No. 19-8660

In the
Supreme Court of the United States

Thomas Michael Riley,

Petitioner,

v.

State of Arizona,

Respondent

On Petition for a Writ of Certiorari to the
Supreme Court of Arizona

Reply in Support of Petition for a Writ of Certiorari

Mikel Steinfeld
Counsel of Record
Kevin Heade
Maricopa County Public Defender's Office
620 W. Jackson, Suite 4015
Phoenix, Arizona 85003
(602) 506-7711
Mikel.Steinfeld@Maricopa.gov

Counsel for Petitioner

CAPITAL CASE

QUESTION PRESENTED

"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) (quotation marks omitted). When the legislature elects to use a broad definition of murder combined with aggravating factors, this narrowing requirement has long been understood to require the aggravating factors to collectively narrow the persons eligible for death.

Arizona has split from this rule. The Arizona Supreme Court concluded that only individual aggravators need narrow; the collective scheme need not. This is the sole basis for the court's conclusion that Arizona's scheme constitutionally narrows, even though nearly 99% of first-degree murder defendants qualify for one or more aggravating factors.

Arizona's decision requires this Court to clarify a limited issue:

To pass constitutional muster, must a death eligibility scheme collectively narrow the class of defendants eligible for the death penalty?

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REPLY

The state's Brief in Opposition largely did not contest the Certiorari Petition. Rather than respond to the merits of the question presented, the state mischaracterized the claim. To the extent it is responsive, Respondent did little to justify the Arizona Supreme Court's drastic departure from this Court's jurisprudence regarding the narrowing requirement established in *Furman v. Georgia*, 408 U.S. 238 (1972), *Gregg v. Georgia*, 428 U.S. 153 (1976), and related cases. Arizona's refusal to recognize, let alone adhere to, this Court's precedent reinforces the need for this Court to reiterate that aggravating factors must collectively reduce the class of persons eligible for the death penalty. This Court should therefore grant the Petition and declare that Arizona's novel approach to narrowing the class of murders eligible for the death penalty is inconsistent with precedent, and remand so the Arizona Supreme Court can consider, in the first instance, whether its aggravating scheme collectively narrows.

1. The Petition asks this Court to reiterate the rule that aggravating factors must collectively narrow eligibility for the death penalty, not to correct a misapplication of a correctly stated rule.

The Certiorari Petition raised an issue regarding whether a death-eligibility scheme must collectively narrow eligibility for the death penalty. The question presented asked whether the Arizona Supreme Court's conclusion conflicted with relevant decisions of this Court. Pet.Cert. ii. Explaining why this Court should grant review, the Petition discussed this Court's history of requiring and engaging in collective review of death-eligibility schemes in *Lowenfield v. Phelps,* 484 U.S. 231 (1988); *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Pulley v. Harris*, 465 U.S. 37 (1984); and *Kansas v. Marsh*, 548 U.S. 163 (2006). Pet.Cert. 13-17. Other

courts and academics have understood this Court's precedent as requiring aggravating circumstances to collectively narrow eligibility. *Id.* at 17-21.

The state, however, repeatedly mischaracterized the Petition as a request for this Court to decide the constitutionality of Arizona's death scheme. Br.Opp. 1, 6. The state painted the Petition as nothing more than a rehash of the issue brought up in *Hidalgo v. Arizona*, 138 S.Ct. 1054 (2018), which this Court declined to review. *E.g.* Br.Opp. 1, 6. This mischaracterization also found root in the state's attempt to reframe the issue: "Should this Court revisit the previously-rejected challenge to Arizona's death eligibility scheme in *Hidalgo v. Arizona*, where Riley presents no new information and where Arizona's capital sentencing scheme constitutionally narrows the death-eligibility factors under this Court's precedents?" *Id.* at i.

Nothing in the Petition asked this Court to declare Arizona's death-eligibility scheme unconstitutional; the Petition merely asked this Court to "grant certiorari, reiterate that capital-eligibility schemes must collectively narrow, and remand for further proceedings." Pet.Cert. 27. The Petition even contrasted *Hidalgo*: "Unlike *Hidalgo*, this petition does not ask this Court to determine whether Arizona's scheme is constitutional when the Arizona Supreme Court has not properly considered the question in the first instance." *Id.* It asked "this Court to clarify that the narrowing requirement established by *Gregg*, and extended in cases like *Lowenfield* and *Marsh*, requires courts to consider an eligibility scheme as a whole. It is not enough for individual aggravators to narrow; the scheme must collectively narrow eligibility." *Id.*

The issue before this Court is conceptual. It concerns the proper legal standard, not the application of that standard. The Arizona Supreme Court used the wrong rule for assessing how death-eligibility schemes must narrow eligibility to survive constitutional challenges. Thus, this case does not present "the misapplication of a properly stated rule of law"; it presents a state

court opinion on "an important federal question in a way that conflicts with relevant decisions of this Court." U.S.Sup.Ct. R. 10. This Court, other courts, and academics universally agree that aggravating factors must collectively reduce the class of persons eligible for death; Arizona alone has ruled that it is only necessary for individual aggravators to narrow.

2. Arizona's misunderstanding of this Court's narrowing jurisprudence merits review.

Like the Arizona Supreme Court, the state failed to understand this Court's jurisprudence. *See State v. Riley*, 459 P.3d 66, ¶ 176 (Ariz. 2020); Br.Opp. 7-8. The state did not support the Arizona Supreme Court's flawed interpretation. Instead, the state inserted yet another erroneous interpretation of this Court's jurisprudence. This explains why review is needed, and why this case is well suited to that review.

A. Respondent conflates guidance with narrowing.

Following *Furman*'s holding that the death penalty as applied in 1972 was unconstitutional, this Court decided five cases regarding the constitutionality of death penalty schemes on July 2, 1976: *Gregg*, 428 U.S. 153; *Proffitt*, 428 U.S. 242; *Jurek*, 428 U.S. 262; *Woodson v. North Carolina*, 428 U.S. 280 (1976); and *Roberts v. Louisiana*, 428 U.S. 325 (1976). To avoid the risk of arbitrary and capricious death sentences seen in *Furman*, these cases set forth a number of requirements. Two of these requirements were narrowing and guidance. While both work to ensure death is not imposed arbitrarily or capriciously, the two factors are different.

Under the narrowing prong, the legislature must reduce the class of persons eligible for death through either eligibility (or aggravating) factors or a circumscribed definition of capital murder that incorporates eligibility factors. *Gregg*, 428 U.S. at 196-97; *Proffitt*, 428 U.S. at 248-

51; *Jurek*, 428 U.S. at 270-71. This Court has continued to enforce the narrowing factor in cases like *Lowenfield*, 484 U.S. at 244-46; *Pulley*, 465 U.S. at 42-54; and *Marsh*, 548 U.S. at 173-80.

Under the guidance requirement, the sentencer's discretion must be guided by the aggravating factors (or narrowed homicide definition) and consideration of mitigation. *Gregg*, 428 U.S. at 197-98; *Proffitt*, 428 U.S. at 250-51; *Jurek*, 428 U.S. at 271-72. This Court has enforced the guidance factor, particularly as it relates to aggravating factors. *E.g. Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980); *Arave v. Creech*, 507 U.S. 463, 471 (1993).

As the Petition established, the Arizona Supreme Court's assertion that narrowing may occur at the individual-aggravator level is not grounded in precedent. Cert. Pet. 22-24.

The state did not defend the Arizona Supreme Court's reliance upon narrowing by individual aggravators. *See* Br.Opp. 6-8.

Instead, the state asserted the guidance function *is* the narrowing function: "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.'" *Id.* at 7 (quoting *Furman*, 408 U.S. at 310). This premise became the foundation for the state's claim that Arizona has narrowed eligibility through its aggravating factors. *Id.* at 7-8. The state's position is that a legislature need not reduce the class of persons eligible for death, the legislature need only provide some modicum of guidance. The state is wrong.

One of the primary reasons the *Furman* plurality believed death sentences were being imposed arbitrarily and capriciously was the vast discrepancy between eligibility and imposition. *Furman*, 408 U.S. at 276-77 (Brennan, J., concurring), 309 (Stewart, J., concurring), 311-12 (White, J., concurring), 340 (Marshall, J., concurring), 386 n.11 (Burger, C.J., dissenting).

Over the next four years, legislatures took two primary approaches to address the discrepancy. North Carolina made the death penalty mandatory, thereby increasing imposition to match eligibility. *Woodson*, 428 U.S. at 285-87. Other states limited eligibility through either a constrained definition of capital murder or a limited number of aggravating factors. *Jurek*, 428 U.S. at 267-75; *Gregg*, 428 U.S. at 162-68; *Proffitt*, 428 U.S. at 247-53.

This Court rejected the attempts to drive imposition rates up through mandatory death. It upheld the schemes that drove eligibility down closer to imposition.

Justice White's concurring opinion in *Gregg* is particularly helpful; Justice White was in the plurality that held death unconstitutional in *Furman*, and the plurality that upheld the death schemes in *Gregg*, *Jurek*, and *Proffitt*. Justice White explained that a limited list of aggravating factors would drive eligibility down closer to the rates of imposition:

> As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate as they are in Georgia by reason of the aggravating-circumstance requirement, it becomes reasonable to expect that juries even given discretion Not to impose the death penalty will impose the death penalty in a substantial portion of the cases so defined.

Gregg, 428 U.S. at 222 (White, J., concurring) (emphasis original). By reducing eligibility, it could "no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device." *Id.* Schemes that reduced eligibility in a meaningful manner would therefore "escape the infirmities which invalidated its previous system under *Furman*." *Id.*

This is the heart of the narrowing function—to legislatively reduce eligibility so it is closer to actual imposition. This is why this Court explained, "To pass constitutional muster, a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty." *Lowenfield*, 484 U.S. at 244 (quotation marks omitted). Whether through a limited list

of aggravating factors or a circumscribed definition of capital homicide, the legislative scheme must meaningfully limit death eligibility.

Contrary to Respondent's assertion, guidance alone is not narrowing.

Narrowing requires a meaningful reduction of the persons eligible for death. But narrowing is particularly important because it also promotes the goal of guidance. As Hannah L. Gorman and Margot Ravenscroft recently explained, "[i]f a statute fails to sufficiently narrow the scope of death penalty eligibility, it cannot provide adequate guidance, and therefore, the decision-makers cannot produce reasoned decisions." Hannah L. Gorman & Margot Ravenscroft, *Hurricane Florida: The Hot and Cold Fronts of America's Most Active Death Row*, 51 Columbia Human Rights L. Rev. 937, 960 (2020).

Similarly, Professor Mona Lynch emphasized that failures to meaningfully narrow eligibility produce the risk of arbitrariness: "If [a legislature] provides for broad eligibility on the books, it has the potential to produce arbitrariness at two critical decision-points in regard to the eligibility assessment: The prosecutor's decision to seek death, and the capital jury's fact-finding decision about the presence of any statutory aggravators." Mona Lynch, *Double Duty: The Amplified Role of Special Circumstances in California's Capital Punishment System*, 51 Columbia Human Rights L. Rev. 1010, 1016 (2020).

Guidance and narrowing are different interests. Narrowing seeks to ensure death is not imposed in an arbitrary and capricious manner by reducing eligibility closer to expected imposition. As it is meant to work, eligibility factors reflect murders "for which the death penalty is peculiarly appropriate …." *Gregg*, 428 U.S. at 222 (White, J., concurring). These factors work in concert to "genuinely narrow the class of persons eligible for the death penalty." *Lowenfield*, 484 U.S. at 244.

The Petition simply asked this Court to confirm that the narrowing function requires eligibility factors to collectively narrow. It is not enough for an individual aggravator to reduce eligibility by some quantum; the overall eligibility scheme must do so. The Arizona Supreme Court therefore decided an important federal question in conflict with this Court's decisions when it rejected collective narrowing. *See* U.S.Sup.Ct. R. 10. And the state's misunderstanding of this Court's jurisprudence further underscores the need for review.

B. This case is an ideal vehicle to affirm that aggravating factors must collectively narrow death-eligibility.

In the opinion below, the Arizona Supreme Court clarified that its decision regarding the constitutionality of Arizona's death penalty focused on one conclusion—narrowing is accomplished at the individual-aggravator level. *Riley*, 459 P.3d 66, ¶¶ 176-178 (Ariz. 2020). The court recognized that Riley had asked the court to "examine the aggravating factors in their entirety—as opposed to individually—when considering whether the legislature has sufficiently narrowed the class of persons eligible for the death penalty." *Id.* at ¶ 176. But the court had previously rejected collective narrowing. *Id.* (citing *State v. Hidalgo*, 390 P.3d 783, ¶¶ 19-20, 26 (Ariz. 2017)).[1] And the court affirmed this decision despite Justice Breyer's statement respecting the denial of certiorari in *Hidalgo v. Arizona*. *Riley*, 459 P.3d 66, ¶ 178.

The Arizona Supreme Court retreated, however, from the other justifications it had offered in *State v. Hidalgo*. *Riley*, 459 P.3d 66, ¶¶ 177-178. The court admitted Arizona's broad definition of first-degree murder likely did not narrow eligibility. *Id.* And the court conceded jury

[1] The Arizona Supreme Court relied upon *Tuilaepa v. California*, 512 U.S. 967 (1994). *See State v. Hidalgo*, 390 P.3d 783, ¶¶ 21-23 (Ariz. 2017). As explained in the Petition, *Tuilaepa* did not address eligibility factors. Pet.Cert. 22-23. The Petitioners in *Tuilaepa* did not even challenge the constitutionality of the eligibility procedure. *Tuilaepa*, 512 U.S. at 981 (Stevens, J., concurring). To the extent the Arizona Supreme Court's discussion can be construed as relying upon cases that addressed vagueness and overbreadth challenges, the Petition explained that those cases concern guidance, not narrowing. Pet.Cert. 22-24.

function—whether at the guilt, aggravation, or sentencing stage—did not satisfy the legislative duty to narrow. *Id.* at ¶ 178.

This case thus turns on one question: Did the Arizona Supreme Court err when it refused to consider whether aggravating factors collectively narrowed eligibility?

This is a legal question focused on this Court's precedents. It is a limited question that does not require this Court to decide whether Arizona's aggravation scheme adequately narrows eligibility.

The state asserted this case is a poor vehicle because it "demonstrates that Arizona law does, in fact, constitutionally narrow the class of death-eligible offenders." Br.Opp. 6; *see also id.* at i, 1. This position reflects Respondent's mischaracterizations and misunderstandings.

Its contention that this case is a poor vehicle relies upon its incorrect claim that the Petition asked this Court to review Arizona's death scheme. It did not.

Its proposition that this case proves Arizona's scheme performs the necessary narrowing function is premised upon one of two errors: 1) Respondent's confusion of guidance for narrowing, or 2) the Arizona Supreme Court's aberrant conclusion that death-eligibility schemes need not collectively narrow. And its reference to aggravating factors that were found in this case is beside the point; the question presented in this case concerns the legal standard.

To the contrary, the state's arguments demonstrate why it is important for this Court to grant certiorari in this case. Neither the Respondent nor the Arizona Supreme Court have correctly understood the law. In different ways, they have each confused guidance for narrowing.

Thus, the error identified in the Petition is not "the misapplication of a properly stated rule of law." U.S.Sup.Ct. R. 10. The challenge concerns a decision on an "an important federal question in a way that conflicts with relevant decisions of this Court." *Id.*

The resolution of this case is not particularly difficult. The Petition provided an in-depth discussion of this Court's long history of considering aggravating factors collectively. Pet.Cert. 13-17. It noted other jurisdictions and commentators that have understood this Court's precedent to require aggravation schemes to collectively reduce eligibility at the legislative stage. *Id.* at 17-21. It explained how this Court's vagueness and overbreadth cases address the guidance requirement, not narrowing. *Id.* at 22-24. And it pointed out that collective review of aggravating factors best accomplishes the constitutional goals set out in *Furman* and *Gregg*. *Id.* at 25-26.

The state did not cite a single authority that called any of this discussion into question. The state simply mischaracterized the arguments in the Petition, misconstrued this Court's cases, and confused guidance for narrowing.

Resolution of this Petition would simply require this Court to confirm that aggravating factors must collectively narrow death-eligibility. With this clarification, this Court would need to conduct no further examination, as remand to the Arizona Supreme Court would be appropriate. *See* Pet.Cert. 27-28.

CONCLUSION

The Arizona Supreme Court stands alone in its conclusion that narrowing need only be accomplished by individual aggravators. *Riley*, 459 P.3d 66, ¶¶ 176, 178. Even the Respondent failed to support the lower court, presenting instead a misguided claim that conflated guidance with narrowing.

This Court's precedent and application has been clear: it is not enough for individual aggravators to narrow; the aggravators must collectively narrow eligibility for the death penalty. *Lowenfield*, 484 U.S. at 244. Other courts and scholars agree the collective-narrowing function is essential.

Accordingly, this Court should grant this Petition for Writ of Certiorari, hold that the Arizona Supreme Court failed to correctly apply the law, and remand for further proceedings.

Respectfully submitted,

/s/ Mikel Steinfeld
Mikel Steinfeld
Counsel of Record
Kevin Heade
Maricopa County Public Defender's Office