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CAPITAL CASE
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

PETITIONER'S REPLY BRIEF

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REPLY

Respondents consistently have acknowledged that on the day Mr. McGill committed his crime, he could not have been sentenced to death. And this Court's recent decisions make clear that a state violates the Ex Post Facto Clause when retroactive changes create "sufficient risk" of increased punishment. *Cal. Dep't of Corr.* v. *Morales*, 514 U.S. 499, 509 (1995); *Garner* v. *Jones*, 529 U.S. 244, 250–51 (2000).[1] The change from death being unavailable to being possible is such a risk, yet both the Ninth Circuit and Arizona Supreme Court have rejected Mr. McGill's Ex Post Facto claim. Mr. McGill's petition presents an important question that addresses the continued viability of the substance-procedure distinction under the Ex Post Facto Clause. That is a sufficient basis for the Court to grant review, especially in the context of a capital case such as this. See Sup. Ct. R. 10(c).

Respondents present an Ex Post Facto jurisprudence frozen in time. Relying upon decisions from 1990 or earlier, they advance the argument that this Court analyzes Ex Post Facto claims under the substance-procedure distinction. More modern decisions, however, establish that this Court has long since moved past re-

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[1] *Morales* describes the Ex Post Facto Clause as requiring "sufficient risk" while *Garner* refers primarily to "significant risk." However, *Garner*'s heavy reliance on *Morales* makes clear that "significant risk" and "sufficient risk" refer to the same test. *Garner*, 529 U.S. at 251; *see also Peugh* v. *United States*, 569 U.S. 530, 541 n.5 (2013) ("The relevant question is whether the change in law creates a 'sufficient' or 'significant' risk of increasing the punishment for a given crime." (quoting *Garner*, 529 U.S. at 250–51)) (internal quotation marks omitted).

spondents' proffered test to instead ask whether a retroactive application of law poses a "sufficient risk" of increased punishment. See *Morales*, 514 U.S. at 509.

So too do respondents fail to grapple with the significance of Mr. McGill's case. They claim that review would do little more than resolve unique factual circumstances, but they ignore the circuit split below and the weight of Mr. McGill's death sentence.

1. Respondents claim that the substance-procedure distinction is clearly established law under *Collins* v. *Youngblood*, 497 U.S. 37 (1990), and *Dobbert* v. *Florida*, 432 U.S. 282 (1977). But in so doing, they commit the same error as the Ninth Circuit and Arizona Supreme Court: they disregard the line of *this Court's* subsequent decisions clearly establishing that "[t]he touchstone of the [Ex Post Facto] inquiry is whether a given change in law presents a 'sufficient risk of increasing the measure of punishment attached to the covered crimes.'" *Peugh*, 569 U.S. at 539 (quoting *Garner*, 529 U.S. at 250; *Morales*, 514 U.S. at 509). Respondents only briefly acknowledge the "sufficient risk" test and make no effort to reconcile it with their proposed substance-procedure distinction. Resp. Br. 13. Instead, they inexplicably argue that "if *Dobbert* is not the applicable clearly established federal law, then there is no clearly established federal law," *id.* at 18 n.1, even though Mr. McGill has canvassed the post-*Dobbert* cases establishing the "sufficient risk" test in his petition. Pet. 7–9.

There is a direct line of cases from *Dobbert* to *Peugh* detailing how this Court's Ex Post Facto jurisprudence has evolved away from the substance-procedure distinction. Ten years after *Dobbert*, this Court began that evolution by acknowledging procedural changes to criminal laws could still implicate the Ex Post Facto Clause. See *Miller* v. *Florida*, 482 U.S. 423, 433 (1987),

abrogated in part by Peugh, 569 U.S. at 541 n.4; *Collins*, 497 U.S. at 46. To be sure, *Collins* still required a procedural change to affect substantial rights for it to violate the Ex Post Facto Clause. Resp. Br. 18 (citing *Collins*, 497 U.S. at 46). But while respondents' view of clearly established law stops there, this Court's jurisprudence did not.

Following *Collins*, the next steps in the Ex Post Facto Clause's evolution came in *Morales* and *Garner*, see Pet. 8–10, both of which respondents ignore entirely. *Morales* and *Garner* each involved challenges to changes in the frequency of parole hearings, changes that are obviously procedural and far less substantive than Mr. McGill's right to a jury. *Morales*, 514 U.S. at 503; *Garner*, 529 U.S. at 247. Indeed, the *Morales* court explained that "the [challenged] amendment simply 'alters the method to be followed' in fixing a parole release date under identical substantive standards. 514 U.S. at 508 (quoting *Miller*, 482 U.S. at 433). Yet neither *Morales* nor *Garner* ruled against the challengers on the basis that the changed laws were procedural. Rather, they asked whether the change created a "sufficient risk" of increasing punishment. *Morales*, 514 U.S. at 509; *Garner*, 529 U.S. at 250–51. Under this test, there is no distinction between substantive changes and procedural changes—either may create a risk of increased punishment.

In case the shift in jurisprudence was not clear, this Court subsequently and explicitly rejected the notion that the Ex Post Facto Clause applies only to "substantial protections."[2] *Carmell* v. *Texas*, 529 U.S. 513, 519

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[2] The Court had good reason to abandon the substance-procedure distinction. As it observed in *Miller*, "the distinction between substance and procedure might sometimes prove elusive." 482

(2000). Although respondents make the conclusory assertion that Mr. McGill "misstates the explanation in *Carmell*," Resp. Br. 18, the Court unambiguously held there that it was "eliminat[ing] 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.'" *Carmell*, 529 U.S. at 539. To the extent that respondents interpret *Collins* to establish the rule that procedural changes violate the Ex Post Facto Clause only if they affect substantial rights, that view conflicts with the Court's square holding in *Carmell*. See also *Peugh*, 569 U.S. at 539 (synthesizing the Court's Ex Post Facto jurisprudence and holding that the proper test is whether a changed law creates "sufficient risk of increasing the measure of punishment" (internal quotations omitted)).

When the Arizona Supreme Court decided Mr. McGill's appeal, *Morales, Garner,* and *Carmell* were all established law. Pet. App. 137a–188a (decided in 2006). Yet it relied only on *Dobbert* and *Collins*, overlooking the shift in Ex Post Facto law in the decades since those two decisions. Pet. App. 172a (citing *State* v. *Ring* (*Ring II*), 65 P.3d 915, 928 (Ariz. 2003)). As such, the Arizona Supreme Court failed to follow clearly established law.

U.S. at 433. Indeed, "[s]ubstantive law relies on procedure to effectuate the substantive mandate." Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 Wash. U. L. Rev. 801, 822 (2010). And for capital cases in particular, "the line between substance and procedure in death penalty jurisprudence is often very fine." Daniel Suleiman, *The Capital Punishment Exception: A Case for Constitutionalizing the Substantive Criminal Law*, 104 Colum. L. Rev. 426, 440 n.99 (2004).

2. Respondents take a shotgun approach when arguing that the Arizona Supreme Court reasonably applied clearly established law. Each argument fails.

First, respondents argue that, because the Arizona death penalty statute is bifurcated into one section that specifies possible punishments (Ariz. Rev. Stat. § 13-1105 (2001)) and one that lays out the procedures for the death penalty (Ariz. Rev. Stat. § 13-703 (2001)), death remained a possible punishment even after this Court declared § 13-703 to be unconstitutional in *Ring* v. *Arizona* (*Ring I*), 536 U.S. 584 (2002).

As an initial matter, the two statutory provisions are not as separate as respondents imply. Section 13-1105 expressly incorporates the procedural provision: "First degree murder . . . is punishable by death or life imprisonment *as provided by § 13-703*." Ariz. Rev. Stat. § 13-1105 (2001) (emphasis added). And even if the two provisions were fully independent, the fact that § 13-1105 remained undisturbed following *Ring I* is not dispositive. Instead, the question is whether the change in law created a "sufficient risk" of increasing Mr. McGill's punishment. *Morales*, 514 U.S. at 509; *Garner*, 529 U.S. at 250–51.

Respondents suggest there was little change in risk because *Ring I* merely altered the procedure for determining death from relying on judges to relying on juries. Resp. Br. 12. That was not the case for Mr. McGill. Rather, the relevant change for him was that Arizona went from having *no valid procedure at all* for determining death to having such a procedure. As noted at the outset, respondents have repeatedly conceded that death "would not have been an option" for Mr. McGill had the legislature not enacted a constitutional version of § 13-703. Resp. Br. 15; see also Pet. App. 80a n.1 ("The State conceded multiple times during oral argument that if the Arizona legislature had

never re-enacted § 13-703, McGill could not have been sentenced to death."); cf. *State* v. *Sizemore*, S-0900-CR-20010338 (Ariz. Super. Ct. Navajo County July 24, 2022).[3]

Given the admission that death was not available, Arizona's revision of its capital sentencing procedure created a more than sufficient risk that Mr. McGill's measure of punishment would increase. Indeed, that risk was *absolute*: Because there was no valid procedure whatsoever for imposing the death penalty amid the thirty-eight-day period during which Mr. McGill committed his crime, Arizona's revision increased Mr. McGill's chances of receiving the death penalty from "*no possibility* . . . to *possibility*." Pet. App. 82a. The amended statute thus increased the "quantum of punishment" significantly, from nothing to the death penalty, see *Dobbert*, 432 U.S. at 293–94, thereby creating a "sufficient risk" that Mr. McGill would face a capital sentence. *Morales*, 514 U.S. at 509; *Garner*, 529 U.S. at 250–51.

Second, respondents contend that § 13-1105 provided adequate notice that death was a potential punishment. The opposite is true.

Again, the text of § 13-1105 expressly references the procedural provision that this Court had invalidated in *Ring I*, stating that capital punishment is available only "as provided by § 13-703." Ariz. Rev. Stat. § 13-

[3] Respondents devote a page and a half of their brief to discussing how *State* v. *Sizemore* is not "dispositive." Resp. Br. at 16–17. Mr. McGill has not argued *Sizemore* "disposes" of respondents' arguments. The defendant in that case was charged before *Ring I* and sentenced after—putting him in company with the *Ring II* defendants, rather than Mr. McGill. *Sizemore*, S-0900-CR-20010338. The point is that even the State, in *Sizemore*, believed death would be an unconstitutional sentence for the defendant until they found a way to walk that back. *Id.*

1105 (2001). Clearly, the plain text of § 13-1105 provides for a death sentence conditioned on meeting the procedural requirements of § 13-703. Respondents' concession "that there was briefly a lack of a mechanism for implementation," Resp. Br. at 15, is thus also a concession that Mr. McGill did not have notice. Viewing § 13-1105 on the day he committed his crime, a would-be offender would have been on notice that he could *not* receive the death penalty should he commit first-degree murder.[4] Pet. App. 81a.

Third, respondents claim that none of Mr. McGill's substantive rights changed when the Arizona legislature enacted the amended version of § 13-703 because such change might be "classified as procedural." Resp. Br. 15 (quoting *Schriro* v. *Summerlin*, 542 U.S. 348, 353–54 (2004)).

That is beside the point. The proper test for determining if retroactive application of the amended version of § 13-703 is Ex Post Facto is whether doing so creates a "sufficient risk" of increased punishment. It does pose such a risk.

3. Respondents consistently misconstrue the scope and significance of Mr. McGill's petition. Despite asserting that Mr. McGill "has not established that the Ninth Circuit Court of Appeals' decision conflicts with

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[4] A defendant is "given no notice whatsoever" if sentenced to death under a newly enacted statute. *Coleman* v. *McCormick*, 874 F.2d 1280, 1288 (9th Cir. 1989) (en banc). Although respondents argue *Coleman* was "decided . . . on due process grounds, not the Ex Post Facto Clause," Resp. Br. at 19, *Coleman* still stands for the proposition that Mr. McGill was not on notice. And *Blue* v. *State*, 303 So.3d 714 (Miss. 2020), supports Mr. McGill's position because the penalty there—life in prison without parole—was not an available sentence at the time of the defendant's crime, just as death was not possible when Mr. McGill committed his crime.

a decision" from another circuit, Resp. Br. 6, respondents fail to reconcile the Ninth Circuit's approach to the Ex Post Facto Clause with those of the other circuits highlighted in Mr. McGill's petition. Pet. 10. (discussing how other circuits' approaches to the Ex Post Facto Clause differ from the Ninth Circuit's).

For example, the Third Circuit held in *Holmes* v. *Christie* that "[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." 14 F.4th 250, 264 (3d Cir. 2021). And it recently doubled down in *United States* v. *Norwood*, explaining that "both we and the Supreme Court have refused 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." 49 F.4th 189, 218 (3d Cir. 2022) (cleaned up) (quoting *Holmes*, 14 F.4th at 265). Instead, courts "look to whether the rule has the practical effect of increasing a defendant's punishment." *Id.*

Other circuits, consistent with this Court's direction, have likewise applied a risk-based test. See, *e.g.*, *United States* v. *McGee*, 60 F.3d 1266, 1271 (7th Cir. 1995) (holding that "a court 'must determine whether [the legislative change] produces a sufficient risk of increasing the measure of punishment attached to the covered crimes'" (quoting *Morales*, 512 U.S. at 509)) (alteration in original); *Williams* v. *Hobbs*, 658 F.3d 842, 851 (8th Cir. 2011) (holding that a prisoner had "not pled facts showing the 'significant risk' of increased punishment necessary to make out an Ex Post Facto violation." (citing *Garner*, 529 U.S. at 255)); *United States* v. *Turner*, 548 F.3d 1094, 1100 (D.C. Cir. 2008) ("It is enough that using the 2006 Guidelines created a substantial risk that Turner's sentence was

more severe, thus resulting in a violation of the Ex Post Facto Clause." (citation omitted)); *United States* v. *Ortiz*, 621 F.3d 82, 87 (2d Cir. 2010) ("We think the 'substantial risk' standard adopted by the D.C. Circuit appropriately implements the *Ex Post Facto* Clause in the context of sentencing under the advisory Guidelines regime, and is faithful to Supreme Court jurisprudence explaining that the Clause protects."); *Evans* v. *Gerry*, 647 F.3d 30, 33–34 (1st Cir. 2011) (holding that New Hampshire state court reasonably applied the sufficient risk test to an Ex Post Facto claim); see also *McGuire* v. *Marshall*, No. 15-10958, 2022 U.S. App. LEXIS 27632 (11th Cir. Oct. 3, 2022) (analyzing whether a civil scheme can violate the Ex Post Facto Clause by looking to the risk of punishment).[5]

The Ninth Circuit's reliance on a formal substance-procedure distinction is plainly incompatible with the functional approaches of this Court and the circuits above. Pet. App. 60a–74a. The Tenth and Sixth Circuits join the Ninth Circuit in refusing to fully relinquish the obsolete substance-procedure test. See *United States* v. *Farrow*, 277 F.3d 1260, 1264 n.5 (10th Cir. 2002) (holding that an Ex Post Facto violation occurs when a change in law affects "substantial personal rights" but not when a change affects only "modes of procedure" (quoting *Miller*, 482 U.S. at 430)); *Ruhlman* v. *Brunsman*, 664 F.3d 615, 620 (6th Cir. 2011) ("[T]he *Ex Post Facto* clause does not apply to procedural changes." (citation omitted)); but see

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[5] Several state supreme courts have also followed this Court's direction. *See, e.g.*, *Barton* v. *S.C. Dep't of Prob. Parole & Pardon Servs.*, 745 S.E.2d 110, 114 (S.C. 2013) ("The relevant inquiry regarding an increase in punishment is whether a legislative amendment produces a sufficient risk of increasing the measure of punishment attached to the covered crimes." (cleaned up)); *Wool* v. *Pallito*, 193 A.3d 510, 512 (Vt. 2018) (holding the same).

United States v. *Welch*, 689 F.3d 529, 533 (6th Cir. 2012).

Moreover, even if Mr. McGill's circumstances are uncommon, Ex Post Facto claims themselves are quite common. Since Mr. McGill's petition was filed on July 8, 2022, counsel have identified 217 federal and state court decisions which have analyzed Ex Post Facto claims. *E.g.*, *State* v. *Peralta*, No. DA 21-0029, 2022 WL 10323645 (Mont. Oct. 18, 2022) (unpublished tentative decision); *Blake* v. *Ndoh*, No. 3:19-cv-06227-WHO, 2022 U.S. Dist. LEXIS 162234 (N.D. Cal. Sept. 8, 2022); *Peterson* v. *Gunderson*, No. 48781, 2022 Ida. App. LEXIS 13 (Ida. Ct. App. July 8, 2022). Given the prevalence of such claims, this petition poses an opportunity for the Court to clarify a rule affecting hundreds of cases each year.

Finally, central to this Court's jurisprudence is the tenet that "[d]eath is different." See *Ring I*, 536 U.S. at 606 (alteration in original); *accord Ford* v. *Wainwright*, 477 U.S. 399, 411 (1986) ("[E]xecution is the most irremediable and unfathomable of penalties."). The death penalty is "a punishment different from all other sanctions in kind rather than degree," and thus "differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson* v. *North Carolina*, 428 U.S. 280, 303–05 (1976). It is therefore especially important for the Court to review capital cases such as Mr. McGill's.

CONCLUSION

For these reasons and the reasons stated in the petition, this Court should grant the petition.

Respectfully submitted,

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