No. 24-

In the Supreme Court of the United States

CHRISTOPHER MICHAEL MONTOYA,

Petitioner,

v.

State of Arizona,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Did the Arizona Supreme Court deprive Mr. Montoya of the right to an impartial jury and to due process of law guaranteed to him under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution when it affirmed the trial court's denial of his motion to strike a biased juror for cause, thereby misapplying *Morgan v. Illinois*, 504 U.S. 719 (1992); conflating this Court's precedent governing elimination of death leaning jurors in *Morgan* and its progeny, with precedent governing elimination of life leaning jurors in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and its progeny; and relying upon a footnote that was abrogated by this court in *Wainwright v. Witt*, 469 U.S. 412 (1985)?

Does Arizona's elimination of peremptory strikes require a more heightened standard of scrutiny in capital cases than was applied to such challenges prior to Arizona's elimination of peremptory strikes?

RELATED PROCEEDINGS

Arizona Supreme Court:

State v. Montoya, __ Ariz. __, 554 P.3d 473 (2024) (attached as Appendix A).

Arizona Superior Court, Maricopa County:

State v. Montoya, No. CR2017-006253-001 (Ariz. Super. Ct. Apr. 12, 2022) (unreported).

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Christopher Montoya petitions this Court for a writ of certiorari to review the judgment of the Arizona Supreme Court affirming his death sentence.

OPINIONS BELOW

The Arizona Supreme Court's opinion is reported at *State v. Montoya*, __ Ariz. __, 554 P.3d 473 (2024). App. A, at 1a.

JURISDICTION

The Arizona Supreme Court issued its opinion on August 15, 2024. App. A, at 1a. Montoya filed a timely Application for Extension of Time to File Petition for a Writ of Certiorari on October 29, 2024, which was granted by Justice Elena Kagan on November 6, 2024, extending the time to file a Petition for a Writ of Certiorari to January 12, 2025. The Petition for Writ of Certiorari was filed on Monday, January 13, 2025.

CONSTITUTIONAL AND STAUTORY PROVISIONS INVOLVED

The Fifth Amendment provides, in pertinent part: "No person shall be ... deprived of life, liberty, or property, without due process of law ...."

The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ...."

Section One of the Fourteenth Amendment provides, in pertinent part: "... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

INTRODUCTION

Arizona eliminated peremptory strikes just two months before the commencement of Mr. Montoya's trial. As such, Mr. Montoya had no recourse when the trial court denied his motion to strike a biased, death leaning juror for cause. The biased juror was seated on the jury and imposed death.

The Arizona Supreme Court's decision in *State v. Montoya* improperly conflates this Court's precedent governing the removal of death leaning jurors under *Morgan v. Illinois*, 504 U.S. 719 (1992), and its progeny, with precedent governing the improper removal of life leaning jurors under *Witherspoon v. Illinois*, 391 U.S. 510 (1968). In doing so, the court essentially confers on the State both the Sixth Amendment right to an impartial jury and the Fifth Amendment right to due process of law.

Further, the court's decision fails to acknowledge the trial judge's numerous equivocal justifications for denying the motion to strike for cause – statements that conveyed uncertainty as to Juror 17's ability to set aside his bias and base his decision only on the evidence presented at trial. Finding the trial court had no duty to conduct

further questioning despite Juror 17's conflicting answers during *voir dire*, the Arizona Supreme Court's decision essentially affirms a denial of a *Morgan* challenge that rests upon a mere hunch.

Finally, by eliminating peremptory strikes without employing a heightened standard of scrutiny for rulings on motions to strike death-leaning jurors under *Morgan*, the Arizona Supreme Court has stripped capital defendants of meaningful appellate review of trial judges' denials of for-cause strikes that are, as the trial judge noted here, "close calls."

STATEMENT OF THE CASE

A. Legal Background.

1. Arizona's elimination of peremptory strikes.

This Court has long recognized the right to peremptory challenges as "one of the most important rights secured to the accused." *Pointer v. United States*, 151 U.S. 396, 408 (1894). *See also Hayes v. Missouri*, 120 U.S. 68, 70 (1887) ("Experience has shown that one of the most effective means to free the jurybox from men unfit to be there is the exercise of the peremptory challenge."). However, by the second half of the twentieth century, peremptory challenges became disfavored because they were routinely exercised in a racially biased manner. *See, e.g., Swain v. Alabama*, 380 U.S. 202, 231 (1965) (Goldberg, J., dissenting) (noting that use of peremptories to further the practice of racial exclusion from juries in violation of the Fourteenth Amendment "persists today" according to a 1961 report by the United States Commission on Civil Rights.).

After years of the discriminatory use of peremptories to exclude potential jurors based on race, this Court decided *Batson v. Kentucky*, 476 U.S. 79 (1986), which found that "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial[,]" thereby overturning *Swain*. *Batson*, 476 U.S. at 96. Although Justice Thurgood Marshall, in his concurrence, lauded *Batson* as a necessary and "historic step toward eliminating the shameful practice of racial discrimination in the selection of juries," he also presaged that *Batson* would "not end the racial discrimination that peremptories inject into the jury-selection process." *Id.* at 102-03 (J. Marshall, concurring). That, he noted, could only be accomplished through the elimination of peremptory strikes all together because any attorney could "easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons." *Id.* at 106.

What Justice Marshall warned against is precisely what occurred in Arizona and throughout the nation – thwarting the goal of *Batson*. Consequently, several states endeavored to avert the pitfalls inherent in peremptory challenges through legislation. *See, e.g.,* Wash. R. Gen. 37(e), (f) (2018) (requiring courts to review *Batson* challenges to determine whether "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge" and defining "objective observer" as a person aware of "implicit, institutional, and unconscious biases."); Cal. Code Civ. P. § 231.7(d)(1), (f) (2021) (requiring courts to assess the rationale provided for the strike as an "objectively reasonable person").

Arizona took much more drastic action. On January 1, 2022, Arizona became the first state in the nation to eliminate peremptory challenges for all defendants – including capital defendants. Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, No. R-21-0020 (Ariz. 2021) (attached as Appendix B).

2. The right to appellate review.

The Arizona Constitution guarantees all defendants the right to appeal a verdict and sentence. Ariz. Const. art. 2, § 24 ("In criminal prosecutions, the accused shall have . . . the right to appeal in all cases[.]"). For capital defendants, appellate review is automatic and mandatory. Ariz. R. Crim. P. 26.15 & 31.2(b). This Court has noted the importance of "meaningful appellate review" in capital cases to safeguard against unconstitutional death sentences. *Gregg v. Georgia*, 428 U.S. 153, 195 (1976).

B. Factual and Procedural Background.

Petitioner Christopher Montoya pleaded guilty to premeditated, first-degree murder, admitted two aggravating circumstances that made him eligible for the death penalty, and waived all mitigation except acceptance of responsibility and any mitigating facts that could be drawn from the State's witnesses during the penalty phase. App. A, at 4a ¶ 8. Just two months prior to the commencement of the penalty phase proceeding, the Arizona Supreme Court amended the Arizona Rules of Criminal Procedure to eliminate peremptory challenges. *See* App. B.

During *voir dire*, defense counsel moved to strike a death-leaning potential juror for cause (Venireperson 119, hereinafter referred to as "Juror 17"). Juror 17

stated, in response to the defense hypothetical of a "[c]old-blooded" murder "of an innocent victim," that "everything was pretty clear, cut, and dry" and that he would "definitely lean towards the death penalty in that case." App. C, at 55a-56a. He also expressed that the severity of the crime would be more important to him than surrounding circumstances, and he showed hesitation whether substance abuse issues and acceptance of responsibility would be of any great importance to him:

> [DEFENSE COUNSEL]: The question that you answered in the – in the questionnaire was about the fact that the defendant accepted responsibility. How do you feel about that?
>
> PROSPECTIVE JUROR: Well, I mean, if he did accept responsibility, then all of the circumstances or information leading up to it, yeah, you would definitely – what's the word I want to use – not favor but, you know, lean towards he accepted it. Based on what I've read, it was a pretty heinous crime, but I don't know all the answers or all the circumstances around it.
>
> [DEFENSE COUNSEL]: Okay. But does his acceptance of responsibility, what does that mean to you?
>
> PROSPECTIVE JUROR: Acceptance of responsibility is that he admitted he's wrong, but in the case that he mentioned too, just because he admitted responsibility, I mean, like does he have, like he said, remorse? I mean, is there other circumstances? He just wanted to be done with it? ...
>
> ...
>
> PROSPECTIVE JUROR: . . . [P]eople that use hard drugs, like meth and everything like that, they do a lot of hideous things in order to keep that habit going, whether to rob a store, whether it's to rob someone and kill them, you know, and, at the same time, they're doing that, I mean, you have to take that into a factor, too, is his background, was how many times has he been incarcerated before, you know.

> [DEFENSE COUNSEL]: So you're kind of talking about the vicious cycle that goes into that?
>
> PROSPECTIVE JUROR: Correct, yes.

Id. at 55a-60a. The prosecutor made no attempt to rehabilitate Juror 17. *See id.* at 62a-63a.

After *voir dire*, the trial court anticipated that defense counsel would ask to strike Juror 17: "There's only other – one other [venireperson] that I think is close ... I have the feeling you're going to go after [Juror 17]." App. C, at 70a. Defense counsel objected to Juror 17 as having a presumption of death and asked the court to strike him for cause. App. C, at 71a-72a. Defense counsel expressed concern that Juror 17's answers indicated he would weigh the severity of the crime more heavily than the "surrounding circumstances" and that he would treat substance abuse as an aggravating factor. *Id.* The court denied the motion to strike on that date, noting again that this was a "closer call" than other jurors and granting leave for defense counsel to "re-raise" the issue "at a later time." *Id.* at 73a-74a.

The next day, defense counsel re-raised the objection, noting that Juror 17 had circled 10 out of 10 in favor of the death penalty on the juror questionnaire, indicating that the juror strongly agreed with the death penalty. App. D, at 82a. Defense counsel also argued that Juror 17's answers to *voir dire* questions indicated that he would view the few anticipated proffered mitigators as aggravating factors. *Id.* at 116-17. The State argued that Juror 17 also stated he would consider the circumstances surrounding the crime. *Id.* at 119. Admitting the court was "troubled" by the juror's marking 10 out of 10 in favor of the death penalty on the questionnaire, the trial

judge overruled defense counsel's objection. *Id.* at 123. Juror 17 deliberated and returned a verdict of death. App. A, at 28a ¶ 70.

On appeal, Mr. Montoya argued that the trial court's failure to grant the motion to strike was an abuse of discretion. In the alternative, he argued that the Arizona Supreme Court should heighten the standard for reviewing "close calls" after the elimination of peremptory strikes to require more than a mere abuse of discretion. The court confirmed the lower court's decision, finding no abuse of discretion and holding that no heightened standard of scrutiny is necessary. App. A, at 24a-30a ¶¶ 66-79. The court rejected Mr. Montoya's remaining arguments on appeal.

This petition followed.

REASONS FOR GRANTING THE PETITION

A. The Arizona Supreme Court conflates this Court's precedent governing a defendant's constitutional right to challenge death leaning jurors for cause under *Morgan* with this Court's limitations on the State's challenges to life leaning jurors for cause under *Witherspoon*.

In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), this Court held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon*, 391 U.S. at 521-22. In *Witherspoon*, 47 potential jurors were dismissed for cause after expressing generalized objections to the death penalty. *Id.* at 514. The Court found this improper because "a State may not entrust the determination of whether a man should live or die to a tribunal organized to return

a verdict of death." *Id.* at 521. In footnote 21, the Court noted that general objections to the death penalty are not disqualifying; only that a venireperson cannot be "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." *Id.* at 522 n.21.

More recently in *Morgan v. Illinois*, 504 U.S. 719 (1992), this Court held that trial courts, upon request, must allow defendants to ask "reverse *Witherspoon*" questions during *voir dire* to ensure impartiality of capital juries. Reiterating that a defendant is entitled to "'a fair trial by a panel of impartial, indifferent jurors[,]'" the Court provided guidance regarding the *voir dire* process required to develop a basis for a motion to strike for cause. *Morgan*, 504 U.S. at 727 (quoting *Irvin v. Dowd*, 366 U.S. 717, 721-22 (1961) (internal quotation marks omitted)). The Court found that "[a] juror who will automatically vote for the death penalty" without considering the evidence of mitigating circumstances does not meet this threshold requirement of impartiality. *Morgan*, at 729. Under the due process guarantees of the Fifth, Sixth and Fourteenth Amendments, "[i]f even one such juror is empaneled and the death sentence is imposed," the conviction and sentence must be reversed. *Id.*

1. The decision conflates *Morgan* and *Witherspoon* challenges, thereby improperly conferring on the State the constitutional rights to due process and an impartial jury.

The *Montoya* decision partially rests upon a misreading of *Davis v. Georgia*, 429 U.S. 122 (1976) and its progeny, by holding that improperly striking a *death leaning* juror for cause amounts to structural error "unless the juror is 'irrevocably committed' to vote for *or against* the death penalty . . . ." App. A, at 29a ¶ 75 (emphasis

added). This is wrong for two reasons. First, although this Court noted in *Morgan* that "a juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause[,]" the Court has never held that it is structural error to improperly eliminate a death leaning juror for cause. *Morgan*, 504 U.S. at 728. Second, in *Wainwright v. Witt*, 469 U.S. 412 (1985), this Court abrogated the "irrevocably committed" standard in footnote 21, noting the "general confusion surrounding the application of *Witherspoon*. . . ." *Witt*, 469 U.S. at 417-18.

a. The court's decision improperly confers upon the State the constitutional rights to due process and to an impartial jury by conflating this Court's precedent regarding challenges of death leaning jurors for cause under *Morgan* with improper removal of life leaning jurors under *Witherspoon*.

The *Montoya* court hypothesizes that, had the trial court excused Juror 17 "because of his 'views on capital punishment[,]'" it would have constituted "structural error that requires reversal[.]" App. A, 29a ¶ 75 (quoting *State v. Ring*, 204 Ariz. 534, 552 ¶ 46 (2003)). This is incorrect. The improper elimination of a death leaning juror can never constitute structural error requiring reversal because 1) the State does not have the same constitutional right to an impartial jury as a criminal defendant and 2) a criminal defendant has a right to not "be twice put in jeopardy of life or limb" for the same offense. U.S. CONST. AMEND. V. Further, the court quotes from *Davis v. Georgia*, 429 U.S. 122 (1976), to contend that a death leaning juror may only be struck if "the juror is 'irrevocably committed' to vote for or against the death penalty 'regardless of the facts and circumstances[.]'" App. A, at 29a ¶ 75 (quoting *Davis*, 429

U.S. at 123 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1976)). This footnote was abrogated in *Wainwright v. Witt*, 469 U.S. 412, 417-18 (1985).

The Due Process Clause is a limitation on the State's power to act against an individual. *See Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992) (noting the purpose of the Due Process Clause "is to provide a guarantee of fair procedure in connection with any deprivation of life, liberty, or property by a State."). The Clause is designed to ensure that the State does not deprive individuals of life, liberty, or property without due process of law. This Court has determined that the right to an impartial jury in the Sixth Amendment does not extend to the penalty phase of a capital proceeding; however, such right is guaranteed to defendants through the due process clause. *Morgan v. Illinois*, 504 U.S. 719, 727 (1992) (citing *Turner v. Louisiana*, 379 U.S. 466, 472 and n.10 (1965); *Groppi v. Wisconsin*, 400 U.S. 505, 508-11 (1971)). The Arizona Supreme Court erred by conferring on the State the right to due process granted only to individuals.

In *Montoya*, the court cites to *State v. Ring*, 204 Ariz. 534 (2003), to conclude that improperly striking a *death leaning* juror for cause constitutes structural error requiring reversal. App. A, at 29a ¶ 75. In *Ring*, the court set forth the types of errors that the United States Supreme Court had deemed structural errors in the past. *Ring*, 204 Ariz. at 552-53 ¶46. One such error is "excusing a juror because of his views on capital punishment," which is gleaned from *Gray v. Mississippi*, 481 U.S. 648 (1987). *Id.* at 552 ¶ 46 (citing *Gray*, 481 U.S. 648 (1987)).

Gray v. Mississippi involved a *life leaning* capital juror improperly excused for cause who, though she had equivocated, ultimately affirmed she could consider the penalty of death in the appropriate case. *Gray*, 481 U.S. at 653-55. Thus, the error in striking a life leaning juror who did not unequivocally say she would never vote for death was structural. The Arizona Supreme Court's decision here assumes the opposite is true – namely, striking a death leaning juror who did not unequivocally say he would never vote for a life sentence is structural error. This is a misreading of *Gray*.

In capital cases, the State has only a "legitimate interest" in an impartial jury, which is satisfied when a venireperson will set aside his or her strong opinions against the death penalty and fairly consider a sentence of death. *Lockhart v. McCree*, 476 U.S. 162, 175-76 (1986). A violation of this "legitimate interest" can never rise to the level of structural error requiring reversal without violating the constitutional protections afforded criminal defendants under the Fifth Amendment – namely the protection against double jeopardy.

If, for example, a death leaning juror were improperly eliminated and the seated jury returned a verdict of life or an acquittal, the Fifth Amendment would bar the State from appealing that decision, and a reviewing court would be barred from reversing for structural error because of the defendant's double jeopardy protections under the Fifth Amendment to the United States Constitution. The Arizona Supreme Court effectively extends the Fifth Amendment's Due Process Protections, which are specifically granted to individuals, and the Sixth Amendment's right to an impartial

jury, which are specifically granted to criminal defendants, to the State. This is an improper application of the United States Constitution.

b. The court relies upon the "irrevocably committed" standard in *Witherspoon's* footnote 21, which was abrogated in *Witt*.

The Arizona Supreme Court's citation to the standard in *Davis v. Georgia*, 429 U.S. 122, 123 (1976), and application of that standard to venirepersons who would vote for *or against* the death penalty regardless of the facts and circumstances of the case, is error. First, the *Davis* Court was quoting footnote 21 in *Witherspoon*. App. A, at 29a ¶ 75. However, in *Witt*, this Court dispensed with the "irrevocably committed" standard in *Witherspoon's* footnote 21, adopting instead the following standard from *Adams v. Texas*, 448 U.S. 38 (1980), as the proper test of impartiality: "[W]hether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath.'" *Witt*, 469 U.S. at 424 (quoting *Adams*, 448 U.S. at 45). The *Montoya* court's reliance on the abrogated standard is error and illustrates the court's fundamental misunderstanding of this Court's precedent.

What's more, *Davis* merely stands for the proposition that only a life-leaning prospective juror irrevocably committed to vote against the death penalty may be excused for cause:

> Unless a venireman is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings," he cannot be excluded; if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand.

Davis, 429 U.S. at 123 (quoting *Witherspoon*, 391 U.S. at 522 n.21). The Arizona Supreme Court supplemented the *Davis* holding to include the words "for or" prior to the phrase "against the death penalty." This is a clear misapplication of the holding in *Davis*.

B. Arizona's elimination of peremptory strikes requires heightened scrutiny in capital cases on appellate review of decisions on for-cause challenges of death leaning jurors.

The Arizona Supreme Court's refusal to require heightened scrutiny on *Morgan* challenges deprives defendants of meaningful appellate review and effectively renders Mr. Montoya's and every other Arizona defendant's rights to an impartial jury illusory. App. A, at 28a-29a ¶¶ 71-73. By eliminating peremptory strikes while simultaneously refusing to find abuse of discretion in "close calls" on appeal and refusing to require judges to conduct additional *voir dire* when there is uncertainty as to the juror's impartiality, the Arizona Supreme Court has constructed a system that jeopardizes defendants' constitutional right to an impartial jury.

Arizona defendants have been stripped of the failsafe that peremptory challenges provide to ensure the constitutionally protected right to an impartial jury. Because the Arizona Supreme Court refuses to change its manner of reviewing *Morgan* challenges on appeal, defendants are also denied meaningful appellate review except in the very limited instances where the court's action is "clearly untenable, legally incorrect, or amounts to a denial of justice." App. A, at 28a ¶ 71 (quoting *State v. Chapple*, 135 Ariz. 281, 297 n.18 (1983), *superseded on other grounds by* ARIZ. REV. STAT. § 13-756)). More is required, particularly in capital cases such as Mr. Montoya's, where a man's life is at stake.

The court's review in this case is precisely the type of review this Court, in *Gray v. Mississippi,* endeavored to avoid. *Gray v. Mississippi*, 481 U.S. 648, 665 (1987) (refusing to apply harmless error review to erroneous strikes of life leaning jurors when the State has unexercised peremptory challenges: "The practical result of adoption of this unexercised peremptory argument would be to insulate jury selection error from *meaningful appellate review.*") (emphasis added). If a state intends to impose a sentence of death, it must provide meaningful appellate review in capital cases. *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (observing that "the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner."). Because Arizona's post-elimination-of-peremptory-strikes appellate review grants such great deference to the trial court's decisions on *Morgan* challenges, that review does nothing to safeguard against sentences imposed by a jury that was not seated in a fair and impartial manner.

The Arizona Supreme Court erred by granting deference to the trial court's decision denying Mr. Montoya's motion to strike Juror 17, despite the trial judge's own statements revealing the court's uncertainty as to the juror's impartiality. First, it was the trial court, not defense counsel, that first recognized Juror 17's problematic representations. App. C, at 70a. Next, when reviewing the juror's answers to questions regarding substance abuse – one of only two mitigating circumstances his attorneys were allowed to present – the judge noted that Juror 17 was "kind of all over the place there". App. D, at 82a.

Further, what the trial court and the Arizona Supreme Court relied upon as evidence of impartiality doesn't withstand scrutiny. *See* App. A, at 30a ¶¶ 77-78; App. D, at 77a-90a. Specifically, the trial judge interprets Juror 17's use of the word "circumstances" to mean "mitigating circumstances" where the record indicates the juror is referring to defenses to the crime:

> THE COURT: When he says the severity of the crime, I think he's talking about the circumstances. On page 4 [of the voir dire transcript], he says: Circumstances – what I'm talking about, the severity of the crime based on what I read it was a pretty severe crime but based on natural life as it – like he indicated there, too, was there circumstances behind it? Was the guy mentally ill? Was he – you know, [in] a passion? Was it a fit of rage because he found out his ex-girlfriend was seeing someone else or he caught them in the act or whatever it might be? That's what I refer to there.

App. D, at 83a-84a. The "circumstances" the juror is referencing here are clearly defenses or justifications for the crime – not mitigating circumstances. *See, e.g.*, ARIZ. REV. STAT. § 13-502 (guilty except insane defense). The court also noted that "he says inconsistent things so – he did – he favors the death penalty. He circled 10. Pretty strong." App. D, at 85a. Finally, the court rules against striking Juror 17:

> THE COURT: All right. I'm inclined to leave 119 on. I think that he did say that he would consider all of the circumstances.
>
> I am troubled, as [defense counsel] is, that he said 10 out of 10 for – he favors the death penalty, but he also said a lot of other things that were, as he says, the right answer. There's right answers as far as I'm concerned in terms of them being death qualified. So I think that 119 is not impaired to a degree that he should be struck for cause.

Id. at 90a. In denying the motion to strike, the court repeatedly uses the words "I think" and "I believe" when assessing Juror 17's answers, underlining the close nature of this call. App. D, at 77a-90a. In close calls such as this, the Arizona Supreme Court's deference to the trial court is error. Essentially, the *Montoya* decision affirms the trial court's denial of a *Morgan* challenge based upon on a trial judge's mere hunch. The Sixth Amendment requires more.

The Arizona Supreme Court's finding that the trial court had no duty to conduct further questioning despite the juror's confusing and contradictory answers further works to undermine criminal defendants' right to a fair trial. App. A, at 28a-29a ¶ 73. The *Montoya* decision holds that a trial judge is not required to *sua sponte* conduct additional *voir dire* even where, as here, the judge recognizes the "close" nature of the call: "The court conducts, controls, and manages *voir dire*, Ariz. R. Crim. P. 18.5(f), but it is not required to participate in *voir dire* in the manner Montoya suggests." *Id.* However, judges have a duty to conduct *voir dire* in such a manner as to ensure a fair trial and to determine whether a challenge for cause is proper. *Wainwright v. Witt*, 469 U.S. 412, 423 (1985). If a judge lacks information necessary to make that determination, it is incumbent upon them to further question the juror.

In *Ross v. Oklahoma*, 487 U.S. 81 (1988), this Court found that a trial court's failure to remove a biased juror for cause was constitutional error which, pursuant to the standard set forth in *Adams* and reaffirmed in *Witt*, would have required reversal if the defendant had not eliminated the juror by exercising one of nine peremptory strikes. *Ross*, 487 U.S. at 85-86. Because the biased juror did not serve on the jury,

the Court reasoned, Ross's right to an impartial jury under the Fifth, Sixth, and Fourteenth Amendments had not been violated. *Id.* However, the Court emphasized that had the biased juror not been removed by a peremptory strike, "the sentence would have to be overturned." *Id.* Such is the case here.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari to reiterate the correct standard involving for-cause challenges as set forth in *Morgan* and its progeny, to require a heightened standard of scrutiny for such challenges given Arizona's elimination of peremptory strikes, and to remand this case for further proceedings.

Respectfully submitted this 13th day of January, 2025.

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