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Andrea Johnson

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## WHO SHOULD DECIDE?: WHY ARIZONA COURTS SHOULD REEVALUATE THEIR REWEIGHING PROCEDURES

ANDREA JOHNSON

### INTRODUCTION

Does the judge have to consider all relevant mitigating circumstances during a death sentencing proceeding? What happens if the judge does not consider all relevant mitigating circumstances against the aggravating circumstances presented? Judges can quickly and easily identify the aggravating circumstances surrounding a defendant during a death penalty proceeding. However, some judges find it difficult to decide the relevancy of mitigating evidence presented by the defendant. This problem raises an issue as to whether the death penalty sentencing is an appropriate decision for the judge to make or a necessary decision for the jury.

An en banc panel of the U.S. Court of Appeals for the Ninth Circuit determined that the Arizona courts failed to consider the defendant's mental illness in *McKinney v. Arizona*, which should have been used as mitigating evidence.<sup>1</sup> The Arizona Court's precedents explained that "a defendant convicted of murder is eligible for a death sentence if at least one aggravating circumstance is found."<sup>2</sup> So, when relevant mitigating evidence is found but not considered, the state appellate courts must reweigh the mitigating circumstances against the aggravating circumstances to determine the death penalty proceeding.<sup>3</sup> The judge is in charge of reweighing the evidence because it is on collateral review, and a jury is not required.<sup>4</sup>

This case note will focus on *McKinney v. Arizona* and how the Arizona Supreme Court utilized Arizona law and other case law to rule on the reweighing procedures of aggravating and mitigating circumstances regarding death penalty cases. This note will then evaluate the holding in *Eddings v. Oklahoma* to build the foundation on what the state courts are required to consider when weighing the aggravating and mitigating evidence presented. Next, this note will discuss *Clemons v. Mississippi* to determine what is ap-

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<sup>1</sup> *McKinney v. Arizona*, 140 S. Ct. 702, 706 (2020).

<sup>2</sup> *Id.* at 705-06 (citing *Tuilaepa v. California*, 512 U.S. 967 (1994); *Zant v. Stephens*, 462 U.S. 862 (1983); *Gregg v. Georgia*, 428 U.S. 153 (1976)) (requiring the finding of at least one aggravating circumstance to impose the death penalty).

<sup>3</sup> *Id.* at 707 (citing *Clemons v. Mississippi*, 494 U.S. 738, 741 (1990)).

<sup>4</sup> *Id.* at 708-09.

propriate when there is an *Eddings* error. In addition, this note will examine *Ring v. Arizona* and *Hurst v. Florida* to establish who must make the final determination in a criminal proceeding. Finally, this note will address the issues presented by the *McKinney* decision and the utilization of the existing Arizona law.

#### THE CASE

In *McKinney*, the defendant, James McKinney (McKinney), was convicted of two counts of first-degree murder by an Arizona jury in 1992.<sup>5</sup> McKinney and his half-brother, Charles Hedlund (Hedlund), were involved in five burglaries in the Phoenix, Arizona area.<sup>6</sup> During one of the burglaries, after being beaten and stabbed by McKinney and Hedlund, McKinney fatally shot Christine Mertens in the back of the head.<sup>7</sup> In a separate burglary, Jim McClain was shot in the back of the head with a sawed-off rifle by McKinney and Hedlund.<sup>8</sup> The trial judge found that aggravated circumstances existed when the murders were for “pecuniary gain” and “especially”<sup>9</sup> after finding aggravated circumstances in both murders and weighing the aggravating and mitigating circumstances, the trial judge sentenced McKinney to death for both murders.<sup>10</sup> In 1996, the judgment was affirmed on appeal by the Arizona Supreme Court.<sup>11</sup>

On federal habeas corpus review in the sentencing of McKinney, roughly 20 years later, U.S. Court of Appeals for the Ninth Circuit later decided by a six to five vote that the Arizona courts “failed to properly consider McKinney’s posttraumatic stress disorder (PTSD).”<sup>12</sup> This failure contradicted the decision made in *Eddings*, where it was “held that a capital sentencer may not refuse as a matter of law to consider relevant mitigating evidence.”<sup>13</sup>

As a result of the review, the *McKinney* case was returned to the Arizona Supreme Court. This Court looks at Clemons’s decision to create “a permissible remedy for an *Eddings* error.”<sup>14</sup> In *Clemons*, “the Court stated that

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<sup>5</sup> *Id.* at 705.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* heinous, cruel, or depraved manner.”

<sup>9</sup> *Id.* at 706.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982)).

<sup>14</sup> *Id.* at 707 (citing *Clemons v. Mississippi*, 494 U.S. 738, 741 (1990)).

“the Federal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence. . . .”<sup>15</sup> The *Clemons* reweighing does not constitute a resentencing and “may be conducted by an appellate court.”<sup>16</sup> Thus, there is no requirement for a jury to conduct the reweighing because it is not a sentencing proceeding.<sup>17</sup>

Furthermore, it is established that a state court may conduct a *Clemons* reweighing on collateral review when an *Eddings* error is found on collateral review.<sup>18</sup> Therefore, as a matter of Arizona state law, the *Clemons* reweighing proceeding in McKinney’s case was permissibly conducted on collateral review by the Arizona Supreme Court.<sup>19</sup> Thus, the United States Supreme Court held that the Arizona Supreme Court could independently reweigh aggravating and mitigating circumstances in a collateral proceeding in order to affirm McKinney’s death sentence.<sup>20</sup>

The dissenting opinion focused on the type of review that was being conducted when the Arizona courts revisited the initial direct review proceeding of the *McKinney* case.<sup>21</sup> The dissent stated that the “renewal of a direct review cannot sensibly be characterized as anything other than direct review.”<sup>22</sup> Furthermore, the dissent indicated that an “independent review is the paradigm of direct review.”<sup>23</sup> The dissent also establishes that a direct review is the primary way for the defendant to challenge his conviction.<sup>24</sup> Therefore, the *Clemons* reweighing in *McKinney* should have been on direct review, requiring the Sixth Amendment right to a jury trial for this case.<sup>25</sup>

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<sup>15</sup> *Id.* at 706 (citing *Clemons*, 494 U.S. at 741).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 708 (citing *Clemons*, 494 U.S. at 744-55).

<sup>18</sup> *Id.* at 709.

<sup>19</sup> *Id.* at 708.

<sup>20</sup> *Id.* (citing *State v. Styers*, 227 Ariz. 186 (2011)).

<sup>21</sup> *Id.* at 709 (Ginsburg, J., dissenting).

<sup>22</sup> *Id.* at 711.

<sup>23</sup> *Id.* at 712 (citing *Styers*, 227 Ariz. at 191) (Hurwitz, J., dissenting) (explaining the concept of a direct review for a death sentence).

<sup>24</sup> *Id.* at 711 (citing *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993)).

<sup>25</sup> *Id.* at 709 (citing *Hurst v. Florida*, 136 S. Ct. 616, 619 (2000)).

## BACKGROUND

Prior to *McKinney v. Arizona*, several cases set the foundation to discuss the issue of reweighing relevant aggravating and mitigating circumstances in a death sentence conviction and the type of review that must be conducted. The *McKinney* Court's precedents stated that "a defendant convicted of murder is eligible for a death sentence if at least one aggravating circumstance is found."<sup>26</sup> Under the Sixth Amendment, "a jury, not a judge, [is required] to find each fact necessary to impose a sentence of death."<sup>27</sup>

In *Eddings v. Oklahoma*, the U.S. Supreme Court explained that evidence of aggravating circumstances must be considered and weighed against all relevant mitigating evidence by the state courts.<sup>28</sup> Therefore, the Court remanded the case for further proceedings for the state court to weigh the evidence and reversed the case in part "to the extent that it sustains the imposition of the death penalty."<sup>29</sup>

At the trial court level, the judge, as a matter of law, stated that he was unable to consider the mitigating evidence of Monty Lee Eddings' (Eddings) family history, which referred to his "violent background."<sup>30</sup> In addition, the judge did not consider youth as a relevant mitigating factor, which is determined by looking at the "time and condition of life when [this defendant is] most susceptible to influence and to psychological damage."<sup>31</sup> Based on these factors and the evidence provided by Eddings, the judge could conclude that he was not the average 16-year-old.<sup>32</sup> On appeal, the Oklahoma Court of Criminal Appeals found that the mitigating evidence of Eddings' "personality disorder" and his family history was irrelevant because it would only consider mitigating evidence that would "tend to support a legal excuse from criminal liability."<sup>33</sup>

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<sup>26</sup> *Id.* at 705-06 (majority opinion) (citing *Tuilaepa v. California*, 512 U.S. 967 (1994); *Zant v. Stephens*, 462 U.S. 862 (1983); *Gregg v. Georgia*, 428 U.S. 153 (1976)).

<sup>27</sup> *Id.* at 709 (Ginsburg, J., dissenting) (citing *Hurst*, 136 S.Ct. at 619).

<sup>28</sup> *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982) (requiring courts to review all relevant mitigating and aggravating circumstances).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 113.

<sup>31</sup> *Id.* at 115.

<sup>32</sup> *Id.* at 116.

<sup>33</sup> *Id.* at 113.

In *Eddings*, the U.S. Supreme Court found no dispute regarding relevant mitigating evidence presented on Eddings' personality and background.<sup>34</sup> Eddings had a difficult childhood with a turbulent family history and an abusive relationship with his father, which led to his emotional disturbance.<sup>35</sup> Thus, this Court determined that it is the state courts' responsibility to reweigh the aggravating and mitigating evidence presented, including the relevant mitigating evidence that Eddings previously presented.<sup>36</sup>

Since it is the "routine task of appellate courts" to evaluate the validity of the evidence presented, the *Clemons*' court explained that an appellate weighing of aggravating and mitigating circumstances would conduct a "measured consistent application" of the death penalty.<sup>37</sup> Thus, "when errors have occurred in a capital sentencing proceeding," this Court holds that the reweighing procedures of the state appellate courts are "constitutionally permissible."<sup>38</sup>

In *Clemons*, the defendant was convicted of capital murder, and the State argued that the defendant committed the murder for "pecuniary gain" and that it was an "especially heinous, atrocious or cruel" murder.<sup>39</sup> Based on the findings that the factors presented outweighed the mitigating evidence, the jury sentenced the defendant to death.<sup>40</sup> This was after the jury was instructed that there was no requirement to impose the death sentence regardless of the lack of mitigating circumstances.<sup>41</sup>

On appeal, the judgment was affirmed by the Mississippi Supreme Court because there was an established procedure in Mississippi that indicated that the death penalty verdict would be supported when any valid aggravating circumstance is present.<sup>42</sup> In addition, although the vagueness issue of the "especially heinous" aggravating factor was not raised, this Court reinforced their previously held determination, stating that this factor was a "constitutional limiting construction, narrowing the category to murders."<sup>43</sup>

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 115.

<sup>36</sup> *Id.* at 117.

<sup>37</sup> *Clemons v. Mississippi*, 494 U.S. 738, 748-49 (1990) (reweighing procedure for aggravating and mitigating circumstances to determine whether the death sentence should be imposed).

<sup>38</sup> *Id.* at 754.

<sup>39</sup> *Id.* at 742.

<sup>40</sup> *Id.* at 743.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* (citing *Maynard v. Cartwright*, 486 U.S. 356 (1988)) (noting that the "especially heinous atrocious, or cruel" aggravating factor was not constitutionally valid

Therefore, when errors occur by not considering all relevant evidence, the *Clemons* reweighing procedures are an acceptable remedy.<sup>44</sup>

Under Arizona law, the judge is authorized to sentence a defendant to death only if there are no sufficiently mitigating circumstances that would result in leniency and at least one aggravating circumstance present.<sup>45</sup> However, in *Ring*, the U.S. Supreme Court stated that it was a violation of the Sixth Amendment to allow the “sentencing judge...to find an aggravating circumstance necessary for imposition of the death penalty” without a jury.<sup>46</sup> In *Ring*, the trial judge also found the presence of similar aggravated factors presented in *Eddings* and *Clemons*, with the “pecuniary value” being one of the reasons for the murder as well as the murder being committed in an “especially heinous, cruel or depraved manner.”<sup>47</sup> The mitigating factor found by the judge in this case was that the defendant has a minimal criminal record.<sup>48</sup> However, weighing the circumstances, the judge determined that the mitigating circumstance was not enough to prevent the defendant’s death sentence.<sup>49</sup> The Arizona Supreme Court affirmed the death sentence.<sup>50</sup>

The U.S. Supreme Court reversed the Arizona Supreme Court’s decision because the factors were not evaluated and determined by a jury but by a judge alone.<sup>51</sup> This Court determined that, regardless of whether the fact-finding is “necessary to increase the defendant’s sentence” or to impose the death penalty on the defendant, the right to a jury trial should be guaranteed.<sup>52</sup> Thus, the Sixth Amendment requires the finding of “Arizona’s enumerated aggravating factors” to be conducted by a jury.<sup>53</sup>

There was a direct application of *Ring* in the *Hurst* case.<sup>54</sup> In *Hurst*, the defendant was convicted of first-degree murder by a jury and sentenced to

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because it was too vague and provided no “sufficient guidance” for the jury to determine whether the death penalty should be imposed).

<sup>44</sup> McKinney v. Arizona, 140 S. Ct. 702, 707 (2020).

<sup>45</sup> Ring v. Arizona, 536 U.S. 584, 593 (2002) (citing Ariz. Rev. Stat. Ann. § 13-703(F)) (determining that the requirement of the Sixth Amendment right to a jury trial in criminal proceedings).

<sup>46</sup> *Id.* at 609.

<sup>47</sup> *Id.* at 594-95.

<sup>48</sup> *Id.* at 595.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 596.

<sup>51</sup> *Id.* at 609.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Hurst v. Florida, 136 S. Ct. 616, 622 (2016) (citing Ring v. Arizona, 536 U.S.

death by a judge.<sup>55</sup> After the Florida Supreme Court vacated the death sentence and remanded the case, the “sentencing judge conducted a new hearing” at the resentencing.<sup>56</sup> During the new hearing, the defendant presented mitigating evidence which showed that “he was not a ‘major participant’ in the murder because he was at home when it happened.”<sup>57</sup> This Court determined that a jury is required “to find every fact necessary to render [a defendant] eligible for the death penalty.”<sup>58</sup> As a result, the sentencing judge instructed the jury to find “at least one aggravating circumstance beyond a reasonable doubt” to recommend the death penalty.<sup>59</sup> Subsequently, the judge sentenced the defendant to death after receiving the recommendation of death from the jury by a seven to five vote.<sup>60</sup>

Upon the review by the U.S. Supreme Court, the *Hurst* sentencing was deemed unconstitutional because a jury recommendation on how the court should rule is not enough.<sup>61</sup> In fact, it is a violation of the Sixth Amendment.<sup>62</sup> A jury must be used to find the necessary facts to impose, not recommend, the death sentence.<sup>63</sup>

*Ring* and *Hurst* maintain that “a jury must find the aggravating circumstance that makes the defendant death eligible.”<sup>64</sup> However, *Ring* and *Hurst* only apply to cases under direct review, not cases on state collateral review.<sup>65</sup> The Arizona Supreme Court explained that conducting the reweighing of aggravating and mitigating evidence was “an independent review in a collateral proceeding.”<sup>66</sup> So, as a matter of Arizona state law, *Ring* and *Hurst* cannot be utilized in the *McKinney* reweighing proceedings because it occurred on collateral review.<sup>67</sup>

However, a *Clemons* reweighing can be conducted by the Arizona state court on collateral review when an *Eddings* error is discovered on collateral

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584 (2002)) (identifying the necessity of a jury trial).

<sup>55</sup> *Id.* at 619.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 622.

<sup>59</sup> *Id.* at 620.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 619.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *McKinney v. Arizona*, 140 S. Ct. 702, 707 (2020) (citing *Ring v. Arizona*, 536 U.S. 584, 589 (2002); *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016)).

<sup>65</sup> *Id.* at 708.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*



review.<sup>68</sup> *Clemons* explained that a jury is not required for an appellate reweighing because it is not a sentencing proceeding.<sup>69</sup> Thus, “the Arizona Supreme Court permissibly conducted a *Clemons* reweighing on collateral review” by a judge, without a jury.<sup>70</sup>

#### ANALYSIS

Although the Arizona law was appropriately applied in *McKinney*, the law itself needs some adjustments. *Ring* identified that it is a constitutional right for a person to have a jury trial in capital prosecution under the Sixth Amendment.<sup>71</sup> However, *Ring* only applies to a direct review.<sup>72</sup> So, for the Arizona Supreme Court to establish that reweighing aggravating and mitigating circumstances only occurs on collateral review, it prevents the defendants from receiving the opportunity to have a jury trial.<sup>73</sup> This places the defendant’s sentence and future in the hands of one person, the judge.

A *Clemons* reweighing should be a sentencing proceeding that occurs on direct review for the jury trial to be an option for the defendant. After the *McKinney* case “became final on direct review in 1996,” it was revisited because it was established that the Arizona courts failed to recognize and consider a relevant mitigating circumstance.<sup>74</sup> Therefore, the *McKinney* dissent was correct when it found that this proceeding was conducted on direct review.<sup>75</sup> Thus, the revisiting of the case should simply constitute a reopening of a direct review.<sup>76</sup> Although the court upheld their decision after conducting the reweighing, there is no way to know that the judge made an unbiased decision that actually included the newly identified mitigating evidence. Therefore, it is crucial for a jury to be a part of the reweighing process. The lower courts already decided not to consider the mitigating evidence; therefore, it would be problematic for the judge to be in charge of reevaluating a decision he already made final.

Thus, Arizona needs to change its existing law, which states that a *Clemons* reweighing proceeding occurs on collateral review because it does

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<sup>68</sup> *Id.* at 709.

<sup>69</sup> *Id.* at 708.

<sup>70</sup> *Id.* at 709.

<sup>71</sup> *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

<sup>72</sup> *See McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020).

<sup>73</sup> *See id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 711 (Ginsburg, J., dissenting).

<sup>76</sup> *See id.* at 709 (majority opinion).

not.<sup>77</sup> The appellate reweighing is a sentencing proceeding that is on independent direct review and requires a jury.<sup>78</sup> Therefore, a jury instructed by the judge to reweigh the mitigating evidence against the aggravating evidence presented to determine the defendant's sentence will allow for a constitutionally appropriate review.<sup>79</sup> This change will give the defendant a more significant opportunity of a fair review when their death penalty sentence is being decided.

#### CONCLUSION

Even though the *McKinney* court correctly decided the case based on the existing Arizona law, this law must be changed. The *McKinney* decision indicated that reweighing the aggravating and mitigating evidence was on collateral review, making it the judge's sole responsibility to determine the death sentence of the defendant.<sup>80</sup> However, this is not true. After the U.S. Court of Appeals for the Ninth Circuit established that the Arizona courts failed to consider McKinney's initial mitigating evidence, the court should have viewed this as a reopening of a direct review.<sup>81</sup> The direct review will allow a jury, not a judge, to be the factfinders who will impose the death penalty if they find at least one aggravating circumstance.<sup>82</sup> Therefore, when reweighing circumstances in capital proceedings, the Sixth Amendment right to a jury trial must be applied.<sup>83</sup>

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<sup>77</sup> *See id.* at 708.

<sup>78</sup> *Id.*

<sup>79</sup> *See id.* at 707-09.

<sup>80</sup> *See id.* at 708-09.

<sup>81</sup> *See id.* at 706.

<sup>82</sup> *Id.* at 709 (Ginsburg, J., dissenting) (citing *Hurst*, 136 S. Ct. at 619).

<sup>83</sup> *Id.*