

No. 19-8660

IN THE
SUPREME COURT OF THE UNITED STATES

THOMAS MICHAEL RILEY,
PETITIONER,

-vs-

STATE OF ARIZONA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARIZONA

BRIEF IN OPPOSITION

MARK BRNOVICH
ATTORNEY GENERAL

O.H. SKINNER
SOLICITOR GENERAL

LACEY STOVER GARD
CHIEF COUNSEL

ELIZABETH T. BINGERT
ASSISTANT ATTORNEY GENERAL
CAPITAL LITIGATION SECTION
(COUNSEL OF RECORD)
2005 N CENTRAL AVENUE
PHOENIX, ARIZONA 85004
CADOCKET@AZAG.GOV
TELEPHONE: (602) 542-4686

ATTORNEYS FOR RESPONDENT

CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Should this Court revisit the previously-rejected challenge to Arizona's death eligibility scheme in *Hidalgo v. Arizona*,¹ where Riley presents no new information and where Arizona's capital sentencing scheme constitutionally narrows the death-eligibility factors under this Court's precedents?

¹ *State v. Hidalgo*, 390 P.3d 783 (Ariz. 2017), cert. denied, 138 S.Ct. 1054 (2018).

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
INTRODUCTION.....	1
OPINION BELOW	2
STATEMENT OF JURISDICTION	2
PROVISIONS INVOLVED	2
STATEMENT OF THE CASE.....	2
REASONS FOR DENYING THE WRIT.....	6
CONCLUSION.....	9

TABLE OF AUTHORITIES

CASES

<i>Furman v. Georgia</i> , 408 U.S. 238 (1972)	7
<i>Hidalgo v. Arizona</i> , 138 S. Ct. 1054 (2018)	1, 5, 6
<i>Lowenfield v. Phelps</i> , 484 U.S. 231 (1988)	1, 7
<i>State v. Hidalgo</i> , 390 P.3d 783 (Ariz. 2017)	<i>passim</i>
<i>State v. Johnson</i> , 447 P.3d 783 (Ariz. 2019)	8
<i>State v. Riley</i> , 459 P.3d 66 (Ariz. 2020)	<i>passim</i>
<i>Teague v. Lane</i> , 489 U.S. 288 (1989)	8
<i>Zant v. Stephens</i> , 462 U.S. 862 (1983)	7

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. VIII	2
U.S. Const. amend. XIV	2
U.S. Const. art. III., § 2	2
28 U.S.C. § 1257(a)	2
A.R.S. § 13-751	4, 7
A.R.S. § 13-751(F)(6)	4
A.R.S. § 13-751(F)(7)(a)	4
A.R.S. § 13-751(F)(11)	4
A.R.S. § 13-751(F)(13)	4

RULES

U.S. Sup. Ct. R. 10	1, 2, 6
U.S. Sup. Ct. R. 13.1, 13.3	2

INTRODUCTION

Petitioner Thomas Riley asks this Court to revisit the constitutionality of Arizona's death eligibility scheme, but fails to provide new information or evidence since this Court denied certiorari of the same issue in *Hidalgo v. Arizona*, 138 S. Ct. 1054 (2018). Riley states no compelling reason to grant certiorari: he 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; that Arizona'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 conflict with this Court's relevant decisions. U.S. Sup. Ct. R. 10. Instead, Riley argues that states must "collectively"—rather than individually—evaluate their aggravating circumstances to determine whether the legislature has sufficiently narrowed the class of death-eligible offenders. Riley ignores that there is not one prescribed modality for a death eligibility scheme to be constitutional under this Court's capital jurisprudence. *See Lowenfield v. Phelps*, 484 U.S. 231 (1988).

Moreover, Riley's case is a clear example of how Arizona's aggravating circumstances adequately narrow the class of death-eligible offenders: his capital sentence is supported by five aggravating circumstances that a jury found beyond a reasonable doubt. Thus, even if the question he presented had some merit, Riley's case is a poor vehicle to address the constitutionality of Arizona's capital sentencing scheme.

OPINION BELOW

On March 10, 2020, the Arizona Supreme Court unanimously affirmed Petitioner Thomas Riley's convictions and death sentence in a published opinion. Pet. App. 2a–71a. The court's opinion is reported as *State v. Riley*, 459 P.3d 66 (Ariz. 2020). On April 6, 2020, the court denied Riley's motion for reconsideration. Pet. at 1.

STATEMENT OF JURISDICTION

Riley timely filed the instant Petition for Writ of Certiorari. U.S. Sup. Ct. R. 13.1, 13.3; U.S. Sup. Ct. Order 589 U.S. (March 19, 2020). This Court has jurisdiction under Article III, Section 2 of the United States Constitution; 28 U.S.C. § 1257(a); and United States Supreme Court Rule 10.

PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law

STATEMENT OF THE CASE

I. Factual Summary

On June 29, 2008, Riley—along with two accomplices—murdered fellow prison inmate, Sean Kelly. *State v. Riley*, 459 P.3d 66 (Ariz. 2020). Riley and Kelly

were housed at the Arizona State Prison Complex-Lewis in Buckeye, Arizona. *Id.* at 78, ¶ 2. Riley sought full membership with the Aryan Brotherhood (“AB”), a violent, white supremacist prison gang, and in order to join, he requested and received authorization from the gang to assault Kelly. *Id.* Riley and his accomplices snuck into Kelly’s cell and stabbed him 114 times with homemade prison knives, killing him. *Id.* Riley changed into Kelly’s clothing, washed up, and returned to his cell. *Id.*

Subsequent investigation uncovered forensic evidence linking Riley to the murder; specifically, blood found on Riley’s body and clothing matched Kelly’s DNA profile. *Id.* at 78, ¶ 3. In Kelly’s cell, investigators found a bloody pair of pants with Riley’s inmate card inside its pocket, and a bloody shirt imprinted with Riley’s inmate number. *Id.*

Investigators discovered that Riley had sent a change-of-address form to a book publisher listing his new address as a maximum-security prison. *Id.* at 78, ¶ 4. On the day of Kelly’s murder, Riley was not scheduled for relocation and was placed in lockdown afterward, so he likely sent the form before he killed Kelly. *Id.*

Almost two years after the crime, an inmate gave investigators a letter he had received from Riley, which described Kelly’s murder in morbid detail. *Id.* at 78, ¶ 5. Investigators confirmed Riley wrote the letter through handwriting analysis and by a fingerprint on the letter identified as Riley’s. *Id.* In the letter, Riley admitted to stabbing Kelly fifty times and listed three “defining moments” from the killing: passing a frightened inmate on his way into Kelly’s housing area; the look on the face of an inmate who came upon the scene as Riley was washing up; and the sound of Kelly’s last breath leaving his limp body. *Id.* Riley drew a smiley face after

the last sentence and signed the letter, "Your hero the butcher" in German and English. *Id.*

Riley was convicted of first-degree murder and assisting a criminal street gang. *Id.* at 78, ¶ 6. The jury found beyond a reasonable doubt five death-qualifying aggravating circumstances: (1) Riley had previously been convicted of a serious offense, A.R.S. § 13-751²(F)(2); (2) Riley killed Kelly in an especially cruel, heinous or depraved manner,³ A.R.S. § 13-751(F)(6); (3) Riley killed Kelly while in the custody of the Arizona Department of Corrections, A.R.S. § 13-751(F)(7)(a); (4) Riley killed Kelly to promote, further or assist a criminal street gang, A.R.S. § 13-751(F)(11); and Riley killed Kelly in a cold and calculated manner without pretense of moral or legal justification, A.R.S. § 13-751(F)(13).⁴ *Riley*, 459 P.3d at 78, ¶ 6.

The jury found Riley's proffered mitigation⁵ was not sufficiently substantial to call for leniency and sentenced him to death for Kelly's murder. *Id.*

II. Relevant Procedural History

While his case was pending pre-trial, Riley joined a Motion to Dismiss the Death Penalty filed by another defendant. Pet. at 7; Pet. App. B-D. The motion argued that Arizona's aggravating circumstances did not constitutionally narrow offenders who were eligible for the death penalty because at least one aggravating

² Effective January 1, 2020, the Arizona Legislature renumbered this statute. For clarity and consistency, Respondents will refer to the statute as it existed at the time of Riley's conviction.

³ The jurors unanimously found both the especially cruel and especially heinous-or-depraved prongs of the (F)(6) aggravating circumstance. *Riley*, 459 P.3d at 94, ¶ 99.

⁴ Effective August 27, 2019, the Arizona Legislature eliminated this aggravating circumstance for first-degree murders committed after that date.

⁵ The trial court found, and the Arizona Supreme Court affirmed, that Riley knowingly, intelligently, and voluntarily waived his right to present mitigation evidence. *Riley*, 459 P.3d at 113, ¶ 201.

circumstance would apply to the majority of first-degree murders. Pet. App. 116a–117a.

Petitioner summarizes the state's argument in response without proper context. Pet. at 7. The state did not simply argue that every first-degree murder defendant should be eligible for the death penalty, but rather that Arizona's aggravating circumstances constitutionally narrow a jury's focus on who is or is not eligible for the death penalty. Pet. App. 118a–121a. The trial court denied the motion. Pet. App. 132a. Riley joined a second round of similar litigation and, two years later, the trial court again denied the motion to dismiss the death penalty. Pet. App. B–C.

The first defendant to appeal the trial court's denial of the joint motion to the Arizona Supreme Court was in *State v. Hidalgo* 390 P.3d 783 (Ariz. 2017). There, the Arizona Supreme Court held that Arizona's aggravating circumstances constitutionally narrow the class of defendants eligible for the death penalty. *Id.* at 789–92, ¶¶ 14–29. This Court denied the defendant's petition for certiorari review of that issue and Justice Breyer issued a statement regarding the certiorari denial, which three justices joined. 138 S.Ct. 1054, 1057 (2018).

Riley appealed to the Arizona Supreme Court and argued that the court should revisit the constitutionality of Arizona's death penalty that the court addressed in *Hidalgo*. The Arizona Supreme Court declined to overrule *Hidalgo* and affirmed Riley's convictions and sentences. *Riley*, 459 P.3d at 108–09, ¶¶ 174–80, Riley subsequently filed a petition for writ of certiorari in this Court.

REASONS FOR DENYING THE WRIT

“Review on a writ of certiorari is not a matter of right, but of judicial discretion.” U.S. Sup. Ct. R. 10. Accordingly, this Court grants certiorari “only for compelling reasons.” *Id.* As discussed above, Riley has not presented any compelling reasons to grant certiorari. Riley asserts a vague facial challenge to Arizona’s death eligibility scheme and repackages the issues this Court declined to review in *Hidalgo*. 390 P.3d 783 (Ariz. 2017), *cert. denied*, 138 S. Ct. 1054 (2018). Moreover, his case is a poor vehicle for such a challenge because his case demonstrates that Arizona law does, in fact, constitutionally narrow the class of death-eligible offenders. For these general reasons, and the specific ones set forth below, this Court should deny Riley’s petition.

Riley argues that Arizona does not sufficiently narrow the class of offenders eligible for the death penalty because its death-qualifying aggravating circumstances *could* apply to the majority of first-degree murders. Pet. at 27. Put simply, Riley re-urges the arguments made in *Hidalgo* and heavily relies on Justice Breyer’s statement accompanying the certiorari denial. 138 S.Ct. at 1057; Pet. at 8-10, 27. The Arizona Supreme Court correctly concluded, however, that *Riley* failed to distinguish his constitutional challenge to Arizona’s death-eligibility scheme from that presented in *Hidalgo* and thus presents no novel issue for this Court’s consideration.

“To pass constitutional muster, a capital sentencing scheme must ‘genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to

others found guilty of murder.” *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)). Legislatures may accomplish this narrowing function by either narrowly defining capital offenses “so that the jury finding of guilt responds to this concern,” or by “broadly defin[ing] capital offenses and provid[ing] for narrowing by *jury findings* of aggravating circumstances at the penalty phase.” *Id.* at 246 (emphasis added).

The Arizona Supreme Court agreed that Arizona’s scheme does not narrow death-eligible offenders through its “broad definition of first-degree murder.” *Riley*, 459 P.3d at 108. But *Lowenfield* makes clear that is *one* option that states have to render their schemes constitutional. 484 U.S. at 246. Arizona chooses to narrow its capital sentencing scheme through *Lowenfield’s* second option: defining the capital offense broadly, and allowing a jury to find the existence of death-qualifying aggravating circumstances. *Id.* See A.R.S. § 13-751.

When this Court has considered the “narrowing” requirement, it has focused on the sentencer’s discretion. The main objective of a narrowing requirement is to provide juries with guidance to avoid the death penalty being “wantonly and freakishly imposed.” *Furman v. Georgia*, 408 U.S. 238, 310 (1972). In *Hidalgo*, the Arizona Supreme Court held that, “observing that at least one of several aggravating circumstances *could* apply to nearly every murder is not the same as saying that a particular aggravating circumstance is present in every murder.” 390 P.3d at 791 (emphasis added). In other words, the discretion remains with Arizona jurors to determine whether the specifically-alleged aggravating circumstances

apply to the case before them. This Court evaluated the Arizona court's rationale in *Hidalgo* and declined to review its decision. 390 P.3d 783 (2017).

Finally, Riley presents no facts or information to this Court that it did not already consider in *Hidalgo*. In *Hidalgo* and in Riley's case, trial counsel proffered evidence to the trial court that statistically, most first-degree murders in Arizona could be eligible for the death penalty. Riley, 459 P.3d at 109; *Hidalgo*, 390 P.3d at 788. Riley contends that the Arizona Supreme Court has "ignored the data." Pet. at 27. However, just like Hidalgo before him, the trial court accepted all of the factual allegations surrounding Riley's statistical evidence as true, and still found that his constitutional claims failed as a matter of law. *Id.* The Arizona Supreme Court did not remand either case for an evidentiary hearing, and this Court denied certiorari when presented with whether a similarly-situated petitioner was entitled to one. *State v. Johnson*, 447 P.3d 783 (Ariz. 2019), cert. denied, 140 S. Ct. 1154 (2020).

Ultimately, Justice Breyer's statement holds no precedential weight. *Riley*, 459 P.3d at 109 (citing *Teague v. Lane*, 489 U.S. 288, 296 (1989) and noting that opinions accompanying certiorari denials have no precedential value). Regardless, Riley has not satisfied his and the joining justices' request for additional information on this issue and merely re-presents the same arguments based on the same facts this Court has already rejected. This Court should again deny certiorari.

\\\\

\\\\

\\\\

\\\\

CONCLUSION

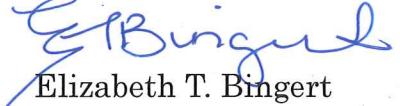
Based on the foregoing authorities and arguments, Respondent respectfully requests this Court to deny Riley's petition for writ of certiorari.

Respectfully submitted,

Mark Brnovich
Attorney General

OH Skinner
Solicitor General

Lacey Stover Gard
Chief Counsel


Elizabeth T. Bingert
Assistant Attorney General
(Counsel of Record)

Attorneys for Respondent