AMERICAN CONSTITUTIONALISM

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Supplementary Material

Chapter 12: The Contemporary Era – Criminal Justice/Punishments/The Death Penalty

**McKinney v. Arizona, 140 S.Ct. 702** (2020)

*James McKinney went on a burglary spree in 1991, during which he murdered Christine Mertens and Jim McClain. He was arrested, tried, convicted by a judge, and sentenced to death by a trial judge who found as the required statutory aggravating factor that McKinney had murdered both victims for pecuniary gain*. *After a long series of appeals, a federal court ruled that McKinney had been unconstitutionally sentenced to death because the sentencer had not considered evidence of his post-traumatic stress disorder (PTSD)*. *McKinney insisted he had a constitutional right to have a jury determine the weight of his PTSD. Instead, the Arizona Supreme Court reweighed the aggravating and mitigating factors and upheld the death sentences. McKinney, claiming the resentencing by the appellate court violated his rights under the cruel and unusual punishment of the Eight Amendment as incorporated by the due process clause of the Fourteenth Amendment, appealed to the Supreme Court of the United States.*

 *The Supreme Court by a 5-4 vote affirmed the decision of the Arizona Supreme Court. Justice Brett Kavanaugh’s majority decision maintained that the Arizona Supreme Court when reweighing the aggravating and mitigating factors was engaged in collateral review, and pas precedents foreclosed claims on collateral review that persons sentenced to death had a right to have a jury determine the existence of aggravating factors. Both Kavanagh’s majority opinion and Justice Ruth Bader Ginsburg’s dissent agree that McKinney’s petition should have been granted if the Arizona Supreme Court was engaged in direct review when reweighing the aggravating and mitigating facts, but not if that tribunal was engaged in collateral review. What is the difference between direct review and collateral review? Why does Kavanaugh think this was an instance of collateral review? Why does Ginsburg disagree? Who has the better of the argument? Note how Kavanaugh treats concurring opinions by Justices Scalia and Thomas, as well as past dissents by conservative justices. Does* McKinney *bode a sharp conservative turn on death penalty cases or would this case have come out the same way had the issue been before the court while Justice Anthony Kennedy was on the bench.*

Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I975640b257c411eabf0f8b3df1233a01&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I975640b257c411eabf0f8b3df1233a01) delivered the opinion of the Court.

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McKinney's argument does not square with this Court's decision in [*Clemons*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990055730&pubNum=0000780&originatingDoc=I975640b257c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) *v. Mississippi* (1990). In [*Clemons*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990055730&pubNum=0000780&originatingDoc=I975640b257c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), a Mississippi jury sentenced the defendant to death based in part on two aggravating circumstances. After the Mississippi Supreme Court determined that one of the aggravators was unconstitutionally vague, the defendant argued that he was entitled to resentencing before a jury so that the jury could properly weigh the permissible aggravating and mitigating evidence. This Court disagreed. The Court concluded that the Mississippi Supreme Court could itself reweigh the permissible aggravating and mitigating evidence. . . . The Court explained that a [*Clemons*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990055730&pubNum=0000780&originatingDoc=I975640b257c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) reweighing is not a resentencing but instead is akin to harmless-error review in that both may be conducted by an appellate court.

. . . . McKinney maintains that [*Clemons*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990055730&pubNum=0000780&originatingDoc=I975640b257c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) involved an improperly considered aggravating circumstance, whereas his case involves what the Ninth Circuit said was an improperly ignored mitigating circumstance. . . . In deciding whether a particular defendant warrants a death sentence in light of the mix of aggravating and mitigating circumstances, there is no meaningful difference for purposes of appellate reweighing between subtracting an aggravator from one side of the scale and adding a mitigator to the other side. Both involve weighing, and the Court's decision in [*Clemons*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990055730&pubNum=0000780&originatingDoc=I975640b257c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) ruled that appellate tribunals may perform a “reweighing of the aggravating and mitigating evidence.”

. . . . McKinney argues that [*Clemons*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990055730&pubNum=0000780&originatingDoc=I975640b257c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) is no longer good law in the wake of this Court's decisions in *Ring v. Arizona* (2002), and *Hurst* v. *Florida* (2016). According to McKinney, appellate courts may no longer reweigh aggravating and mitigating circumstances in determining whether to uphold a death sentence. McKinney is incorrect.

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Under [*Ring*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002390142&pubNum=0000780&originatingDoc=I975640b257c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and [*Hurst*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037976642&originatingDoc=I975640b257c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), a jury must find the aggravating circumstance that makes the defendant death eligible. But importantly, in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range. . . . And in the death penalty context, as Justice Scalia, joined by Justice THOMAS, explained in his concurrence in [*Ring*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002390142&pubNum=0000780&originatingDoc=I975640b257c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), the decision in [*Ring*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002390142&pubNum=0000780&originatingDoc=I975640b257c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) “has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed.” Therefore, as Justice Scalia explained, the “States that leave the ultimate life-or-death decision to the judge may continue to do so.”

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. . . . McKinney points out that a *jury* did not find the aggravating circumstances, as is now required by [*Ring*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002390142&pubNum=0000780&originatingDoc=I975640b257c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and[*Hurst*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037976642&originatingDoc=I975640b257c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). The hurdle is that McKinney's case became final on direct review in 1996, long before [*Ring*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002390142&pubNum=0000780&originatingDoc=I975640b257c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and [*Hurst*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037976642&originatingDoc=I975640b257c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). [*Ring*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002390142&pubNum=0000780&originatingDoc=I975640b257c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and [*Hurst*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037976642&originatingDoc=I975640b257c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) do not apply retroactively on collateral review. . . . . [T]he Arizona Supreme Court's reweighing of the aggravating and mitigating circumstances occurred on collateral review, not direct review. In conducting the reweighing, the Arizona Supreme Court explained that it was conducting an independent review in a collateral proceeding. . . .

McKinney responds that the state label of collateral review cannot control the finality question; that a [*Clemons*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990055730&pubNum=0000780&originatingDoc=I975640b257c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) reweighing is a sentencing proceeding; and that a [*Clemons*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990055730&pubNum=0000780&originatingDoc=I975640b257c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) reweighing therefore may occur only on direct review (or on reopening of direct review). But [*Clemons*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990055730&pubNum=0000780&originatingDoc=I975640b257c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) itself, over a vigorous dissent, stated that an appellate reweighing is not a sentencing proceeding that must be conducted by a jury. The appellate reweighing is akin to harmless-error review. Courts routinely conduct harmless-error review in collateral proceedings. There is no good reason—and McKinney supplies none—why state courts may not likewise conduct a [*Clemons*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990055730&pubNum=0000780&originatingDoc=I975640b257c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) reweighing on collateral review. . . .

Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I975640b257c411eabf0f8b3df1233a01&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I975640b257c411eabf0f8b3df1233a01), with whom Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I975640b257c411eabf0f8b3df1233a01&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I975640b257c411eabf0f8b3df1233a01), Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I975640b257c411eabf0f8b3df1233a01&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I975640b257c411eabf0f8b3df1233a01), and Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I975640b257c411eabf0f8b3df1233a01&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I975640b257c411eabf0f8b3df1233a01) join, dissenting.

In . . . *Ring v. Arizona* (2002), this Court held Arizona's capital sentencing regime unconstitutional. The “aggravating factors” that render a defendant eligible for capital punishment in Arizona, the Court reasoned, “operate as ‘the functional equivalent of an element of a greater offense.’ ” “[T]he Sixth Amendment [therefore] requires that [such aggravating factors] be found by a jury.” . . .

The Constitution, this Court has determined, requires the application of new rules of constitutional law to cases on direct review.  . . . I would rank the Arizona Supreme Court's proceeding now before this Court for review as direct in character. I would therefore hold McKinney's death sentences unconstitutional under [*Ring*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002390142&pubNum=0000780&originatingDoc=I975640b257c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), and reverse the judgment of the Arizona Supreme Court.

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Beyond doubt, the Arizona Supreme Court engaged in direct review in 1996. A defendant's first opportunity to appeal his conviction and sentence is the archetype of direct review. The Arizona Supreme Court's 2018 proceeding was essentially a replay of the initial direct review proceeding. The State's request for “a *new* independent review,” (emphasis added), asked the Arizona Supreme Court to resume and redo direct review. . . The Arizona Supreme Court proceeded accordingly. . . . In its 2018 review, the Arizona Supreme Court “examine[d] ‘the trial court's findings of aggravation and mitigation and the propriety of the death sentence’ ” afresh, treating that court's 1996 decision as though it never issued. . . . If, as the State does not contest, the court's 1996 review ranked as review direct in character, so, too, did its 2018 do-over.

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Accepting “collateral” as a fit description of the 2018 Arizona Supreme Court review proceeding, the Court relies on [*Clemons* v. *Mississippi*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990055730&pubNum=0000780&originatingDoc=I975640b257c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) *(1990)*, a decision holding that appellate courts can reweigh aggravating and mitigating factors as a form of “harmless-error analysis” when the factfinder “relied in part on an invalid aggravating circumstance. Here, however, *the Ninth Circuit* engaged in harmless-error review when that court evaluated McKinney's federal habeas petition—and found the Arizona Supreme Court's 1996 error harmful.  The State accordingly asked the Arizona Supreme Court “to *cure* [that] error” by conducting a new independent review proceeding. In determining *de novo* in 2018 whether McKinney's death sentences were “not only legally correct, but also appropriate,” the Arizona Supreme Court was not conducting garden-variety harmless-error review of a lower court decision; it was rerunning direct review to correct its own prior harmful error.

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