d 181 (Ariz. 2018),[4] and *State v. Styers*, 254 P.3d 1132 (Ariz. 2011) (en banc). In both cases, the court affirmed the defendant's

[4] *Hedlund* involves Mr. McKinney's half-brother and co-defendant.

death sentence without a remand. *Hedlund*, 431 P.3d at 191; *Styers*, 254 P.3d at 1136. In both cases, however, one member of the court dissented from the decision. *Hedlund*, 431 P.3d at 192-98; *Styers*, 254 P.3d at 1136-37.

Hedlund is instructive. In that case, the Arizona Supreme Court considered whether the mitigating evidence that both the trier of fact and the appellate court had failed to consider before—including Hedlund's "extremely abusive childhood, resulting alcohol abuse, [post-traumatic stress disorder], and brain damage"—was substantial enough to call for leniency when considered against the aggravating circumstance of pecuniary gain. 431 P.3d at 185. A majority concluded that the evidence was insufficient to warrant leniency and affirmed Hedlund's death sentence. *Id.* at 190-91. One member of the court dissented, concluding that the substantial mitigating evidence, namely Hedlund's "horrific" history of childhood abuse and neglect, outweighed the aggravating evidence and thus warranted reduction of Hedlund's death sentence to life imprisonment. *Id.* at 192-98.

Had that judge been a juror, and had Hedlund been afforded the jury sentencing that every other Arizona capital defendant receives under current law, his vote for a life sentence would have precluded the death penalty or at least resulted in a second penalty phase before a new jury. Because the Arizona Supreme Court weighed the mitigating and aggravating evidence itself in the first instance, however, his vote resulted only in a dissenting opinion and Mr. Hedlund was resentenced to death. Absent a remand for resentencing, the key safeguard of jury unanimity would fall away in cases where the sentencer did not consider all mitigating evidence because of an *Eddings* error.

2. The decision below also deprived Mr. McKinney of his right of allocution. As discussed above, *see* p. 9, *supra*, Arizona has codified a capital defendant's right to present statements of allocution to the jury before imposition of a death sentence. *See* Ariz. R. Crim. P. 19.1(e).

By failing to remand this case to the trier of fact, the Arizona Supreme Court deprived Mr. McKinney of the opportunity to plead for his life to the trier of fact that heard and considered all of the mitigating evidence in his case. Absent the *Eddings* error, for example, Mr. McKinney could have urged the original trier of fact to grant him leniency in light of his PTSD diagnosis.

3. The decision below further deprived Mr. McKinney of his state-law right to two constitutionally adequate sentencing decisions—the first by the initial trier of fact and the second by the appellate court.

When assessing the constitutional adequacy of a State's capital-sentencing system, this Court has identified appellate review as an important safeguard against the arbitrary imposition of the death penalty. In a trio of cases that this Court decided the same day in 1976, Justices Stewart, Powell, and Stevens identified appellate review as "a check against the random or arbitrary imposition of the death penalty." *Gregg*, 428 U.S. at 206; *see also Jurek v. Texas*, 428 U.S. 262, 276 (1976) (reasoning that "[b]y providing prompt judicial review of the jury's decision . . . , Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law"); *Proffitt v. Florida*, 428 U.S. 242, 250-53 (1976) (procedures provided by Florida's death penalty scheme—including "automatic review by the Supreme Court of Florida of all cases in which a death sentence has been imposed"—"satisf[y] the constitutional deficiencies identified in *Furman*").

In *Pulley*, this Court examined the foregoing opinions and concluded that their references to appellate review were focused "only on the provision of some sort of prompt and automatic appellate review" as a key safeguard in each state's death penalty scheme. *Pulley*, 465 U.S. at 49. Concurring in part, Justice Stevens expressed the view that "in each of the statutory schemes approved in our prior cases . . . . , meaningful appellate review is an indispensable component of the Court's determination that the State's capital sentencing procedure is valid." *Id.* at 59. Accordingly, he explained, "some form of meaningful appellate review is an essential safeguard against the arbitrary and capricious imposition of death sentences by individual juries and judges." *Id.* at 59.

The Arizona capital-sentencing scheme provides appellate review. Under Arizona law as it applies to Mr. McKinney, the Arizona Supreme Court must undertake an "independent" review of the trial court's findings of aggravation and mitigation and the propriety of the death sentence imposed by the trier of fact. Ariz. Rev. Stat. Ann. § 13-755(A).[5] The purpose of this independent review, as the Arizona Supreme Court has explained, is to "ensure that Arizona's capital sentencing scheme 'genuinely narrow[s] the class of persons eligible for the death

[5] In 2002, the Arizona legislature ended independent appellate review of death penalty verdicts for murders committed after August 1, 2002. *State v. Martinez*, 189 P.3d 348, 361 (Ariz. 2008). For murders committed after that date, the Arizona Supreme Court reviews the jury's decision for abuse of discretion in finding aggravating circumstances and imposing a sentence of death. *See* Ariz. Rev. Stat. Ann. § 13-756. Section 13-755 continues to apply for murders, as here, that were committed before August 1, 2002. *State v. Prince*, 250 P.3d 1145, 1168 (Ariz. 2011).

penalty.'" *State v. Wood*, 881 P.2d 1158, 1174 (Ariz. 1994) (quoting *Arave v. Creech*, 507 U.S. 463, 474 (1993)).

To achieve its stated goal, the Arizona Supreme Court's independent review necessarily entails a *second* look at a death sentence, subsequent to that of the initial trier of fact. Before the codification of the current capital-sentencing scheme, the Arizona Supreme Court understood its role to be additive, explaining:

> [T]he Arizona procedure . . . resembles a trial on the issue of life or death *followed by* the utilization of this court's appellate process to make a conscientious review on a statewide basis in order to assure rationality and "evenhanded operation" in the imposition of the death penalty. This review is conducted in order to determine whether the death penalty, when imposed by the trial court, should be reduced to life.

State v. Rumsey, 665 P.2d 48, 55-56 (Ariz. 1983) (emphasis added).

Since adoption of the applicable statutory capital-sentencing scheme, the Arizona Supreme Court continues to characterize its review as separate from and subsequent to the trial court's assessment in the first instance. *E.g.*, *State v. Roseberry*, 353 P.3d 847, 850 (Ariz. 2015) (commenting that "independent review serves as a constitutional means to cure sentencing errors" by the trier of fact); *State v. Grell*, 291 P.3d 350, 352 (Ariz. 2013) (en banc) ("In our independent review, we do not defer to the jury's findings or decisions or necessarily afford evidence the same weight it received at trial.").

The decision below deprives Mr. McKinney of the first step in Arizona's two-step capital-sentencing process. No trier of fact considered his PTSD diagnosis when deciding

whether the mitigating circumstances of his case merited leniency. Instead, the appellate court considered that evidence, not in the exercise of appellate review, but in the first instance, without the benefit of the trier of fact's findings or decision. Mr. McKinney was thereby denied an opportunity to have his death sentence considered twice, as Arizona law requires for all other capital defendants.

By concluding that an *Eddings* error can be corrected through appellate reweighing of aggravating and mitigating evidence, the Arizona Supreme Court deprived Mr. McKinney of several critical safeguards available to similarly situated capital defendants under Arizona law. Perversely, under the decision below, a capital defendant whose death sentence is infected by *Eddings* error receives *fewer* procedural protections than other capital defendants. These omissions, taken together, at a minimum raise the question whether the resulting system—stripped of those protections—can produce reliable death sentencing as required by the Eighth Amendment.

II. THE SIXTH AND EIGHTH AMENDMENTS REQUIRE A JURY TO IMPOSE A DEATH SENTENCE IN ORDER TO ENSURE HEIGHTENED RELIABILITY AND SUBJECTIVE, INDIVIDUALIZED COMMUNITY JUDGMENT IN DEATH SENTENCING DECISIONS

While it is sufficient to resolve this case to hold that resentencing must be conducted by the trier of fact, the Sixth and Eighth Amendments, properly construed, require that a *jury*, not a *judge*, assess all mitigating circumstances and make the initial determination whether a defendant shall be sentenced to death. Reliance on juries for life-or-death decisions also is essential to the fairness and reliability of capital sentencing required by the Eighth Amendment.

A. Juries Are the Best Safeguard Against Arbitrary and Capricious Imposition of the Death Penalty and the Most Accurate Barometer of Evolving Standards of Decency

Juries, as established in our constitutional tradition, are best able to protect defendants from the potential abuse of state authority in capital sentencing. Since the founding, juries have been viewed as an indispensable defense against oppression by powerful executives and the judges they appoint. As this Court has explained:

> The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge.

Taylor v. Louisiana, 419 U.S. 522, 530 (1975); *see also Batson v. Kentucky*, 476 U.S. 79, 86 (1986) ("The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge.").

Only a jury can ensure that death sentences are consistent with the moral views of the community and evolving standards of decency, as the Eighth Amendment requires. Juries are "more attuned to the community's moral sensibility, because they reflect more accurately the composition and experiences of the community as a whole." *Ring v. Arizona*, 536 U.S. 584, 615 (2002) (Breyer, J., concurring in judgment) (internal quotation marks omitted).

Juries facilitate a sense of community participation in capital-sentencing decisions. The jury's role in reflecting

the moral views of the community is particularly acute given the diversity of opinions regarding the appropriateness of the death penalty under different circumstances. *See id.* at 616-19 (cataloging various bases for contemporary opposition to the death penalty). The diversity of views regarding the death penalty "argues strongly for procedures that will help assure that, in a particular case, the community indeed believes application of the death penalty is appropriate." *Id.* at 618. "Community participation in the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system." *Taylor*, 419 U.S. at 530.

B. The Sixth Amendment Protects the Jury's Historical Role in Capital Sentencing and Requires That Juries Weigh the Mitigating and Aggravating Circumstances

1. Entrusting life-or-death decisions to juries is consistent with long-standing historical practice. From the beginning of our nation's history, the jury's role as the sentencer in capital cases "was unquestioned." *Walton v. Arizona*, 497 U.S. 639, 711 (1990) (Stevens, J., dissenting) (internal quotation marks omitted). In that era, unitary criminal proceedings in which juries adjudicated "[t]he question of guilt and the question of death" with a single verdict were the norm. John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 Colum. L. Rev. 1967, 1972, 1986 (2005). In cases where the death penalty was mandatory, juries engaged in nullification when they deemed a death sentence disproportionate to the offense—a practice both common and respected throughout history. *See Woodson*, 428 U.S. at 293 ("At least since the Revolution, American jurors have, with some regularity, disregarded their oaths and

refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict.").

Thus, since the founding, the jury was the essential arbiter in capital cases, and it retained this authority for much of our Nation's history. Leading up to this Court's decision in *Furman*, there was "near-universal reliance on jury sentencing in capital cases." Douglass, *supra*, at 1983; *see also id.* at 1983 n.94 ("By 1948, only three states allowed judges to impose a death sentence that was not recommended by a jury." (citing *Andres v. United States*, 333 U.S. 740, 758 (1948))).

2. This Court relied on this history when it affirmed the jury's central fact-finding role in *Apprendi*. There, the Court held that the Sixth Amendment does not permit a defendant to be "expose[d] . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Apprendi v. New Jersey*, 530 U.S. 466, 483 (2000). In reaching this conclusion, the Court cited the historical role of the jury at the founding, reasoning that "practice must at least adhere to the basic principles undergirding" the protections afforded by the Sixth Amendment. *Id.* In particular, the Court noted that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." *Id.* at 478.

This Court again invoked this historical understanding when it invalidated Arizona's then-existing capital sentencing scheme in *Ring*. 536 U.S. at 609. In derogation of the jury's role, that scheme required a trial court to determine the existence of at least one statutorily enumerated aggravating circumstance and to determine that no mitigating circumstances called for leniency before the

death penalty could be imposed. *Ring* held that the Sixth Amendment entitles capital defendants to *jury* determination of any fact-finding that renders them eligible for the death penalty, stating that "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished . . . [if it did not encompass] the fact-finding necessary to put [a defendant] to death." *Id.*

This Court recently affirmed *Apprendi* and *Ring* in *Hurst v. Florida*, 136 S. Ct. 616 (2016), when it invalidated Florida's death penalty sentencing scheme, which treated a jury's capital sentencing decision as merely advisory and required a court to find the existence of an aggravating circumstance. This Court held that "[t]he Sixth Amendment requires a jury, not a judge, to find *each fact* necessary to impose a sentence of death." *Id.* at 619 (emphasis added).

3. The logical outgrowth of these cases is that a jury—not a judge—must consider the mitigating factors in capital cases to determine whether defendants should be sentenced to death. In Arizona, for example, a death sentence is predicated on a finding "that there are no mitigating circumstances sufficiently substantial to call for leniency." Ariz. Rev. Stat. Ann. § 13-751(E). Whether a given mitigating circumstance is "sufficiently substantial to call for leniency" is a necessary finding before the death penalty may be imposed. The principles animating *Apprendi*, *Ring*, and *Hurst* require that a jury make this finding. *See Rauf v. State*, 145 A.3d 430, 434 (Del. 2016) (holding that the Sixth Amendment requires a jury, not a sentencing judge, find that aggravating circumstances outweigh mitigating circumstances before imposing the death penalty); *see also Woodward v. Alabama*, 134 S. Ct. 405, 410-11 (2013) (Sotomayor, J., dissenting from denial of certiorari).

Permitting an appellate court to weigh the aggravating and mitigating factors in the first instance unconstitutionally deprives defendants of their Sixth Amendment right to have a jury serve as the initial arbiter in capital cases. As Justice Scalia warned in his concurring opinion in *Ring*, "[w]e cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it." 536 U.S. at 612 (Scalia, J. concurring).

In sum, the Sixth and Eighth Amendments require that, upon invalidation of a death sentence due to an *Eddings* error, resentencing must be conducted by a jury.

CONCLUSION

The judgment of the Arizona Supreme Court should be reversed.

Respectfully submitted,

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