

No. 18A_____

IN THE
Supreme Court of the United States

JAMES ERIN MCKINNEY,

Applicant,

v.

STATE OF ARIZONA,

Respondent.

**APPLICATION FOR AN EXTENSION OF TIME TO FILE A
PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT**

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December 7, 2018

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APPLICATION

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for Arizona:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), applicant James Erin McKinney respectfully requests a 30-day extension of time, to and including February 21, 2019, within which to file a petition for a writ of certiorari to review the judgment of the Arizona Supreme Court in this case.

1. The Arizona Supreme Court issued its decision on September 27, 2018. *See State v. McKinney*, 426 P.3d 1204 (Ariz. 2018) (Appendix A). McKinney sought rehearing, which was denied on October 23, 2018 (Appendix B). Unless extended, the time to file a petition for certiorari will expire on January 22, 2019. This application is being filed more than ten days before the petition is currently due. *See* Sup. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1257(a).

2. This case presents an important question of federal law on which the state and federal courts are divided: whether a court must apply the law in effect at the time it corrects a defendant's sentence or conducts a resentencing, or whether a court may instead apply the law in effect at the time the defendant's first certiorari petition was denied (or the time for seeking certiorari expired).

3. McKinney was convicted of two first-degree murders and sentenced to death by a judge in Arizona, and his sentence was affirmed by the Arizona Supreme Court in 1996. *See State v. McKinney*, 917 P.2d 1214 (Ariz. 1996). In federal habe-

as proceedings in 2015, the Ninth Circuit held that the Arizona courts had erred by refusing as a matter of law to consider mitigating evidence during McKinney's sentencing proceedings, contrary to this Court's decision in *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982). *See McKinney v. Ryan*, 813 F.3d 798, 819 (9th Cir. 2015) (en banc). The Ninth Circuit remanded McKinney's habeas petition to the district court "with instructions to grant the writ with respect to McKinney's sentence unless the state, within a reasonable period, either corrects the constitutional error in his death sentence or vacates the sentence and imposes a lesser sentence consistent with law." *Id.* at 827.

4. Following the Ninth Circuit's decision, the State filed a motion for independent review of McKinney's death sentence before the Arizona Supreme Court. McKinney opposed that motion, arguing that he was entitled to resentencing by a jury under *Ring v. Arizona*, 536 U.S. 584 (2002). The Arizona Supreme Court granted independent review, concluding that McKinney was not entitled to resentencing by a jury because his case became "final" before this Court's decision in *Ring*. *See McKinney*, 426 P.3d at 1205-06. According to the Arizona Supreme Court, McKinney's case became final as soon as the time for filing McKinney's first certiorari petition expired. *See id.* The Arizona Supreme Court proceeded to independently weigh the mitigating and aggravating factors in McKinney's case, finding that McKinney's mitigating evidence, which included evidence of a "horrific childhood" and Post-Traumatic Stress Disorder, was "not sufficiently substantial to war-

rant leniency.” *Id.* at 1206. The Arizona Supreme Court “affirm[ed]” McKinney’s death sentence. *Id.* at 1208.

5. The Arizona Supreme Court’s decision is directly contrary to the Florida Supreme Court’s decision in *State v. Fleming*, 61 So. 3d 399, 407-408 (Fla. 2011), and the Washington Supreme Court’s decision in *State v. Kilgore*, 216 P.3d 393, 398-401 (Wash. 2009). It is also directly contrary to the decisions of multiple circuit courts. *See, e.g., United States v. Pizarro*, 772 F.3d 284, 290-291 (1st Cir. 2014); *Burrell v. United States*, 467 F.3d 160, 164 (2d Cir. 2006) (Sotomayor, J.); *United States v. Hadden*, 475 F.3d 652, 664-666, 670-671 (4th Cir. 2007). Each of those courts has held that the law as it stands at the time the court corrects a defendant’s sentence or conducts a resentencing governs. The Seventh Circuit, in contrast, follows the approach adopted by the Arizona Supreme Court. *See Richardson v. Gramley*, 998 F.2d 463, 467-468 (7th Cir. 1993) (Posner, J.). This Court’s review is warranted to resolve this clear split, which affects both McKinney and numerous other death-row inmates in Arizona. *See Ryan*, 813 F.3d at 849-850 (Bea, J., dissenting) (recognizing that the Ninth Circuit’s decision “potentially undermines every Arizona death sentence between 1989 and 2005”).

6. Applicant recently retained Neal Kumar Katyal of Hogan Lovells US LLP, Washington, D.C., to file a petition for a writ of certiorari. Mr. Katyal was not involved in the proceedings below. He must therefore familiarize himself with the proceedings, including the record and arguments presented in the Arizona Supreme Court.

During the next several weeks, Mr. Katyal is also occupied with a number of other matters. For example, he is scheduled to file the opening merits brief in *Maryland-National Capital Park and Planning Commission v. American Humanist Association*, No. 18-18, on December 17, 2018, and a reply brief in mid-February. He is also planning to file the certiorari-stage reply brief in *McDonough v. Smith*, No. 18-485, by December 21, 2018. In addition, he has other briefing and argument deadlines in the federal courts over the next two months, including in *United Healthcare of New York, Inc. v. Vullo*, No. 18-2583 (2d Cir.).

Accordingly, applicant respectfully requests that an order be entered extending the time to file a petition for certiorari to and including February 21, 2019.

Respectfully submitted,

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