No. 18-1109

IN THE
Supreme Court of the United States

JAMES ERIN MCKINNEY,
Petitioner,
v.

STATE OF ARIZONA,
Respondent.

On Writ of Certiorari to the Arizona Supreme Court

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

BRIEF OF *AMICUS CURIAE*[1]

INTEREST OF THE *AMICUS*

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands, and up to 40,000 attorneys including affiliates' members. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper and efficient administration of justice and files numerous *amicus* briefs each year in the federal and state courts addressing issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system. Based on its criminal law expertise, NACDL seeks to assist the Court in deciding the serious issues presented in the case regarding the constitutionality of declining to apply current rules of constitutional law when imposing Mr. McKinney's sentence.

[1] *Amicus* certifies that no party or party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for both the Petitioner and Respondent have provided blanket consent to amicus briefing.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Supreme Court of Arizona's use of direct review to rectify the original constitutional violation in Mr. McKinney's sentence, the court refused to even consider currently applicable constitutional law, undermining the rule of law.

In his direct appeal, in 1993, when reviewing McKinney's original conviction and sentence of death, the Supreme Court of Arizona – like the lower Arizona courts at the time – refused to consider as mitigation any evidence that was not causally connected to the offense. In light of this violation of *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Ninth Circuit en banc provided that the State of Arizona could either reduce his sentence to something less than death or correct the constitutional error in his sentencing. *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (*en banc*).

The State of Arizona took the latter course. However, in deciding whether to re-impose his death sentence, the state refused to abide by current constitutional law. Most notably, despite being sentenced to death in 2018, McKinney has never had a jury determine whether he is eligible for his sentence.

That is, in at his original trial, Mr. McKinney had a judge determine whether aggravating circumstances were present such that he would be eligible for sentence of death. *Ring v. Arizona*, 536 U.S. 584 (2002) (describing Arizona capital sentencing process at the time). Having found them present, the same judge decided whether in light of both the aggravating circumstances and the admissible mitigating

evidence a sentence of death was warranted. Pet. App. 178a-184a, 187a-192a.

On direct review, the Supreme Court of Arizona refused as a matter of law to consider McKinney's mitigating evidence, his post-traumatic stress disorder, because, according to that court, it lacked a causal nexus to the offense. Pet. App. 68a. This constrained review led the Ninth Circuit to issue its order to either reduce McKinney's sentence or correct the constitutional error in the sentencing. *McKinney*, 813 F.3d at 819-21.

Although the Ninth Circuit's ruling focused on the Arizona Supreme Court's unduly cramped view of mitigating evidence, Arizona's unlawful "causal nexus" requirement applied with equal force to the trial courts at the time. In Arizona, from the late 1980s through the mid-2000s, mitigating evidence was irrelevant unless a "defendant can show that something in that background had an effect or impact on his behavior . . . [and demonstrated] that [the evidence] had [something] to do with the murders he committed." *State v. Wallace*, 773 P.2d 983, 986 (Ariz. 1989). Thus, both trial courts and the Arizona Supreme Court alike ran afoul of *Eddings*.

Even though McKinney has never had a jury determine (1) his death eligibility or (2) whether the full range of mitigating evidence warrants a sentence of death, in the 2018 proceedings, the Supreme Court of Arizona refused to remand for a full sentencing hearing that would provide these protections. Instead, that court re-imposed a death sentence. It did so by invoking its authority to conduct independent review of whether the mitigation presented calls for a sentence less than death and concluded it did not.

As a matter of state practice, that review takes place during direct appeal. And as a matter of federal law, when the Supreme Court of Arizona decided to undertake a new sentencing proceedings, it reopened McKinney's sentence such that current constitutional law should have applied.

By failing to simultaneously apply current constitutional law, the Supreme Court of Arizona undermined the rule of law. Beyond the fundamental problem with not having a jury determine eligibility, the state court foreclosed McKinney from having a factfinding court weigh the full range of admissible mitigating evidence. In doing so, that court denigrated the rule of law and took a course contrary to basic assumptions about how constitutional courts operate.

ARGUMENT

I. AS PART OF THE DIRECT REVIEW PROCESS, THE ARIZONA SUPREME COURT'S INDEPENDENT REVIEW SHOULD HAVE INCORPORATED THE ESTABLISHED RULES OF CONSTITUTIONAL LAW AT THE TIME.

As a matter of state law, the reweighing the Arizona Supreme Court undertook when it imposed Mr. McKinney's sentence took place during its direct review process. In Arizona, the legislature has provided that death sentences are reviewed on direct appeal by the Arizona Supreme Court.[2] *See* Ariz. Rev. Stat. § 13-755; *State v. Green*, 967 P.2d 106, 113

[2] Subsequent to Petitioner's initial direct appeal the statute was renumbered. *See* Ariz. Rev. Stat. § 13-703 (1993).

(Ariz. 1998). Some constitutional claims, such as ineffective assistance of trial counsel, are *not* considered as part of that process. *Martinez v. Ryan*, 566 U.S. 1, 13 (2012) (noting Arizona requires claim of ineffective assistance of counsel to be filed in collateral review proceedings). And it is abundantly clear that re-weighing is not part of state collateral review. That process is limited to the narrow grounds enumerated by the legislature. Ariz. R. Crim. P., Rule 32.1; *see also State v. Carriger*, 692 P.2d 991, 994-95 (Ariz. 1984) (contrasting collateral review process with direct review).

As part of direct review, for crimes occurring prior to August 1, 2002 the Supreme Court of Arizona, "independently review[s] the aggravating and mitigating circumstances and assess[es] the propriety of the death sentences." *State v. Hargrave*, 234 P.3d 569, 584 (2010); *Greene*, 967 P.2d at 113. If the court finds both aggravating and mitigating factors to be present the court then determines whether the, "latter outweigh[s] the former." *State v. Richmond*, 560 P.2d 41, 51 (Ariz. 1976). The court conducts this independent reweighing in order to determine, "if the mitigation is sufficiently substantial to warrant leniency in light of existing aggravation." *State v. Roseberry*, 111 P.3d 402, 415 (Ariz. 2005) (citing *Greene*, 967 P.2d at 118-19).

In reviewing the record, the court reweighs the mitigating and aggravating evidence by considering, "the quality and strength, not simply the number, of aggravating and mitigating factors" *Greene*, 967 P.2d at 118 (citing *State v. McKinney*, 917 P.2d 1214, 1225 (Ariz. 1996)). This reweighing on direct appeal requires examination of the entire record. *State v. Spreitz*, 945 P.2d 1260, 1278 (Ariz. 1997).

In its en banc decision in this case, the Circuit Court of Appeals conditionally granted a writ of habeas corpus as to Petitioner's sentence: unless the state corrected his unconstitutional sentence, it had to vacate his death sentence and impose a lesser sentence. *McKinney*, 813 F.3d at 827.

Back in state court last year, Arizona decided to make use of the state's longstanding direct appeal process. In its independent review, the state court referenced the direct review statute and described the standard of "independent review" as "examin[ing] 'the trial courts findings of aggravation and mitigation and the propriety of the death sentence,' [to] determine whether the defendant's proffered mitigation, 'is sufficiently substantial to warrant leniency in light of the existing aggravation.'" Pet. App. 4a (quoting Ariz. Rev. Stat. § 13-755(A)).

This independent review, as a matter of state law and practice takes place during direct review and occurs before the conviction is final. Ariz. Rev. Stat. § 13-755; *Green*, 967 P.2d at 113. The Supreme Court of Arizona's actions and authorities relied upon suggest that even as a matter of state law, the court undertook the direct appeal process.

Finality is ultimately a federal question. *See Griffith v. Kentucky*, 479 U.S. 314, 322 n.6 (1987) (defining finality as when certiorari is denied or the time for seeking it expires); *see also United States v. Howard*, 115 F.3d 1151, 1158 (4th Cir. 1997) ("The finality of a conviction is a matter of federal, rather than state law."). And where a state court reopens direct review, the case again becomes non-final, such that certiorari can again be sought. *Accord Jimenez v. Quarterman*, 555 U.S. 113, 120 (2009). The weighing process undertaken by the Arizona Supreme Court is, as a matter of state law, something undertaken during direct review.

With the state and state court having chosen to undertake this means of correcting McKinney's sentence, rather than allowing the writ to issue, concerns regarding comity, federalism, and, indeed finality, must give way "basic norms of constitutional adjudication" which require courts to "apply [a] rule to all similar cases pending on direct review." *Griffith*, 479 U.S. at 322-23.

The sentencing proceeding here was part of Arizona's direct review process, and current rules of constitutional law should have applied.

II. THE ARIZONA SUPREME COURT'S REFUSAL TO REVIEW PATENT CONSTITUTIONAL ERROR UNDERMINES THE RULE OF LAW.

The Supreme Court of Arizona did not apply current rules of constitutional law. Instead, it applied law as it existed in 1996, imposing a death sentence that blatantly violates *Ring v. Arizona*, 536 U.S. 584 (2002). The state court's practice flagrantly violates "basic norms of constitutional adjudication" and undermines the rule of law. *Griffith*, 479 U.S. at 322.

"[T]he integrity of judicial review requires that we apply that [constitutional] rule to all similar cases pending on direct review." *Id.* at 322-23. Allowing the Arizona court to circumvent these constitutional norms undermines the rule of law.

The constitutional error created the Arizona Supreme Court's direct review was multifold. Most notably, the state court's refusal to provide McKinney with a jury at sentencing further diminishes the jury's role in capital sentencing in Arizona. The rights McKinney sought to invoke below were announced by this Court in 2002 and recently reaf-

firmed in 2016. *Ring*, 536 U.S. at 589; *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016). McKinney was resentenced in 2018. Nonetheless, he has not had a jury "find each fact necessary to impose a sentence of death." *Hurst*, 136 S. Ct. at 619.

The ongoing Sixth Amendment violation in McKinney's case is representative of but one significant constitutional shift since his 1993 sentencing hearing. It was only after this Court's intervention in 2016 that Arizona applied the 1994 decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994). *Lynch v. Arizona*, 136 S. Ct. 1818, 1818-19 (2016) (*per curiam*). Despite in 1994 having abolished parole eligibility for first-degree murder, Arizona courts refused to permit evidence of a lack of future dangerousness or, after *Ring*, instruct the jury that the defendant would not be released if the jury did not return a death sentence. *Id.*

Nationwide, one of the most significant changes to the administration of capital punishment has been the quality of representation at sentencing. This Court's decision in *Wiggins v. Smith*, 539 U.S. 510 (2003) for the first time in the modern era of the death penalty concluded that trial counsel provided deficient performance in the penalty phase of a capital sentencing proceeding and that performance prejudiced the defendant. *Id.* at 534-36. The change in quality of representation in capital sentencing is a primary driver of the large reduction in death sentences carried out as compared to only a couple of decades ago. Death Penalty Information Center, *Executions by Year* (Mar. 1, 2019) *available at* https://deathpenaltyinfo.org/executions-year (reporting 98 executions 1999 as compared to 25 in 2018); Stephen Bright, *Counsel for the Poor: The Death*

Penalty not for the Worst Crime But for the Worst Lawyer, 103 Yale L.J. 1835, 1836 (1994); Gregory J. Kuykendall, et al., *Mitigation Abroad: Preparing a Successful Case for Life for the Foreign National Client*, 36 Hofstra L. Rev. 989, 1000 (2000) (concluding "when the [highly qualified lawyers retained by the Mexican Capital Legal Assistance Program] is involved from the outset . . . the death sentencing rate for Mexican nationals accused of capital crimes is three to five times lower than for death-eligible cases in general.").

Provision of counsel in capital cases has proven to be a particular challenge in Maricopa County, Arizona, where McKinney was tried. Christopher Dupont & Larry Hammond, *Capital Case Crisis in Maricopa County, Arizona: A Response from the Defense*, 95 Judicature 216, 218 (2012) (noting that because of charging practices defense counsel would often be required to carry six or more active capital trial cases). Even the most able defense attorneys have struggled to provide competent representation under these circumstances, and the Arizona courts have resisted bar-led efforts to improve the quality of representation. Larry Hammond & Robin Maher, *The Effective Capital Defense Representation: ABA Guidelines, and the Twilight of the Death Penalty*, 47 Hostra L. Rev. 137, 144-45 (2018) (noting resistance adoption of binding best practices). Nonetheless, important systemic reforms aimed at improving the quality of counsel have been adopted and implemented in Maricopa County since the time of McKinney's sentence. Providing a new sentencing proceeding with counsel who will meet today's standard of care will improve the reliability of

McKinney's sentence and bolster the legitimacy of the proceedings.

Arizona has undertaken other significant changes to its assessment of death eligibility for those with intellectual disability. That is, prior to *Hall v. Florida*, 572 U.S. 701 (2014), Arizona did not account for standard error of measure in assessing whether a capital defendant has significantly impaired intellectual function. *State v. Escalante-Orozco*, 386 P.3d 798, 811 (Ariz. 2017), *abrogated on other grounds State v. Escalante*, 425 P.3d 1078 (Ariz. 2018).

McKinney has noted that under the approach of the Supreme Court of Arizona, the court could sidestep the application of the critical protections provided against the use of racism in jury selection. Br. 28. Surely we would not countenance intentional discrimination in jury selection when given an opportunity to correct it on direct review.

The same should hold for each of these protections – jury sentencing in capital cases, provision of accurate information about parole and future dangerousness during sentencing, improved reliability in assessing claims of intellectual disability, and dramatic improvements in representation in capital cases – all of which would be undermined if the court endorses the approach of the Supreme Court of Arizona.

This Court should hold that when a court imposes a sentence as part of its direct review process, current constitutional law applies. Doing so will ensure that the state courts are enforcing current constitutional norms and protecting the rule of law.

CONCLUSION

The Court should find Arizona's independent review as conducted in this case falls under the direct appeal process, and therefore not a final judgement, thus requiring that Petitioner be guaranteed jury resentencing that gives full consideration to any presented mitigation evidence.

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