No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Richard Dale Stokley, Petitioner,

vs.

Charles L. Ryan, Director, Arizona Department of Corrections,
and Ron Credio, Warden, Arizona State Prison Complex—Eyman Unit,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Jon M. Sands
Federal Public Defender
*Cary Sandman (Ariz. Bar No. 004779)
Jennifer Y. Garcia (Ariz. Bar No. 021782)
Estela Dimas (Ala. Bar No. 1321-E57D)
Golnoosh Farzaneh (Cal. Bar No. 261557)
Ellie Hoecker (Cal. Bar No. 268830)
407 West Congress Street, Suite 501
Tucson, AZ 85701
(520) 879-7622
Cary_Sandman@fd.org

Amy B. Krauss (Ariz. Bar No. 013916)
P.O. Box 65126
Tucson, AZ 85728
(520) 400-6170

Attorneys for Petitioner Richard Dale Stokley

* *Counsel of Record*

*****CAPITAL CASE*****
EXECUTION SCHEDULED FOR DECEMBER 5, 2012 AT 10:00 AM (MST)

QUESTIONS PRESENTED

Last term, this Court decided *Maples v. Thomas*, 132 S. Ct. 912 (2012). During independent review of Petitioner Richard Dale Stokley's sentence on direct appeal, the Arizona Supreme Court ran afoul of the Eighth Amendment by applying a judicially-imposed limitation on the consideration of mitigation. The court below determined that this underlying claim was colorable, and that Stokley demonstrated cause to overcome the procedural default of the constitutional violation. However, the majority concluded *sua sponte* that any error by the Arizona Supreme Court was harmless, and thus pursuant to *Brecht v. Abrahamson*, 507 U.S. 619 (1993), Stokley could not show actual prejudice sufficient to overcome the procedural default of the claim.

There are two questions to be resolved by this Court.

1. Whether the Arizona Supreme Court's violation of *Eddings v. Oklahoma* constituted structural error.

2. If the *Eddings* error was structural, was Stokley required to demonstrate actual prejudice to overcome the procedural default of this claim.

PARTIES TO THE PROCEEDING

The petitioner is not a corporation. The respondents throughout the federal habeas corpus proceedings have been the Director of the Arizona Department of Corrections and the Warden of the Arizona State Prison Complex—Eyman Unit, the facility where Stokley is currently incarcerated.

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MISCELLANEOUS

Arizona death-row prisoner Richard Dale Stokley seeks a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit that denied his motion to stay the appellate mandate, and remand to the district court for reconsideration of its procedural-default ruling in light of *Maples v. Thomas*, 132 S. Ct. 912 (2012).

DECISIONS BELOW

The panel's amended order is reported at *Stokley v. Ryan*, No. 09-99004, 2012 WL 5883592 (9th Cir. Nov. 21, 2012), and is included in the appendix beginning at page A-1. The dissents from the denial of Stokley's petition for rehearing en banc are reported at *Stokley v. Ryan*, No. 09-99004, 2012 WL 5928279 (9th Cir. Nov. 27, 2012), and are included in the appendix beginning at page A-23. The panel's original order denying Stokley's motion to stay the appellate mandate is not reported, and is included in the appendix beginning at page A-36. The decision of the district court addressing the procedural status of Stokley's underlying claim is unreported, and is included in the appendix at page A-54. The Arizona Supreme Court's opinion on direct appeal is reported at *State v. Stokley*, 898 P.2d 454 (Ariz. 1995), and is included in the appendix at page A-92.

STATEMENT OF JURISDICTION

The court of appeals issued its original order in this case on November 15, 2012. (*Stokley v. Ryan*, No. 09-99004, ECF No. 101.) Stokley filed a timely petition for panel rehearing and rehearing en banc on November 19, 2012, which the court of appeals denied on November 21, 2012. (*Stokley v. Ryan*, No. 09-99004, ECF Nos.

103, 107.) On November 27, 2012, the court issued an amended order that included four dissents from the denial of the petition for rehearing on banc. (A-21.) This petition is timely under Supreme Court Rule 30.1. This court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

In 1992, Stokley was convicted of two counts of first-degree murder, and was sentenced to death. (A-110.) His co-defendant was allowed to plead guilty to second-degree murder with a maximum twenty-year sentence, despite his equal or greater participation in the crime. (ER 167.)[1] On direct appeal, the Arizona Supreme Court affirmed Stokley's conviction and conducted an independent review of his death sentence, determining that the mitigation evidence it considered was not sufficiently substantial to call for leniency. (A-125.) This Court denied certiorari. *Stokley v. Arizona*, 516 U.S. 1078 (1996).

During his state post-conviction proceedings, the Arizona courts appointed Harriette Levitt to represent Stokley.[2] The problems with Levitt's representation

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[1]The citations throughout this section are to the Excerpts of Record filed in the appellate proceedings in the United States Court of Appeals for the Ninth Circuit.

[2]As noted by Judge Paez, Levitt is the same attorney whose inadequate state post-conviction representation was at issue in this Court's recent decision in *Martinez v. Ryan*, 132 S. Ct. 1309, 1320–21 (2012). (A-36.) *See* Br. for Pet'r at 6,

began at the outset. In disregard of her ethical duties, Levitt engaged in no substantive communication with Stokley prior to filing the petition, frustrating establishment of an attorney-client relationship.[3] (ER 601-02; ER 859-61.) Levitt's billing records reflect that she did not begin reviewing the trial transcripts until eight months after her appointment. (ER 860-61.) Then, she expended a total of 7.5 hours researching all possible post-conviction legal issues, and drafting and filing the post-conviction petition. (ER 860-61.) Despite the extra-record nature of post-conviction proceedings, Levitt did not conduct any independent investigation aside from a few brief telephone calls to prior prosecution and defense team members regarding one of the issues she raised. She did not retain any expert witnesses. The petition Levitt eventually filed (after first missing the initial filing deadline) raised just two claims and included three-and-a-half pages of legal argument. (ER 872-80.)

After Stokley received a copy of the petition, he wrote a letter to the judge outlining his serious concerns. (ER 872; ER 717-18.) In the letter, Stokley stated that the petition was "sorely lacking and wholly inadequate." (ER 717.) He informed the judge that he spoke to Levitt by phone and informed her that he was "concerned and dissatisfied with her work and the brevity of this 6-page, 2 issue

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Martinez v. Ryan, No. 10-1001 (U.S. Aug. 4, 2011) (identifying Levitt as Martinez's state post-conviction attorney).

[3]Levitt did have one twenty-minute telephone conference with Stokley prior to filing the petition, but this took place soon after her appointment and before she reviewed the record. This brief communication took place as the result of a collect call placed by Stokley. (ER 860.) In fact, during the entire course of her representation of Stokley, Levitt never met him in person. (ER 601-02; ER 859-62.)

Rule 32 [petition]." (ER 717.) He stated that it was "evident that [his] present appeal was handled with a lick and a promise, rather than being given the conscientious analysis and preparation which should be applied." (ER 718.) Stokley further requested a stay of the proceedings and appointment of competent counsel because "the Rule 32 [petition] is a disgrace, and a good example of the very 'ineffective assistance of counsel' which it is meant to relieve." (ER 717-18.) Stokley also wrote to the Arizona Capital Representation Project asking for help (ER 715-16), and filed a complaint with the State Bar of Arizona against Levitt.[4] A copy of Stokley's letter to the court was sent to Levitt, but the court took no action on his concerns. (ER 861.)

After receiving this communication, Levitt received notice of the bar complaint that Stokley had filed. (ER 861.) Levitt's billing records show that she spent one hour reviewing and preparing her reply to the State's objections to the post-conviction petition and an additional thirty minutes responding to the bar complaint. (ER 861.) After the trial court denied the petition on the merits (ER 124), Levitt filed a motion to withdraw, citing "irreconcilable differences" and a "complete breakdown of the attorney/client relationship." Levitt requested that new counsel be appointed. (ER 866.) The trial court granted the motion and appointed Carla Ryan as Stokley's new post-conviction counsel. (ER 867.)

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[4]A copy of Stokley's bar complaint and its disposition was appended to his petition for rehearing and rehearing en banc. (*Stokley v. Ryan*, No. 09-99004, ECF No. 103.) The complaint was not adjudicated. Instead, Stokley was informed that his complaint could be dealt with in post-trial proceedings, and "[i[f there [was] a judicial determination that the lawyer acted improperly, [the bar counsel would] review the matter at that time."

Ryan immediately began work on Stokley's case, requesting the appointment of co-counsel and additional time in which to file a motion for reconsideration. (ER 845-47; ER 852-53.) However, the State just as quickly intervened to thwart the appointment. It "strenuously" opposed Ryan's motion for appointment of co-counsel, arguing that Ryan was requesting "a side-kick" to "milk this case for all it is worth as a cash cow." (ER 842-44; A-13.) The State also moved to reinstate Levitt, arguing that Stokley had no right to the effective assistance of post-conviction counsel and that Levitt's performance was thus "irrelevant." (ER 854-56; ER 833-40.)[5]

Within a matter of days, Ryan responded to the motion to reinstate Levitt, filed a reply to the State's opposition to her motion for appointment of co-counsel, and filed a motion alleging prosecutorial misconduct based on the State's actions in seeking Levitt's reinstatement. (ER 833-41; ER 730-41; ER 813-20.) During this litigation, and less than thirty days after her appointment, Ryan also filed a motion to amend the post-conviction petition, identifying more than thirty additional claims. (ER 681-701.) Ryan expressly stated that the list of potential claims was not exhaustive, as she had not conducted the required investigation, retained expert witnesses, or considered all appropriate claims. (ER 681-701.) Before Ryan could proceed further, the trial court granted the State's motion as "well-taken," ordering that Levitt be reinstated. (ER 122.)

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[5]The State also incorrectly argued that Stokley's "dissatisfaction apparently did not arise until after he learned that the petition had been unsuccessful," ignoring both the letter Stokley had written to the court and the bar complaint he had filed. (ER 846.)

Once reinstated, Levitt filed a petition for review with the Arizona Supreme Court, challenging the trial court's denial of the six-page petition she had filed. (ER 665.) Levitt's petition for review was not focused on that petition; instead, it became a forum to defend herself from charges of professional incompetence. She also assumed a prosecutorial role, arguing that the claims Ryan sought to raise on Stokley's behalf were without merit. (ER 674-76.) Levitt engaged in advocacy against Stokley and his claims, and focused on justifying her own actions. (A-14 (noting that Levitt "systematically dismantled" the claims suggested by Ryan in the motion to amend).) This was a conflict of interest, and Levitt's partisan actions not only breached her duty of loyalty to Stokley, but also indicated that she was incapable of functioning as his advocate.

Meanwhile, after reinstatement of Levitt and denial of the motion to amend, Ryan sought the Arizona Supreme Court's review of those decisions. (ER 651.) Ryan argued that the ethically-conflicted Levitt had taken up the role of the prosecutor, advocating against the very claims that Stokley was attempting to raise. (ER 618-19.) Ryan also argued that it was improper for the State to intervene in the selection of counsel, observing that its actions subverted Stokley's rights to the full and fair presentation of his constitutional claims in the state court necessary to exhaust his claims for later federal review. (ER 621-30.) Stokley weighed in at this stage as well, making his written objections to the trial court's actions clear. (ER 268-69.)

The Arizona Supreme Court ignored Levitt's conflict of interest and denied Ryan's appeal, but in light of Ryan's argument that valid claims had been omitted from the original petition, the court granted Levitt leave to file a supplemental petition. (ER 120.) However, Levitt had no interest in serving as Stokley's advocate. Levitt again refused to meet with Stokley, and correspondence between Stokley and Levitt indicated that she refused to provide Stokley with access to the record so he could make a *pro per* effort to identify claims. (A-15.) This was inexcusable because from that point forward, Levitt never reviewed any portion of the record herself. (ER 600-03.) In fact, on remand, Levitt conducted no independent investigation of potential issues, and she spent a total of one hour evaluating the single issue she did raise. Her billing records confirm a grand total of two hours spent in preparation of the supplemental petition. A significant portion of that petition is consumed with additional arguments that Levitt asserted in opposition to claims that Stokley had suggested to Levitt, in what should have been privileged attorney-client communications, had such a relationship existed. (ER 604-12.)

Subsequently, Levitt filed a supplemental petition arguing that trial counsel was ineffective for not investigating and presenting evidence related to Stokley's brain damage and diminished mental capacity. (ER 607-09.) Levitt did nothing to investigate or to develop the factual or legal basis of the claim, and she had already engaged in partisan advocacy against this claim when she argued in the petition for review that it was meritless. (ER 600-03; ER 691-94; ER 674-76.) In fact, after

submitting her unsubstantiated supplemental petition, Levitt filed a written request for a ruling, revealing her desire for a quick dismissal. (ER 583.)

Stokley once again objected in writing, submitting letters to the trial judge and to the Arizona Supreme Court, asking for assistance from a lawyer who would help him investigate and develop the factual basis of his claims, but his pleas for assistance once again were ignored by the courts. (ER 268-71.) As the Ninth Circuit previously noted, Levitt's supplemental petition was quickly dismissed. *Stokley v. Ryan*, 659 F.3d 802, 810 (9th Cir. 2011) ("The supplemental petition was as vague as Levitt's initial petition, and it failed to comply with Arizona Rule of Criminal Procedure 32.5, which requires petitioners to submit '[a]ffidavits, records, or other evidence currently available to the defendant' in support of claims to post-conviction relief."). (ER 116-19.) Following this denial, the Arizona Supreme Court denied both petitions for review and the state-court proceedings concluded.

Stokley's federal habeas corpus proceedings began in 1998. He filed a petition for writ of habeas corpus that included several claims that had not been exhausted in state court, including a claim that the Arizona Supreme Court had improperly excluded relevant and compelling mitigation evidence in violation of *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Skipper v. South Carolina*, 476 U.S. 1 (1986), during its independent review of Stokley's sentence. (ER 497.) Stokley argued that Levitt's conflict of interest and advocacy against Stokley's interests had severed the agency relationship between Levitt and Stokley, and that her actions in impeding Stokley from presenting his claims in state court constituted cause for any

procedural default. (ER 407.) The district court denied Stokley's cause argument, citing *Coleman v. Thompson*, 501 U.S. 722 (1991), and accordingly dismissed his claim of error by the Arizona Supreme Court as procedurally defaulted. As a result of this dismissal, Stokley was not given the opportunity to brief his arguments on prejudice or the merits of his *Eddings*/*Skipper* claim.

The district court denied the remaining claims in the habeas petition in 2009, and certified one claim for appeal based on Stokley's argument that he had received ineffective assistance of counsel during his capital sentencing proceedings. (ER 76.) The Ninth Circuit affirmed the denial of the ineffective-assistance-of-counsel claim in *Stokley v. Ryan*, 659 F.3d 802 (9th Cir. 2011), *cert. denied*, No. 11-10249, 2012 WL 1643921 (U.S. Oct. 1, 2012). However, in the time between that decision and the filing of Stokley's petition for certiorari, this Court held in *Maples v. Thomas*, 132 S. Ct. 912 (2012), that abandonment by state post-conviction counsel could constitute cause to overcome the procedural default of claims presented in federal habeas corpus proceedings. *Maples*, 132 S. Ct. at 927. On the same day that Stokley's petition for certiorari was denied and jurisdiction returned to the appellate court, he filed a motion arguing that *Maples* warranted a stay of the mandate and a partial remand to the district court for reconsideration of the district court's prior ruling as to whether abandonment by his post-conviction attorney constitutes cause for the default of his *Eddings*/*Skipper* claim. (*Stokley v. Ryan*, No. 09-99004, ECF No. 86.)

The panel, in a 2-1 ruling, denied Stokley's motion because it concluded that he had not proven that he was abandoned by his state post-conviction counsel, and that alternatively, although his *Eddings*/*Skipper* claim was colorable, it was harmless because Stokley had not proven that the excluded mitigation evidence would have made a difference in his sentence. (A-36.) The majority went on to find that Stokley therefore had not shown prejudice under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), to overcome the procedural default. (A-36.) In dissent, Judge Paez stated that Stokley had alleged a prima facie case of abandonment sufficient to overcome the procedural default of his underlying claim; he reiterated that briefing on the issues before the court was limited, and that remand was necessary to allow development of Stokley's arguments regarding prejudice and the merits of his underlying claim. (A-36.)

Stokley filed a petition for panel rehearing and rehearing en banc, arguing that en banc review was appropriate for three reasons. (*Stokley v. Ryan*, No. 09-99004, ECF No. 103.) First, Levitt's actions constituted abandonment under *Maples* and thus established cause. Next, the majority's decision on Stokley's underlying *Eddings*/*Skipper* claim was erroneous and conflicted with prior decisions from the Ninth Circuit and from this Court. Finally, the majority's determination that Stokley could not prove prejudice conflicted with decisions from this Court and prior decisions of the Ninth Circuit because it applied a harmless-error test *sua sponte*, and improperly applied the *Brecht* standard for determination of prejudice to overcome procedural default. A vote was held on the petition for rehearing en banc,

but the petition was denied with at least ten judges calling for en banc review of the majority's decision. (A-21-35.)

Despite the denial of the en banc petition, the panel issued an amended order on Stokley's motion to stay the mandate. In the amended order, the majority deleted its analysis of Levitt's conduct during the state court proceedings, assuming without deciding that there was cause for Stokley's procedural default under *Maples*. (A-3.) However, the majority still concluded that Stokley had not proven actual prejudice to overcome the procedural default of his claim because any underlying error was harmless. (A-7.) Judge Paez also amended his dissent to reflect his disagreement with the majority's failure to decide the *Maples* issue, and he reiterated his position that Stokley had proven constructive termination of the attorney-client relationship, thereby excusing Stokley's procedural default under *Maples*. (A-9 through A-16.) Judge Paez further found that Stokley had proven his *Eddings*/*Skipper* claim, asserted that the majority had "conflate[ed] structural and harmless error," and noted a circuit split on the question of whether *Eddings* error is structural. (A-16.)

REASONS THE WRIT SHOULD BE GRANTED

The opinion by the Ninth Circuit is "in conflict with the decision of another United States court of appeals on the same important matter[s]," Sup. Ct. R. 10(a), and "has decided . . . important federal question[s] in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). For these reasons, this Court should exercise its discretion and grant certiorari.

There are genuine and intolerable conflicts that exist between the decision by the court below and established decisions by other circuits and this Court. Considering Stokley's claim that the Arizona Supreme Court violated *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Ninth Circuit applied a harmless-error analysis and found that even if the state court did consider the excluded mitigating evidence, Stokley's death sentence would have been upheld. (A-24.) Conversely, the Fifth Circuit held that a federal court could not substitute its judgment for the judgment of the state court, and has uniformly held that all such *Eddings* claims constitute structural error and prejudice is thus presumed. *Nelson v. Quarterman*, 472 F.3d 287, 315 (5th Cir. 2006) (en banc); *see also McGowen v. Thaler*, 675 F.3d 481 (5th Cir.), *cert. denied*, No. 12-82, 2012 WL 2955935 (U.S. Nov. 26, 2012). Other circuit courts are equally divided on the issue, and this Court has not performed a harmless-error analysis in its recent *Eddings*-based opinions. *See, e.g.*, *Smith v. Texas*, 543 U.S. 37 (2004); *Tennard v. Dretke*, 542 U.S. 274 (2004). Certiorari should be granted to resolve this tension and square the irreconcilable conflict that exists.[6]

Similarly, the Ninth Circuit's requirement that Stokley prove actual prejudice from the Arizona Supreme Court's *Eddings* error directly conflicts with prior decisions from that Court and other circuits, and highlights the tension between this Court's jurisprudence on claims of structural error and the standard to

[6]As discussed below, four circuit courts have applied harmless-error analysis when addressing *Eddings* claims. Two circuit courts, in addition to the Ninth Circuit, have inconsistently and alternatively applied both the structural-error and harmless-error standards.

apply when assessing cause and prejudice to overcome procedural default. Courts in the First Circuit have held that a petitioner need not show actual prejudice to overcome a default of structural-error claims; the Fifth and Eleventh Circuits have required a showing of actual prejudice even in the face of a defaulted structural-error claim; and courts in the Sixth and Ninth Circuits have decided the question inconsistently within each circuit. *See, e.g., Owens v. United States*, 483 F.3d 48, 65 n.14 (1st Cir. 2007); *Hollis v. Davis*, 941 F.2d 1471, 1480 (11th Cir. 1991); *see also Ambrose v. Booker*, 684 F.3d 638 (6th Cir. 2012), *cert. pending*, 6th Cir. Nos. 11-1430, 10-1247, 09-1539 (filed Nov. 27, 2012). Certiorari should be granted to resolve the conflicts between decisions by this Court and the Ninth Circuit, and the intra- and inter-circuit conflicts that currently exist on these issues.

QUESTION ONE

Whether the Arizona Supreme Court's violation of *Eddings v. Oklahoma* constituted structural error.

The Ninth Circuit determined, *sua sponte*, that any error by the Arizona Supreme Court in categorically excluding relevant and compelling mitigation evidence was harmless, because Stokley could not prove that consideration of the omitted mitigation evidence would have resulted in a sentence other than death. (A-5 through A-7.) This analysis was flawed for several reasons. Although the court cited *Hitchcock v. Dugger*, 481 U.S. 393 (1987), for the proposition that a harmlessness analysis applies in this situation, this Court declined to undertake such an analysis in that case specifically because the respondent had not urged it. In addition, Stokley's claim was not properly subject to a harmless-error analysis

because it was structural in nature, and thus prejudice must be presumed. The panel's analysis conflicts with decisions from this Court, prior decisions of the Ninth Circuit, and decisions from other circuit courts.

A. Claims regarding the exclusion of mitigating evidence constitute structural error.

In *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), this Court defined "structural error" as a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial itself." *Id.* at 310. These defects "defy analysis by 'harmless-error' standards" because "[w]ithout these basic protections, a criminal trial cannot reliably serve its function . . . and no criminal punishment may be regarded as fundamentally fair." *Id.* at 309-10. Constitutional error can also be classified as "structural" depending "upon the difficulty of assessing the effect of the error." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006). In *Gonzalez-Lopez*, the Court stated that its precedent has never supported the assertion "that *only* those errors that *always* and *necessarily* render a trial fundamentally unfair and unreliable are structural."[7] *Id.*

Here, the Arizona Supreme Court did not conduct the "type of individualized consideration of mitigating factors required by the Eighth and Fourteenth Amendments in capital cases." *Eddings v. Oklahoma*, 455 U.S 104, 117 (1982). Although *Eddings* clearly established that a state court may not refuse to consider

[7]At issue was the defendant's Sixth Amendment right to retain counsel of choice. The error was structural because the error was not amenable to harmless-error analysis given the difficulties in assessing how a different attorney may have performed not only in trial but in pretrial preparation, plea negotiations, and other related areas of the proceedings. *Gonzalez-Lopez*, 548 U.S. at 149-50.

as a matter of law any relevant mitigating evidence that a defendant proffers in support of a sentence less than death, including evidence that does not have a connection to the offense at issue, the Arizona Supreme Court violated *Eddings* in its decision affirming the death penalty by failing to consider evidence that did not have a nexus to the crime. (A-123 through A-124 (disregarding evidence of Stokley's chaotic and abusive childhood because Stokley failed to show how this influenced his participation in the offense).) This unconstitutional nexus requirement was firmly established in Arizona law at the time of Stokley's sentencing. "A dysfunctional family background or difficult childhood can be mitigating only if the defendant can establish that early experiences, however negative, affected later criminal behavior in ways that were beyond his control." *State v. Hoskins*, 14 P.3d 997, 1021-22 (Ariz. 2000) (citing *Stokley*, 898 P.2d at 473 ("[F]amily dysfunction can be mitigating only when actual causation is demonstrated between early abuses suffered and the defendant's subsequent acts, . . . [h]owever, if the defendant proves the causal link, the court then will determine what, if any, weight to accord the circumstance in mitigation.")).

The error here was not one made in isolation by a single judge, but rather existed in the fundamental structure governing capital sentencing in Arizona at the time of Stokley's trial and appeal. Under these circumstances, it is impossible for a reviewing court to "quantitatively" assess what affect the excluded mitigating evidence would have had on Stokley's sentence. *See Fulminante*, 499 U.S. at 307-08. Rather, "[a] reviewing court can only engage in pure speculation" about the

extent to which the additional mitigation evidence would have affected the outcome. *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993). The Eighth Amendment "requires more than appellate speculation about a hypothetical [sentencer's] action." *Id.*

The court below rested its decision in this case on the precise inquiry this Court has cautioned against. The majority found that, even if the excluded mitigating evidence had been considered on independent review, the Arizona courts would have still upheld Stokley's death sentence. (A-5.) Such a question is improper. The question that the court should have asked is whether the death sentence Stokley did in fact receive was not in any way attributable to the fact that the reviewing court excluded relevant mitigating evidence.

Under these circumstances, a reviewing court could only speculate, rather than definitively answer, such a question. *Sullivan*, 508 U.S. at 280 ("The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt—not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough."). Thus, "the illogic of harmless-error review in the present case becomes evident." *Id.* Because no judge or jury has been able to consider and give effect to Stokley's mitigating evidence, the Ninth Circuit's question of whether the same decision to impose the death penalty "would have been rendered absent the constitutional error is utterly meaningless." *Id.*

B. This Court's precedents clearly demonstrate that a trial court's exclusion of relevant mitigating evidence is structural error.

In *Lockett v. Ohio*, 438 U.S. 586 (1978), this Court struck down Ohio's death-penalty statute because it limited admissible mitigating evidence to three categories. In striking down the statute, the Court explained that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604. Once this Court determined that the sentencer was precluded from considering relevant mitigating factors, it summarily reversed the death sentence and remanded for further proceedings. *Id.* at 608-09.

Four years later, in *Eddings v. Oklahoma*, 455 U.S. 104, 113 (1982), the Court found that the sentencing judge refused, as a matter of law, to consider mitigating evidence related to the defendant's abusive childhood and emotional disturbance. Upon concluding that the death sentence was "imposed without 'the type of individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments in capital cases,'" this Court reversed and remanded the case to the state courts to consider the mitigation and reweigh against the aggravation. *Id.* at 105, 117 (quoting *Lockett*, 438 U.S. at 606). The Court noted that the rule in *Lockett* "followed from the earlier decisions of this Court and from the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all." *Id.* at 112. Once the Court found that the

framework within which the defendant was sentenced was defective, and that the death sentence may have been erroneously imposed, it concluded its analysis and reversed. *Id.* at 117. This Court did not conduct a harmless-error analysis as to whether the additional mitigation would have made a difference to the outcome and, in fact, specifically noted that it was remanding to the state courts because "[w]e do not weigh the evidence for them." *Id.*; *see also id.* at 117 (O'Connor, J., concurring) ("Because the trial court's failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing.").

Again, in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), and *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*), this Court found that the Texas sentencing scheme precluded the sentencer from being able to consider and give effect to all mitigating evidence and, therefore, the sentence did not "reflect a reasoned moral response to the defendant's background, character, and crime" as required by the Eighth and Fourteenth Amendments. 492 U.S. at 319 (citations and quotations omitted). In both instances, this Court vacated the death sentences upon finding that the jury had not been adequately instructed with respect to mitigating evidence. 532 U.S. at 786, 803-04. "Indeed, the *Penry II* Court applied the *Brecht* harmless-error test to Penry's claim that the prosecution's use of a psychiatrist's report violated his Fifth Amendment rights. Conspicuously absent from the discussion regarding Penry's Eighth Amendment claim, however, is any mention of the harmless-error test in either the majority or the dissenting opinions." *Nelson v.*

Quarterman, 472 F.3d 287, 314 (5th Cir. 2006) (en banc) (internal citations omitted).

Likewise, in *Tennard v. Dretke*, 542 U.S. 274, 284 (2004), the Court found that requiring mitigating evidence to be "constitutionally relevant" before it could be considered was contrary to this Court's precedents. The *Tennard* Court held that, while certain trivial factors may not qualify as mitigating evidence, "to say that only those features and circumstances that a panel of federal appellate judges deems to be 'severe' (let alone 'uniquely severe') could have [a tendency to mitigate the defendant's culpability] is incorrect." *Id*. at 287. Without applying a harmless-error test to the excluded evidence, this Court reversed the Fifth Circuit's decision and remanded for further proceedings. *Id*. at 289.

These decisions reveal that claims relating to the exclusion of relevant mitigating evidence have never been amenable to harmless-error review because assessing the effect of the error on the actual sentence imposed is not possible. In addition to the above-listed cases, this Court has examined many other cases involving the unconstitutional rejection of valid mitigating evidence as structural error. *See, e.g.*, *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 264 (2007) ("Our cases following *Lockett* have made clear that when the jury 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 statue—the sentencing process is *fatally flawed*.") (emphasis added); *Brewer v. Quarterman*, 550 U.S. 286 (2007) (granting relief after finding

that the trial court's instructions prevented jurors from giving meaningful consideration to relevant mitigating evidence); *Smith v. Texas*, 543 U.S. 37 (2003) (same).

While this Court previously granted certiorari to address this question, *see Smith v. Texas*, 549 U.S. 948 (2006), it ultimately decided the case on other grounds, *see Smith v. Texas*, 550 U.S. 297, 316 (2007). However, Justice Souter's concurring opinion in *Smith* is telling. He states: "In some later case, we may be required to consider whether harmless error review is *ever* appropriate in a case with error as described in *Penry*." *Id.* (emphasis added). This Court has never found harmless error review to be appropriate with such claims, and this case presents an opportunity to resolve this question.

C. The federal courts are split over whether *Eddings* violations constitute structural or harmless error.

Despite the fact that this Court's jurisprudence clearly demonstrates that the exclusion of mitigating evidence is structural error, some circuit courts continue to apply a harmless-error analysis to such claims. Compounding the problem, there is no uniformity even within the circuits. The Fifth Circuit is the only court to explicitly address the question of structural- versus harmless-error in this context, and applying this Court's precedent, it held that the error cannot be reviewed for harmlessness. *Nelson*, 472 F.3d at 314-15. Three circuits apply different tests on a case-by-case basis, leading to arbitrary application of federal law in capital cases. Given the inconsistent manner in which lower federal courts address these Eighth Amendment violations, the question presented in this case is of utmost importance.

1. The Fifth Circuit applies a structural-error standard.

In *Nelson*, an en banc panel of the Fifth Circuit held that harmless-error analysis does not apply to a petitioner's claim that Texas's capital-sentencing scheme unconstitutionally precluded the jury from giving full effect to his mitigating evidence. 472 F.3d at 314. The *Nelson* court found instructive the fact that this Court had never applied a harmless-error analysis to any of "its long line of post-*Furman* cases addressing the jury's ability to give full effect to a capital defendant's mitigating evidence." *Id.* The court concluded that substituting a federal appellate court's own moral judgment for a jury's would be wholly inappropriate and contrary to the "entire premise of the *Penry* line of cases . . . that the jury's reasoned moral response might have been different . . . had it been able to fully consider and give effect to the defendant's mitigating evidence." *Id.* at 315. Following its decision in *Nelson*, the Fifth Circuit has uniformly held that such claims are structural. *See, e.g.*, *Rivers v. Thaler*, 389 F. App. 360, 362 (5th Cir. 2010) (acknowledging that the Fifth Circuit has already held that harmless-error analysis does not apply to *Penry* violations).

2. Three circuit courts have applied both structural-error and harmless-error standards.

In addition to the inter-circuit divide on how to address *Eddings* claims, many courts within the same circuits even apply differing standards. These intra-circuit conflicts are unique and exceptional, and create the untenable situation where capital cases are being determined in an arbitrary manner. For instance, here, the majority of the Ninth Circuit panel held that even though Stokley

presented a colorable *Eddings* claim, he could not obtain habeas relief because any error was harmless. (A-5 through A-7.) *See also Landrigan v. Stewart*, 272 F.3d 1221, 1230 & n.9 (9th Cir. 2001). Yet, in other capital cases, the Ninth Circuit has remanded cases upon finding that relevant mitigation was excluded pursuant to *Tennard* or *Eddings*. *See Williams v. Ryan*, 623 F.3d 1258, 1270-71 (9th Cir. 2010); *Styers v. Schriro*, 547 F.3d 1026, 1035-36 (9th Cir. 2008). Both Williams and Styers were granted habeas relief without any inquiry into whether the constitutional violations were harmless.

Similarly, the Seventh Circuit has applied both structural- and harmless-error analysis to such claims. For instance, in *Wright v. Walls*, 288 F.3d 937 (7th Cir. 2002), while the court did not explicitly state that the *Eddings* violation was structural, it granted habeas relief upon concluding that the sentencing judge's statements clearly indicated that he excluded certain mitigating evidence, in violation of the defendant's right to an individualized sentencing. *See also Allen v. Buss*, 558 F.3d 657, 667 (7th Cir. 2009) (denying relief but noting that if trial court had refused to consider petitioner's mitigation evidence, "*Eddings* would mandate relief"). Yet, in *Williams v. Chrans*, 945 F.2d 926, 947-49 (7th Cir. 1991), the Seventh Circuit noted that any claim regarding the exclusion of mitigating evidence under *Lockett* would be reviewed for harmless error. In that case, the court found that the proposed evidence did not qualify as mitigating evidence under *Lockett*. *Id.* at 947-48. However, the court went on to state that "even if we were to give *Lockett*

and its progeny an expansive reading, as the district court apparently did, such an exclusion would be harmless beyond a reasonable doubt." *Id*. at 949.

The Eleventh Circuit contains the same inconsistent approach. *Compare Knight v. Dugger*, 863 F.2d 705, 710 (11th Cir. 1988) (finding that a *Lockett* violation can be harmless but noting that the exact guidelines for determining harmlessness have not been settled), *and Ferguson v. Sec'y for Dep't of Corr.*, 580 F.3d 1183, 1200 (11th Cir. 1994) (finding that error in jury instruction which limited consideration of mitigation was harmless under *Brecht* standard), *with Hargrave v. Dugger*, 832 F.2d 1528 (11th Cir. 1987) (en banc) (granting habeas relief without a harmless-error test, after finding that the jury instructions limited the type of mitigation the jury could consider), *and Songer v. Wainwright*, 769 F.2d 1488 (11th Cir. 1985) (en banc) (finding that sentencing judge's interpretation of Florida statute limited the mitigating evidence he considered, in violation of *Eddings*, and therefore granted habeas relief).

3. Four other circuit courts have applied a harmless-error standard.

In contrast, the Fourth, Sixth, Eighth and Tenth Circuits have all applied harmless-error analysis after finding that relevant mitigating evidence was excluded from the sentencer's consideration. *See, e.g.*, *Jones v. Polk*, 401 F.3d 257 (4th Cir. 2005) (finding *Eddings* error harmless under *Brecht* standard); *Boyd v. French*, 147 F.3d 319, 322 (4th Cir. 1998) (same); *McGuire v. Ohio*, 619 F.3d 623, 630 (6th Cir. 2010) (finding that re-weighing of aggravators and mitigators on direct review cured any *Eddings* violation); *William v. Norris*, 612 F.3d 941, 948 (8th Cir.

2010) ("We will review for harmless error a properly preserved claim that relevant evidence was improperly excluded."); *Hall v. Luebbers*, 341 F.3d 706, 718 (8th Cir. 2003) ("Absent a link between the evidence and a mitigating factor, any claimed error is harmless beyond a reasonable doubt."); *Dutton v. Brown*, 812 F.2d 593, 601 & n.8 (10th Cir. 1987) (en banc) (finding that exclusion of mitigating evidence was not harmless); *Bryson v. Ward*, 187 F.3d 1193, 1205 (10th Cir. 1999) (holding that the exclusion of the mitigation did not have a "substantial and injurious effect" on the verdict and was therefore harmless).

The profound split among courts within and between circuits creates an unfair application of federal law in capital cases. "Beginning with *Furman*, the Court has attempted to provide standards for a constitutional death penalty that would serve both goals of measured consistent application and fairness to the accused." *Eddings*, 455 U.S. at 111. Such an inconsistent application of constitutional guarantees by federal courts defeats both purposes and makes this case particularly suited for review by this Court.

QUESTION TWO

If the *Eddings* error was structural, was Stokley required to demonstrate actual prejudice to overcome the procedural default of this claim.

In assessing Stokley's underlying *Eddings* claim, the majority concluded that the claim was colorable, but then as discussed above, imposed an incorrect standard in determining that any constitutional error was harmless because there was no reasonable likelihood that the Arizona courts would have imposed a different sentence had the additional mitigation evidence been considered. (A-7 (citing

Hitchcock, 481 U.S. at 399).) However, the majority then went on to impose a second layer of error in its prejudice analysis, holding that based on the so-called harmlessness of the Arizona Supreme Court's error, Stokley could not establish the requisite prejudice to overcome the procedural default of this claim because the error did not have a substantial or injurious effect on Stokley's sentence. (A-7 (citing *Brecht*, 507 U.S. at 630-34).) This second level of prejudice analysis is flawed and ripe for this Court's review.

A. This Court's precedents on procedural default and structural error create a conflict about whether a habeas petitioner must show actual prejudice to overcome the procedural default of a structural error claim.

Typically, to overcome a procedural default and obtain review of an underlying claim, a petitioner must establish "actual prejudice resulting from the alleged constitutional violation." *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977). In *Sykes*, the Court adopted the cause-and-prejudice standard of *Francis v. Henderson*, 425 U.S. 536, 542 n.6 (1976), for purposes of procedurally-defaulted habeas claims. 433 U.S. at 87. As the Court explained, such a rule satisfied the principles of comity while also guaranteeing "that the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice." *Id.* at 91.

However, where, as here, a structural error is at issue, courts have also recognized that prejudice stemming from structural errors is presumed because it is "necessarily unquantifiable and indeterminate." *Sullivan*, 508 U.S. at 281-82;

Fulminante, 499 U.S. at 309. In *Fulminante*, this Court stated that structural errors "defy analysis by 'harmless-error' standards" because the errors "affect[] the framework within which the trial proceeds" and undermine the fundamental fairness of the proceeding. 499 U.S. at 309-10. The recognition of the unquantifiable nature of the prejudice resulting from structural errors in *Fulminante* and *Sullivan* calls into question the propriety of requiring a showing of actual prejudice to overcome the procedural default of a structural-error claim. The rule this Court previously established requiring a showing of actual prejudice to overcome the default of a structural error "has been substantially weakened by the [its] subsequent pronouncement . . . that prejudice is impossible to quantify in cases of structural error." *Owens*, 483 F.3d at 65 n.14.

Because the Arizona Supreme Court's *Eddings* error was structural, and the prejudice resulting from the error cannot be quantitatively assessed by the reviewing federal courts, prejudice resulting from the structural error should be presumed. *See Owens*, 483 F.3d at 64. Applying the *Brecht* harmless-error test to the *Eddings* claim, the court below strayed from these principles and asked Stokley to prove something unquantifiable. (A-7.)

B. The lower federal courts are divided over whether actual prejudice is required to overcome the procedural default of a structural-error claim.

Lower federal courts have come to differing conclusions in their attempts to resolve the tension between the two competing procedural habeas corpus doctrines. In *Owens*, the First Circuit held that a defendant seeking to overcome procedural

default need not show actual prejudice in cases involving defaulted structural-error claims. 483 F.3d at 64. The court reasoned, "[i]f the failure to hold a public trial is structural error, *Neder v. United States*, 527 U.S. 1,8 (1999), 527 U.S. at 8, and it is impossible to determine whether a structural error is prejudicial, *Sullivan*, 508 U.S. at 281, we must then conclude that a defendant who is seeking to excuse a procedurally-defaulted claim of structural error need not establish actual prejudice." *Id.*

Conversely, both the Fifth and Eleventh Circuits have required a showing of actual prejudice to overcome the procedural default of a structural-error claim. *See Huffman v. Wainwright*, 651 F.2d 347, 350 (5th Cir. 1981) (applying an actual-prejudice standard and finding that "the chance of having a mixed-race jury would seem to meet the prejudice requirements for relief" where the petitioner "was a black man accused of raping a white woman"); *Hollis v. Davis*, 941 F.2d 1471, 1480 (11th Cir. 1991) (requiring a showing of actual prejudice to overcome a procedurally defaulted claim that the jury was drawn from a racially discriminatory pool); *see also Purvis v. Crosby*, 451 F.3d 734, 742 (11th Cir. 2006) (applying *Hollis* to a claim of ineffective assistance of counsel based on a failure to object to structural error and noting that the "*Hollis* decision establishes as the law of this circuit that an ineffective assistance of counsel claim based on the failure to object to a structural error at trial requires proof of prejudice"); *Jackson v. Herring*, 42 F.3d 1350, 1361 (11th Cir. 1995).

Other circuits are internally split as to the proper standard to apply. In *Johnson v. Sherry*, the Sixth Circuit found that prejudice would be presumed for purposes of procedural default if it was determined that the underlying error was in fact structural. 586 F.3d 439, 447 (6th Cir. 2009). The *Johnson* court ultimately remanded to the district court because the record before it made it "virtually impossible" to determine the scope of the error and whether there was sufficient cause to overcome the procedural default. *Id.* Later, contrary to its analysis in *Johnson*, in *Ambrose v. Booker*, the Sixth Circuit required a showing of actual prejudice, holding that "petitioners must show actual prejudice to excuse their default, even if the error is structural." 684 F.3d 638, 649 (6th Cir. 2012) (relying on *Francis v. Henderson*, 425 U.S. 536, 542 n.6 (1976), and *Davis v. United States*, 411 U.S. 233, 245 (1973)).

Similarly, the Ninth Circuit has considered differing standards for determining whether a petitioner can overcome procedural default. In *Vansickel v. White*, the Ninth Circuit applied an actual-prejudice standard to evaluate a claim challenging the composition of the jury. 166 F.3d 953, 959 (9th Cir. 1999). However, in *United States v. Withers*, the court indicated that it may be appropriate to assume prejudice in procedurally-defaulted structural-error cases. 638 F.3d 1055, 1066 (9th Cir. 2011) (finding that the petitioner raised a non-frivolous claim of prejudice for procedural default purposes, and reasoning that if the petitioner "establishes a violation of his right to a public trial, that structural error would likely satisfy the prejudice showing"). Finally, in this case, the majority of the panel

applied a harmless-error test to Stokley's procedurally-defaulted *Eddings* claim and found that Stokley was not entitled to relief because he could not establish prejudice. (A-7.)

Here, the court below, without analysis, required Stokley to do what this Court has said is impossible—demonstrate prejudice for a procedurally-defaulted claim of structural error. (A-7.) *See Fulminante*, 499 U.S. at 309-10; *Sullivan*, 508 U.S. at 281-82. Because of Stokley's inability to do the impossible, the State of Arizona plans to execute him without any court ever reviewing the merits of his *Eddings* claim. Absent this Court's consideration of the conflict between these two lines of authority, the inconsistent resolution of these conflicting precedents will continue to result in the arbitrary application of federal law in habeas cases.

CONCLUSION

For the preceding reasons, this Court should grant the petition for certiorari.

Jon M. Sands
Federal Public Defender
*Cary Sandman
Jennifer Y. Garcia
Estela Dimas
Golnoosh Farzaneh
Ellie Hoecker

Amy B. Krauss

*Counsel of Record