No. 19–6976

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES CLAYTON JOHNSON,
PETITIONER,
-vs-
STATE OF ARIZONA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARIZONA

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Did the Arizona Supreme Court correctly conclude that the trial court did not violate due process by denying Johnson's request for a pretrial evidentiary hearing regarding whether Arizona's capital sentencing scheme adequately narrowed the class of defendants upon whom a capital sentence may be imposed, where there were no disputed facts and the issue was purely legal?

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INTRODUCTION

Petitioner Johnson alleges that the trial court erred by failing to conduct an evidentiary hearing on a multi-defendant pretrial challenge to Arizona's capital sentencing scheme on the ground that Arizona provides too many death-qualifying aggravating factors and thus does not sufficiently narrow the class of defendants eligible for death. Johnson has stated no compelling reason to grant certiorari. Johnson has not shown that the Arizona Supreme Court decided an important federal question in a way that conflicts with another state court of last resort or a United States court of appeals, or that the state's highest court decided an important question of federal law that has not been, but should be, decided by this Court, or that the state court decided an important federal question in a way that conflicts with this Court's decisions. U.S. Sup. Ct. R. 10. Instead, unsatisfied with the trial court taking his proffered evidence as true for purposes of his challenge to the capital sentencing statutes and concluding that the claim nonetheless failed as a matter of law, Johnson claims that due process required an evidentiary hearing.

Johnson, however, fails to acknowledge that the Arizona Legislature has amended Arizona's capital sentencing statute to reduce the number of death-qualifying aggravating factors. Because the 14-aggravator statute applied in Johnson's case will not apply going forward, there is no compelling need for this Court to consider whether that statute was sufficiently narrowing or whether the failure to conduct a hearing on that on that question violated due process. Moreover, Johnson's capital sentence is supported by three aggravators found by a jury beyond a reasonable doubt—each of which, standing alone, is sufficiently

narrow, and none of which was reduced or eliminated in the Arizona Legislature's recent changes. As such, Johnson's case is a poor vehicle to address the expansion of due process that he promotes. Finally, Johnson's due process claim fails on the merits.

STATEMENT OF THE CASE

In early December of 2010, Johnson attacked and murdered Xiaohung Fu, the owner of a Mesa, Arizona massage business. *State v. Johnson*, 447 P.3d 783 (Ariz. 2019). Johnson entered the business and encountered Fu inside, where a struggle ensued. 447 P.3d at 795, ¶ 2. Johnson bound and repeatedly stabbed Fu, killing her. *Id.*

Next door, Marvin Pearce and Terry Weathers heard the commotion, and Weathers rushed to check on Fu. *Johnson*, 447 at 795, ¶ 3. When he entered Taiwan Massage, he found the front entrance in disarray, so Weathers shouted "hello" but got no response. *Id.* After a moment, Johnson exited the bathroom at the end of the hall, drying his hands. *Id.* Weathers asked where Fu was, and Johnson replied she had cut herself and left in an ambulance. *Id.* Weathers then rushed next door to tell Pearce what he witnessed, and he called for help. *Id.* Weathers and Pearce then watched as Johnson got into his truck and sped away. *Id.* When officers arrived on the scene, they found Fu dead. *Id.* Fu had been stabbed several times, including one laceration down her back that penetrated through her lung and a near four-inch cut into her neck. *Id.* She also suffered superficial cuts across her stomach. *Id.*

Johnson fled to his girlfriend's apartment where he washed his clothes and truck. *Johnson*, 447 P.3d at 795, ¶ 4. Three days later, Johnson robbed a Christmas tree lot and was arrested, pleading guilty to armed robbery on December 21, 2010. 447 P.3d at 795–96, ¶ 4. Based on similarities between the two crimes, police linked Johnson to the Taiwan Massage killing. *Id.* at 796, ¶ 4. Cell phone tower data and DNA evidence substantiated Johnson's involvement. *Id.*

A jury convicted Johnson of all charges, and found the existence beyond a reasonable doubt of three of the four noticed and alleged capital aggravating factors: (1) Johnson was previously convicted of a serious offense, A.R.S. § 13–751(F)(2); (2) Johnson committed the offense in an especially heinous, cruel, or depraved manner, § 13–751(F)(6); and (3) Johnson committed the offense while on release, A.R.S. § 13–751(F)(7)(a) and (b).[1] *Johnson*, 447 P.3d at 796, ¶ 6. The jury also concluded that Johnson's proffered mitigation was not sufficiently substantial to call for leniency and sentenced him to death. *Id.* The Arizona Supreme Court affirmed Johnson's convictions and sentences, and he subsequently filed a petition for writ of certiorari in this Court.

REASONS FOR DENYING THE WRIT

This Court limits review by a writ of certiorari to cases demonstrating "compelling reasons" for review. U.S. Sup. Ct. R. 10. As discussed above, Johnson has not presented any compelling reasons. Johnson does not claim that the death penalty was wrongly imposed on him, or that the crime he committed (supported by three capital aggravators found by a jury to exist beyond a reasonable doubt) does

[1] The Arizona Legislature recently amended and renumbered this statute. The State refers to the numbering in effect at the time of Johnson's crimes.

not fall with an adequately narrow category of the "worst" of all first-degree murders. Instead, he asserts a vague due process right to have an evidentiary hearing regarding whether Arizona's aggravating factors, considered collectively, insufficiently narrow the class of defendants eligible for death. However, because the Arizona Legislature has amended the capital sentencing statutes, reducing the number of aggravating factors, the evidentiary hearing he desires represents an outdated perception of an alleged problem and challenges a statute that no longer exists. Moreover, the Arizona Supreme Court's holding regarding the denial of a pretrial evidentiary hearing is consistent with the overwhelming majority of this Court's decisions. And a hearing would be futile in any event because the trial court accepted Johnson's proffered facts as true in concluding that his claim failed as a matter of law.

THE ARIZONA SUPREME COURT CORRECTLY CONCLUDED THAT NEITHER THE DUE PROCESS CLAUSE, NOR THIS COURT'S CASE LAW, REQUIRED A PRETRIAL EVIDENTIARY HEARING REGARDING WHETHER ARIZONA'S CAPITAL SENTENCING SCHEME ADEQUATELY NARROWS THE CLASS OF DEFENDANTS UPON WHOM A CAPITAL SENTENCE MAY BE IMPOSED.

Effective August 27, 2019, the Arizona Legislature amended the Arizona capital sentencing scheme to further narrow the sub-class of first-degree murders that could qualify to be charged as capital murder. While there is no specific number of aggravating factors that renders a capital scheme constitutional or unconstitutional, the legislature has reduced the overall number of capital aggravating factors from fourteen to ten. *See* A.R.S. § 13–751 (F) (1–10) (2019). The legislature eliminated three aggravators altogether: the former (F)(3)

(commission of offense that created grave risk of death to another); (F)(13) (offense committed in a cold, calculated manner without pretense of moral or legal justification); and (F)(14) (commission of offense with remote stun gun). The changes also limited the pecuniary gain aggravator to essentially either the procurement or commission of a murder for hire.

Thus, Johnson's assertion that an evidentiary hearing was required to bolster his contention that nearly all first-degree murders in Arizona could have been charged as a capital murder under the previous statute is not worthy of certiorari because the Arizona Legislature has amended the statute, reducing the number of statutory capital aggravators.[2] *See* Pet. at 23–24. Importantly, none of the legislative changes to Arizona's capital sentencing statute affect the three capital aggravators his jury found to exist beyond a reasonable doubt.

Further, Johnson's reliance on Justice Breyer's "statement" regarding the denial of the defendant's petition for writ of certiorari in *Hidalgo v. Arizona*, 138 S. Ct. 1054 (2018), is inapposite. Petition at 24–25. As Justice Breyer admitted, it was not even evident "whether and to what extent an empirical study would be relevant to solving the constitutional question presented." *Hidalgo*, 138 S. Ct. at 1057. Justice Breyer did not indicate that there was a due process right to such a pretrial evidentiary hearing, just that he was interested in examining the "empirical evidence," should such exist. *Id.* However, where, as here, the trial court accepted the proffered evidentiary basis for the constitutional challenge as true (*see*

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[2] Johnson specifically argued that the number of statutory aggravators had increased over time, approvingly referencing previous versions of Arizona's statute containing fewer aggravating factors. (Pet. App. F at 608–09.)

Pet. App. G at 619; J at 749), and *still* resolved the constitutional issue against Johnson, it can hardly be a requirement of due process to present live testimony addressing a claim Johnson cannot legally win.

The Arizona Supreme Court correctly acknowledged as much, noting that this Court's case law does not require an evidentiary hearing. *Johnson*, 447 P.3d at 796, ¶ 10, *citing Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Mathews v. Eldridge*, 424 U.S. 319 (1976). In *Hamdi* and *Matthews*, this Court considered whether citizens are entitled to *any* proceedings before a court may deprive them of their liberty, *Hamdi*, 542 U.S. at 509, or property, *Mathews*, 424 U.S. at 323. Here, in contrast, Johnson received full and fair criminal proceedings. The trial court merely denied the request for an unnecessary pre-trial evidentiary hearing on a legal claim that failed as a matter of law.[3]

Moreover, even if *Hamdi* and *Mathews* applied, Johnson would still not be entitled to an evidentiary hearing. Those cases instruct that the due process that should be afforded in any given circumstance is determined by weighing the interest affected by the court's ruling against the State's interest and the burdens that would be imposed by providing expanded process. *Hamdi*, 542 U.S. at 529; *Mathews*, 424 U.S. at 335. First, no liberty interests were directly affected by the trial court's denial of an evidentiary hearing here because the requested hearing

[3] Contrary to Johnson's assertion (Pet. at 12), for this and other reasons, the State did not object to the absence of a hearing, but rather disagreed with the truth of the proffered facts, which the trial court assumed were true for purposes of ruling on the underlying constitutional issue. Pet. App. G at 619. Moreover, whether the State objected to the lack of an evidentiary hearing does not inform the question whether Johnson's general right to due process *required* an evidentiary hearing.

had no bearing on Johnson's detention. Second, as the trial court noted, it would have been unduly burdensome—not to mention inappropriate—for the court to conduct an evidentiary hearing and determine whether aggravating factors could be proven beyond a reasonable doubt in unrelated criminal cases in an effort to bolster Johnson's challenge to the statute.[4] (*See, e.g.*, Pet. App. G at 654–55.)

Further, to the extent that Johnson's due process contention is really an "arbitrariness" argument (*see* Pet. App. Ex. F at 606), the logical extension of his argument is (ironically) that, to guard against arbitrariness, *every* first-degree premeditated murder should automatically qualify for the death penalty, regardless of the existence of additional aggravating factors. Indeed, *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976), would support this as a constitutional narrowing of the class of all homicides (which includes homicides with lesser *mens rea* elements such as negligence or recklessness) to a death-eligible subclass of premeditated murders. *See Arave v. Creech*, 607 U.S. 463, 470 (1993) (stating that a capital sentencing scheme must "suitably direc[t] and limi[t] the sentencer's discretion so as to minimize the risk of wholly arbitrary and capricious action") (internal quotation marks omitted); *Tuilaepa v. California*, 512 U.S. 967, 972–73 (1994) (narrowing questions may involve 1) whether a particular aggravator applies to fewer than all murders, and 2) whether scheme overall "is neutral and principled so as to guard against bias or caprice"). That the vast

[4] Johnson sought to compare facts and circumstances in other, unrelated Arizona first-degree murder cases in an effort to "prove" through "empirical evidence" that the Arizona capital scheme did not adequately narrow the class of death-eligible defendants and this resulted in an unconstitutional arbitrariness. Pet. App. F, at 609–11.

majority of first-degree murders under the version of Arizona's capital statute challenged below *could* have been charged as capital, but were not (according to the factual assertions taken as true by the trial court),[5] and even fewer resulted in imposed capital sentences, seems to be empirical evidence of a great deal of both constitutional narrowing and individualized sentencing at work in Arizona.

Finally, as a practical matter, Johnson's insistence on an evidentiary hearing is perplexing because subjecting his proffered facts to adversarial testing (as opposed to just accepting them as true as was done here) can only serve to undermine them. In other words, a hearing can only make things worse for Johnson. It can hardly be a mandate of due process to insist on an evidentiary hearing under these circumstances. Johnson was permitted to present his legal arguments before a tribunal that accepted his factual allegations as true. This satisfies the mandates of procedural due process, and the Arizona Supreme Court correctly found no abuse of discretion in the trial court's denial of a pre-trial evidentiary hearing. *Johnson*, 447 P.3d at 796–97, ¶ 11. This Court should deny Johnson's petition for writ of certiorari.

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[5] *See Johnson*, 447 P.3d at 797, ¶ 11 (noting that appellate record in *Hidalgo* included "expanded study of first degree murder cases in Arizona, which found that one or more aggravating circumstances were present in 856 of 866 murders.")

CONCLUSION

Based on the foregoing authorities and arguments, Respondent respectfully requests this Court to deny Johnson's petition for writ of certiorari.

Respectfully submitted,

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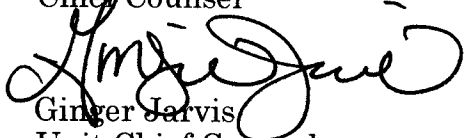

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