No. 18-1109

In the
Supreme Court of the United States

JAMES ERIN MCKINNEY,

Petitioner,

v.

ARIZONA,

Respondent.

On Writ of Certiorari to the Supreme Court of Arizona

BRIEF OF *AMICUS CURIAE* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combatting racial discrimination and the resulting inequality of opportunity. The Lawyers' Committee's principal mission is to secure equal justice for all through the rule of law, targeting in particular the inequities confronting African Americans and other racial and ethnic minorities. The Lawyers' Committee has a particular interest in this case because African Americans and other minorities make up a disproportionate percentage of criminal defendants facing resentencing and sentence correction hearings and are therefore at greater risk of losing integral constitutional protections at resentencing through the application of outdated law. In addition, this Court's ruling will determine whether several specific—and critical—constitutional protections against racial discrimination will protect defendants at resentencing hearings, as explained below.

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[1] No counsel for a party has authored this brief in whole or in part, and no counsel or any party has made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel has made a monetary contribution to its preparation or submission. The parties have consented to the filing of amicus briefs.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2015, the Ninth Circuit Court of Appeals granted James McKinney's writ of habeas corpus, finding that Arizona courts over a 15-year period had violated this Court's decision in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), in McKinney's death penalty sentencing and many others. *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015). Although intervening precedent of this Court required resentencing by a jury and not a judge, *see Ring v. Arizona*, 536 U.S. 584 (2002), the Arizona Supreme Court applied the decades-old law that was in place at the time of McKinney's original sentencing and reweighed the aggravating and mitigating evidence itself. *State v. McKinney*, 426 P.3d 1204 (Ariz. 2018). In doing so, it joined the Seventh Circuit as the only courts that eschew current law during resentencing proceedings in favor of applying the law that was in effect at the time a defendant's conviction first became final—law that could have been superseded or even overturned in the intervening years.

Many death-eligible defendants, like McKinney, are resentenced decades after their original sentence became final. Were this Court to affirm the Arizona Supreme Court's minority view, it would deny criminal defendants access to rights that have been recognized by this Court for years, leaving defendants vulnerable at resentencing to a wide spectrum of egregious conduct that this Court has already deemed—sometimes repeatedly—to violate the Constitution. This brief is a non-exhaustive collection of the considerable constitutional rulings of which defendants

would be deprived on resentencing under the Arizona Supreme Court's approach to retroactivity. Specifically, this brief addresses this Court's recent development of constitutional doctrine with respect to the following aspects of the criminal justice process:

- The jury selection process and juror impartiality (Section I), including *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that racial discrimination in jury selection in a single criminal case violates the Fourteenth Amendment) and its progeny; *Turner v. Murray*, 476 U.S. 28 (1986) (holding that the Constitution affords defendants the right to have prospective jurors informed of a victim's race and questioned on potential racial bias); *Morgan v. Illinois*, 504 U.S. 719 (1992) (holding that a trial court must, if requested by a defendant, inquire into whether a potential juror would automatically impose the death penalty if the defendant was convicted); and *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (holding that a court may inquire into the deliberations of the jury post-verdict when a juror makes statements indicating they relied on racial bias to convict);

- Due process and jury trial rights during sentencing (Section II), including *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (holding that prosecutors could not misinform the jury that an appellate court would make the ultimate decision of whether a death sentence was appropriate); *Simmons v. South Carolina*, 512 U.S. 154 (1994) (holding that due process

requires a capital sentencing jury to be informed when a sentence of life imprisonment would carry with it no possibility of parole); *Deck v. Missouri*, 544 U.S. 622 (2005) (holding that the visible use of shackles during the penalty phase of a capital trial violated the defendant's due process rights); *Penry v. Johnson*, 532 U.S. 782 (2001) (vacating a death sentence because the jury instructions were constitutionally deficient regarding how to give effect to mitigating evidence); *Mills v. Maryland*, 486 U.S. 367 (1988) (holding that resentencing is required where the sentencer fails to consider mitigating evidence following the judge's instructions); and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that any facts that could increase a maximum penalty must be decided by a jury) and its progeny;

- Ineffective assistance of counsel (Section III), including *Strickland v. Washington*, 466 U.S. 668 (1984) (holding for the first time that a criminal defendant could bring a Sixth Amendment claim for ineffective assistance of counsel); *Wiggins v. Smith*, 539 U.S. 510 (2003) (reversing a conviction under *Strickland* for inadequate investigation at a capital sentencing hearing); and *Buck v. Davis*, 137 S. Ct. 759 (2017) (reversing a death sentence under *Strickland* after the defendant's own attorney called a clinical psychologist as an expert witness to testify that the defendant was more likely to commit future acts of violence because he was black); and

- Due process rights and mental health (Section IV), including *Tennard v. Dretke*, 542 U.S. 274 (2004) (holding that evidence of a defendant's impaired intellectual functioning is inherently mitigating at the death phase of a capital trial); and *Ake v. Oklahoma*, 470 U.S. 68 (1985) (holding that due process requires that a defendant be provided with access to a psychiatrist's assistance if the defendant cannot otherwise afford one when his mental state at the time of the offense is likely to be a significant factor at trial).

This case is not about an expansion of constitutional rights—it is about giving effect to constitutional rights that have been recognized by this Court as the law of the land for decades. By not applying current law at resentencing, Arizona and the Seventh Circuit arbitrarily deny defendants access to constitutional rights that this Court has recognized as fundamental to the criminal justice process, from the initial selection of the jury to the defendant's ultimate sentencing.

ARGUMENT

I. Juries: Discrimination, Partiality, and the Right to Public Trials

If the law in effect at the time a defendant's conviction first became final is controlling at resentencing and sentence correction proceedings instead of current law, countless defendants could be denied fundamental constitutional protections relating to racial discrimination during jury selection, juror impartiality, and the right to public trials that have

been recognized and upheld by this Court over the last three decades.

A. Batson *and Racial Discrimination in Peremptory Challenges*

Over the last thirty years, this Court recognized and then repeatedly enforced a defendant's right to a jury selection process free from discrimination on the basis of race. The Arizona Supreme Court's interpretation could deny defendants this crucial constitutional protection on resentencing through the application of outdated law and the failure to give effect to the constitutional rulings decided in the intervening years.

In *Swain v. Alabama*, 380 U.S. 202 (1965), this Court held that the purposeful elimination of black jurors could violate the Equal Protection Clause, but set a standard of proof that defendants could rarely meet. *Swain* required defendants to prove that, "in case after case," the prosecutor "has not seen fit to leave a single [black person] on any jury in a criminal case." *Id.* at 223–24. As this Court noted years later, this standard "was almost impossible for any defendant to surmount, as the aftermath of *Swain* amply demonstrated." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2240 (2019).

This Court reversed course in the 1986 case of *Batson v. Kentucky*, 476 U.S. 79 (1986), "in essence overul[ing]" what were "several critical aspects" of *Swain*. *Flowers*, 139 S. Ct. at 2240. Through *Batson*, in which the prosecutor had struck every black prospective juror from the venire, the Court recognized the challenges that individual defendants faced in

meeting the standard of proof imposed by *Swain* and set up a new test for defendants alleging racial discrimination in jury selection. *Batson*, 476 U.S. at 91–93. Under *Batson*, the defendant must first show purposeful discrimination of a distinct group; the burden then shifts to the state to explain the exclusion by a race-neutral reason; if it does, the court ultimately determines whether the basis for the strike was discrimination or the proffered race-neutral reason. *Id.* at 96–98.

In *Powers v. Ohio*, 499 U.S. 400 (1991), this Court extended *Batson* to white defendants. Although the focus in *Batson* was protecting the right of black defendants to be free from racial discrimination, "*Batson* [also] recognized that a prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large." *Id.* at 406. The Court in *Powers* reasoned that the "opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system," and that *Batson* exists to protect such ordinary citizens just as much as it exists to protect to criminal defendants. *Id.*

Over time, this Court has vigilantly enforced *Batson* when lower courts have strayed too far from its mandate. For example, in *Miller-El v. Dretke*, 545 U.S. 231 (2005), this Court reversed a state court's failure to recognize a *Batson* claim even under the deferential standard of the Anti-Terrorism and Effective Death Penalty Act (AEDPA). The prosecutor in *Dretke* struck nineteen of twenty black jurors in the venire with

reasons that could just as easily have covered non-struck white jurors; "reshuffled" the venire in an apparent attempt to filter out black jurors; and primed black prospective jurors into making anti-capital punishment statements through leading questions and graphic details about the death penalty, neither of which he did for white jurors. 545 U.S. at 240–41, 253–54, 255–57. The prosecutor's office also had an old training manual that explicitly told prosecutors to use peremptory challenges to strike African-Americans and Latinos from the jury, and the prosecutor in Miller-El's case wrote the race of every juror on his notecards. *Id.* at 264.

Similarly, in 2008, the Court reversed another state court in *Snyder v. Louisiana*, 552 U.S. 472 (2008). In that case, the prosecution struck all nine black jurors, four with peremptory challenges, leaving a black defendant with an all-white jury. This Court found that the bases for some of the peremptory challenges, such as demeanor and time conflicts, were obviously pretextual given that they could have been applied just as easily to dozens of white prospective jurors that prosecutors did not strike. *Id.* at 483–86.

The Court again reversed a state court on a *Batson* claim in the 2016 case of *Foster v. Chatman*, 136 S. Ct. 1737 (2016). The evidence of discrimination was disturbing and overwhelming, including: (1) the highlighting of the black prospective jurors' names on the prosecutor's copy of the jury venire list, with a legend indicating that this "represents Blacks"; (2) a memo from the prosecutor's office at jury selection, which included the sentence: "If it comes down to

having to pick one of the black jurors, [this one] might be okay"; (3) handwritten notes on three black prospective jurors denoting them as "B#1," "B#2," and "B#3"; (4) "N" marked next to a small percentage of names on the prosecutor's jury venire list, including every black prospective juror; (5) a handwritten document from the prosecutor's office titled "Definite Nos!" with six names, including every black prospective juror; (6) a handwritten juror report including the phrase "No. No black church"; and (7) the circling of every black prospective jurors' race on their jury questionnaires. *Id.* at 1744–45. This Court found that in addition to this trove of evidence of racial discrimination, two of the prospective jurors struck in peremptory challenges had no basis for their strike other than race. *Id.*

This Court most recently addressed *Batson* in *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019). Flowers was tried for murder six times over the course of 22 years while he remained on Mississippi's death row without ever receiving a final conviction. *Id.* at 2234–35. His first conviction was reversed for prosecutorial misconduct, his second for a *Batson* violation, and his third for additional prosecutorial misconduct, all by Mississippi state courts. *Id.* His fourth and fifth trials resulted in hung juries. *Id.* This Court reviewed the conviction resulting from his sixth trial after compelling evidence of his innocence attracted national media attention. *Id.*; *see* also David Leonhardt, *The Mississippi Man Tried Six Times for the Same Crime*, N.Y. TIMES (May 20, 2018). This Court found yet another *Batson* violation, noting that the prosecution had used peremptory strikes on 41 of 42

potential black jurors across his six trials, as well as the dramatically disparate questioning and treatment of black and white prospective jurors. *Flowers*, 139 S. Ct. at 2235.

Through *Batson* and its progeny, this Court has repeatedly held that states cannot use peremptory challenges to exclude potential jurors on the basis of their race, giving criminal defendants a meaningful opportunity to challenge racial discrimination and enforce their constitutional rights under the Equal Protection Clause. If this Court affirms the Arizona Supreme Court, its 35-year effort to prevent racial discrimination in the jury selection process would be given no effect in a resentencing proceeding for defendants originally convicted before April 1986, denying those defendants critical constitutional protections that have been recognized by this Court again and again.

B. Juror Partiality

In addition to *Batson*, the last thirty years have seen this Court articulate a number of constitutional protections aimed at rooting out juror discrimination and partiality, including the right to have prospective jurors questioned on critical issues such as potential racial biases and their views on capital punishment.

In *Turner v. Murray*, 476 U.S. 28 (1986), for example, this Court held that the Constitution affords defendants the right to have prospective jurors informed of a victim's race and questioned on potential racial bias during *voir dire*. In *Turner*, which involved the sentencing of a black defendant for the murder of

a white victim, the Court recognized that informing prospective jurors of the victim's race and allowing questioning on racial bias were necessary to identify potential racial biases held by jurors, which could adversely affect the impartiality of the jury and the capital sentencing process. *Id.* at 35–37. This Court reasoned that "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudices to operate but remain undetected." *Id*. at 35. The Court therefore held that the right to question jurors on their potential racial biases, and thereby avoid "the risk of racial prejudice infecting a capital sentencing proceeding," was required in order to be consistent with constitutional principles. *Id.*

Similarly, in *Morgan v. Illinois*, 504 U.S. 719 (1992), this Court recognized the rights of defendants to inquire into prospective jurors' views on capital punishment. In *Morgan*, the Court held that a trial court must, if requested by a defendant, inquire into whether a potential juror would automatically impose the death penalty if the defendant was convicted. *Id*. at 738–39. The Court found that this questioning is necessary to ensure that a defendant can intelligently exercise his or her challenges for cause against prospective jurors who would unwaveringly impose a death sentence. *Id*. at 735–36. "Any juror who would impose death regardless of the facts and circumstances of conviction cannot follow the dictates of the law," tainting the capital sentencing process and impugning a defendant's right to an impartial jury under the Due Process Clause of the Fourteenth Amendment. *Id.*

In another case regarding juror partiality, the Court articulated an exception to the "no impeachment" rule in cases where racial animus infected the jury's deliberations. The "no impeachment" rule, which had been codified by Colorado, prohibits a court from inquiring into the deliberations of the jury post-verdict. In *Peña-Rodriguez v. Colorado*,137 S. Ct. 855 (2017), this Court held that the Sixth Amendment requires an exception where juror statements indicate that the conviction was motivated by race. Specifically, the exception allows courts to consider evidence of jurors' statements during the deliberation process where a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant. *Id.* at 869. According to the Court, such evidence goes to the core of whether a defendant has been denied his or her guarantee to a fair and impartial jury trial. *Id.* at 869, 871.

The Arizona Supreme Court's static application of law at resentencing would mandate courts to ignore clear evidence of juror racial biases like those at issue in *Peña-Rodriguez*, despite this Court's admonishments that such evidence imperils a defendant's constitutional rights and "risk[s] systemic injury to the administration of justice." *Id.* at 868.

C. Voir Dire *and the Right to a Public Trial*

This Court has also articulated constitutional protections relating to the *voir dire* process and defendants' right to a public trial. For example, the Court found in *Presley v. Georgia*, 558 U.S. 209 (2010), that the Sixth Amendment right to a public trial extends to the *voir dire* of prospective jurors. This

Court has time and again recognized the importance of the *voir dire* process to ensuring a fair and impartial jury at both the guilt and sentencing phases of a capital trial. Yet the requirements of *Presley*—and all of this Court's doctrine governing the jury selection process and juror impartiality—could be ignored for some defendants on resentencing under the approach of the Arizona Supreme Court.

II. Sentencing: Due Process and the Right to a Jury Trial

In addition to this Court's rulings regarding jury selection and juror impartiality, significant decisions by this Court over the past thirty years have helped to define and hone the constitutional protections afforded to defendants during the sentencing process, ensuring that defendants are afforded their full rights under the Sixth, Eighth, and Fourteenth Amendments. These decisions recognize the "awesome responsibility" of capital juries and seek to ensure that such sentences are consistent with constitutional principles. A survey of this Court's sentencing decisions demonstrates the substantial development of constitutional doctrine regarding the types of information and instructions given to the jury to aid its decision-making; ways to reduce or eliminate jury bias during sentencing; and the kinds of determinations that have to be made by a jury to give effect to the defendant's constitutional rights.

A. The "Awesome Responsibility" of Capital Juries

In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), this Court recognized the power of the jury in a capital case and set the tone for the Court's sentencing decisions for the next several decades. In *Caldwell*, the defendant's counsel made arguments to the jury regarding the finality of death and the "awesome responsibility" of the jury in making that decision. *Id.* at 324. In response, the prosecutor sought to minimize the jury's role in the capital sentencing process, going so far as to say the defense counsel's characterization was "terribly, terribly unfair" because any death sentence would be automatically reviewed by the Mississippi Supreme Court. *Id.* at 325–26 ("Throughout their remarks, they . . . insinuate[ed] that your decision is the final decision and that they're gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, . . . that the decision you render is automatically reviewable by the Supreme Court.").

Citing the Eighth Amendment and the need for the "responsible and reliable" exercise of the jury's sentencing discretion in a capital case, this Court determined that it was "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328–29. This Court recognized that jurors in a capital case have a "very difficult and uncomfortable choice" to make at

sentencing, and that they may very well be eager to shift that responsibility to the appellate court—something that would only happen in the event of a sentence of death. *Id.* at 332–33. But this Court also recognized that the Eighth Amendment requires the jury to understand the "gravity of its task." *Id.* at 341. Without the *Caldwell* decision, death sentences could once again be imposed in cases where prosecutors seek to relieve juries of their solemn responsibility by telling them that they are not the ultimate decision-maker.

B. Ensuring Reliability of Sentences

Following *Caldwell* and its recognition of the weight of the jury's task, other decisions by this Court have sought to ensure the reliability of the jury's determinations. For example, this Court's rulings have recognized criminal defendants' right to be sentenced by a jury that has been given all relevant information, shielded from unduly bias-inducing information, and clearly instructed on how to process and apply that information.

In *Simmons v. South Carolina*, 512 U.S. 154 (1994), this Court held that the Due Process Clause of the Fourteenth Amendment requires a capital sentencing jury to be informed when a sentence of life imprisonment would carry with it no possibility of parole. In *Simmons*, although the defendant was ineligible for parole under South Carolina law, defense counsel was expressly forbidden by court order "even to mention the subject of parole." *Id.* at 156–57. The prosecution's arguments at sentencing focused on the defendant's "future dangerousness," contending that any sentence of death would be "an act of self-defense."

Id. at 157. The trial court's order crippled the defense's ability to respond, despite the fact that in South Carolina "no convicted murderer serving life without parole ever had been furloughed or otherwise released for any reason." *Id.* at 159. Further aggravating the matter, when the jury sent a note asking expressly whether a life sentence carried the possibility of parole, the court instructed the jury "not to consider parole or parole eligibility in reaching [its] verdict." *Id.* at 160. The jury issued a death sentence less than half an hour later. *Id.* This Court held that South Carolina's "refusal to provide the jury with accurate information" and possible encouragement of a "grievous misperception" on the part of the jury violated the defendant's due process rights under the Fourteenth Amendment. *Id.* at 161–62.

In another case, this Court held that the Constitution requires juries to be protected from behavior or information that could "undermine[] the jury's ability to weigh accurately all relevant considerations" during sentencing. *Deck v. Missouri*, 544 U.S. 622, 633 (2005) (internal quotation marks omitted). In *Deck*, this Court held that the visible use of shackles during the penalty phase violated the defendant's due process rights. *Id.* This Court reasoned that the use of visible shackles "almost inevitably affects adversely the jury's perception of the character of the defendant," and particularly that it "almost inevitably implies to a jury . . . that court authorities consider the offender a danger to the community—often a statutory aggregator and nearly always a relevant factor in jury decisionmaking." *Id.* Because it could impact the jury's ability to accurately weigh all

relevant information—which is crucial to achieving a reliable sentence—the use of shackles is a "thumb [on] death's side of the scale" and violates the defendant's rights. *Id.* (internal quotations omitted).

Once a jury has been armed with full information, and shielded from potentially bias-inducing information, this Court's decisions in *Penry v. Johnson*, 532 U.S. 782 (2001), and *Mills v. Maryland*, 486 U.S. 367 (1988), ensure that the jury understands how to properly weigh and apply that information. In *Penry*, this Court found that the jury instructions were constitutionally deficient because they failed to give the jury sufficient guidance regarding how to give effect to mitigating evidence. 532 U.S. at 804. The instructions first "shackled" the jury to the determination of three special issues, and then gave confusing, and even contradictory, guidance on how to incorporate any mitigating evidence into the determination of those issues. *Id.* 802–03. This Court found that under the instructions in question, a "reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." *Id.* at 804 (internal quotation marks omitted). By failing to provide the jury with a vehicle to consider and give effect to the defendant's mitigation evidence, the trial court had violated the defendant's Eighth and Fourteenth Amendment rights. *Id.*

Similarly, in *Mills*, this Court held that resentencing was required in cases where the jury instructions could lead the jurors to believe that they were precluded from considering mitigating evidence.

486 U.S. at 384. The Court found that the sentencing scheme in Maryland, and the jury instructions explaining that scheme, could have led reasonable jurors to conclude that the jury must unanimously agree to the existence of mitigating evidence before it could be given "any effect whatsoever." *Id.* at 375, 383–84. Because it is essential for the "sentencer [to] be permitted to consider all mitigating evidence," the Constitution required that the death sentence be vacated and the case remanded for resentencing. *Id.* at 384.

The rulings issued by this Court in *Simmons*, *Deck*, *Penry*, and *Mills* articulate important constitutional protections governing the information and instructions that shape the jury's deliberations and ensure the reliability of the sentencing process. Yet under the Arizona Supreme Court's interpretation of the law of retroactivity, many defendants could be denied the application of these important constitutional protections on resentencing.

C. Sentencing by Jury, Not by Judge

In another string of sentencing cases, this Court has again and again protected a defendant's Sixth Amendment right to a jury trial by giving effect to the jury's findings and ensuring that it is the jury, and not the judge, that makes the ultimate determination that death is appropriate. This Court has long held that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and

proven beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999). In recent years, the Court has expanded this holding, including in the context of capital cases. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (explaining that the right to have any facts that could increase the maximum penalty be decided by a jury applies even when the facts are characterized as "sentencing factors"); *see also Ring v. Arizona*, 536 U.S. 584, 602 (2002) (expanding *Apprendi* and *Jones* to capital cases and the determination of aggravating factors); *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016) (holding that a jury's mere recommendation as to the appropriateness of a death sentence is insufficient, and that "a jury, not a judge, [must] find each fact necessary to impose a sentence of death").

These cases give meaningful substance to the defendant's right to a trial by a jury of his or her peers. As this Court explained, "[t]hat right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004) (applying *Apprendi* to cases involving plea bargains). Cases like *Apprendi* and *Ring* ensure that "the judge's authority to sentence derives wholly from the jury's verdict," thereby giving effect to the jury's findings and giving the jury "the control that the Framers intended." *Id.* at 306. This right is particularly important in the context of capital cases, where the difference in the sentence is between life and death as opposed to the appropriate number of months of imprisonment.

This Court's decisions regarding the sentencing process over the past few decades have provided defendants with vital protections. Without this Court's holding in *Caldwell*, a sentence of death could be imposed by a jury that assumes, and perhaps hopes, that its decision will be reviewed by an appellate court, thereby lessening the jury's sense of responsibility and potentially biasing it toward death. Without the protections provided by this Court in *Simmons*, *Deck*, *Penry*, and *Mills* juries could make the crucial determination that a defendant deserves death without information relevant to the decision-making process, with the defendant visibly shackled in a way that could bias the jury against him or her, or without clear instructions on how to properly consider and give effect to important mitigating evidence. Moreover, without this Court's decisions in *Apprendi*, *Ring*, and others, a death sentence could be imposed based on findings of fact made by a judge alone rather than a jury of the defendant's peers.

III. Ineffective Assistance of Counsel

The adoption of the Arizona Supreme Court's approach to retroactivity would also significantly undermine the right of criminal defendants to the effective assistance of counsel. Under Arizona's interpretation, defendants originally sentenced before May 1984 may have no right to the effective assistance of counsel whatsoever, and capital defendants sentenced after 1984 but before 2000 may have only an illusory one. It was not until 2000 that this Court required lawyers in capital cases to investigate mitigating evidence and provide a meaningful defense

at sentencing, and it was even later before the Court deemed it a constitutional violation for a defendant's own attorney to put on evidence of future dangerousness simply because of their race.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court held for the first time that a criminal defendant could bring a Sixth Amendment claim for ineffective assistance of counsel. Although this Court had previously addressed Sixth Amendment claims for failures to provide counsel through active denial, constructive denial, state interference, or a conflict of interest, before *Strickland* this Court had "never directly and fully addressed a claim of actual ineffectiveness of counsel's assistance in a case going to trial." *Id.* at 683 (internal quotation marks and citation omitted). *Strickland* articulated the newly operative legal standard for this Sixth Amendment claim: defendants must show both deficient performance, below an objective standard of reasonableness, and prejudice to the defendant, a reasonable probability that, but for the errors, the result of the proceeding would have been different. *Id.* at 687–88, 694.

The early application of *Strickland*, however, required little from defense counsel and served to police only extreme outliers, even in capital cases. For example, three years after *Strickland*, this Court held in *Burger v. Kemp*, 483 U.S. 776, 781 (1987), that a defense counsel who put on zero mitigating evidence at a death sentencing hearing and failed to adequately investigate such evidence was nonetheless constitutionally adequate. Similar examples of cases in which defense counsel were deemed adequate in death

penalty cases despite putting on virtually no defense, at either the guilt or sentencing phase, abound in the pre-2000 era. *See, e.g.*, *Messer v. Kemp*, 474 U.S. 1088 (1986) (Marshall, J., dissenting from denial of certiorari) (defense lawyer put on no opening statement, no case in chief, objected to no evidence, emphasized the horror of the crime during a brief summation, and then at sentencing put on one witness without having investigated any mitigating evidence); *Mitchell v. Kemp*, 483 U.S. 1026 (1987) (Marshall, J., dissenting from denial of certiorari) (attorney made no case in mitigation, including any attempt to contact any mitigating witnesses or any inquiries into client's academic, medical, or psychological history). In one case, defense counsel's entire closing statement consisted of the following statement: "You are an extremely intelligent jury. You've got that man's life in your hands. You can take it or not. That's all I have to say." Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1858 (1994). That defendant's *Strickland* claim failed, and he was executed. *Id.*

Beginning in 2000, however, *Strickland* claims "received a markedly different reception in the Supreme Court." Stephen F. Smith, *Taking Strickland Claims Seriously*, 93 MARQ. L. REV. 515, 526 (2009). Specifically, three cases of this Court decided between 2000 and 2005 articulated a different standard for adequate counsel in death penalty cases that demanded a significantly stronger performance by counsel at the sentencing phase of capital trials. First, in *Williams v. Taylor*, 529 U.S. 362 (2000), this Court

held that while the defense counsel's advocacy was constitutionally adequate at the guilt phase, his performance at sentencing was both inadequate and prejudicial, reversing a lower court that had assumed inadequacy but held that there had been no *Strickland* prejudice. The attorney failed to investigate into the defendant's background, including an abusive childhood—believing incorrectly that state law forbade him from doing so—and failed to introduce evidence of a low IQ bordering on mental disability or the defendant's positive record in prison. *Id.* at 395.

In 2003, this Court went further, reversing a lower court in *Wiggins v. Smith*, 539 U.S. 510 (2003), on both prongs of *Strickland* and articulating clear standards for investigation in capital cases. Unlike in *Williams*, *Burger*, or *Strickland*, the defendant in *Wiggins* was represented by two apparently competent and able defense attorneys who put significant time into his case, pursuing a theory at sentencing of residual doubt that the defendant was the actual killer. *Id.* at 534–36. Counsel also put on some mitigation evidence concerning the defendant's limited capacities and traumatic life, although much less than his habeas counsel would later compile. *Id.* This Court held not only that the failure to uncover the wealth of mitigating evidence that was later identified was constitutionally inadequate counsel under *Strickland*, but also that the lower court's conclusion to the contrary was unreasonable under AEDPA. *Id.*

In the 2005 case of *Rompilla v. Beard*, 545 U.S. 374 (2005), this Court again held that the defendant's lawyer was constitutionally inadequate. Rompilla's

lawyers, like the lawyers for Wiggins, were competent and put effort into his defense, including investigating potential mitigating evidence. *Id.* at 381–82. They failed, however, to follow-up on a specific prison record known to the prosecution which contained powerful evidence of the defendant's neglected childhood, the serious alcoholism of the defendant and his family, and indications of the defendant's serious mental illness and cognitive impairment. *Id.* at 382.

Before 2000, scholars and practitioners believed that *Strickland* set a low bar for constitutionally adequate performance, whether in the context of capital cases or non-capital cases. *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 398 (1995) (stating that "courts judge counsel in capital cases according to the same standard applicable to all criminal cases"). *Williams*, *Wiggins*, and *Beard* constituted a "jurisprudential shift" towards requiring a higher baseline of effectiveness, especially in capital sentencing cases. John H. Blume & Stacey D. Neumann, *"It's Like Deja Vu All over Again:"* Williams v. Taylor*,* Wiggins v. Smith*,* Rompilla v. Beard *and A (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel*, 34 AM. J. CRIM. L. 127, 156 (2007). This doctrinal shift has had significant consequences on lower courts, dramatically increasing the number of successful ineffective of counsel claims in just a few years. *Id.* (explaining that in the six years before *Williams* there was an average of 37 successful ineffective assistance of counsel claims brought per

year, whereas in the six years after there was an average of 55 per year).

More recent cases have articulated additional protections of the constitutional guarantee of the effective assistance of counsel. In *Buck v. Davis*, 137 S. Ct. 759 (2017), for example, the defendant's own attorney called a clinical psychologist as an expert witness who testified that the defendant was more likely to commit future acts of violence because he was black. State law only permitted the jury to impose a death sentence if it found unanimously and beyond a reasonable doubt that the defendant was likely to commit acts of violence in the future, so this explicitly race-based inference went directly to the dispositive question for the jury. *Id.* at 763–64. This Court held that the defense counsel's performance was both deficient and prejudicial. *Id.* "Relying on race to impose a criminal sanction," this Court held, "poisons public confidence in the judicial process." *Id.* at 778 (internal quotation marks omitted).

If this Court affirms the Arizona Supreme Court, little or none of this Court's development of ineffective assistance of counsel case law may apply to counsel's performance in future resentencing hearings. *See* Robert R. Rigg, *The Constitution, Compensation, and Competence: A Case Study*, 27 AM. J. CRIM. L. 1, 7–9 (1999) (listing cases of lawyers found effective despite seemingly obvious deficiencies such as using drugs, sleeping through trial, and suggesting in closing that death is an appropriate punishment). In future sentencing hearings, defendants could be sentenced to death despite their counsels' failure to investigate

mitigating evidence, or even after their counsels made explicitly racist arguments, like claiming that black defendants pose a greater risk of future danger.

IV. Due Process and Mental Health

The application of law from the time the conviction becomes final would also deprive defendants of due process protections relating to mental health that have been recognized by the Court in the past few decades. For example, defendants would not be afforded the due process protections recognized by the Court's decision in *Tennard v. Dretke*, 542 U.S. 274 (2004). In *Tennard*, the Court found that evidence of a defendant's impaired intellectual functioning or low IQ is inherently mitigating at the penalty phase of capital cases pursuant to the Eight and Fourteenth Amendments. *Id.* at 287. Under the application of law proposed by Arizona, such mitigating evidence could essentially be ignored by the court at resentencing, depriving defendants of essential constitutional rights.

Moreover, defendants could be deprived of mental health resources that the Court has deemed necessary to establish their defenses in the first instance and therefore guaranteed under the Due Process Clause. Under *Ake v. Oklahoma*, 470 U.S. 68 (1985), when a defendant has made a preliminary showing that his mental state at the time of the offense is likely to be a significant factor at trial, due process requires that the defendant be provided with access to a psychiatrist's assistance if the defendant cannot otherwise afford one. This requirement is especially important where, as in *Ake*, psychiatric evidence is put forward by the prosecution concerning defendant's future

dangerousness during the capital sentencing phase of the trial. *Id.* at 84.

CONCLUSION

Reversing the Arizona Supreme Court and holding that the vacating of a sentence renders it non-final under federal law would not expand constitutional rights. It would instead merely ensure that a resentencing or sentence correction hearing in 2019 or future years would afford criminal defendants the full protection of the rights that this Court has decided any person is entitled to: the right to a jury free from discrimination; the right to adequate counsel; the right to be sentenced by a jury armed with all relevant information; and any of the other dozens of rights recognized by this Court's opinions over the last several years.

For the foregoing reasons, this Court should reverse the Arizona Supreme Court and hold that the Constitution as currently interpreted applies to defendants facing resentencing or sentence correction hearings.

Respectfully submitted,

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