In the

Supreme Court of the United States

No. 18-1109

JAMES ERIN MCKINNEY, *Petitioner*,

vs.

STATE OF ARIZONA, *Respondent*.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARIZONA

MOTION OF THE CRIMINAL JUSTICE LEGAL FOUNDATION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AS *AMICUS CURIAE*, FOR ADDITIONAL TIME, AND FOR DIVIDED ARGUMENT

Pursuant to Rules 28.3, 28.4, and 28.7 of this Court, the Criminal Justice Legal Foundation (CJLF) respectfully moves for leave to participate in the oral argument in this case as *amicus curiae* supporting Respondent, that ten minutes of additional time be allowed per side, and that CJLF be allowed ten minutes of argument time.

Counsel for Respondent states the Respondent's position on this motion as: "Arizona neither consents to nor opposes the relief sought in this motion, except that Arizona opposes this motion and the relief sought herein to the extent that any argument time awarded to *amicus curiae* would reduce the time allotted to Arizona for presenting argument." This motion does not request any reduction in Arizona's argument time. Counsel for Petitioner opposes any enlargement of time but takes no position on division of time on the Respondent's side.

Amicus CJLF is well aware that "[a]dditional time is rarely accorded," Rule 28.3, and that non-government *amici* are not often granted leave to participate in oral argument. That is why CJLF has not made a motion to participate in over three decades of actively filing *amicus* briefs in this Court, including hundreds of cases. This case is different.

Question Presented 1 in this case is, "[w]hether the Arizona Supreme Court was required to apply current law when weighing mitigating and aggravating evidence to determine whether a death sentence is warranted." The question of whether current federal law is materially different from prior law regarding the weighing is not just "fairly included" in this question, see Rule 14.1(a), it is *necessarily* included. That is, does the rule of *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), apply to the weighing stage in capital cases or is it limited to the death-eligibility finding of an aggravating circumstance? If the latter, the current v. former law issue is moot, as explained in our brief.

The State has chosen to argue only the issue of finality for the purpose of retroactivity, not conceding the *Apprendi* scope issue but not submitting argument on it either. See Brief for Respondent 29, n. 9. This may well be the best litigation strategy for Arizona, but there are many other states that would be impacted by a holding, or even an implication, that the *Apprendi* rule applies to the weighing step. As explained in Part III of our brief, many states have long submitted the weighing question to juries but have not instructed them to use a reasonable doubt standard, relying on repeated assurances from this Court that no standard was constitutionally required. California alone has nearly 500 cases that could be affected.

The finality issue is important as well, as is the refutation of Petitioner's argument under Question 2 that the rule of *Eddings* v. *Oklahoma*, 445 U. S. 104

(1982) warrants a rule-specific exemption from the long-standing principle of *Clemons* v. *Mississippi*, 494 U. S. 738 (1990). The State believes that it needs the full 30 minutes normally allowed to one side for oral argument to present its case on these issues, and therefore it has declined to yield time to *amicus* for the *Apprendi* issue. The *Apprendi* issue will only be argued on the Respondent's side by a participant who briefed it if this motion is granted. The importance of the issue therefore warrants a small departure from the usual schedule.

As counsel for *amicus* CJLF, I believe that I can offer the Court the benefit of a depth of experience and expertise in the complex niches of the law involved in this case. I have 33 years of experience in capital appellate litigation. I have been counsel of record or supervised the counsel of record for 254 briefs filed in this Court. Nearly half of these briefs have involved issues of capital punishment, habeas corpus, retroactivity, the *Apprendi* rule, or a combination of them. I am a nationally known expert on these issues and have been invited to speak on them by, among others, the American Bar Association, the Brookings Institution, the Hoover Institution, C-SPAN, the Federalist Society for its National Lawyers Convention, the Association of Government Attorneys in Capital Litigation, and Intelligence Squared.

For these reasons, *amicus* CJLF respectfully requests that 10 minutes of time be added to oral argument per side, and that CJLF be granted leave to participate for the additional 10 minutes on the Respondent's side.

KENT S. SCHEIDEGGER
2131 L Street
Sacramento, CA 95816
(916) 446-0345
Attorney for Amicus Curiae
Criminal Justice Legal Foundation

CORPORATE DISCLOSURE STATEMENT

The Criminal Justice Legal Foundation is a California nonprofit public benefit corporation. The corporation has no parents or stockholders.