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 ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The Arizona Prosecuting Attorneys' Advisory Council ("APAAC") is comprised of, *inter alia,* the elected county attorneys from Arizona's fifteen counties, in addition to the Arizona Attorney General, and several head city court prosecutors. APAAC's mission is to empower prosecutors through training and advocacy to serve as ministers of justice and to build criminal justice bridges with the greater community. As such, APAAC's primary focus is training prosecutors across Arizona on subjects ranging from basic trial skills and ethics to death penalty issues.

APAAC's interest in this case arises from its commitment to enforcement of the laws and rules of Arizona, which includes protection of the victim's and State's interest in finality in criminal prosecutions. APAAC respectfully submits this *amicus curiae* brief on behalf of itself and its members, in support of Respondent State of Arizona, to offer guidance on the questions presented, as they relate to finality, comity, and federalism, and explain the inequities and costs of perpetual litigation if finality is replaced by a defendant's ability to continually reopen direct review of his state criminal prosecution in collateral proceedings or obtain resentencing for error correction.

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[1] The parties have consented to the filing of amicus curiae briefs. Pursuant to Supreme Court Rule 37.6, APAAC confirms that no counsel for a party authored this brief in whole or in part and that no party, person, or entity made a monetary contribution specifically for the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENTS

This Court's respect for finality should lead its decision in this case. In 1996, the Arizona Supreme Court conducted direct review and Petitioner's case became final. Reopening direct review is not necessary to conduct a collateral independent review to correct an error that occurred in the Arizona Supreme Court's 1996 review of Petitioner's death sentences and was discovered in collateral federal habeas proceedings. Indeed, comity requires federal courts to allow state courts to determine how to correct their own errors, if possible, without interfering and dictating the corrective proceedings.

Moreover, remand to the trial court is not only unnecessary, but directly conflicts with the victim's and State's interest in finality. Here, respect for finality and comity clearly outweigh Petitioner's assertions that current law should be applied when correcting the error or that the trial court must correct the *Eddings* error with resentencing, when neither is constitutionally required. A finding by this Court that a state appellate court can correct errors on a collateral independent review without reopening the direct appeal would promote finality of state court judgments, comity, federalism, and judicial economy.

ARGUMENT

REQUIRING THE ARIZONA SUPREME COURT TO APPLY CURRENT LAW IN ITS COLLATERAL INDEPENDENT REVIEW OF PETITIONER'S 1993 STATE SENTENCES OR REQUIRING RESENTENCING TO CORRECT THE *EDDINGS* ERROR WOULD UNNECESSARILY DISTURB THE PRINCIPLES OF FINALITY AND COMITY.

"There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility." *McCleskey v. Zant*, 499 U.S. 467, 492 (1991) (quoting Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452–53 (1963)). Petitioner's case became final in 1996 when direct review concluded. Independently reviewing Petitioner's case pursuant to collateral federal habeas corpus proceedings does not reopen direct review, nor make his case nonfinal. This Court should deny the relief requested by Petitioner because it would be a repudiation of the established principles of finality, comity, and federalism, and would come at great, unnecessary costs to the victims, the State, and society.

A. Central to the criminal justice system is respect for finality.

1. Requiring application of current law violates the principles of finality.

Requiring state courts to continually apply current law, in the course of error correction, would eviscerate the principle of finality. "Application of constitutional

rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Teague v. Lane*, 489 U.S. 288, 309 (1989). Unnecessarily reopening cases that were final on direct review, and often have been final for decades, causes chronic wounds in the justice system and prevents healing.

Finality that provides for an end to criminal prosecution, when the defendant's constitutional rights have not been violated, is equitable. Justice O'Connor's language in *Teague*, 489 U.S. at 309, is particularly compelling on the issue of finality in the criminal justice system:

> Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions "shows only that 'conventional notions of finality' should not have *as much* place in criminal as in civil litigation, not that they should have *none*."

(citation omitted). Even if a defendant obtains relief in a collateral proceeding, this does not and should not reopen direct review if the error does not entitle the defendant to a retrial or resentencing. Instead the error can be and should be cured with collateral independent review by the state appellate courts.

Finality should be disturbed only if the required remedy for the error is retrial or resentencing. A retrial or resentencing would certainly start the direct review process anew and those new convictions and/or sentences would then not be final until *that* direct

review process was completed. It would not, however, reopen an already completed direct review. Indeed, direct review is just that, review directly from the conviction and sentence.

Here, direct review was completed, and Petitioner's case became final, in 1996. Petitioner's case did not come before the Arizona Supreme Court in 2018 on direct review. Consequently, the Arizona Supreme Court's applicable independent review in this case is anything but direct. Rather, the 2018 independent review in Petitioner's case flows from a collateral proceeding—the conditional writ of federal habeas corpus granting relief on an *Eddings* error, which ordered only that the state court correct the constitutional error in Petitioner's death sentence or vacate the sentence and impose a lesser sentence consistent with law. *See e.g., Styers v. Schriro*, 547 F.3d 1026, 1034–36 (9th Cir. 2008). Correction of this error does not require retrial or resentencing, and thus, does not reopen or otherwise start a new direct review process. Rather, this can and should be considered a collateral independent review.

The Arizona Supreme Court recognized this inability to reopen direct review in *State v. Styers*, 254 P.3d 1132, 1133-34, ¶¶ 4-7 (Ariz. 2011). On appeal from the denial of his petition for writ of habeas corpus, the Ninth Circuit found *Eddings* error in the Arizona Supreme Court's independent review of Styers's death sentence on direct appeal. *Id.* at 1133, ¶ 3. Like Petitioner's case, the Ninth Circuit ordered that Styers's writ of habeas corpus be granted: "unless the state, within a reasonable period of time, either

corrects the constitutional error in petitioner's death sentence or vacates the sentence and imposes a lesser sentence consistent with law." *Id.* (quoting *Styers*, 547 F.3d at 1034–36). The State moved the Arizona Supreme Court to conduct a new independent review of Styers's death sentence. *Id*. at 1133, ¶ 3. The Court granted the motion finding that it could remedy the error by properly conducting independent review of Styers's death sentence and this would fulfill its duty "to review the validity and propriety of all death sentences." *Id*. at 1134, ¶ 7 (quoting *State v. Brewer*, 826 P.2d 783, 790 (Ariz. 1992)).

Like *Styers*, because correction of the *Eddings* error in Petitioner's case came before the Arizona Supreme Court on a collateral proceeding, and not on direct review, *Griffith v. Kentucky*, 479 U.S. 314 (1987), does not require the state court to apply current law. *Griffith* applies to cases that are not final on direct review. Indeed, in its analysis in *Griffith*, this Court repeatedly referred to cases "on direct review" or "pending on direct review," before finding that *new rules apply retroactively to convictions pending on direct review or not yet final. Id*. at 321-28 (emphasis added). The Arizona Supreme Court recognized this distinction in *Styers*, finding that "[n]ew rules of criminal procedure (like the rule announced in *Ring*) apply retroactively to non-final cases pending on direct review," *Styers*, 254 P.3d at 187, ¶ 5 (citing *Griffith*, 479 U.S. 314), and thus, found *Griffith* inapplicable.

Similarly, *Jimenez v. Quarterman*, 555 U.S. 113, 120, n.4 (2009), does not support the proposition that a case is no longer final, under a *Teague* analysis, if the

court independently reviews the defendant's sentence a second time. *Jimenez* applied only in the narrow scope of determining the statute of limitations for federal habeas pursuant to § 2244 (d)(1)(A). *Id*. at 120-21. This Court cautioned that its holding was "a narrow one" and refused to depart from its previously held rule "that the possibility that a state court may reopen direct review 'does not render convictions and sentences that are no longer subject to direct review nonfinal.'" *Id*. at 120, n.4 (quoting *Beard v. Banks*, 542 U.S. 406, 412 (2004)).

Amicus recognizes the need for balance between finality and the imperative that a conviction and sentence are authorized by law. *See Welch v. United States*, 136 S. Ct. 1257, 1266 (2016) ("The *Teague* framework creates a balance between, first, the need for finality in criminal cases, and second, the countervailing imperative to ensure that criminal punishment is imposed only when authorized by law.") That balance, however, can be accomplished by the Arizona Supreme Court's collateral independent review, which, in this case, confirmed that Petitioner's mitigating circumstances were not sufficiently substantial to call for leniency. *See State v. Carreon*, 107 P.3d 900, 918, supplemented, 116 P.3d 1192 (Ariz. 2005) ("If the supreme court determines that an error was made regarding a finding of aggravation or mitigation, the supreme court shall independently determine if the mitigation the supreme court finds is sufficiently substantial to warrant leniency in light of the existing aggravation.") (quoting A.R.S. § 13-703.04, now renumbered as A.R.S. § 13-755.).

Moreover, finding that the Arizona Supreme Court cannot conduct error correction by independent review without reopening direct review, would open a proverbial can of worms for convictions in state court. If a judgment is rendered non-final every time a court determines, in a collateral proceeding, that error correction is warranted, the proceedings may never end. This would allow for retroactive application of all *Teague* permitted law decided *after* the case became final on direct review, sometimes years and decades after, leading to an unending cycle of application of newer law, to newer law, to newer law… "A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of underlying substantive commands." *McCleskey*, 499 U.S. at 492 (quoting Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L.Rev. at 452–53).

Nothing in Arizona Revised Statute section 13-755, which governs independent review, limits the Arizona Supreme Court's ability to independently review a death sentence to only direct appeal. *See Styers*, 254 P.3d at 1134, ¶ 7 n.1. Therefore, independent review can be constitutionally conducted on collateral proceedings, without reopening direct review, as was done in both Styers's and Petitioner's cases. More importantly, this promotes the interest of finality, which is equally critical to the criminal justice system.

2. Requiring resentencing to correct Eddings error violates the principles of finality.

It is well-established that independent review can cure sentencing error because "state appellate courts can and do give each defendant an individualized and reliable sentencing determination based on the defendant's circumstances, his background, and the crime." *Clemons v. Mississippi*, 494 U.S. 738, 749 (1990). *Hurst v. Florida*, 136 S. Ct. 616 (2016), did not overrule *Clemons* and does not change this.

"The primary concern in the Eighth Amendment context has been that the sentencing decision be based on the facts and circumstances of the defendant, his background, and his crime." *Clemons*, 494 U.S. at 748 (citing *Spaziano v. Florida*, 468 U.S. 447, 460 (1984); *Zant v. Stephens*, 462 U.S. 862, 879 (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 110–112 (1982); *Lockett v. Ohio*, 438 U.S. 586, 601–605 (1978) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 197 (1976)). Independent review achieves the "'twin objectives' of 'measured consistent application and fairness to the accused.'" *Clemons,* 494 U.S. at 748 (quoting *Eddings*, 455 U.S. at 110–111).

Here, the Arizona Supreme Court's independent review, which requires the court to review the findings of aggravation and mitigation and "independently determine if the mitigation the supreme court finds is sufficiently substantial to warrant leniency in light of the existing aggravation," A.R.S. § 13-755, achieves those twin objectives. Indeed, "[i]t is a routine task of appellate courts to decide whether the evidence

supports a jury verdict and in capital cases in 'weighing' States, to consider whether the evidence is such that the sentencer could have arrived at the death sentence that was imposed." *Clemons*, 494 U.S. at 748–49. Accordingly, equity favors appellate review because appellate courts who review many death sentences provide a more consistent application of the laws authorizing a death sentence than a typical juror who sees only one such case in their lifetime. *Id.* at 749. Moreover, this logical procedure aligns with the principles of finality.

As this Court has recognized, there is no constitutional requirement that a defendant be permitted to "litigate his claims indefinitely in hopes that [this Court] will one day have a change of heart." *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004). Respecting finality, this Court should hold that a state court can conduct error correction in a collateral independent review proceeding without reopening direct review, such that neither the application of current law, nor resentencing, is required.

B. Comity and federalism require federal courts to allow state courts to adjudicate state law issues.

If the state court holds that it can correct the *Eddings* error by collateral independent review that does not reopen direct review, the doctrines of comity and federalism disfavor the federal court from finding otherwise. "In the exercise of comity and in the recognition that state courts are better equipped to handle claims of state prisoners federal courts should yield as to the handling of state prisoner claims, as long

as the state courts provide an existing forum to entertain the merits of the petition." *Harris v. Brewer*, 434 F.2d 166, 168 (8th Cir. 1970). Although the habeas writ provides the federal court with a great deal of power, this power is not without limits and boundaries. The writ "can act only on the body of the petitioner. . . it cannot revise the state court judgment." *Fay v. Noia*, 372 U.S. 391, 431 (1963), *overruled in part by Wainwright v. Sykes*, 433 U.S. 72 (1977), and *abrogated by Coleman v. Thompson*, 501 U.S. 722 (1991). Federal courts may not use state courts as conduits to exercise habeas jurisdiction and have no power to order state courts to conduct, or how to conduct, further proceedings. Notably, in Petitioner's case, the Ninth Circuit did not tell the state court *how* to fix the error; nor could they.

Aside from violating the doctrines of comity and federalism, permitting federal courts to essentially order state courts to reopen direct review would be "a radical alteration of our habeas jurisprudence that will impose considerable economic costs on the States and further impair their ability to provide justice in a timely fashion." *Martinez v. Ryan*, 566 U.S. 1, 28 (2012). This logic aligns with the purpose and goal of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which governs Petitioner's federal petition for writ of habeas corpus wherein he sought the relief provided.

Congress enacted AEDPA to "curb delays, to prevent 'retrials' on federal habeas, and *to give effect to state convictions to the extent possible under law*." *Williams v. Taylor*, 529 U.S. 362, 386 (2000) (emphasis

added). The purpose of AEDPA is to promote "'comity, finality, and federalism.'" *Jimenez*, 555 U.S. at 121 (quoting *Carey v. Saffold*, 536 U.S. 214, 220 (2002)) (quoting *Williams v. Taylor*, 529 U.S. 420, 436 (2000)) and (citing *O'Sullivan v. Boerckel*, 526 U.S. 838, 844–845 (1999)). Dictating that a state court reopen review that is no longer direct, but instead results from collateral federal habeas proceedings, would gut the established principles of comity and federalism.

C. The costs of perpetual litigation.

Perpetual litigation comes at great cost to both victims and society. These costs are not just monetary. The costs of retroactive application of new rules includes emotional costs to victims and their families and the unnecessary use of judicial and governmental resources by the State and society. "Only with an assurance of real finality can the State execute its moral judgment . . . [and] can the victims of crime move forward knowing the moral judgment will be carried out." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998).

Victims have a right to finality. Specifically, in Arizona, a victim of a crime has a right to a "speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence." Ariz. Const. art. II § 2.1(A)(10); *see also State v. Towery*, 64 P.3d 828, 833, ¶ 14, (Ariz. 2003) ("Arizona courts are especially concerned with the finality of criminal cases because the Arizona Constitution requires courts to protect the rights of victims of crime by ensuring a 'prompt and final conclusion of the case after the conviction and sentence.'") (quoting Ariz. Const. art. II, § 2.1(A)(10)). Furthermore, the Arizona Constitution

requires that "all rules governing criminal procedure . . . in all criminal proceedings protect victims' rights" and those rules are "subject to amendment or repeal by the legislature to ensure the protection of these rights." *Id.* at § 2.1(A)(11). These provisions are mandatory. *See id.* at § 32. ("The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise."). Beyond the devastation wrought by the crime itself, the seemingly endless legal proceedings cause continuing harm to the victims and emotionally bankrupt many. And the anxiety and fear that come from not just the crimes, but from endless delays in the prosecution causes an inhumane hopelessness that is certainly contrary to the tenets of our criminal justice system.

There are also great costs to the State and society in perpetual criminal prosecutions—prosecutions that often were final decades ago. The "application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, . . . for it *continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Teague*, 489 U.S. at 310 (citation omitted). The State and society have an economical interest in conserving its resources. This includes not only monetary resources, but judicial and governmental resources. These resources will be quickly and unnecessarily depleted if state courts are ordered to conduct "do-overs" where correction by the appellate court can suffice to remedy the error.

Furthermore, the State has an interest in protecting its citizens, which includes punishing those that have committed crimes in its jurisdiction. *See Thompson*, 523 U.S. at 555 ("Finality is essential to both the retributive and the deterrent functions of criminal law" and "enhances the quality of judging."); *see also Herrera v. Collins*, 506 U.S. 390, 421 (1993) (the State has a "powerful and legitimate interest in punishing the guilty." Justice O'Connor, concurring.) A state that is prevented from enforcing its laws, is prevented from protecting its citizens. *See Thompson*, 523 U.S. at 556 ("the power of a State to pass laws means little if the State cannot enforce them.") (quoting *McCleskey*, 499 U.S. at 491). With protection of its citizens, comes society's ability, and need, to reside and prosper in a tranquil civilization. As Harvard Law Professor Paul Bator recognized, in considering finality in criminal litigation, "[r]epose is a psychological necessity in a secure and active society" and should be one of the aims in ensuring that justice had been done. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. at 452.

Arizona courts have specifically found that "there is a 'compelling interest in the finality of judgments' which should not lightly be disregarded." *City of Phoenix v. Geyler*, 697 P.2d 1073, 1078 (Ariz. 1985) (quoting *Rodgers v. Watt*, 722 F.2d 456, 459 (9th Cir. 1983)). "'The function of courts is to put an end to litigation,'" not to perpetuate it. *State v. Waldrip*, 533 P.2d 1151, 1153 (Ariz. 1975) (quoting *Tucson Gas & Electric Company v. Superior Court*, 450 P.2d 722, 724-25 (Ariz. App. 1969)). If decisions are not considered final, "then the prime goal of the judicial process will be

proportionately defeated." *Id*. This Court has and should continue to have an "enduring respect for 'the State's interest in the finality of convictions that have survived direct review within the state court system.'" *Thompson*, 523 U.S. at 554 (1998) (quoting *Brecht v. Abrahamson,* 507 U.S. 619, 635 (1993)).

This Court recently again acknowledged and affirmed the State's and crime victims' interests in finality and the frustration of those interests when the proceedings are inflicted with continuous delay. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1133 (2019) (the State and the victims both have an "important interest in the timely enforcement of a sentence.") (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)). Balance of these interests are key in this Court's determination of the subject petition and should not be weighed lightly.

In sum, this Court will eviscerate the principles of comity and finality if it finds that a state court must apply current law when a case is remanded for correction of a constitutional error pursuant to a federal petition for writ of habeas corpus or it finds that resentencing is required to correct *Eddings* error. Either finding would compound the already significant delay infecting these cases. As set forth above, perpetual litigation comes at great cost to the victims, the State, and society as a whole. This Court should decline Petitioner's request to apply current law on collateral independent review or require resentencing to correct *Eddings* error, where it is unnecessary and would certainly frustrate the principles of comity, federalism, and finality.

CONCLUSION

The sentences, upheld by the Arizona Supreme Court on collateral independent review, should be affirmed.

Respectfully submitted,

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