No. 22–5073

In the Supreme Court of the United States

LEROY MCGILL,

Petitioner,

v.

DAVID SHINN, et al.,

Respondent.

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

BRIEF IN OPPOSITION

MARK BRNOVICH
Attorney General of Arizona

JOSEPH A. KANEFIELD
Chief Deputy and Chief of Staff

JEFFREY SPARKS
Deputy Solicitor General/ Section Chief of Capital Litigation

ERIN D. BENNETT
Assistant Attorney General
(*Counsel of Record*)

OFFICE OF THE ARIZONA ATTORNEY GENERAL
CAPITAL LITIGATION SECTION
2005 N. CENTRAL AVE.
PHOENIX, AZ 85004
602-542-4686
ERIN.BENNETT@AZAG.GOV
CLDOCKET@AZAG.GOV

Counsel for Respondents

QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit correctly conclude that the Arizona state courts reasonably applied firmly established federal law in holding that Leroy McGill's death sentence did not violate the Ex Post Facto Clause?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Constitutional Provisions

Rules

Other Authorities

INTRODUCTION

Petitioner Leroy McGill has presented no compelling reason for this Court to grant certiorari. He has not established that the Ninth Circuit Court of Appeals' decision conflicts with a decision from another United States Court of Appeals or a state court of last resort, that the Ninth Circuit decided an important question of federal law not yet settled by this Court, or that the Ninth Circuit "decided an important federal question in a way that conflicts with relevant decisions of this Court." U.S. SUP. CT. R. 10.

Additionally, the error McGill alleges affects only his case. *See* SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *Butler v. McKellar*, 494 U.S. 407, 429 (1990) (Brennan, J., dissenting) ("[The] Supreme Court's burden and responsibility are too great to permit it to review and correct every misstep made by the lower courts in the application of accepted principles. Hence the Court generally will not grant certiorari just because the decision below may be erroneous.") (quotations omitted); *Layne & Bowler Corp. v. West. Well Works, Inc.,* 261 U.S. 387, 393 (1923) ("[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals."). And to the extent McGill raises a novel or unsettled issue, his case is a poor vehicle to resolve it.

STATEMENT OF THE CASE

McGill was convicted of first-degree murder and sentenced to death by a jury after he poured gasoline on Charles Perez and Nova Banta and lit them on fire, resulting in third-degree burns to over seventy-five percent of both victims' bodies. Pet. App. 7a. Perez died the next day in the hospital and Banta survived. *Id*. McGill committed his horrific crimes in the 38-day interim between this Court's decision in *Ring v. Arizona* (*Ring I*), 536 U.S. 584 (2001)—holding that a jury must find the aggravating factors making a defendant eligible for the death penalty—and the ensuing revision of Arizona's capital sentencing statute to provide for jury sentencing in capital cases. McGill argued that because there was no *Ring*-compliant method to impose the death penalty at the time he murdered Perez, the application of the revised statute to him violated the Ex Post Facto Clause.

On direct appeal, the Arizona Supreme Court rejected McGill's Ex Post Facto challenge based on its earlier decision in *State v. Ring (Ring II)*, 65 P.3d 915, 928 (Ariz. 2003). In *Ring II*, the state court looked to this Court's decisions in *Dobbert v. Florida*, 432 U.S. 282 (1977), and *Collins v. Youngblood*, 497 U.S. 37 (1990), and concluded that application of Arizona's capital sentencing statute, A.R.S. § 13–703 and § 13–703.01 (2002), did not violate the Ex Post Facto Clause. *Ring II*, 65 P.3d at 926–28, ¶¶ 15–24. The Arizona Supreme Court noted that this Court's decisions "clearly indicate not only that ex post facto principles generally do not bar applying procedural changes to criminal proceedings, but also that the general framework of a state's statutory capital sentencing scheme is procedural in nature." *Id.* at 928,

¶ 23. Based on these principles, the court held that "Arizona's change in the statutory method [i.e., a jury instead of a judge] for imposing capital punishment is clearly procedural" because it "alter[s] the method used to determine whether the death penalty will be imposed but make[s] no changes to the punishment attached to first degree murder." *Id.* As a result, applying the new statutes to offenses committed before their enactment did not violate the Ex Post Facto Clause. *Id.* at 928, ¶ 24.

McGill challenged the Arizona Supreme Court's denial of this claim in his habeas petition under 28 U.S.C. § 2254(d). Both the district court and the Ninth Circuit Court of Appeals denied habeas relief. Applying § 2254(d), the court of appeals denied relief, concluding "that the Arizona Supreme Court [*in Ring II*] reasonably applied clearly established federal law when it determined 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.

SUMMARY OF ARGUMENT

McGill has presented no compelling reason for this Court's review because this Court's decision in *Dobbert*, 432 U.S. 282, held that a procedural change in how the death penalty is implemented does not violate the Ex Post Facto Clause. Moreover, contrary to McGill's assertion, this Court has not overruled *Dobbert* with its later decisions clarifying that a procedural change could violate the Ex Post Facto Clause if it involves a substantial right. Applying the highly deferential standard from the Anti-Terrorism and Effective Death Penalty Act (AEPDA), the Ninth Circuit Court of Appeals correctly concluded that the Arizona courts did not unreasonably apply this Court's clearly established precedent when holding that McGill's death sentence did not violate the Ex Post Facto Clause.

REASONS FOR DENYING THE PETITION

I. THE ARIZONA SUPREME COURT REASONABLY APPLIED THIS COURT'S PRCEDENT TO CONCLUDE THAT MCGILL'S DEATH SENTENCE DOES NOT VIOLATE THE EX POST FACTO CLAUSE.

A. AEDPA Standard.

McGill's petition for certiorari originates from the Ninth Circuit Court of Appeals' decision affirming the district court's denial of his petition for writ of habeas corpus and therefore, this Court owes the state court's determinations deference. Because McGill filed his habeas petition in 2013, AEDPA governs. *Woodford v. Garceau*, 538 U.S. 202, 204 (2003); *Lindh v. Murphy*, 521 U.S. 320, 336 (1997).

Under AEDPA, a federal court "must defer to the state court's resolution of federal claims," *Delgadillo v. Woodford*, 527 F.3d 919, 924 (9th Cir. 2008) (citing *Woodford v. Visciotti,* 537 U.S. 19, 24 (2002) (per curiam)). It may not grant habeas relief unless the state-court adjudication decision was either (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). *See also Wood v. Allen*, 558 U.S. 290, 293 (2010). A reviewing federal court must also presume that a state court's factual findings are correct, and McGill has the burden of rebutting this presumption. 28 U.S.C. § 2254(e)(1).

In evaluating whether a state court decision was contrary to, or involved an unreasonable application of, federal law, or involved an unreasonable factual

determination, the federal courts review the last reasoned state court decision addressing the claim. *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). The phrase "clearly established Federal law," as set forth in 28 U.S.C. § 2254(d)(1), "refers to the holdings, as opposed to the dicta of this Court's decisions as of the time of the relevant state-court decision." *Carey v. Musladin*, 549 U.S. 70, 74 (2006) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). "For purposes of § 2254(d)(1), an unreasonable application of federal law is different from an incorrect application of federal law." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quotations omitted; emphasis in original); *see also Lockyer v. Andrade*, 538 U.S. 63, 75 (2003); *Bell v. Cone*, 535 U.S. 685, 694 (2002) (unreasonable application distinct from incorrect one).

Finally, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Richter*, 562 U.S. at 101 (quotations omitted). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 102. Rather, a prisoner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103.

"The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993). As such, habeas petitioners are not entitled to relief

"unless they can establish that it resulted in actual prejudice." *Id*. at 637.

B. **Application of AEDPA to McGill's claim.**

McGill fails to show that the Ninth Circuit incorrectly concluded that the Arizona Supreme Court reasonably applied this Court's precedent to his case. Although he claims that this Court has rejected the "substance-procedure distinction" (Pet. at 7), he misses the true distinction. A procedural change that alters a substantive right violates the Ex Post Facto Clause. However, if the procedural change does not alter a substantive right then there is no Ex Post Facto violation. That is the case here, where the revision to Arizona's sentencing statutes that required a jury instead of a judge to determine the existence of capital aggravating factors is a procedural change that does not alter any underlying substantive right to a fair determination of eligibility for the death penalty.

1. ***Clearly established federal law.***

Article I of the United States Constitution prohibits Congress and the states from enacting Ex Post Facto laws. U.S. Const. Art. I, § 10, cl. 10. To be Ex Post Facto, a criminal law 1) must be "retrospective," meaning that it applies "to events occurring before its enactment," 2) "must disadvantage the offender affected by it," and 3) must alter "substantial personal rights" and not merely change "modes of procedure which do not affect matters of substance." *Miller v. Florida*, 482 U.S. 423, 430 (1987) (quotations omitted); *see also Youngblood*, 497 U.S. at 43 (Ex Post Facto Clause prohibits legislatures from "retroactively alter[ing] the definitions of crimes or increas[ing] the punishment for criminal acts.").

"A law is retrospective if it 'changes the legal consequences of acts completed before its effective date.'" *Miller*, 482 U.S. at 430 (quoting *Weaver v. Graham*, 450 U.S. 24, 31 (1981)). Thus, in *Peugh v. United States, 569 U.S. 530 (2013)*, for example, this Court held that the Ex Post Facto Clause prevents a court from applying an amended version of a sentencing guideline that was not yet in effect when the defendant committed the crime, if doing so would "create[] a sufficient or significant risk of increasing the punishment for a given crime." *Peugh*, 569 U.S. at 541, n.4 (quotation marks omitted). But in *Dobbert*, this Court held that a procedural change to the roles of the jury and judge in capital sentencing did not violate the Ex Post Facto Clause because it did not add to the "quantum of punishment." 432 U.S. at 293–94.

C. The Arizona Supreme Court reasonably concluded that application of Arizona's revised death penalty statute to McGill's case does not violate the federal constitutional prohibition against Ex Post Facto.

On June 24, 2002, this Court found Arizona's capital sentencing scheme unconstitutional because judges—not juries—determined the aggravating factors that determined whether a defendant was eligible for a death sentence. *Ring I*, 536 U.S. at 609. Arizona amended its death penalty statute on August 1, 2002, to comply with *Ring I*. 2002 Ariz. Legis. Serv. 5th Sp. Sess. Ch. 1 (S.B. 1001). On July 13, 2002, McGill murdered Perez. He argues that for thirty-eight days in 2002, Arizona had no death-penalty statute in effect, including the date that he committed murder. Pet. At 3. McGill conflates the potential punishment a

defendant was eligible to receive with the procedural implementation of the greatest possible punishment.

In claiming that imposing the death penalty subjected McGill to an increased punishment that was not available at the time of the crime, McGill ignores both this Court's law and the Arizona statute that specified the possible punishments for first degree murder. At the time of McGill's crimes, A.R.S. § 13–1105 stated, "First degree murder is a class 1 felony *and is punishable by death* or life imprisonment as provided by §§ 13–703 and 13–703.01." (Emphasis added.) "[E]ven if a law operates to the defendant's detriment, the *ex post facto* prohibition does not restrict 'legislative control of remedies and modes of procedure which do not affect matters of substance.'" *Miller*, 482 U.S. at 433, (quoting *Dobbert,* 432 U.S. at 293).

In *Ring I*, this Court concluded that the *procedure* by which Arizona determined whether the death penalty could be imposed violated the Sixth Amendment. 536 U.S. at 609. *See also Schriro v. Summerlin*, 542 U.S. 348 (2004) (finding decision in *Ring I* was properly classified as procedural, rather than substantive). The death penalty, however, remained in place as a potential sentence for first degree murder in Arizona both before and after *Ring I*. *See* 2002 Ariz. Legis. Serv. 5th Sp. Sess. Ch. 1 (S.B. 1001) (providing that trier of fact from guilt-phase shall determine existence of aggravating circumstances; no change to provision that "[a] person guilty of first degree murder as defined in section 13–1105 shall suffer death" or life imprisonment "as determined and in accordance with the procedures provided" in the statute). McGill ignores this section of the relevant Arizona

statutes, focusing only on the portion of the statute that governs the finder of fact for aggravating factors and penalty. The fact that the *procedural* sentencing statute had been declared unconstitutional in *Ring I* does not support McGill's Ex Post Facto claim.

Because this Court's decision *Ring I* did not remove the death penalty as a possible sentence for first-degree murder in Arizona, the ensuing amendment to Arizona's sentencing statute for jury determination of capital aggravating circumstances, rather than a judge, was not an impermissible Ex Post Facto law because it did not "change[] the legal consequences of acts completed before its effective date." *Miller*, 482 U.S. at 430. The death penalty was a potential sentence for first-degree murder before *Ring I*, after *Ring I*, and after the Arizona Legislature amended the statute to comply with this Court's decision. *See also Youngblood*, 497 U.S. at 51–52; *Miller*, 482 U.S. at 430; *Dobbert*, 432 U.S. at 284; *Summerlin*, 542 U.S.at 353–54 (for purposes of retroactive application, *Ring I's* holding "is properly classified as procedural," not substantive). Moreover, the newly-enacted statute did not "retroactively alter the definitions of crimes or increase the punishment for criminal acts." *Youngblood*, 497 U.S. at 43.

McGill and the dissenting judge below argue that if the Legislature had not changed the law, then the death penalty would not have been an option for him. But that is true for all of the capital defendants who were resentenced by juries following *Ring I* because their cases were not yet final on direct appeal. Moreover, that there was briefly a lack of a mechanism for implementation does not address

the primary issue underlying the Ex Post Facto law prohibition, which is *notice* of potential punishment, not the *method* of its application through eligibility determination. One cannot ignore A.R.S. § 13–1105, which the dissenting Ninth Circuit judge and McGill continue to do.

Additionally, McGill claims that *State v. Sizemore*, Navajo County Case No. CR 2001-0338, is dispositive here, but McGill misunderstands the facts of that case. To begin, McGill contends that Sizemore "invoked [his] right to immediate sentencing." Pet. at 5. However, Sizemore did not invoke a "right to immediate sentencing" because Arizona had no such right. *See* AZ Crim. Pro. R. 26.3 (2002). ("Upon a determination of guilt, the court shall set a date for sentencing. Sentence shall be pronounced not less than 15 nor more than 30 days after the determination of guilt unless the court, after advising the defendant of his or her right to a pre-sentence report, grants his or her request that sentence be pronounced earlier.") Furthermore, Sizemore did not request to be sentenced immediately. *See* Resp. App. at A-12–A-16.

While Sizemore pleaded guilty to the charge—without the benefit of a plea agreement—due to a misunderstanding that *Ring I* deemed Arizona's capital sentencing unconstitutional. The State later moved to permit Sizemore to withdraw from the plea because he remained eligible for the death penalty. However, because at the change of plea hearing, the State did not correct the trial court and clarify that the death penalty remained a potential sentence for Sizemore, the court

determined that the State had waived its right to seek the death penalty against Sizemore. *See* Resp. App. at A-3–A-79. The court's language is particularly relevant:

> The question before the Court is what was the appropriate sentencing range for the crime of first degree murder on July 2, 2002 after *Ring*, and before the enactment of the revisions to A.R.S. 13-703. The defendant's [sic] have also raised the issue of the states [sic] conduct at the change of plea proceeding and that by agreeing that death would not apply to the defendants the State effectively withdrew or waived its right to seek the death penalty. It is clear to the Court that *Ring did not* hold that the death penalty in Arizona was not a viable sentence option. It declared the process by which the penalty was determined unconstitutional and therefore required the State to amend the statute. *It is clear to the Court that the range of sentence for the Defendant's on July 24 2002 did include the possibility of a death sentence.*

Resp. App. at A-78 (emphasis added).

Finally, McGill fails to identify any substantive right that changed. The potential punishments did not change. The aggravating factors remained the same. The eligible offenses remained the same. Only the method to impose the sentence changed. *Dobbert* addressed a procedural change that occurred after Dobbert committed the crime but before he was sentenced, and McGill committed his murder shortly after the procedural mechanism to implement the death penalty was declared unconstitutional but before a new procedural method was enacted. Nevertheless, the analysis is the same. The procedural change that allowed a jury, rather than a judge, to determine death-eligible aggravating factors did not violate

the Ex Post Facto Clause.[1] The Ninth Circuit correctly concluded that the Arizona Supreme Court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law.

D. **McGill's reliance on other case law is inapposite.**

McGill insists that this Court has abolished its "substance-procedure distinction." Pet. at 7. McGill misstates the explanation in *Carmell v. Texas*, 529 U.S. 513 (2000), of *Youngblood's* overruling of *Kring v. Missouri*, 107 U.S. 221 (1883), and *Thompson v. Utah,* 170 U.S. 343 (1898). *See* Pet. At 8. McGill states that this Court held that prior to *Youngblood*, the Ex Post Facto doctrine was not violated if the new law was only procedural in nature, regardless of whether it involved substantial rights. However, *Youngblood* held that procedural rules that affected substantial rights may violate the Ex Post Facto Clause. *Youngblood*, 497 U.S. at 46. McGill fails to identify any substantial right that the newly-enacted law affected. The substantial right to a fair determination of eligibility for the death penalty by way of a finding of the existence of at least one statutory capital aggravating factor was unaffected by the change in the statute from judge to jury as the designated fact-finder.

Further, McGill relies on three cases that mention the Ex Post Facto Clause, but only one actually addresses the federal Ex Post Facto Clause. Pet. at 14–15. The

---

[1] Moreover, if *Dobbert* is not the applicable clearly established federal law, then there is no clearly established federal law, and McGill is still not entitled to relief. 28 U.S.C. § 2254(d)(1), (2).

Ninth Circuit specifically decided *Coleman v. McCormick*, 874 F.2d 1280, 1286, fn 7 (1989), on due process grounds, not the Ex Post Facto Clause. And, *People* v. *Aguayo*, 840 P.2d 336 (Colo. 1992), was decided on state law grounds. Finally, *Blue* v. *State*, 303 So.3d 714 (Miss. 2020), is inapplicable because it was a clear violation of the Ex Post Facto Clause, for the penalty—life in prison without parole—was not a potential sentence at the time of the defendant's crime. In contrast, Arizona law specified that the potential sentences for murder were life in prison or death; therefore, McGill had notice that he could be sentenced to death. Most importantly, none of these cases is controlling Supreme Court case law, so none affects the reasonableness of the Arizona Supreme Court's decision. *See* 28 U.S.C. § 2254(d)(2).

CONCLUSION

The Ninth Circuit correctly determined that the Arizona Supreme Court reasonably applied this Court's applicable controlling case law in dismissing his claim regarding the Ex Post Facto Clause. The petition for a writ of certiorari should be denied.

Respectfully submitted,

MARK BRNOVICH
Attorney General
of Arizona

JOSEPH A. KANEFIELD
Chief Deputy and
Chief of Staff

JEFFREY SPARKS
Deputy Solicitor General/
Section Chief of Capital
Litigation

ERIN D. BENNETT
Assistant Attorney General
(*Counsel of Record*)

Office of the Arizona
Attorney General
Capital Litigation Section
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-4686
CLDOCKET@AZAG.GOV

Counsel for Respondents