No. 09-99018

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CAPITAL CASE

JAMES E. MCKINNEY

Petitioner – Appellant,

vs.

DORA SCHRIRO, Director,
Arizona Department of Corrections, and
ROBERT STEWART, Warden,
Arizona State Prison – Eyman Complex

Respondent – Appellees,

On Appeal from the United States District Court
District of Arizona, No. 2:03-CV-00774-DGC

PETITION FOR REHEARING OR *EN BANC* REVIEW
Wardlaw, Smith, Bea, CJJ

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Date Mailed: September 30, 2013

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that *en banc* review is necessary as the majority opinion in this case as (1) It conflicts with the *Eddings v. Oklahoma*, 455 U.S. 104 (1983), *Tennard v. Dretke*, 542 U.S. 274, 283-87 (2004), *Lockett v. Ohio*, 438 U.S. 586, 604-06 (1978), *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) *Eddings/Lockett* (line of cases); and (2) it conflicts with other decisions of this Court. *En Banc* review is needed to secure and maintain unification of the court's decisions.

The majority decision overlooks the recent case of *Henry v. Ryan*, No. CV-12-198-TUC-JGZ-DTF (D. Ariz. Apr. 18, 2013) and its holdings as to the defendant's *Eddings/Lockett* claims.

The majority decision also conflicts with prior cases of the Ninth Circuit. *See, Styers v. Schriro*, 547 F.3d 1026 (9th Cir. 2008) and *Williams v. Ryan*, 623 F.3d 1258 (9th Cir. 2010).

This is a death penalty case and involves questions of extreme importance. The majority opinion conflicts with the decisions of the U.S. Supreme Court, other appellate courts, and there is a need for national uniformity. *Parker v. Matthews,* 567 U.S. ___, 32 S.Ct. 2148 (2012). The death penalty cases cannot be administered in an arbitrary and capricious fashion. *Parker v. Dugger*, 498 U.S. 308 (1991). When a state supreme court applies law contrary to the law of the Supreme Court, the sentencing scheme is "fatally flawed." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 127 S. Ct. 1654 (2007). *See, also, Parker v. Dugger*, 498 U.S. at _____. The cases of *Styers*, *Williams*, *Poyson v. Ryan*, 711 F.3d

1087 (9th Cir. 2013) and *Henry*, show the application of a multitude of different standards which, in this case and others, adds impermissible judicial gloss to create circuit precedence which precludes relief from an unconstitutional sentence. *See, Poyson v. Ryan,* 711 F.3d 1087 (9th Cir. 2013). *The* holding of the Ninth Circuit also conflicts with the holdings of another circuit. *Nelson v. Quarterman*, 472 F.3d 287 (2006) (*en banc*) (A sentencing scheme due to structural error is not harmless error).

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STATEMENT OF THE CASE

This is a death penalty case and involves questions of extreme importance. I express a belief, based on reasoned and studied professional judgment, that *en banc* review is necessary as the majority opinion in this case: (1) conflicts with the *Eddings v. Oklahoma*, 455 U.S. 104 (1983,) *Tennard v. Dretke*, 542 U.S. 274, 283-87 (2004,) *Lockett v. Ohio*, 438 U.S. 586, 604-06 (1978,) *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) the *Eddings/Lockett* line of cases; and (2) conflicts with other decisions of this Court. *En Banc* review is needed to secure and maintain unification of the court's decisions.

The majority decision overlooks the recent case of *Henry v. Ryan*, __ F.3d __ (9th Cir. June 19, 2013) (Slip Op. at pp. 26 and 27) and its holding as to the defendant's *Eddings/Lockett* claims.

The majority decision also conflicts with prior cases of the Ninth Circuit. *See, Styers v. Schriro*, 547 F.3d 1026 (9th Cir. 2008) and *Williams v. Ryan*, 623 F.3d 1258 (9th Cir. 2010.) The majority decision also conflicts with the holdings of another circuit. *Nelson v. Quarterman*, 472 F.3d 287, 314 (5th Cir. 2006) (*en banc*) (A sentencing scheme due to structural error is not harmless error.)

The majority opinion conflict with the decisions of the U.S. Supreme Court and other appellate courts, emphasizes the need for national uniformity in evaluating death penalty case claims and consequences. *Parker v. Matthews,* 567 U.S. ___, 132 S.Ct. 2148 (2012.) Death penalty cases cannot be administered in an arbitrary and capricious fashion. *Parker v. Dugger*, 498 U.S. 308, 313 (1991.) When a state supreme court applies law contrary to the law of the Supreme Court,

the sentencing scheme is "fatally flawed." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 127 S. Ct. 1654, 1675 (2007.) *See, also, Parker v. Dugger*, 498 U.S. at 323. The cases of *Styers*, *Williams*, *Poyson v. Ryan*, 711 F.3d 1087 (9th Cir. 2013) and *Henry*, show the application of a multitude of standards which, in this case and others, add impermissible judicial gloss to create circuit precedence which precludes relief from an unconstitutional sentence. *See, Poyson v. Ryan,* 711 F.3d 1087, 1104-07 (9th Cir. 2013.) (dissenting opinion of Judge Thomas.)

STATEMENT OF THE CASE

The *McKinney* majority opinion conflicts with Circuit precedent published before the December 2012 oral argument. *See, Lopez v. Ryan*, 630 F.3d 1198, 1204 (9th Cir. 2011); *Williams v. Ryan*, 623 F.3d 1258, 1271 (9th Cir. 2010;) *Styers v. Schriro*, 547 F.3d 1026, 1035 (9th Cir. 2008.) (unconstitutional causal nexus not presumed when record is silent.) The *McKinney* majority opinion also conflicts with Circuit precedent published after the oral argument. *See, Henry v. Ryan*, __ F.3d __ (9th Cir. June 19, 2013.) (Slip Op. No. 09-99007, at pp. 26 and 27.)

STATEMENT OF FACTS

McKinney had a horrific childhood. McKinney grew up in extreme poverty, living in filth, suffering constant physical and emotional abuse. (Slip Op. at pp. 20 and 37.) McKinney consistently arrived at school covered in welts and bruises. *Id.* McKinney repeatedly ran away, and arrived at homes of relatives and friends with signs of being beaten. *Id.*

The sentencing judge did not consider PTSD evidence to mitigate McKinney's sentence and unconstitutionally excluded the copious evidence of McKinney's deficits in violation of the *Eddings/Lockett* line of cases. The sentence and the Appellate review were contrary to the laws of the Supreme Court. The sentence and the Appellate review reveal an unreasonable application of the law to the facts. *See,* dissent of Judge Wardlaw. (Slip Op. at pp. 40-50.) the Arizona courts applied an unreasonable factual determination in addressing the

presentation and consideration of mitigation evidence. (Slip Op. at pp. 45 and 52 dissenting opinion of Judge Wardlaw.)

IMPORTANCE OF MITIGATION EVIDENCE

Mitigation evidence serves two purposes. It can serve as an explanation to show diminished capacity warranting leniency. *Henry v. Ryan*, __ F.3d __ (9th Cir. June 19, 2013.) (Slip Op. at pp. 26 and 27.) In addition, it can independently place the Petitioner's excruciating life history on the mitigating side of the scale so a sentencer can strike a balance or a moral response for a sentence other than death. *Id.* at 27; *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003.) (Habeas Petition granted as there was a "reasonable probability" that sentencer would have struck a different balance if sentencer had been allowed to consider and give a moral response to a life of abuse.) The Supreme Court has held: *Indeed, the right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration*. (Emphasis in original, citations omitted.) *Abdul-Kabir*, 127 S.Ct. at 1667.

DECISIONS PRIOR TO ORAL ARGUMENT

In *Styers v. Schriro*, this Court held that the defendant is entitled to a new resentencing when the state applied a causal nexus test. *Styers v. Schriro*, 547 F.3d at 1035-1036. *Styers* is indistinguishable from the *McKinney* case. Whether or not

the state incorrectly applied the nexus test is determined by the last state decision. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005.) In this case, the last state court decision was *State v. McKinney,* 185 Ariz. 567, 576, 917 P.2d, 1211-1214, 1223 (1996.) It is inconsistent with the Ninth Circuit case of *Jones v. Ryan,* 583 F.3d 626, 646 (9th Cir. 2009.) (Defendants need only show that evidence is such character that it might serve as a basis for a sentence less than death.)

In *Schad v. Ryan* and *Lopez v. Ryan*, the court held that when the last opinion is silent, the court will not infer an unconstitutional application of the nexus test. *Schad v. Ryan*, 671 F.3d 708, 1047 (9th Cir. 2010); *Lopez v. Ryan*, 630 F.3d at 1204. However, in *McKinney*, the decision expressly relies on *State v. Ross,* 180 Ariz. 598, 886 P.2d 1354 (1994) (Mitigation information is "not relevant" unless it has effect on crime.) Judge Wardlaw's dissent noted that the Arizona trial court and Supreme Court were not silent. (Slip Op. at pp. 41-53.)

DECISIONS SUBSEQUENT TO ORAL ARGUMENT

Oral argument before the Ninth Circuit took place on December 6, 2012. In *Poyson v. Ryan*, 711 F.3d at 1087 (9th Cir. 2013,) issued on March 22, 2013, the threshold showing required by defendant was increased. The majority announced a new ambiguity test. *Id.* at 1099-1100. Judge Thomas, in his dissent in *Poyson*, asserted that the new test is inconsistent with Supreme Court law and law of the Ninth Circuit. Indeed, such a test has never been advanced by the U.S. Supreme Court. *Id.* at 1104-1107. Judge Wardlaw confirmed her agreement with Judge Thomas. (*McKinney* Slip Op. at p. 43, fn.2.)

In *Williams v. Ryan*, 623 F.3d 1258, 1280 (2010,) this court granted relief when the Arizona Supreme Court applied an improper screening mechanism to preclude proper consideration of mitigation evidence. *Poyson* is inconsistent with *Williams v. Ryan* and *Styers*.

Poyson applied dicta from *Parker v. Dugger*. *Poyson v. Ryan*, 711 F.3d at 1101. (*Parker* opinion "suggests".) The *Poyson* majority panel used this dicta to craft an opinion conflicting with Supreme Court precedent. *See, Brewer v. Quarterman*, 550 U.S. 286, 127 S.Ct. 1706 (2007.) The *McKinney* majority decision furthered the *Poyson* error by incorporating the flawed conclusion in the *McKinney* decision. (Slip Op. at p. 27.)

The new ambiguity test also conflicts with the no citation test or the silent record test. *Lopez v. Ryan,* 630 F.3d at 1204. The panel in *Henry v. Ryan,* found that when there is a causal nexus test, and there is substantial evidence of mitigation, resentencing is appropriate. *Henry,* __ F.3d __ (9th Cir. June 19, 2013.) (Slip Op. at pp. 26 and 27.)

The Supreme Court has spoken with clarity on this matter. Death penalty cases are to be decided based upon Supreme Court precedent, not on circuit court precedent based upon circuit court interpretation of Supreme Court law. *Parker v. Matthews,* 567 U.S. ___, 132 S.Ct. at 2148. The Supreme Court confirmed that Habeas cases must be determined by the application of United States Supreme Court precedent, not by circuit precedent in analyzing Supreme Court precedent. *Id.* (Emphasis added). The Supreme Courts mandate against analyzing death penalty cases based upon circuit precedent is especially applicable in this case. In *Poyson*, the Ninth Circuit erred in using *Woodward v. Visciotti*, 537 U.S. 19, 123

S.Ct. 357 (2002) and *Parker v. Dugger,* 498 U.S. 308 to create a new rule (Ninth Circuit precedent) that in death penalty cases ambiguity is decided in favor of the state and against the defendant. *Poyson,* 711 F.3d at 1100-1101. *McKinney* compounded the error by utilizing the *Poyson* precedent to bar relief to Mr. McKinney. In other words, the Ninth Circuit in *Poyson* created circuit precedent from dicta then applied this precedent in *McKinney.* The Supreme Court precedent was not utilized. Also, in *Poyson*, the majority interpreted a Supreme Court case in which Justice O'Connor wrote a concurring opinion and then distinguished it by claiming that Justice O'Connor's view of ambiguity has never been adopted by a majority of the United States Supreme Court. However, in *Richmond v. Lewis*, 506 U.S. 40, 113 S.Ct. 528 (1992,) Justice O'Connor, writing for the majority regarding a death penalty sentence, held that a death penalty sentence should not be rendered with a finger on the scale. Furthermore, writing for the majority, Justice O'Connor held that there must be a new resentencing. *Id.* at p. 51.

Conspicuously absent from the majority opinion is the modifier "meaningful". The law requires "meaningful" consideration of mitigation evidence. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 127 S.Ct. 1654, at 1664 (2007.) *See,* dissent of Judge Thomas in *Poyson,* 711 F.3d at 1104-07. The majority repeatedly claims there was consideration. Nowhere did it address the "meaningful" mandate. (*See, Woodward v. Visciotti*, 537 U.S. 19, 123 S.Ct. 357 (2002) (Supreme Court notes omission of a proper modifier as to the improper application of the law.)

The *McKinney* majority also misapplied the holding in *Parker v. Dugger*, 498 U.S. 308. *Parker v. Dugger* supports Judge Wardlaw's dissent, not the

majority decision. In *Parker v. Dugger,* the United States Supreme Court held the Florida Supreme Court wrongfully applied the law during the Appellate review of a death sentence. *Id.* at 321-23. The wrongful application rendered the death penalty sentence unconstitutional. The Supreme Court held that due to the wrongful application of law to the facts *even when there is ambiguity in the trial court* fails to preclude the harm done by the application of the wrong law by a State Supreme Court. *Id.* (New sentence ordered.) (Emphasis added.)

Courts are precluded from impermissibly interpreting dicta to preclude relief. *See, Brewer v. Quarterman*, 127 S.Ct. at 1706, 1710 (2007) (Judicial gloss cannot be used to preclude relief.)

After the March 2013 *Poyson* decision on June 19, 2013, the Ninth Circuit decided *Henry v. Ryan*, __ F.3d __ (9th Cir. June 19, 2013) (Slip Op. No. 09-99007, at pp. 26 and 27.) In *Henry v. Ryan*, the court addressed the failure of the Arizona Supreme Court to properly consider Mr. Henry's intoxication at the time of the crime as a statutory and non-statutory mitigating factor under A.R.S. § 13-703(G)(1.) *Henry* held that cases like *McKinney* are readily distinguishable from cases in which the mitigation evidence is *de minimis*, citing *Correll v. Ryan*, 539 F.3d 938, 944, 952-54 (9th Cir. 2008) (holding that the defendant's "mental health disorders, psychiatric commitments, drug abuse history, brain injury, and family dysfunction amounted to classic mitigating circumstances"); *Earp v. Ornoski*, 431 F.3d 1158, 1179 (9th Cir. 2005) ("If proven to be true during future evidentiary hearings, this alleged history of substance abuse, emotional problems, and organic brain damage is the very sort of mitigating evidence that 'might well have influenced the jury's appraisal of [Earp's] moral culpability'." (Alteration in

original) (quoting *Williams v. Taylor*, 529 U.S. 362, 398, 120 S.Ct. 1495 (2000)); *Ainsworth v. Woodford*, 268 F.3d 868, 875, 878 (9th Cir. 2001) (holding that mitigating evidence of the defendant's "troubled childhood, his history of substance abuse, and his mental and emotional problems would have been extremely important to the jury in its effort to decide whether to impose the death penalty or a sentence of life in prison".) *Poyson* is not cited in the *Henry v. Ryan* decision. Arizona has a history of using the unconstitutional causal nexus test. (*See,* dissent of Judge Wardlaw, p. 47.) (*citing Williams* and *Styers*.)

Mitigation evidence cannot be considered in an arbitrary manner. *Parker v. Dugger*, 498 U.S. at 313.

UNUSUAL SPLITS

Not only are there unusual inner circuit splits, but there are splits amongst judges themselves. In *Williams v. Ryan*, Judge Ikuta deemed Arizona's sentencing scheme unconstitutional. *Id.* at 1281-1283. (concurring opinion.) In *Poyson v. Ryan*, 711 F.3d 1027 (9th Cir. 2013,) Judge Ikuta was part of the majority panel which created the new ambiguity test based upon its interpretation of Supreme Court case law. In *Styers v. Schriro,* Judge Bea was part of a *per curium* panel that held that Arizona applied the prohibited unconstitutional nexus test. *Styers v. Schriro,* 547 F.3d at 1035-36. In *McKinney*, Judge Bea applied the *Poyson* ambiguity test. (Slip Op. at p. 27.) The "ambiguity standard" is inconsistent with the level of proof required in *Styers* to sustain an unconstitutional sentence.

These various conclusions reveal that the death penalty is being applied in an arbitrary and capricious manner. Further, in the McKinney opinion, the application of *Poyson* and the exclusion of *Henry v. Ryan* results in a standard which is illusory, arbitrary and capricious.

"The Supreme Court cases following *Lockett*, have made clear that when the sentencer is not permitted to give meaningful effect or a "reasoned moral response" to a defendant's mitigating evidence – because it is forbidden from doing so by statute or a judicial interpretation of a statute – the sentencing process is fatally flawed." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 127 S.Ct. 1654, 1675 (2007.) A *Penry* violation exists whenever a statute, or judicial gloss on a statute, prevents a jury from giving meaningful effect to mitigating evidence that may justify the imposition of a life sentence, rather than a death sentence. *Brewer v. Quarterman,* 127 S.Ct. at 1706. In *Brewer v. Quarterman,* the Supreme Court emphatically reaffirmed the holding in *Abdul-Kabir*. *Id*. ("We do so here again.") The precluding mitigating evidence was both "contrary to and involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States." *Id.* at 1710.

Nowhere in Supreme Court jurisprudence regarding the *Penry* line of cases has the Supreme Court held that the question whether mitigating evidence could have been considered by a sentencer is a matter purely of quantity, degree or immutability. *Id.* at 1712-13. Rather, evidence may be relevant to the defendant's moral culpability thereby allowing a moral response to avoid a death sentence. *Id.* at 1709. (citing and quoting *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320 (1988.))

The *Brewer* court noted that prior Fifth Circuit decisions failed to heed Supreme Court's repeated warning affirming the extent to which the sentencer must be allowed to have such evidence before it, to consider such evidence, to respond to it in a reasoned, moral manner, "and to weigh such evidence in its calculus of deciding whether a defendant is truly deserving of death." *Id.* at 1714. The *Abdul-Kabir* court held that "consideration" is not enough; it must be meaningful. *Abdul-Kabir*, 127 S.Ct. at 1673.

The Arizona Supreme Court relied upon its prior precedent, in *State v. Ross*, 180 Ariz. 598, 886 P.2d 1354 (Ariz. 1994), which provides:

> A difficult family background is not a relevant mitigating circumstance unless "a defendant can show that something in that background had an effect or impact on his behavior that was beyond the defendant's control." There is no indication here that Ross was unable to control his actions because of a difficult childhood. Defendant's background therefore is not a mitigating circumstance.
>
> We have previously held that cooperation is in the best interest of the accused and is not a mitigating circumstance. *State v. Ross*, 180 Ariz. 598, 607, 886 P.2d 1354, 1363 (1994,) *cert. denied*, U.S., 116 S.Ct. 210 (1995.) (Emphasis added, citations omitted.)

The Arizona Supreme Court's words "not relevant" affirm that the non-statutory mitigation evidence could not be considered. This conclusion is a judicial interpretation – *i.e.,* judicial gloss – rendering the sentence fatally flawed. *Abdul-Kabir v. Quarterman*, 127 S.Ct. at 1675. As Judge Wardlaw noted, such a conclusion is contrary to clearly established Federal law and an unreasonable application of existing United States Supreme Court law. Judge Wardlaw

reviewed the Supreme Court's statement: Relevant information is information which the meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding than in any other context, and thus the general evidentiary standard -- any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence -- applies." Dissent of Judge Wardlaw, quoting *Tennard v. Dretke*, 542 U.S. 274, 284 (2004.) (Slip Op. at p. 48.) Judge Wardlaw also noted that the Supreme Court has confirmed that disorders like PTSD are relevant for mitigation purposes:

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.

Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (internal citations and quotation marks omitted) abrogated on other grounds by *Atkins v. Virginia*, 536 U.S. 304 (2002.) Dissenting opinion of Judge Wardlaw. (Slip Op. at pp. 48-49.)

Judge Wardlaw found from the record that the sentencing judge's words track the sentencing statute requiring a causal nexus text. (Slip Op. at p. 146). (*See,* A.R.S. § 13-703(G)(1).) The sentencing judge's statements confirm that the record in Mr. McKinney's case is not silent.

Judge Wardlaw's and Judge Thomas' dissents are supported by the case law of *Abdul-Kabir v. Quarterman*, 127 S.Ct. at 1675 and *Brewer v. Quarterman,* 127 S.Ct. at 1706. (Statutory or judicial interpretation which does not allow for "meaningful consideration" is not adequate consideration).

SECOND CLAIM OF ERROR

The majority opinion attempts to whitewash the error of the clear application of the causal nexus test in *McKinney* by noting the Arizona Supreme Court's application of the correct test in another case. Unfortunately, this attempt does not remedy the decision's flaws. On June 27, 1996, approximately one month after the Arizona Supreme Court's *McKinney* decision, the Arizona Supreme Court decided *State v. Towery*, 204 Ariz. 386, 64 P.3d 828 (2003.) In *Towery*, the Arizona Supreme Court actually cited to the case of *Edmunds, Lockett* and *Penry*. However, only one month prior, in *McKinney*, the Arizona Supreme Court cited none of those U.S. Supreme Court decisions. Instead, it relied upon its own authority in *State v. Ross*, 180 Ariz. 598, 886 P.2d 1354 (1994.) The Arizona Supreme Court relied upon its own case law and ignored the U.S. Supreme Court standard, yet one month later, it applied those cases to *State v. Towery.* Under these circumstances, Mr. McKinney's sentence is fatally flawed. *Abdul-Kabir v. Quarterman*, 127 S.Ct. at 1675.

The *McKinney* majority panel concluded that because the Arizona Supreme Court applied the *Eddings/Lockett* standard in other cases, its decision in *McKinney* was correct despite the glaring absence of reference to those controlling cases. This requires reversal. *Parker v. Dugger*, 498 U.S. 308 (1991). Indeed, in *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011), the Supreme Court held that the Federal Courts cannot look outside the record. The Arizona *McKinney* decision has no reference to justify a decision to *Lockett* or *Edding,* only *Ross.* The Ninth Circuit majority's quantum leap claiming that the Arizona Supreme Court was

aware of the *Eddings/Lockett* test because it applied the test correctly in another case is unsupported by the *McKinney* record.

Merely because the Arizona court applied the correct legal standard in another case, decided after *McKinney* does not *ipso facto* mean that it applied correct standard in this case. Moreover, Judge Wardlaw noted such a statement would be inconsistent with the record in this case. (Slip. Op. at p. 52). The Arizona record was not silent. The Arizona Supreme Court expressly relied on *State v. Ross*, 180 Ariz. 598, 886 P.2d at 1354, which holds that family, social, mental background is "not relevant." *Id.* at 1363. According to *Towery v. Ryan*:

> Our review must be of the record in *Towery* itself, rather than the state supreme court's subsequent interpretations of *Towery*. *See, Lopez v. Ryan,* 630 F.3d 1198, 1203 (9th Cir. 2011) (explaining that we review "the *record*," to determine whether "the state court applied the wrong standard," and we "cannot assume the courts violated . . . constitutional mandates" otherwise Considering *Towery* itself, we conclude that it was not contrary to Supreme Court precedent -- a conclusion we have noted before. (Italics in original.)

State v. Towery, 711 F.3d at 946. (Emphasis added). The Ninth Circuit's leap in *McKinney* masked the unconstitutional reliance on *Ross* and causal nexus in *McKinney*'s case. This judicial gloss wrongly precludes relief for a fatally flawed sentence. *Abdul-Kabir*, 127 S.Ct. at 1675.

THIRD ASSIGNMENT OF ERROR

The *McKinney* analysis conflicts with Fifth Circuit authority. In an *en banc* decision, *Nelson v. Quarterman*, 472 F.3d 287 (2006,) the Fifth Circuit, in a very

comprehensive opinion, held that the causal nexus test cannot be constrained by circuit precedent. *Id.* at 316. (Once and for all, rejecting the "substantial effect test.") *See, also, McGowen v. Thaler*, 675 F.3d 482 (5th Cir. 2012.)

FOURTH CLAIM OF ERROR

Judge Wardlaw concluded that as the sentencing was done pursuant to an illegal screening, which precluded meaningful consideration of mitigation evidence and prejudice is presumed. (Slip Op. at pp. 50-51.) This is supported by Supreme Court law. *Abdul-Kabir*, 127 S.Ct. at 1675. Judge Wardlaw held, "It is abundantly clear on this record that McKinney is entitled to a new resentencing. (Slip Op. at p. 50.)

The Supreme Court law does not utilize *Brecht v. Abrahamson*, 507 U.S. 619, 622-23 (1993) when state courts apply a causal nexus test. *Nelson v. Quarterman*, 472 F.3d at 314. An *Eddings/Lockett* claim which comes about as a result of a statute or judicial interpretation, renders the sentence "fatally flawed," *i.e.*, it is as a result of a structural error. *Nelson v. Quarterman*, 472 F.3d at 317. In *Henry v. Ryan*, the Ninth Circuit applied a harmless error test. *Henry v. Ryan*, __ F.3d __ (9th Cir. June 19, 2013.) (Slip Op. No. 09-99007, pp. 26 and 27.) In *McKinney* and *Poyson*, the majority panels employed an "ambiguity test." (Slip Op. at p. 27.) In *Henry v. Ryan* and , the Ninth Circuit employed a "de minimis test." In *Lambright v. Schriro,* 490 F.3d 1103, 1115 (2007), held that the court cannot give mitigating information de minimis weight. *In Lopez* and *Styers*, the Ninth Circuit adopted a "silent record test." As noted by the Supreme Court in

Abdul-Kabir, Tennard, Smith and *Penry*, the Supreme Court has never required proof in sentencing of any quantity. *Brewer v. Quarterman*, 127 S.Ct. at 1712-13.

In *Lopez* and *Schad*, this court held that it would not infer an unconstitutional sentence from a record that had "no" indication of an illegal sentence. The *Poyson* case raises the standard to a "clear" indication. This "clear indication standard" is not supported by the United States Supreme Court law. Nevertheless, the record in the *McKinney* case is not silent. *See,* dissent of Judge Wardlaw. Record is not silent. (Slip Op. at p. 50.)

The ambiguity test clearly conflicts with *Nelson v. Quarterman*, which holds there is no need to show prejudice when there is structural error. *Nelson v. Quarterman,* 472 F.3d at 316-5. (Finally, we reject the state's argument that any *Penry* error in this case is subject to harmless error analysis under *Brecht v. Abrahamson*, 507 U.S. 619, 622-23 (1993.)

SIMILAR CASES

Cases where issue is pending rehearing or *en banc* review:

1. *Poyson v. Ryan,* 711 F.3d 1087 (9th Cir. 2013.)
2. *Henry v. Ryan,* __ F.3d __ (9th Cir. June 19, 2013.)
   (Slip Op. No. 09-99007, pp. 26 and 27)

CONCLUSION

It is respectfully requested that an *en banc* review be granted for James McKinney. The Arizona courts employed an improper screening through statute and judicial gloss. The Ninth Circuit decision was not based on controlling Supreme Court law. Mr. McKinney respectfully requests an opportunity to present how the existing abstruse Ninth Circuit precedent conflicts with other Ninth Circuit precedent so as to make the application of the death penalty arbitrary and capricious and therefore unconstitutional. Finally, Mr. McKinney respectfully request an opportunity to address the decisions published after briefing and oral argument in this case to demonstrate that *Henry v. Ryan* supports Mr. McKinney's case and to distinguish *Poyson*.

By: /s/ Ivan K. Mathew
Ivan K. Mathew, Counsel of Record

CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached PETITION FOR REHEARING OR *EN BANC* REVIEW is proportionally spaced, has a typeface of 14 points and contains 4185 words, exclusive of exempted portions.

By: /s/ Ivan K. Mathew
Ivan K. Mathew, Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that on **September 30, 2013**, I electronically filed the foregoing PETITION FOR REHEARING ON EN BANC REVIEW of appellants with the Clerk of the Court for the United State Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system and provides them with true and correct copies thereof on September 30, 2013.

All counsel of record are registered CM/ECF users.

I certify and declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on this **30th** day of **September, 2013**.

By: /s/Ivan K. Mathew
Ivan K. Mathew, Counsel of Record

No. 09-99018

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES E. McKINNEY, Petitioner-Appellant, v. CHARLES L. RYAN, Respondent-Appellee	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CIV-03-00774-DGC

RESPONDENT-APPELLEE'S RESPONSE TO PETITIONER-APPELLANT'S PETITION FOR REHEARING OR *EN BANC* REVIEW

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I. SUMMARY OF ARGUMENT

McKinney urges either reconsideration by this panel, or *en banc*, of the panel majority's[1] rejection of his claim that the state courts' consideration of mitigating evidence violated *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Lockett v. Ohio*, 438 U.S. 586 (1978). McKinney asserts four reasons for reconsideration: (1) an alleged conflict with Supreme Court opinions and other opinions from this Court (Petition, at 2-10); (2) that the majority opinion "attempts to whitewash" the Arizona Supreme Court's citation to *State v. Ross*, 886 P.2d 1354 (Ariz. 1994) (Petition, at 11-12); (3) the alleged creation of an inter-circuit conflict with a Fifth Circuit opinion, *Nelson v. Quarterman*, 472 F.3d 287 (5th Cir. 2006) (*en banc*); and (4) an alleged inter-circuit conflict with *Nelson* regarding whether *Brecht v. Abrahamson*, 507 U.S. 619 (1993), applies when a federal habeas court finds *Eddings/Lockett* error (Petition, at 13-14). None present cause for reconsideration by the panel or *en banc*.

First, McKinney's petition is essentially urging adoption of Judge Wardlaw's dissenting opinion, which McKinney's petition cites numerous times. (Petition, at 1, 2, 3 (twice), 9, 10 (four times), 12, 13 (twice), and 14.) Obviously, the panel majority already considered, and rejected, Judge Wardlaw's views. Accordingly, he has not shown "points of law or fact" that the panel majority opinion "overlooked" or "misapprehended." *See* Rule 40(a)(2), Fed. R. App. P.

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[1] The panel opinions, majority and dissenting, are now reported in *McKinney v. Ryan*, 730 F.3d 903 (9th Cir. 2013), which Respondents will cite rather than the slip opinion.

Second, McKinney has not shown that the panel majority opinion "conflicts" with a decision by the United States Supreme Court or this circuit, or that it "involves one or more questions of exceptional importance." *See* Rule 35(b)(1)(A &B), Fed. R. App. P. To the contrary, the panel majority properly applied *Eddings/Lockett* to the specific facts of this case, in accordance with well-established precedent from this Court dating back to 2007.

Third, the panel majority opinion does not create a new inter-circuit conflict with *Nelson*, issued in 2006, because it is based on the specific statements of the Arizona sentencing judge and the Arizona Supreme Court, and involves different legal considerations than the ones applicable to Texas' peculiar jurisprudence in capital jury sentencing cases.

Fourth, whether *Brecht* applies to *Eddings* error is not cause for reconsideration because the panel majority found no such error. Also, this Court recently denied rehearing, with no judge requesting a vote on whether to rehear the matter *en banc*, in another Arizona capital habeas appeal involving this same issue. *Henry v. Ryan*, No. 09-99007 (Order, November 1, 2013).

II. ARGUMENTS

A. *The majority panel opinion does not conflict with United States Supreme Court opinions or with other Ninth Circuit opinions.*

1. Supreme Court opinions.

McKinney claims that the sentencing judge did not consider PTSD evidence and "unconstitutionally excluded the copious evidence of McKinney's deficits in violation of the *Eddings/Lockett* line of cases," and that the sentencing judge and appellate court both unreasonably found the facts. (Pet. at 1.) But the panel majority already considered these points, holding that "the record makes clear that the trial court adequately considered and weighed McKinney's mitigating evidence." 730 F.3d at 915. It also held that the Arizona Supreme

Court "did not violate *Eddings* when it concluded that the trial court considered all the mitigation evidence before it." *Id.* at 917. The dissent argued that the decisions of the sentencing judge and the Arizona Supreme Court on the issue were "contrary to the U.S. Supreme Court's decisions in *Eddings* and its progeny." *Id.* at 921. But McKinney fails to show the panel majority erred in application of *Eddings* to this case. *See Eddings*, 455 U.S. at 104, 113-114 ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence."); *Towery v. Ryan*, 673 F.3d 933, 945-946 (9th Cir. 2012) ("One could question the wisdom of the Arizona Supreme Court's decision to accord Towery's evidence little or no weight."; but the decision was not contrary to Supreme Court precedent because: "The record supports the conclusion that the Arizona Supreme Court gave Towery's difficult childhood little or no weight as a matter of fact, after giving individualized consideration to the evidence, rather than treating the evidence as irrelevant or non-mitigating as a matter of law.").

The panel majority opinion's discussion of *Eddings* also cited *Parker v. Dugger*, 498 U.S. 308, 314 (1991) ("We must assume that the trial judge considered all this [mitigation] evidence before passing sentence. For one thing, he said he did."), in support of the proposition that the sentencing judge's statement that he considered the evidence at issue is "entitled to some weight." 730 F.3d at 917. McKinney argues that the panel majority "misapplied the holding" and improperly used *dicta* from *Parker*, and that *Parker* actually aids McKinney and supports the dissenting opinion. (Pet. at 4-6.) He is incorrect.

First, the cited portion of *Parker* does not aid McKinney; the dissent did not even cite *Parker*. Numerous opinions from this Court, several involving Arizona capital prisoners, have cited *Parker* for the same proposition as the

panel majority. *See Poyson v. Ryan*, 711 F.3d 1087, 1090 (9th Cir. 2013); *Hurles v. Ryan*, 706 F.3d 1021, 1036 (9th Cir. 2013); *Lopez (George) v. Schriro*, 491 F.3d 1029, 1037 (9th Cir. 2007); *Lambright v. Stewart*, 220 F.3d 1022, 1030 (9th Cir. 2000); *Gerlaugh v. Stewart*, 129 F.3d 1027, 1044 (9th Cir. 1997).

Second, the cited portion of *Parker* is not *dicta.* There, the trial court *had considered* the evidence at issue, but the state supreme court, in reweighing the evidence after finding two aggravating factors invalid, made the erroneous factual assumption that the trial court had found no mitigating circumstances, and thus failed to conduct a proper reweighing. *Parker*, 498 U.S. at 321-322. Thus, the cited portion of *Parker* was not *dicta* because it was *essential* to the holding, and the found constitutional violation was not a failure to consider evidence, but rather the appellate court's failure to properly reweigh based on a factual error—something that did not occur here. As in *Poyson*, petitioner "has not shown a constitutional violation under *Lockett*, *Eddings*, or *Parker*. 711 F.3d at 1101.

Although the panel majority in this case did not cite *Woodford v. Visciotti*, 537 U.S. 119 (2002), McKinney argues that the panel majority relied on *Poyson*, and that *Poyson* erroneously employed *Visciotti*. (Pet. at 4-5.) *Visciotti* mandates that, in evaluating the state court decision, the federal court must refrain from mischaracterization of the state court opinion or record, and must presume that state courts know and follow the law. 537 U.S. at 22-24 ("[R]eadiness to attribute error is inconsistent with the presumption that state courts know and follow the law.") First, whether *Poyson* erroneously employed *Visciotti* is most appropriately decided in connection with the pending petition for rehearing in *Poyson.* Second, because it is clear from the statements of the Arizona trial and appellate court that they *actually considered* the mitigating evidence at issue, the panel majority did not need to employ the *Visciotti*

presumption. Third, even if the panel majority had employed the *Visciotti* presumption, it is clearly established federal law that has been followed by this Court in various contexts. *See, e.g.*, *Briggs v. Grounds*, 682 F.3d 1165, 1179 (9th Cir. 2012); *Musladin v. Lamarque*, 555 F.3d 830, 838 fn.6 (9th Cir. 2009).

Certainly, there would be no basis for this Court to *presume*, on the record in this case, that the Arizona courts did not know of *Eddings/Lockett* and failed to follow them. As the Supreme Court has recently stated, "AEDPA recognizes a foundational principle of our federal system: State courts are adequate forums for the validation of federal rights." *See Burt v. Titlow*, No. 12-414, slip op. at 5 (U.S. Nov. 5, 2013). The state courts are "*presumptively competent*" to adjudicate claims arising under the laws of the United States. *Id.* "[T]here is no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned . . . than his neighbor in a state courthouse." *Id.* at 6, *quoting Stone v. Powell*, 428 U.S. 465, 494 n. 35 (1976).

"The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (emphasis added). "This is a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) (citations and internal quotation marks omitted). Similarly, a state court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance. *See Titlow*, slip op. at 5.

"A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011)

(quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Richter*, 131 S. Ct. at 786. Rather, a prisoner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Id.* at 786–87, emphasis added. McKinney has not made that showing.

McKinney relies on Supreme Court opinions considering whether Texas courts and law prevented capital case juries from considering mitigation, citing: *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Brewer v. Quarterman*, 550 U.S. 286 (2007); and *Tennard v. Dretke*, 542 U.S. 274 (2004). First, that the Texas cases are not the basis of McKinney's claim is shown by the dissent's conclusion: "I would grant habeas relief on the *Eddings/Lockett* claim." *McKinney*, 730 F.3d at 929. Second, none of the cited Supreme Court opinions regarding Texas jury sentencing, nor *Smith v. Texas*, 543 U.S. 37 (2004), should be used to analyze whether the Arizona Supreme Court reasonably applied clearly established federal law when it decided McKinney's appeal 1996. *See Metrish v. Lancaster*, 133 S. Ct. 1781, 1786 (2013) ("To obtain habeas relief . . . a state prisoner must show that the challenged state-court ruling rested on 'an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'") (quoting *Richter*, 131 S. Ct. at 786-787).

Furthermore, the panel majority cited and discussed *Tennard* and *Smith*, but found the Arizona courts did not apply an unconstitutional nexus test to McKinney's mitigating evidence. 730 F.3d at 916-917 & 919-21. The panel majority's analysis, and the dissent's analysis, focused on the specific statements of the sentencing judge and the Arizona Supreme Court in this case. The Texas

cases are distinguishable because they concern Texas' unique specific question instructions limiting actual jury consideration of mitigation. Under Arizona's former judge-sentencing regime, not only must the Arizona courts be presumed to know and follow the law, but also their written discussions of mitigation show in some detail whether and how they considered the mitigation.

Finally, McKinney argues that Supreme Court authority, such as *Abdul-Kabir*, means that the sentencer must not only *consider* mitigating evidence, but must also *meaningfully* consider the evidence, by giving it weight. But the law is clear that, although a sentencer must consider mitigating evidence, the Constitution does not require a state to ascribe any specific weight to the evidence. *Harris v. Alabama*, 513 U.S. 504, 512 (1995); *Eddings*, 455 U.S. at 114-115. The sentencing judge was not prevented from giving meaningful consideration to constitutionally relevant mitigating evidence. McKinney proposes a rule under which a state court acts unreasonably—even if it considers mitigation—if it fails to give a certain quantum of "weight" in order to give it "meaningful consideration." Such a rule is neither the law nor workable.

Finally, in view of the state sentencing judge's extensive discussion of the mitigation at issue, it is clear that he gave "meaningful consideration" to the mitigating evidence, under any standard. Moreover, the relevant state court factual determinations were reasonable under AEDPA's deferential standard. *See Titlow*, slip op. at 8-9, 11.

2. Ninth Circuit opinions.

The panel majority does not conflict with various opinions from this Court, dating back to 2007, that have considered whether Arizona courts properly applied *Lockett/Eddings.* In *George Lopez*, this Court first considered an Arizona capital prisoner's claim that his death sentence violated *Eddings*; it held that the Arizona trial court's statement about considering the evidence was

"at least ambiguous and that we should not speculate as to whether all the mitigating factors were actually considered." 491 F.3d at 1037-1038. The judge dissenting from the panel opinion argued that the majority had incorrectly assumed that the state court knew and followed the law. *Id*. at 1044-1053. But the panel majority responded that: "Under AEDPA, we must do more than find the statement ambiguous—we would have to conclude that the Arizona Supreme Court was objectively unreasonable in concluding the sentencing court did, in fact, review all the proffered mitigating evidence." *Id*. at 1037-38, *citing Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). Thus, the conclusion of the panel majority here—that the Arizona Supreme Court's decision upholding the trial court's ruling was not contrary to or an unreasonable application of *Lockett/Eddings*, 730 F.3d at 920-921—is in accordance with *George Lopez.*

Since *George Lopez*, this Court has since rejected *Eddings* attacks by several Arizona capital habeas petitioners, based on the specific records in those cases. *See Poyson*, 711 F.3d at 1097-1100; *Towery*, 673 F.3d at 945 ("the court's reasoned and individualized decision to give Towery's evidence little or no weight was not contrary to Supreme Court precedent"); *Stokley v. Ryan*, 705 F.3d 401, 403-404 (9th Cir. 2012)("However, on balance, the Arizona Supreme Court's opinion suggests that the court did weigh and consider all the evidence presented in mitigation at sentencing."); *Schad v. Ryan*, 671 F.3d 708, 7249 (9th Cir. 2011) (no "clear indication" that the state court applied the wrong standard); *Greenway v. Schriro*, 653 F.3d 790, 807-808 (9th Cir. 2011) (record did not indicate that either the trial court or the Arizona Supreme Court applied an unconstitutional nexus test); *Lopez (Sammy) v. Ryan*, 630 F.3d 1198, 1204 (9th Cir. 2011) ("there is no reason to infer unconstitutional reasoning from judicial silence. Rather, we must look to what the record actually says").

In an attempt to show an intra-circuit conflict, McKinney cites *Styers v.*

Schriro, 547 F.3d 1026 (9th Cir. 2008), and *Williams v. Ryan*, 623 F.3d 1258 (9th Cir. 2010). However, the panel majority considered and distinguished those opinions, as well as *Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2007). *McKinney*, 730 F.3d at 918-919. *See also Poyson*, 711 F3d at 1098 (distinguishing *Styers* and *Williams*); *Schad*, 671 F.3d at 723-24 (same). Thus, *Styers* and *Williams* do not present a basis for reconsideration by the panel or *en banc*.

Styers does not purport to reject the "clear indication" test of *George Lopez*; indeed, it does not even cite *George Lopez*. 547 F.3d at 1035-37. It does analyze *the specific statements by the Arizona Supreme Court* to determine whether that court considered the proffered mitigation. *Id.* at 1035. Thus, despite the Arizona Supreme Court's general statement that it considered all of the proffered mitigation, the *Styers* panel found "its analysis prior to this statement indicates otherwise." *Id.*, emphasis added. Although *Styers* does not specifically say that there was a "clear indication" of an *Eddings* violation, it obviously thought the Arizona Supreme Court's language was a clear enough indication to justify habeas relief. Thus, *Styers* does not establish a "direct conflict" with other opinions of this Court or with the panel majority's opinion in this case.

Finally, McKinney cites *Jones v. Ryan*, 583 F.3d 626 (9th Cir. 2009). (Pet. at 3.) However, that opinion was vacated by the Supreme Court. *See Ryan v. Jones*, 131 S. Ct. 2091 (2011).

B. *The Arizona Supreme Court's citation of* State v. Ross *does not show an unreasonable application of clearly established federal law.*

McKinney argues that the Arizona Supreme Court's citation to *State v. Ross*, 886 P.2d 1354 (1994), shows that it applied a nexus test that unconstitutionally precluded consideration of mitigation evidence. (Pet. at 11-

12.) That does not justify rehearing because the panel majority considered, and rejected, this very argument. 730 F.3d at 920. This Court held in another case that whether a state court's application of *Eddings/Lockett* is unreasonable turns on the specific record of the case, not on a particular authority cited by the state court. *See Towery*, 673 F.3d at 946. *Towery* rejected an argument, like the one McKinney makes, that the Arizona Supreme Court's erroneous analysis was shown by its citation of another Arizona Supreme Court opinion. *Id.*, discussing *State v. Wallace*, 773 P.2d 983 (Ariz. 1989). Similarly, in this case, the panel majority found no unreasonable application of *Eddings/Lockett* based on the specific statements by the sentencing court and the Arizona Supreme Court regarding the mitigating evidence. 730 F.3d at 915 ("Because the record makes clear that the trial court adequately considered and weighed McKinney's mitigation evidence, we deny relief."). *See also Hurles*, 706 F.3d at 1036 ("The record makes plain that the trial court did in fact consider the mitigating evidence, as the Constitution requires.").

McKinney argues that the Arizona Supreme Court's *Towery* opinion is distinguishable because it cited *Penry v. Lynaugh*, 492 U.S. 302 (1989), *Eddings*, and *Lockett*, whereas the Arizona Supreme Court's opinion in this case did not cite any of these Supreme Court opinions. (Pet. at 11). *See State v. Towery*, 920 P.2d 290, 310 fn. 17 (Ariz. 1996). First, the fact that in the same year it decided McKinney's appeal (1996), the Arizona Supreme Court cited relevant Supreme Court authority in *Towery* shows it was aware of the applicable Supreme Court authority, even if not cited in its McKinney opinion. *See also State v. Hurles*, 914 P.2d 1291 (Ariz. 1996).

Second, even if the state court's ruling on the merits is unexplained or does not cite Supreme Court authority, a habeas court must still look to existing Supreme Court precedent to decide whether the outcome was a reasonable

application of federal law. *Early v. Packer*, 537 U.S. 3, 8 (2002). The Supreme Court has held that citation to relevant federal law is not required and that "a state court need not even be aware of [Supreme Court] precedents, 'so long as neither the reasoning nor the result of the state-court decision contradicts them.'" *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003) (citing *Early*, 537 U.S. at 8).

C. *The majority panel opinion does not conflict with* Nelson v. Quarterman.

McKinney next asks for rehearing based on an alleged conflict with the Fifth Circuit's opinion in *Nelson*. (Pet. at 12-13.) The alleged conflict does not merit rehearing because the panel majority considered the relevant Supreme Court authority regarding Texas' jury sentencing in capital cases, and because there is no conflict.

First, *Nelson* is just a specific application of *Tennard*. The Supreme Court had granted Nelson's petition for certiorari from the Fifth Circuit's prior opinion, and ordered the Fifth Circuit to reconsider the *Penry* issue in light of *Tennard*. *Nelson*, 472 F.3d at 289, 291-92. The panel majority opinion considered, and distinguished, *Tennard*, as well as *Smith*. 730 F.3d at 916-917, 919-21. Thus, this Court need not rehear this case based on the Fifth Circuit's application of *Tennard* and/or *Smith*.

Second, there is no conflict with the Texas cases, whether or not they are the clearly established federal law existing when the Arizona Supreme Court rejected McKinney's appeal. The analysis by the panel majority is very fact-specific, based on the particular statements by the sentencing judge and the Arizona Supreme Court. Moreover, there is no direct conflict because there are significant differences in consideration of mitigating evidence between judge sentencing and jury sentencing.

One important distinction is the presumption that judges know and follow the law. *Visciotti*, as discussed above, mandates that federal courts reviewing state court proceedings presume that state courts know and follow the law. This Court cannot presume that the Arizona courts both did not know of, and failed to follow, *Eddings*. *See Sammy Lopez*, 630 F.3d at 1203-1204.

Another important distinction is that Arizona's judge sentencing resulted in extensive written special verdicts that specifically addressed how Arizona sentencing judges considered proffered mitigation, and then the mitigation was independently reviewed by the Arizona Supreme Court. The special verdict and Arizona Supreme Court discussion in this case created a specific record for this Court to decide whether the state courts reasonably applied *Lockett/Eddings* to the consideration of proffered mitigation.

Because of the crucial difference between the Texas and the Arizona death sentencing schemes, any alleged "'circuit split' created by these cases is completely illusory." *United States v. Lopez*, 484 F.3d 1186, 1198 (9th Cir. 2007).

D. *The panel majority found no* Eddings/Lockett *error, and so had no reason to consider if* Brecht *applied, but if it had found such error,* Brecht *would apply, and McKinney does not show prejudice under* Brecht.

McKinney's final claim of error is that *Eddings/Lockett* error is not subject to analysis under *Brecht*. (Pet. at 13-14.) But *Brecht* was not an issue here because the panel majority found no *Eddings/Lockett* error. Accordingly, there is no reason for either the panel or this Court *en banc* to reconsider a point not decided by the panel majority opinion.

Even if the panel majority opinion had employed *Brecht*, it has been the established law of this Circuit since 2001 that *Eddings* error must be reviewed for prejudice under *Brecht*. *See Henry v. Ryan*, 720 F.3d 1073, 1089 (9th Cir.

2013) ("Henry has not shown that any error would have "had substantial and injurious effect or influence in determining" the sentence," citing *Brecht*.); *Stokley*, 705 F.3d at 404-405 ("In sum, because the claimed causal nexus error, if any, did not have a substantial or injurious influence on Stokley's sentence, Stokley cannot establish prejudice.") (citing *Brecht*); *Landrigan v. Stewart*, 272 F.3d 1221, 1230 n.9 (9th Cir. 2001) ("At any rate, any error in failing to consider Landrigan's use of alcohol and drugs would have been inconsequential; it would have had no effect whatsoever on the outcome."). That *Styers* and *Williams* did not do a *Brecht* analysis does not create a circuit split; those opinions simply did not address the point.

This issue has been raised in petitions for rehearing in both *Stokley* and *Henry*, but this Court denied rehearing in both cases. *See Stokley v. Ryan*, 704 F.3d 1010, 1011 (9th Cir. 2012); *Henry v. Ryan*, No. 09-99007, Order (9th Cir. Nov. 1, 2013) ("The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc.").

The Supreme Court has not established that such error is structural, but rather indicated that it is not. *See Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987) (finding that exclusion of mitigating evidence renders death sentence invalid in the absence of a showing of harmless error) (cited by *Landrigan*, 272 F.3d at 1230 fn.9); *Skipper v. South Carolina*, 476 U.S. 1, 7–8 (1986) (addressing and rejecting state's argument that the excluded mitigation evidence was "cumulative and its exclusion . . . harmless"). All the other circuits, save one, that have considered this point have found that such error *is* subject to harmless-error analysis. *See, e.g., Dixon v. Hawk*, 2013 WL 4792224, *6 (6th Cir. Sept. 10, 2013); *McGehee v. Norris*, 588 F.3d 1185, 1197-98 (8th Cir. 2009); *Martini v. Hendricks*, 348 F.3d 360, 368-71 (3rd Cir. 2003); *Bryson v. Ward*, 187

F.3d 1193, 1205 (10th Cir. 1999) (cited by *Landrigan*, 272 F.3d at 1230 fn.9); *Boyd v. French*, 147 F.3d 319, 322, 327–28 (4th Cir. 1998); *Horsley v. Alabama*, 45 F.3d 1486, 1492-93 (11th Cir. 1995); *Williams v. Chrans*, 945 F.2d 926, 949 (7th Cir. 1991).

The one exception is the Fifth Circuit's opinion in *Nelson*, 472 F.3d at 314. But the panel majority's opinion in this case did not *create* a conflict with *Nelson*, which was issued in 2006 and was then contrary on this issue to this Court's 2001 *Landrigan* opinion. Moreover, the panel majority did not create a conflict when it did not even reach the *Brecht* issue.

Even if there had been *Eddings/Lockett* constitutional error, McKinney does not show prejudice under *Brecht*. Both the Arizona trial court and the Arizona Supreme Court's comments make clear that, even if they were to "properly" consider the mitigation, they would have found the mitigating evidence to be of little or no weight. *See Stokley*, 705 F.3d at 404-405. Moreover, such mitigation would have been unlikely to change the sentence, particularly in view of the fact that McKinney committed more than one murder, which is the "most powerful imaginable aggravating evidence." *See Wong v. Belmontes*, 558 U.S. 15, 28 (2009).

III. CONCLUSION.

Respondent respectfully requests this Court to deny McKinney's petition for rehearing or *en banc* review.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 32-1, Rules of the Ninth Circuit Court of Appeals, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 4,194 words.

/S/JON G. ANDERSON
JON G. ANDERSON

No. 09-99018

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES E. MCKINNEY, PETITIONER-APPELLANT, –VS– CHARLES L. RYAN, RESPONDENT-APPELLEE.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, NO. 2:03-CV-00774-DGC STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28–2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, Respondent-Appellee is aware of only one related case, the federal habeas appeal of McKinney's co-defendant/brother: *Hedlund v. Ryan*, No. 09-99019.

DATED this 7th day of November, 2013

THOMAS C. HORNE
ATTORNEY GENERAL

/S/*JON G. ANDERSON*
ASSISTANT ATTORNEY GENERAL
ATTORNEYS FOR RESPONDENT-APPELLEE

No. 09-99018

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES E. McKINNEY, Petitioner-Appellant, v. CHARLES L. RYAN, Respondent-Appellee	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CIV-03-00774-DGC

RESPONDENT-APPELLEE'S RESPONSE TO PETITIONER-APPELLANT'S PETITION FOR REHEARING OR *EN BANC* REVIEW

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I. SUMMARY OF ARGUMENT

McKinney urges either reconsideration by this panel, or *en banc*, of the panel majority's[1] rejection of his claim that the state courts' consideration of mitigating evidence violated *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Lockett v. Ohio*, 438 U.S. 586 (1978). McKinney asserts four reasons for reconsideration: (1) an alleged conflict with Supreme Court opinions and other opinions from this Court (Petition, at 2-10); (2) that the majority opinion "attempts to whitewash" the Arizona Supreme Court's citation to *State v. Ross*, 886 P.2d 1354 (Ariz. 1994) (Petition, at 11-12); (3) the alleged creation of an inter-circuit conflict with a Fifth Circuit opinion, *Nelson v. Quarterman*, 472 F.3d 287 (5th Cir. 2006) (*en banc*); and (4) an alleged inter-circuit conflict with *Nelson* regarding whether *Brecht v. Abrahamson*, 507 U.S. 619 (1993), applies when a federal habeas court finds *Eddings/Lockett* error (Petition, at 13-14). None present cause for reconsideration by the panel or *en banc*.

First, McKinney's petition is essentially urging adoption of Judge Wardlaw's dissenting opinion, which McKinney's petition cites numerous times. (Petition, at 1, 2, 3 (twice), 9, 10 (four times), 12, 13 (twice), and 14.) Obviously, the panel majority already considered, and rejected, Judge Wardlaw's views. Accordingly, he has not shown "points of law or fact" that the panel majority opinion "overlooked" or "misapprehended." *See* Rule 40(a)(2), Fed. R. App. P.

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[1] The panel opinions, majority and dissenting, are now reported in *McKinney v. Ryan*, 730 F.3d 903 (9th Cir. 2013), which Respondents will cite rather than the slip opinion.

Second, McKinney has not shown that the panel majority opinion "conflicts" with a decision by the United States Supreme Court or this circuit, or that it "involves one or more questions of exceptional importance." *See* Rule 35(b)(1)(A &B), Fed. R. App. P. To the contrary, the panel majority properly applied *Eddings/Lockett* to the specific facts of this case, in accordance with well-established precedent from this Court dating back to 2007.

Third, the panel majority opinion does not create a new inter-circuit conflict with *Nelson*, issued in 2006, because it is based on the specific statements of the Arizona sentencing judge and the Arizona Supreme Court, and involves different legal considerations than the ones applicable to Texas' peculiar jurisprudence in capital jury sentencing cases.

Fourth, whether *Brecht* applies to *Eddings* error is not cause for reconsideration because the panel majority found no such error. Also, this Court recently denied rehearing, with no judge requesting a vote on whether to rehear the matter *en banc*, in another Arizona capital habeas appeal involving this same issue. *Henry v. Ryan*, No. 09-99007 (Order, November 1, 2013).

II. ARGUMENTS

A. *The majority panel opinion does not conflict with United States Supreme Court opinions or with other Ninth Circuit opinions.*

1. Supreme Court opinions.

McKinney claims that the sentencing judge did not consider PTSD evidence and "unconstitutionally excluded the copious evidence of McKinney's deficits in violation of the *Eddings/Lockett* line of cases," and that the sentencing judge and appellate court both unreasonably found the facts. (Pet. at 1.) But the panel majority already considered these points, holding that "the record makes clear that the trial court adequately considered and weighed McKinney's mitigating evidence." 730 F.3d at 915. It also held that the Arizona Supreme

Court "did not violate *Eddings* when it concluded that the trial court considered all the mitigation evidence before it." *Id.* at 917. The dissent argued that the decisions of the sentencing judge and the Arizona Supreme Court on the issue were "contrary to the U.S. Supreme Court's decisions in *Eddings* and its progeny." *Id.* at 921. But McKinney fails to show the panel majority erred in application of *Eddings* to this case. *See Eddings*, 455 U.S. at 104, 113-114 ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence."); *Towery v. Ryan*, 673 F.3d 933, 945-946 (9th Cir. 2012) ("One could question the wisdom of the Arizona Supreme Court's decision to accord Towery's evidence little or no weight."; but the decision was not contrary to Supreme Court precedent because: "The record supports the conclusion that the Arizona Supreme Court gave Towery's difficult childhood little or no weight as a matter of fact, after giving individualized consideration to the evidence, rather than treating the evidence as irrelevant or non-mitigating as a matter of law.").

The panel majority opinion's discussion of *Eddings* also cited *Parker v. Dugger*, 498 U.S. 308, 314 (1991) ("We must assume that the trial judge considered all this [mitigation] evidence before passing sentence. For one thing, he said he did."), in support of the proposition that the sentencing judge's statement that he considered the evidence at issue is "entitled to some weight." 730 F.3d at 917. McKinney argues that the panel majority "misapplied the holding" and improperly used *dicta* from *Parker*, and that *Parker* actually aids McKinney and supports the dissenting opinion. (Pet. at 4-6.) He is incorrect.

First, the cited portion of *Parker* does not aid McKinney; the dissent did not even cite *Parker*. Numerous opinions from this Court, several involving Arizona capital prisoners, have cited *Parker* for the same proposition as the

panel majority. *See Poyson v. Ryan*, 711 F.3d 1087, 1090 (9th Cir. 2013); *Hurles v. Ryan*, 706 F.3d 1021, 1036 (9th Cir. 2013); *Lopez (George) v. Schriro*, 491 F.3d 1029, 1037 (9th Cir. 2007); *Lambright v. Stewart*, 220 F.3d 1022, 1030 (9th Cir. 2000); *Gerlaugh v. Stewart*, 129 F.3d 1027, 1044 (9th Cir. 1997).

Second, the cited portion of *Parker* is not *dicta.* There, the trial court *had considered* the evidence at issue, but the state supreme court, in reweighing the evidence after finding two aggravating factors invalid, made the erroneous factual assumption that the trial court had found no mitigating circumstances, and thus failed to conduct a proper reweighing. *Parker*, 498 U.S. at 321-322. Thus, the cited portion of *Parker* was not *dicta* because it was *essential* to the holding, and the found constitutional violation was not a failure to consider evidence, but rather the appellate court's failure to properly reweigh based on a factual error—something that did not occur here. As in *Poyson*, petitioner "has not shown a constitutional violation under *Lockett*, *Eddings*, or *Parker*. 711 F.3d at 1101.

Although the panel majority in this case did not cite *Woodford v. Visciotti*, 537 U.S. 119 (2002), McKinney argues that the panel majority relied on *Poyson*, and that *Poyson* erroneously employed *Visciotti*. (Pet. at 4-5.) *Visciotti* mandates that, in evaluating the state court decision, the federal court must refrain from mischaracterization of the state court opinion or record, and must presume that state courts know and follow the law. 537 U.S. at 22-24 ("[R]eadiness to attribute error is inconsistent with the presumption that state courts know and follow the law.") First, whether *Poyson* erroneously employed *Visciotti* is most appropriately decided in connection with the pending petition for rehearing in *Poyson.* Second, because it is clear from the statements of the Arizona trial and appellate court that they *actually considered* the mitigating evidence at issue, the panel majority did not need to employ the *Visciotti*

presumption. Third, even if the panel majority had employed the *Visciotti* presumption, it is clearly established federal law that has been followed by this Court in various contexts. *See, e.g.*, *Briggs v. Grounds*, 682 F.3d 1165, 1179 (9th Cir. 2012); *Musladin v. Lamarque*, 555 F.3d 830, 838 fn.6 (9th Cir. 2009).

Certainly, there would be no basis for this Court to *presume*, on the record in this case, that the Arizona courts did not know of *Eddings/Lockett* and failed to follow them. As the Supreme Court has recently stated, "AEDPA recognizes a foundational principle of our federal system: State courts are adequate forums for the validation of federal rights." *See Burt v. Titlow*, No. 12-414, slip op. at 5 (U.S. Nov. 5, 2013). The state courts are "*presumptively competent*" to adjudicate claims arising under the laws of the United States. *Id.* "[T]here is no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned . . . than his neighbor in a state courthouse." *Id.* at 6, *quoting Stone v. Powell*, 428 U.S. 465, 494 n. 35 (1976).

"The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (emphasis added). "This is a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) (citations and internal quotation marks omitted). Similarly, a state court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance. *See Titlow*, slip op. at 5.

"A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011)

(quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Richter*, 131 S. Ct. at 786. Rather, a prisoner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Id.* at 786–87, emphasis added. McKinney has not made that showing.

McKinney relies on Supreme Court opinions considering whether Texas courts and law prevented capital case juries from considering mitigation, citing: *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Brewer v. Quarterman*, 550 U.S. 286 (2007); and *Tennard v. Dretke*, 542 U.S. 274 (2004). First, that the Texas cases are not the basis of McKinney's claim is shown by the dissent's conclusion: "I would grant habeas relief on the *Eddings/Lockett* claim." *McKinney*, 730 F.3d at 929. Second, none of the cited Supreme Court opinions regarding Texas jury sentencing, nor *Smith v. Texas*, 543 U.S. 37 (2004), should be used to analyze whether the Arizona Supreme Court reasonably applied clearly established federal law when it decided McKinney's appeal 1996. *See Metrish v. Lancaster*, 133 S. Ct. 1781, 1786 (2013) ("To obtain habeas relief . . . a state prisoner must show that the challenged state-court ruling rested on 'an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'") (quoting *Richter*, 131 S. Ct. at 786-787).

Furthermore, the panel majority cited and discussed *Tennard* and *Smith*, but found the Arizona courts did not apply an unconstitutional nexus test to McKinney's mitigating evidence. 730 F.3d at 916-917 & 919-21. The panel majority's analysis, and the dissent's analysis, focused on the specific statements of the sentencing judge and the Arizona Supreme Court in this case. The Texas

cases are distinguishable because they concern Texas' unique specific question instructions limiting actual jury consideration of mitigation. Under Arizona's former judge-sentencing regime, not only must the Arizona courts be presumed to know and follow the law, but also their written discussions of mitigation show in some detail whether and how they considered the mitigation.

Finally, McKinney argues that Supreme Court authority, such as *Abdul-Kabir*, means that the sentencer must not only *consider* mitigating evidence, but must also *meaningfully* consider the evidence, by giving it weight. But the law is clear that, although a sentencer must consider mitigating evidence, the Constitution does not require a state to ascribe any specific weight to the evidence. *Harris v. Alabama*, 513 U.S. 504, 512 (1995); *Eddings*, 455 U.S. at 114-115. The sentencing judge was not prevented from giving meaningful consideration to constitutionally relevant mitigating evidence. McKinney proposes a rule under which a state court acts unreasonably—even if it considers mitigation—if it fails to give a certain quantum of "weight" in order to give it "meaningful consideration." Such a rule is neither the law nor workable.

Finally, in view of the state sentencing judge's extensive discussion of the mitigation at issue, it is clear that he gave "meaningful consideration" to the mitigating evidence, under any standard. Moreover, the relevant state court factual determinations were reasonable under AEDPA's deferential standard. *See Titlow*, slip op. at 8-9, 11.

2. Ninth Circuit opinions.

The panel majority does not conflict with various opinions from this Court, dating back to 2007, that have considered whether Arizona courts properly applied *Lockett/Eddings.* In *George Lopez*, this Court first considered an Arizona capital prisoner's claim that his death sentence violated *Eddings*; it held that the Arizona trial court's statement about considering the evidence was

"at least ambiguous and that we should not speculate as to whether all the mitigating factors were actually considered." 491 F.3d at 1037-1038. The judge dissenting from the panel opinion argued that the majority had incorrectly assumed that the state court knew and followed the law. *Id*. at 1044-1053. But the panel majority responded that: "Under AEDPA, we must do more than find the statement ambiguous—we would have to conclude that the Arizona Supreme Court was objectively unreasonable in concluding the sentencing court did, in fact, review all the proffered mitigating evidence." *Id*. at 1037-38, *citing Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). Thus, the conclusion of the panel majority here—that the Arizona Supreme Court's decision upholding the trial court's ruling was not contrary to or an unreasonable application of *Lockett/Eddings*, 730 F.3d at 920-921—is in accordance with *George Lopez.*

Since *George Lopez*, this Court has since rejected *Eddings* attacks by several Arizona capital habeas petitioners, based on the specific records in those cases. *See Poyson*, 711 F.3d at 1097-1100; *Towery*, 673 F.3d at 945 ("the court's reasoned and individualized decision to give Towery's evidence little or no weight was not contrary to Supreme Court precedent"); *Stokley v. Ryan*, 705 F.3d 401, 403-404 (9th Cir. 2012)("However, on balance, the Arizona Supreme Court's opinion suggests that the court did weigh and consider all the evidence presented in mitigation at sentencing."); *Schad v. Ryan*, 671 F.3d 708, 7249 (9th Cir. 2011) (no "clear indication" that the state court applied the wrong standard); *Greenway v. Schriro*, 653 F.3d 790, 807-808 (9th Cir. 2011) (record did not indicate that either the trial court or the Arizona Supreme Court applied an unconstitutional nexus test); *Lopez (Sammy) v. Ryan*, 630 F.3d 1198, 1204 (9th Cir. 2011) ("there is no reason to infer unconstitutional reasoning from judicial silence. Rather, we must look to what the record actually says").

In an attempt to show an intra-circuit conflict, McKinney cites *Styers v.*

Schriro, 547 F.3d 1026 (9th Cir. 2008), and *Williams v. Ryan*, 623 F.3d 1258 (9th Cir. 2010). However, the panel majority considered and distinguished those opinions, as well as *Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2007). *McKinney*, 730 F.3d at 918-919. *See also Poyson*, 711 F3d at 1098 (distinguishing *Styers* and *Williams*); *Schad*, 671 F.3d at 723-24 (same). Thus, *Styers* and *Williams* do not present a basis for reconsideration by the panel or *en banc*.

Styers does not purport to reject the "clear indication" test of *George Lopez*; indeed, it does not even cite *George Lopez*. 547 F.3d at 1035-37. It does analyze *the specific statements by the Arizona Supreme Court* to determine whether that court considered the proffered mitigation. *Id.* at 1035. Thus, despite the Arizona Supreme Court's general statement that it considered all of the proffered mitigation, the *Styers* panel found "its analysis prior to this statement indicates otherwise." *Id.*, emphasis added. Although *Styers* does not specifically say that there was a "clear indication" of an *Eddings* violation, it obviously thought the Arizona Supreme Court's language was a clear enough indication to justify habeas relief. Thus, *Styers* does not establish a "direct conflict" with other opinions of this Court or with the panel majority's opinion in this case.

Finally, McKinney cites *Jones v. Ryan*, 583 F.3d 626 (9th Cir. 2009). (Pet. at 3.) However, that opinion was vacated by the Supreme Court. *See Ryan v. Jones*, 131 S. Ct. 2091 (2011).

B. *The Arizona Supreme Court's citation of* State v. Ross *does not show an unreasonable application of clearly established federal law.*

McKinney argues that the Arizona Supreme Court's citation to *State v. Ross*, 886 P.2d 1354 (1994), shows that it applied a nexus test that unconstitutionally precluded consideration of mitigation evidence. (Pet. at 11-

12.) That does not justify rehearing because the panel majority considered, and rejected, this very argument. 730 F.3d at 920. This Court held in another case that whether a state court's application of *Eddings/Lockett* is unreasonable turns on the specific record of the case, not on a particular authority cited by the state court. *See Towery*, 673 F.3d at 946. *Towery* rejected an argument, like the one McKinney makes, that the Arizona Supreme Court's erroneous analysis was shown by its citation of another Arizona Supreme Court opinion. *Id.*, discussing *State v. Wallace*, 773 P.2d 983 (Ariz. 1989). Similarly, in this case, the panel majority found no unreasonable application of *Eddings/Lockett* based on the specific statements by the sentencing court and the Arizona Supreme Court regarding the mitigating evidence. 730 F.3d at 915 ("Because the record makes clear that the trial court adequately considered and weighed McKinney's mitigation evidence, we deny relief."). *See also Hurles*, 706 F.3d at 1036 ("The record makes plain that the trial court did in fact consider the mitigating evidence, as the Constitution requires.").

McKinney argues that the Arizona Supreme Court's *Towery* opinion is distinguishable because it cited *Penry v. Lynaugh*, 492 U.S. 302 (1989), *Eddings*, and *Lockett*, whereas the Arizona Supreme Court's opinion in this case did not cite any of these Supreme Court opinions. (Pet. at 11). *See State v. Towery*, 920 P.2d 290, 310 fn. 17 (Ariz. 1996). First, the fact that in the same year it decided McKinney's appeal (1996), the Arizona Supreme Court cited relevant Supreme Court authority in *Towery* shows it was aware of the applicable Supreme Court authority, even if not cited in its McKinney opinion. *See also State v. Hurles*, 914 P.2d 1291 (Ariz. 1996).

Second, even if the state court's ruling on the merits is unexplained or does not cite Supreme Court authority, a habeas court must still look to existing Supreme Court precedent to decide whether the outcome was a reasonable

application of federal law. *Early v. Packer*, 537 U.S. 3, 8 (2002). The Supreme Court has held that citation to relevant federal law is not required and that "a state court need not even be aware of [Supreme Court] precedents, 'so long as neither the reasoning nor the result of the state-court decision contradicts them.'" *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003) (citing *Early*, 537 U.S. at 8).

C. *The majority panel opinion does not conflict with* Nelson v. Quarterman.

McKinney next asks for rehearing based on an alleged conflict with the Fifth Circuit's opinion in *Nelson*. (Pet. at 12-13.) The alleged conflict does not merit rehearing because the panel majority considered the relevant Supreme Court authority regarding Texas' jury sentencing in capital cases, and because there is no conflict.

First, *Nelson* is just a specific application of *Tennard*. The Supreme Court had granted Nelson's petition for certiorari from the Fifth Circuit's prior opinion, and ordered the Fifth Circuit to reconsider the *Penry* issue in light of *Tennard*. *Nelson*, 472 F.3d at 289, 291-92. The panel majority opinion considered, and distinguished, *Tennard*, as well as *Smith*. 730 F.3d at 916-917, 919-21. Thus, this Court need not rehear this case based on the Fifth Circuit's application of *Tennard* and/or *Smith*.

Second, there is no conflict with the Texas cases, whether or not they are the clearly established federal law existing when the Arizona Supreme Court rejected McKinney's appeal. The analysis by the panel majority is very fact-specific, based on the particular statements by the sentencing judge and the Arizona Supreme Court. Moreover, there is no direct conflict because there are significant differences in consideration of mitigating evidence between judge sentencing and jury sentencing.

One important distinction is the presumption that judges know and follow the law. *Visciotti*, as discussed above, mandates that federal courts reviewing state court proceedings presume that state courts know and follow the law. This Court cannot presume that the Arizona courts both did not know of, and failed to follow, *Eddings*. *See Sammy Lopez*, 630 F.3d at 1203-1204.

Another important distinction is that Arizona's judge sentencing resulted in extensive written special verdicts that specifically addressed how Arizona sentencing judges considered proffered mitigation, and then the mitigation was independently reviewed by the Arizona Supreme Court. The special verdict and Arizona Supreme Court discussion in this case created a specific record for this Court to decide whether the state courts reasonably applied *Lockett/Eddings* to the consideration of proffered mitigation.

Because of the crucial difference between the Texas and the Arizona death sentencing schemes, any alleged "'circuit split' created by these cases is completely illusory." *United States v. Lopez*, 484 F.3d 1186, 1198 (9th Cir. 2007).

D. *The panel majority found no* Eddings/Lockett *error, and so had no reason to consider if* Brecht *applied, but if it had found such error,* Brecht *would apply, and McKinney does not show prejudice under* Brecht.

McKinney's final claim of error is that *Eddings/Lockett* error is not subject to analysis under *Brecht*. (Pet. at 13-14.) But *Brecht* was not an issue here because the panel majority found no *Eddings/Lockett* error. Accordingly, there is no reason for either the panel or this Court *en banc* to reconsider a point not decided by the panel majority opinion.

Even if the panel majority opinion had employed *Brecht*, it has been the established law of this Circuit since 2001 that *Eddings* error must be reviewed for prejudice under *Brecht*. *See Henry v. Ryan*, 720 F.3d 1073, 1089 (9th Cir.

2013) ("Henry has not shown that any error would have "had substantial and injurious effect or influence in determining" the sentence," citing *Brecht*.); *Stokley*, 705 F.3d at 404-405 ("In sum, because the claimed causal nexus error, if any, did not have a substantial or injurious influence on Stokley's sentence, Stokley cannot establish prejudice.") (citing *Brecht*); *Landrigan v. Stewart*, 272 F.3d 1221, 1230 n.9 (9th Cir. 2001) ("At any rate, any error in failing to consider Landrigan's use of alcohol and drugs would have been inconsequential; it would have had no effect whatsoever on the outcome."). That *Styers* and *Williams* did not do a *Brecht* analysis does not create a circuit split; those opinions simply did not address the point.

This issue has been raised in petitions for rehearing in both *Stokley* and *Henry*, but this Court denied rehearing in both cases. *See Stokley v. Ryan*, 704 F.3d 1010, 1011 (9th Cir. 2012); *Henry v. Ryan*, No. 09-99007, Order (9th Cir. Nov. 1, 2013) ("The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc.").

The Supreme Court has not established that such error is structural, but rather indicated that it is not. *See Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987) (finding that exclusion of mitigating evidence renders death sentence invalid in the absence of a showing of harmless error) (cited by *Landrigan*, 272 F.3d at 1230 fn.9); *Skipper v. South Carolina*, 476 U.S. 1, 7–8 (1986) (addressing and rejecting state's argument that the excluded mitigation evidence was "cumulative and its exclusion . . . harmless"). All the other circuits, save one, that have considered this point have found that such error *is* subject to harmless-error analysis. *See, e.g., Dixon v. Hawk*, 2013 WL 4792224, *6 (6th Cir. Sept. 10, 2013); *McGehee v. Norris*, 588 F.3d 1185, 1197-98 (8th Cir. 2009); *Martini v. Hendricks*, 348 F.3d 360, 368-71 (3rd Cir. 2003); *Bryson v. Ward*, 187

F.3d 1193, 1205 (10th Cir. 1999) (cited by *Landrigan*, 272 F.3d at 1230 fn.9); *Boyd v. French*, 147 F.3d 319, 322, 327–28 (4th Cir. 1998); *Horsley v. Alabama*, 45 F.3d 1486, 1492-93 (11th Cir. 1995); *Williams v. Chrans*, 945 F.2d 926, 949 (7th Cir. 1991).

The one exception is the Fifth Circuit's opinion in *Nelson*, 472 F.3d at 314. But the panel majority's opinion in this case did not *create* a conflict with *Nelson*, which was issued in 2006 and was then contrary on this issue to this Court's 2001 *Landrigan* opinion. Moreover, the panel majority did not create a conflict when it did not even reach the *Brecht* issue.

Even if there had been *Eddings/Lockett* constitutional error, McKinney does not show prejudice under *Brecht*. Both the Arizona trial court and the Arizona Supreme Court's comments make clear that, even if they were to "properly" consider the mitigation, they would have found the mitigating evidence to be of little or no weight. *See Stokley*, 705 F.3d at 404-405. Moreover, such mitigation would have been unlikely to change the sentence, particularly in view of the fact that McKinney committed more than one murder, which is the "most powerful imaginable aggravating evidence." *See Wong v. Belmontes*, 558 U.S. 15, 28 (2009).

III. CONCLUSION.

Respondent respectfully requests this Court to deny McKinney's petition for rehearing or *en banc* review.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 32-1, Rules of the Ninth Circuit Court of Appeals, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 4,194 words.

/S/JON G. ANDERSON
JON G. ANDERSON

No. 09-99018

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES E. MCKINNEY, PETITIONER-APPELLANT, –VS– CHARLES L. RYAN, RESPONDENT-APPELLEE.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, NO. 2:03-CV-00774-DGC STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28–2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, Respondent-Appellee is aware of only one related case, the federal habeas appeal of McKinney's co-defendant/brother: *Hedlund v. Ryan*, No. 09-99019.

DATED this 7th day of November, 2013

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