CAPITAL CASE
No. 22-

IN THE
Supreme Court of the United States

LEROY MCGILL,

Petitioner,

v.

DAVID SHINN, ET AL.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Ex Post Facto Clause prohibits retroactive increases in criminal punishment. When Mr. McGill committed the crime for which he was convicted, Arizona law did not allow the State to sentence him to death. Instead, the State sentenced him to death under a provision enacted after the crime occurred. Did the Ninth Circuit err in holding that Arizona did not violate the Ex Post Facto Clause by sentencing Mr. McGill to death under the later-enacted statute simply because that statute could be characterized as "procedural?"

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioner is Leroy McGill.

Respondents are David Shinn, in his official capacity as Director of the Arizona Department of Corrections, and Walter Hensley, in his official capacity as Warden of the Arizona Department of Corrections – Eyman Complex.

No party is a corporation.

RULE 14.1(B)(III) STATEMENT

This case arises from the following proceedings in the Arizona State Court system, the United States District Court for the District of Arizona, and the United States Court of Appeals for the Ninth Circuit:

McGill v. *Shinn*, No. 19-99002 (9th Cir. Feb. 9, 2022);

McGill v. *Shinn*, 16 F.4th 666 (9th Cir. 2021);

McGill v. *Shinn*, No. CV-12-01149, 2019 WL 160732 (Jan. 10, 2019);

McGill v. *Arizona*, 549 U.S. 1324 (2007);

State v. *McGill*, 140 P.3d 930 (Ariz. 2006).

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Leroy McGill respectfully petitions for a writ of certiorari to review the opinion of the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion affirming the denial of the petition for writ of habeas corpus is reported at 16 F.4th 666. Pet. App. 1a–85a. The Ninth Circuit's order denying the petition for rehearing and rehearing en banc is unpublished. Pet. App. 136a. The District of Arizona's order denying the petition for writ of habeas corpus is unpublished and available at 2019 WL 160732. Pet. App. 86a–135a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment on October 21, 2021. Pet. App. 1a. A petition for rehearing and rehearing en banc was denied on February 9, 2022. Pet. App. 136a. Justice Kagan initially extended this petition's filing date to June 9, 2022, and further extended its filing date to July 9, 2022. Application for Extension of Time, No. 21A672 (Apr. 29, 2022); Application for Extension of Time, No. 21A672 (May 27, 2022). This Court has jurisdiction under 28 U.S.C. § 1254(1).

LEGAL FRAMEWORK

Article 1, Section 10 of the United States Constitution provides, in relevant part, that "No State shall . . . pass any . . . ex post facto Law . . . ." U.S. Const. art. I, § 10, cl. 1.

STATEMENT OF THE CASE

A. Introduction

When Leroy McGill committed the crime for which he was convicted, he could not have been sentenced to death. Days earlier, this Court had invalidated part of Arizona's death penalty statute in *Ring* v. *Arizona* ("*Ring I*"), 536 U.S. 584 (2002), so capital punishment was not available. Only later, and only after Mr. McGill's crime, did the State amend its statute to correct the deficiencies identified by this Court. It was under this later-enacted statute that Mr. McGill was sentenced to death.

On these facts, this case should have been a straightforward application of the Ex Post Facto Clause. The Clause prohibits a sentencing court from inflicting a greater punishment than was available when the crime occurred. According to the Ninth Circuit and the Arizona Supreme Court, however, Arizona's peculiar statutory structure precluded this straightforward result. Arizona's criminal statutes contained two interdependent death penalty provisions, and *Ring I* struck down only the procedural one. Because the legislative changes that Arizona made in response to *Ring I* were thus merely procedural, they reasoned, Mr. McGill's sentence did not violate the Ex Post Facto Clause.

Applying such a rigid substance-procedure distinction is contrary to a long line of clearly established case law from this Court and, in any event, would render the Clause a nullity.

B. Arizona Law

During the period leading up to Mr. McGill's crime, Arizona codified the death penalty in two interconnected provisions. The first provision was Arizona Revised Statute § 13-1105 (2001), which defined first

degree murder and set forth that it "[was] punishable by death or life imprisonment as provided by []§ 13-703." Section 13-703, in turn, established the procedures by which a defendant could be sentenced to death.[1]

On June 24, 2002, this Court held § 13-703 unconstitutional. *Ring I*, 536 U.S. 584. For thirty-eight days thereafter, Arizona had no valid capital punishment statute, so the maximum sentence available was life without parole. It was not until August 1, 2002, when Arizona enacted a new, constitutional death penalty procedure, that the death penalty once again became a viable punishment. Arizona Laws 2002, 5th S.S., Ch.1, § 3.

C. Factual and Procedural History

Mr. McGill committed his crime on July 13, 2002, during the thirty-eight day period when the death penalty was unavailable in Arizona. Two years later, a jury found Mr. McGill guilty and sentenced him to death under the death penalty statute as enacted on August 1, 2002.

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[1] Among other things, § 13-703 required "the judge who presided at trial to conduct a separate sentencing hearing to determine the existence or nonexistence of certain enumerated circumstances for the purpose of determining" whether to impose a death sentence. *Ring I*, 536 U.S. at 592 (cleaned up). It further instructed that the hearing "be conducted before the court alone" and that the court was to "make all factual determinations required" by law. *Id.* After the hearing, the statute mandated that the judge "determine the presence or absence of [certain] enumerated 'aggravating circumstances' and any 'mitigating circumstances.'" *Id.* If the court found at least one aggravating factor and there were no sufficiently substantial mitigating circumstances, § 13-703 authorized the court to impose the death penalty. *Id.* at 592–93.

The Arizona Supreme Court affirmed. *State* v. *McGill* ("*McGill I*"), 140 P.3d 930 (Ariz. 2006). Mr. McGill argued that his death sentence violated the Ex Post Facto Clause, but the court summarily disposed of his argument by citing one of its prior cases. Pet. App. 172a ("We rejected this argument in *State* v. *Ring* ["*Ring II*"], [65 P.3d 915, 928 (Ariz. 2003)].").

Following unsuccessful state post-conviction proceedings, Mr. McGill filed a petition for writ of habeas corpus in federal court. In his habeas petition, he again raised his Ex Post Facto Clause argument. Ultimately, the Ninth Circuit concluded that, under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the Arizona Supreme Court had not unreasonably applied clearly established federal law when determining that "Arizona had only made a procedural change to its death penalty process, and that change did not violate the Ex Post Facto Clause." Pet. App. 61a ("*McGill II*"). The court of appeals acknowledged that the Arizona Supreme Court had relied upon *Ring II* in reaching that conclusion, and that Mr. McGill was in a "different position" compared to the defendants in *Ring II*. *Id.* at 67a. Although the court did not "go so far as to decide that Arizona's new scheme is consistent with the Ex Post Facto Clause," it held that the Arizona Supreme Court's decision was not unreasonable. *Id.* at 73a.

Judge Milan Smith dissented. Contrary to the majority, he explained that the proper and clearly established test for an Ex Post Facto Clause violation is not whether a change can be labelled "procedural" or "substantive" but rather "whether a given change in law presents a 'sufficient risk of increasing the measure of punishment attached to the covered crimes.'" *Id.* at 80a (Smith, J., dissenting) (quoting *Peugh* v. *United States*, 569 U.S. 530, 539 (2013)). Judge Smith found

that test satisfied because there was "*no possibility of the death penalty*" when Mr. McGill committed his crime, and it was only Arizona's subsequent re-enactment of a constitutionally permissible death sentencing scheme that reinstated the "*possibility of the death penalty*." *Id.* at 82a, 84a–85a.

That conclusion stemmed in large part from the text and structure of Arizona's death penalty statute. Although *Ring I* had left one half—namely § 13-1105—of Arizona's capital punishment scheme undisturbed, § 13-1105 explicitly incorporated and relied upon § 13-703. *Id.* at 81a. Specifically, § 13-1105 said that "[f]irst degree murder is punishable by death or life imprisonment *as provided by § 13-703*." *Id.* at 79a (cleaned up, emphasis added). And because § 13-703 had been held unconstitutional, "a potential offender [looking at the interdependent statutes would be] on notice that he could *not* be sentenced to death for first degree murder." *Id.* at 81a. In other words, when *Ring I* rendered the prior version of § 13-703 a "legal nullity, the statute [became] crystal clear that life imprisonment alone [was] the punishment for first degree murder committed during the period between *Ring I* and the reenactment of § 13-703." *Id.* Arizona conceded as much. At oral argument, the State repeatedly admitted that Mr. McGill could not have been sentenced to death had the Arizona legislature not re-enacted § 13-703. *Id.* at 80a n.1; see also *State* v. *Sizemore*, S-0900-CR-20010338 (Ariz. Super. Ct. Navajo County July 24, 2022) (defendant facing possible death sentence invoked right to immediate sentencing and was sentenced to life after the state and court agreed that there was no viable death penalty statute in effect).

After the panel issued its opinion, Mr. McGill filed a petition for rehearing and rehearing en banc, which was denied.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S TEST IS CONTRARY TO THIS COURT'S PRECEDENT

The Ninth Circuit applied the wrong test for Ex Post Facto Clause violations. Rather than follow the long string of this Court's cases establishing that violations arise when retroactive application of a law creates sufficient risk of increased punishment, the Ninth Circuit adopted the Arizona Supreme Court's conclusion that procedural changes are strictly excluded from the reach of the Ex Post Facto Clause. Such a decision is so contrary to this Court's precedents that it cannot survive even under AEDPA's deferential standard of review.[2] See Sup. Ct. R. 10(c) (Review may be granted when "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court.").

To reach this erroneous conclusion, the Ninth Circuit turned to *Ring II*, which the Arizona Supreme Court had relied upon to affirm Mr. McGill's sentence.

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[2] AEDPA authorizes federal courts to grant habeas relief "when a state court's decision on the merits was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by' decisions from [the U.S. Supreme] Court." *Woods* v. *Donald*, 575 U.S. 312, 315 (2015) (quoting 28 U.S.C. § 2254(d)). A state court's decision "is contrary to this Court's clearly established precedents if it applies a rule that contradicts the governing law set forth in this Court's cases." *Brown* v. *Payton*, 544 U.S. 133, 134 (2005). "[U]nder the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Lockyer* v. *Andrade*, 538 U.S. 63, 75 (2003). Moreover, when a state court's decision is "objectively unreasonable," it is improper for a federal court to defer to the state court's decision. *Id.*

See Pet. App. 65a–66a. In *Ring II*, the Arizona Supreme Court reasoned that "a legislative act affecting changes in criminal procedure, including procedural changes that disadvantage a defendant, generally does not violate the Ex Post Facto Clause" because the Clause "reach[es] only those legislative enactments that affect substantive criminal law." *Ring II*, 65 P.3d at 927 (citing *Dobbert* v. *Florida*, 432 U.S. 282, 292 (1977); *Collins* v. *Youngblood*, 497 U.S. 37, 45 (1990)). Accordingly, it found that "[t]he question before us . . . is whether Arizona's new sentencing statutes worked a substantive or procedural change in the law." *Id.* The Ninth Circuit adopted this test, holding categorically that "procedural changes fall outside the protections of the Ex Post Facto Clause." Pet. App. 68a–69a. Thus, because Arizona's change in law was procedural, it was reasonable for the Arizona Supreme Court to conclude Mr. McGill's death sentence was constitutional. *Id.*

But, this Court has, over the last thirty years, repeatedly rejected the substance-procedure distinction that the Ninth Circuit endorsed here. Although *Dobbert*, 432 U.S. at 293, observed that "a procedural change is not ex post facto" "[e]ven though it may work to the disadvantage of a defendant," a long line of this Court's subsequent decisions shows that the Court has since abandoned that rule. In *Florida* v. *Miller*, for example, the Court observed that "even if the statute takes a seemingly procedural form," it is still ex post facto if it "alters a substantial right." 482 U.S. 423, 433 (1987) (quoting *Weaver* v. *Graham*, 450 U.S. 24, 29 n.12 (1981)). Likewise in *Collins*, this Court explained that "simply labeling a law 'procedural' . . . does not thereby immunize it from scrutiny under the *Ex Post Facto* Clause." 497 U.S. at 46. Most significantly, over two decades ago, the Court conclusively held that the

substance-procedure test was not proper. In *Carmell* v. *Texas*, 529 U.S. 513 (2000), the Court explained *Collins* "eliminated a doctrinal hitch . . . which purported to define the scope of the [Ex Post Facto] Clause along an axis distinguishing between laws involving 'substantial protections' and those that are merely 'procedural.'" *Id.* at 539. In fact, relying on the substance-procedure distinction to evaluate Ex Post Facto Clause claims is contrary to the Constitution, and the Court pointed out that *Collins* had overruled two prior decisions precisely because they depended on that distinction. *Id.*[3]

Rather than asking if a change in law is substantive or procedural, the correct test is "whether the change in law creates a 'sufficient' or 'significant' risk of increasing the punishment for a given crime." *Peugh*, 569 U.S. at 541 n.4. Two decisions—*California Dep't of Corr.* v. *Morales*, 514 U.S. 499 (1995), and *Garner* v. *Jones*, 529 U.S. 244 (2000)—illustrate this test.

In *Morales*, a petitioner challenged changes to California's parole rules. 514 U.S. at 503–04. At the time the petitioner committed his crime, California law required the Board of Prison Terms to hold annual parole hearings. *Id.* Under the amended law, the Board

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[3] Practitioners have roundly criticized the substance-procedure distinction as unworkable. *See, e.g.*, R. Brian Tanner, *A Legislative Miracle: Revival Prosecutions and the Ex Post Facto Clauses*, 50 Emory L.J. 397, 416–22 (2001) (arguing that "[t]he substantive-procedural dichotomy is traditionally difficult to define" and observing that "[t]he definitions of 'substance' and 'procedure' are themselves variable") (internal citations omitted); Janeen M. Carruthers, *Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages,* 53 The International and Comparative Law Quarterly no. 3 691, 694 n.22 (2004), http://www.jstor.org/stable/3663295 ("The distinction between substantive and procedural law is artificial and illusory.").

could defer subsequent hearings for up to three years. *Id.* The petitioner argued that applying the amendment to him violated the Ex Post Facto Clause because it increased his punishment retroactively. *Id.* at 504–05. The amendment was undeniably procedural because it "simply 'alter[ed] the method to be followed' in fixing a parole release date under identical substantive standards." *Id.* at 507–08. But the Court did not decide the case on that basis. Instead, it analyzed whether the amendments "produce[d] a sufficient risk of increasing the measure of punishment" to determine if the Ex Post Facto Clause applied. *Id.* at 509. When the Court held that the Clause did not apply, it did so because the amendments created only a speculative risk of greater punishment, not because the amendments were procedural. *Id.* at 514.

Garner also involved changes to parole procedures. 529 U.S. at 246. Once again, it did not matter that the changes were procedural. The relevant test was whether "the law created a significant risk of increasing [the] punishment," and this Court remanded the case because the court of appeals did not properly apply that test. *Id.* at 255–57.

Taken together, *Miller*, *Collins*, *Carmell*, *Morales*, and *Garner* demonstrate that the appropriate test for assessing Mr. McGill's claim under the Ex Post Facto Clause is to ask whether there was a "sufficient or significant risk" that the change in law would increase his punishment. Each of those five cases were available to the Ninth Circuit here, and to the Arizona Supreme Court when it decided *Ring II* (2003) and Mr. McGill's appeal (2006). The Ninth Circuit's and the Arizona Supreme Court's failures to apply the "sufficient or significant risk" test were therefore not only contrary to, but an unreasonable application of this Court's clearly established law.

The question presented also affords this Court the opportunity to bring uniformity to Ex Post Facto Clause analysis outside the AEDPA context. That is because the Ninth Circuit is not alone in clinging to, or occasionally resurrecting, the defunct substance-procedure analytical structure. See, *e.g.*, *Ruhlman* v. *Brunsman*, 664 F.3d 615, 620 (6th Cir. 2011) ("[T]he *Ex Post Facto* clause does not apply to procedural changes."). Other courts of appeal have heard this Court's message loudly and clearly. See, *e.g.*, *Evans* v. *Gerry*, 647 F.3d 30, 32 (1st Cir. 2011) ("[T]he Supreme Court has said that . . . the Ex Post Facto clause could apply to statutes adopting procedural changes."); *Holmes* v. *Christie*, 14 F. 4th 250, 264 (3d Cir. 2021) ("[An Ex Post Facto Clause] test that formalistically distinguishes between substantive rules and procedural ones finds no foundation in controlling cases or the functional approach that animates them."). And still others, without expressly addressing the substance-procedure distinction, have adopted the risk-based test from *Morales*, *Garner*, and *Peugh*. See, *e.g.*, *Warren* v. *Miles*, 230 F.3d 688, 692 (5th Cir. 2000) ("For an ex post facto violation to occur . . . the new law must create a sufficient risk of increasing the punishment attached to the defendant's crimes."); *United States* v. *Gayden*, 977 F.3d 1146, 1154 (11th Cir. 2020) (applying the "sufficient risk" test). Accordingly, some analytical uniformity can be achieved through review of the Ninth Circuit's "procedural exception" opinion here.

II. THE NINTH CIRCUIT UNREASONABLY APPLIED THIS COURT'S PRECEDENTS

The Ninth Circuit ignored the clearly established line of precedent discussed above. Instead of applying the "sufficient or significant risk" test, the Ninth Circuit relied on two inapposite cases—*Collins* and

Dobbert—which had been cited by the Arizona Supreme Court in *Ring II*.[4] Doing so was error.

A. *Collins* is Inapposite

Collins involved the "reformation" of a prior sentence in accordance with a Texas statute that was expressly retroactive. The defendant "was convicted in a Texas court of aggravated sexual abuse." *Collins*, 497 U.S. at 39. "The jury imposed punishment of life imprisonment and a fine of $10,000," despite the fact that Texas law prohibited the imposition of a fine in addition to a sentence of any term of imprisonment. *Id.* In light of that prohibition, the defendant brought a post-conviction challenge to both the "judgment and sentence." *Id.* While that challenge was pending, Texas passed a new statute which enabled "an appellate court to reform an improper verdict that assesse[d] a punishment not authorized by law." *Id.* at 40. Subsequently, the Texas "Court of Criminal Appeals reformed the verdict in [defendant's] case by ordering *deletion* of the $10,000 fine." *Id.* (emphasis added).

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[4] The Ninth Circuit's deference to *Ring II* was itself highly questionable. *Ring II* arose from this Court's decision in *Ring I*, 536 U.S. 584, which invalidated Arizona's death penalty statute as unconstitutional under the Sixth Amendment. But that is where the similarities to this case end. After this Court's decision in *Ring I*, the Arizona Supreme Court consolidated the cases of defendants who "either pled guilty to or were convicted by a jury of first degree premeditated or felony murder" under the unconstitutional statutory scheme. *Ring II*, 65 P.3d at 925. Critically, and unlike Mr. McGill, all of the defendants whose cases were consolidated had committed their crimes *before* this Court declared Arizona's capital punishment statute unconstitutional. When those defendants committed their crimes, there was a statutory scheme in place under which each of the defendants could have been sentenced to death. Even the panel majority conceded that Mr. McGill is in a very "different position from the defendants in *Ring II*." Pet. App. 66a–67a.

The defendant then filed a federal habeas petition, arguing that the "retroactive application" of the new Texas statute violated the Ex Post Facto Clause. *Id.* The district court denied the petition because, among other things, the defendant's "punishment was not increased," and instead "actually decreased" because the fine was eliminated. *Id.* (cleaned up). The court of appeals reversed, but on review, this Court agreed with the district court and denied defendant's habeas petition. Critically, this Court held that there was no Ex Post Facto Clause violation because application of the new Texas law did not "make more burdensome the punishment for a crime, after its commission." *Id.* at 52.

That is miles apart from the circumstances here. As discussed above, when Mr. McGill committed his crime, the maximum sentence he could have received was life imprisonment without the possibility of parole. Arizona's newly passed death penalty statute changed that by increasing the maximum available punishment to death. Unlike Texas's law in *Collins*, it was not made retroactive. See *id.* at 40–41. Under that new statute, Mr. McGill was sentenced to death—something that could not have occurred under the capital punishment statutory scheme in place at the time of the crime. In other words, applying the death penalty to Mr. McGill "ma[d]e more burdensome the punishment for [his] crime." See *id.* at 52. Whereas the new statute in *Collins* had the effect of decreasing the defendant's punishment, the new statute here had precisely the opposite effect—namely, increasing Mr. McGill's maximum sentence from life imprisonment to capital punishment. That being so, it was objectively unreasonable for the Ninth Circuit and Arizona Supreme Court to rely on *Collins* to reject Mr. McGill's petition.

B. *Dobbert* is Inapposite

The Ninth Circuit's and the Arizona Supreme Court's reliance on *Dobbert* was likewise objectively unreasonable. This is primarily because the facts of *Dobbert* are markedly different from those here. In *Dobbert*, the petitioner, "[u]nder the Florida death penalty statute *then in effect*[,] . . . was sentenced by the trial judge to death." 432 U.S. at 284 (emphasis added). Later, in 1972, Florida "enacted a new death penalty procedure." *Id.* at 288. There was no Ex Post Facto Clause violation because "[t]he new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime." *Id.* at 293–94 (footnote omitted).

In reaching this determination, the Supreme Court relied on two key principles. The first was notice. *Id.* at 297 ("[Florida] provided fair warning as to the degree of culpability which the State ascribed to the act of murder."); *id.* at 303 (Burger, C.J., concurring) ("Petitioner was at least constructively on notice that this penalty might indeed follow his actions."). Florida law allowed for the death penalty and provided an accompanying procedure to impose such a punishment at the time petitioner committed his crime, at sentencing, and after the fact.

The second was fundamental fairness: "a procedural change is not ex post facto" when it does not affect "substantial personal rights against arbitrary and oppressive legislation." *Id.* at 293; see also *id.* at 307 (Stevens, J., dissenting) ("[T]he Ex Post Facto Clause also provides a basic protection against improperly motivated or capricious legislation."). In *Dobbert*, no such fairness concerns were implicated because the statute in effect at the time of the offense was valid, and the

later-imposed statute was also valid. The death penalty was available at all times.

But these same principles point in the opposite direction as to Mr. McGill. At the time Mr. McGill committed his crime, "a look at [Arizona law] would actually put a potential offender on notice that he could *not* be sentenced to death for first-degree murder." Pet. App. 81a (Smith, J., dissenting). That is because the only means by which the death penalty could be imposed—Arizona Revised Statute § 13-703—had been invalidated in *Ring I*, 536 U.S. at 609. Hence, *Ring I* put Mr. McGill on notice that, under the law at the time of the offense, "life imprisonment *alone* [was] the punishment." Pet App. 81a (Smith, J., dissenting) (emphasis added).

Likewise, as to fairness, Arizona has admitted that "Mr. McGill could not have been sentenced to death" for murder when he committed his crimes. *Id.* at 80a n.1; see also *State* v. *Sizemore*, S-0900-CR-20010338. If the Ex Post Facto Clause ensures that "the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life," *Carmell*, 529 U.S. at 533, then exercising legislative authority where no such power exists is paradigmatic of "arbitrary and oppressive legislation," *Dobbert*, 493 U.S. at 293.

This reading of the Ex Post Facto Clause is consistent with that of other courts in similar circumstances. In June 1991, the Colorado Supreme Court overturned Colorado's death penalty statute. *People* v. *Aguayo*, 840 P.2d 336, 337 (Colo. 1992). The state did not enact a new statute until September 1991. *Id.* During this 76-day window, the defendants were charged with murder. *Id.* On review, the Colorado Supreme Court granted relief because "to impose a death penalty would, . . . inflict a greater punishment than the

law annexed to the crime when committed, thus violating both the federal and state constitutional proscriptions against ex post facto laws." *Id.* at 339; *accord Blue* v. *State*, 303 So.3d 714, 719–20 (Miss. 2020) (invalidating "sentence of life without parole" under the Ex Post Facto Clause because it was "not available for murder when [defendant] committed his crime").

Similarly, the petitioner in *Coleman* v. *McCormick*, 874 F.2d 1280, 1289 (9th Cir. 1989) (en banc), was granted relief because he "was sentenced to death under a [Montana] statute not in effect at the time of his trial." The petitioner was initially sentenced "under a mandatory death penalty statute subsequently held to be unconstitutional," and he was then resentenced pursuant to a newly enacted death penalty statute. *Id.* at 1285. Because the death penalty statute under which he was resentenced was not in effect at the time the offense was committed, petitioner "was given no notice whatsoever of the life and death consequences of his actions." *Id.* at 1288.

Against this backdrop—*i.e.*, specific, material facts distinguishing Mr. McGill's case from *Dobbert* and case law rejecting extension of *Dobbert*'s reasoning in similar contexts—relying upon *Dobbert* was patently unreasonable.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

The question of when a procedural change to criminal laws falls under the scope of the Ex Post Facto Clause is especially acute in the context of capital cases like Mr. McGill's. As the Court has recognized, "death is different," *Ring I*, 536 U.S. at 586–87. This case is an excellent vehicle for the Court to provide clarification as to proper analysis under the Ex Post Facto Clause. Mr. McGill preserved his Ex Post Facto

Clause arguments throughout the case, and the Ninth Circuit squarely addressed the question. See *supra* § I. And the issue is dispositive. The Ninth Circuit rejected all of Mr. McGill's claims for habeas relief and, except for his claim under the Ex Post Facto Clause, Mr. McGill is not seeking review of any of his other claims for relief.

Moreover, the question presented implicates the fundamental fairness of our criminal justice system. Fairness requires "having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Carmell*, 529 U.S. at 533. It is unfair, and threatens trust in the justice system, when governments can punish acts which were legal when completed, or can increase punishments beyond those in place at the time of an act. Normally, the Ex Post Facto Clause prevents this. But when governments can evade the Ex Post Facto Clause merely by characterizing changes to the criminal law as "procedural," fairness is compromised.

Such concern is more than theoretical. The criminal justice system is intricately intertwined with the political system, and as history has shown, politics can provide a powerful incentive to punish harshly. For example, in the 1990s, public concern about crime spiked, Frank R. Baumgartner et al., *Throwing Away the Key: The Unintended Consequences of "Tough-on-Crime" Laws*, 19 Perspectives on Politics 1233, 1235 (2021), and politicians flocked towards "tough-on-crime" positions to win office, David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 Ohio St. J. Crim. Law 647, 668 (2017). Unsurprisingly, that sentiment led to governments passing a wave of punitive policies. Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 Stan. L. & Pol'y Rev. 9,

10–11 (1999). The same political pressures buttressing this phenomenon also create incentives for governments to apply enhanced punishments retroactively, particularly where public opinion is animated by a demand for greater punishment in highly publicized cases.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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