No. 24–6336

In the Supreme Court of the United States

CHRISTOPHER MICHAEL MONTOYA,
Petitioner,

v.

STATE OF ARIZONA,
Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION(S) PRESENTED FOR REVIEW

Petitioner Christopher Montoya pled guilty to the first-degree murder of A.R., admitted the existence of two aggravating circumstances, waived the presentation of most mitigating evidence, and was sentenced to death by an Arizona jury. In selecting the penalty phase jury, the trial court allowed both Montoya and the State to explore whether the venire members were qualified to sit in judgment in a death penalty case. During voir dire, Montoya moved to remove Juror 17 for cause, alleging that the juror was not qualified under *Morgan v. Illinois*. The trial court denied Montoya's motion, and the Arizona Supreme Court held that the denial was not an abuse of discretion.

The questions presented are:

1. Did the Arizona Supreme Court review the denial of Montoya's motion to remove Juror 17 for cause under the correct standard under this Court's precedents?

2. Was the Arizona Supreme Court obligated to review the trial court's ruling under a less deferential standard because Arizona has eliminated peremptory strikes in criminal cases?

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INTRODUCTION

There is no compelling reason to grant certiorari here. First, the Arizona Supreme Court reviewed Montoya's for-cause motion to strike Juror 17 under the correct standard, as articulated by this Court in *Morgan v. Illinois*, when it cited to *Morgan* and stated that "[a] juror who would impose death regardless of the aggravating and mitigating evidence is not impartial." Pet. App. 29a.

Second, the Arizona Supreme Court's decision to eliminate peremptory strikes in Arizona criminal cases did not necessitate application of a new, less deferential standard of review to comply with the Constitution. Montoya fails to provide any persuasive reason to think the Constitution now requires a different standard in Arizona than is required in other states. Nor is he correct that the elimination of peremptory strikes has eliminated the right to meaningful appellate review. The right to meaningful appellate review is not eliminated merely because the Arizona Supreme Court will affirm "close calls" on abuse of discretion review, as Montoya seems to contend. Moreover, because criminal defendants have no right to peremptory strikes, they similarly have no right to enhanced appellate review of their for-cause strikes where a state elects to eliminate peremptories.

STATEMENT OF THE CASE

Montoya began dating A.R. in April of 2017 after the two met on a dating application. Pet. App. 2a. They dated for two months, with Montoya frequently staying at A.R.'s residence, until A.R. discovered that Montoya was still messaging other women on the application. *Id*. A.R. ended the relationship in June of 2017, changed the locks on her door, and got her garage door opener back from Montoya. *Id*. But for the next four months, Montoya repeatedly called and texted A.R., and would even park outside her house and wait for her. *Id*. at 2a–3a. A.R. considered obtaining a restraining order against Montoya, but she was scared to do so. *Id*. at 3a.

On October 13, 2017, Montoya broke into A.R.'s home and waited for her. Pet. App. 3a. When A.R. returned home, Montoya attacked her, handcuffed her behind the back, and bound her legs with a belt. *Id*. Montoya then moved A.R. to the master bedroom where he tortured her with a knife in order to obtain her personal and financial information. *Id*. Sometime after getting A.R.'s passwords and banking information, Montoya bludgeoned A.R. to death, striking her in the head with a hammer at least fourteen times. *Id*. He then wrapped A.R.'s body in a blanket and several tarps and placed it on the floor of the master bedroom. *Id*. At some point that day, Montoya also killed one of A.R.'s dogs and placed its body in a kennel next to A.R.'s other dog. *Id*.

Over the next week, Montoya made several online purchases in A.R.'s name, used her debit card, and removed most of A.R.'s personal belongings from her home.

Pet. App. 3a. In total, he spent around $13,713 of A.R.'s money and drove her truck around town. *Id*. Moreover, Montoya masked his activities and A.R.'s absence by posing as A.R. over text message and email. *Id*. Because the purported communications from A.R. seemed odd, her friends and family eventually asked police to conduct a welfare check on October 24, 2017. *Id*. When police arrived at A.R.'s house they found the glass patio door shattered, blood on the walls and master bed, and A.R.'s body in the master bedroom. *Id*. at 2a–3a.

The State of Arizona indicted Montoya with first-degree murder and other offenses related to his conduct. Pet. App. 4a. Montoya pled guilty to the indictment and admitted two aggravating circumstances. *Id*. He then waived the presentation of mitigation, except that he allowed his attorneys to present evidence of his guilty pleas and anything arising from cross-examination of the State's witnesses. *Id*. The jury sentenced Montoya to death. *Id*.

Before the penalty phase, the trial court and parties participated in jury selection, which included a jury questionnaire. Pet. App. 20a. Of particular import here, Juror 17 completed a jury questionnaire and participated in voir dire. *Id*. at 24a. Among other responses, Juror 17 gave the following responses on the questionnaire: (1) "rated his overall opinion of the death penalty at ten, strongly in favor, on a scale of one to ten," i*d*; (2) "wrote that he felt the death and natural life penalties should be imposed based on the severity and circumstances of the crime," *id*; (3) "indicated that he agreed with the law regarding mitigating circumstances, he did not believe that people who plead guilty to first degree murder should always

be sentenced to death, and he would not automatically vote for the death penalty without considering mitigation," *id*; (4) "wrote that the State's decision to seek the death penalty should not be based on whether a defendant accepts responsibility for a crime," *id.* at 26a; (5) "wrote that he had strong feelings about people who abuse hard drugs, specifically the actions they take to maintain their habits," *id*; and (6) "wrote that people who abuse over-the-counter medications need to seek help and that he thought marijuana should be legalized." *Id.*

During directed voir dire, Juror 17 explained that he would "lean towards the death penalty" when defense counsel asked how he feels about the death penalty for a "[c]old-blooded, meant-to-do-it murder of an innocent victim." Pet. App. 55a–56a. But in clarifying his answer, Juror 17 added that "not every case is that cut and dry." *Id.* at 56a. Juror 17 described how he would consider things like mental illness and emotional arousal in deciding whether the death penalty is appropriate. *Id.* at 56a–57a. When asked about his answer on the questionnaire indicating he was strongly in favor of the death penalty, Juror 17 explained that "I said the death penalty should be considered…. I didn't say it was—it should be automatic." *Id.* at 58a. On the question of acceptance of responsibility, Juror 17 explained that it matters to him, but "the circumstances dictate whether it should be applied or not." *Id*. 58a–59a.

Defense counsel moved to strike Juror 17 for cause, arguing that "[h]e said he would have to lean towards the death penalty but would have to review the facts and circumstances." Pet. App. 71a. This, in counsel's estimation, showed that Juror

17 presumed death was the appropriate sentence. *Id*. In response, the State noted that Juror 17 indicated he could keep an open mind because he said he would need to consider the facts and circumstances before making a final decision. *Id*. at 72a. The State further reminded the trial court that Juror 17 said that the death penalty should not be automatic. *Id*. The trial court commented that it was a "close call," but ultimately denied the motion based on Juror 17's answers that he would "dissect the facts" and "hear everything." *Id*. at 74a.

Defense counsel raised the motion to strike again the next day. Pet. App. 79a. In denying the renewed motion, the trial court highlighted several questionnaire answers from Juror 17 showing that he would consider the case with an open mind and consider all of the circumstances. *Id*. at 81a–82a, 90a.

REASONS FOR DENYING THE PETITION

This Court grants certiorari "only for compelling reasons," and Montoya has presented no such reason. Sup. Ct. R. 10. Montoya has failed to demonstrate either that the Arizona Supreme Court "decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals," or that it "decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(b), (c). Instead, Montoya asks this Court to correct purported errors committed by the Arizona Supreme Court, but general error correction does not offer a compelling reason for certiorari review. 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."); *see also* S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3), p. 352 (10th ed. 2013) ("[E]rror correction ... is outside the mainstream of the Court's functions and ... not among the 'compelling reasons' ... that govern the grant of certiorari"). Even setting that aside, Montoya has identified no error committed by the Arizona Supreme Court.

Because the Arizona Supreme Court properly applied *Morgan v. Illinois*, and because criminal defendants have no right to heightened review in the absence of peremptory strikes, this Court should deny Montoya's petition.

I. THE ARIZONA SUPREME COURT PROPERLY APPLIED *MORGAN V. ILLINOIS* IN REVIEWING MONTOYA'S MOTION TO STRIKE JUROR 17 FOR CAUSE.

A. Death Qualification: *Witherspoon* through *Morgan*.

In *Witherspoon v. Illinois*, 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." 391 U.S. 510, 522 (1968). In expounding on this maxim, the Court in *Witherspoon* clarified that "[t]he most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not 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 523 n.21. The Court further explained that the State could still exclude potential jurors for cause where it is "unmistakably clear" that they would either automatically vote against a death sentence or had a negative attitude against the death penalty such that they could not impartially decide the defendant's guilt. *Id*.

Next, in *Davis v. Georgia*, 429 U.S. 122 (1976) this Court rebuked the Supreme Court of Georgia for affirming a death sentence in spite of a *Witherspoon* violation because only one venire member had been removed on improper grounds. *Id* at 122–23. The Court reasoned, "[t]hat … is not the test established in *Witherspoon*, and it is not the test this Court has applied in subsequent cases where a death penalty was imposed after the improper exclusion of one member of the

venire," *id*. at 123, before quoting the *Witherspoon* "irrevocably committed" language. *Id*.

Then the Court held that *Witherspoon* and the intervening cases interpreting it "establish[] the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams v. Texas*, 448 U.S. 38, 45 (1980). And in reiterating the standard in *Adams*, the Court again repeated the limitation imposed by *Witherspoon*: "if prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out." *Id*. at 48.

But later in *Wainwright v. Witt*, 469 U.S. 412 (1985) this Court clarified that the *Witherspoon* limitation should not be reviewed on whether a venire member was "irrevocably committed" to voting against death. *Id*. at 419–25. Instead, the Court deferred to the simplified language espoused in *Adams*, and the State could now exclude venire members without meeting the "extremely high burden" of proving that they would never impose death. *Id*. at 421; *see also Darden v. Wainwright*, 477 U.S. 168, 175 (1986). And in so clarifying, the Court "reiterat[ed] *Adams*' acknowledgment that *Witherspoon* is not a ground for challenging any prospective juror," but "rather a limitation on the State's power to exclude." *Witt*, 469 U.S. at 423 (internal quotation marks omitted).

Finally, in *Morgan v. Illinois*, 504 U.S. 719 (1992), this Court established the "reverse-*Witherspoon*" rule in holding that "the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment" mandates that capital defendants be able to inquire whether a venire member would always vote to impose the death penalty. *Id*. at 729.[1] *See also Ross v. Oklahoma*, 487 U.S. 81, 85 (1988); *Morgan*, 504 U.S. at 734 ("We deal here with petitioner's ability to exercise intelligently his complementary challenge for cause against those biased persons on the venire who as jurors would *unwaveringly* impose death after a finding of guilt.") (emphasis added).

B. The Arizona Supreme Court properly applied *Morgan*.

As Montoya tacitly concedes at the outset, Juror 17 was at worst a "death leaning juror." *See* Petition at 2. But a proclivity towards death is not enough to trigger the protections of the Fourteenth Amendment as this Court interpreted them in *Morgan*. Instead, the trial court's obligation only extended to striking for cause those venire members who would vote for death in any circumstance. Because the juror at issue made clear that he could decide Montoya's sentence fairly and

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[1] The Court also held that the State had a "right" to exclude venire members who would never impose the death penalty rather than a mere interest. *Morgan*, 504 U.S. at 733–34; *cf. Witt*, 469 U.S. at 416 (noting the *Witherspoon* court's recognition of "the State's legitimate interest in excluding those jurors whose opposition to capital punishment would not allow them to view the proceedings impartially, and who therefore might frustrate administration of a State's death penalty scheme").

impartially, and because the Arizona Supreme Court correctly interpreted and applied the applicable holdings of this Court, Montoya is not entitled to relief.

Montoya complains that the Arizona Supreme Court "erred by conferring on the State the right to due process granted only to individuals." Petition at 11. But Montoya does not, and cannot, set out how this purported error affected his rights. In any event, close examination of the Arizona Supreme Court's statement reveals that Montoya simply misreads it. The Arizona Supreme Court did not create a new circumstance in which structural error would occur.

In the opening clause of the sentence at issue, the court says, citing to *State v. Ring*, 204 Ariz. 534, 552 ¶ 46 (2003), that "excusing a juror because of his 'views on capital punishment' is structural error." Pet. App. 29a. As Montoya notes, *see* Petition at 11, the *Ring* decision cites to *Gray* for this proposition. By invoking *Gray*, the first part of the court's statement therefore sets out the *Witherspoon* guidepost. But the court continues by citing *Davis* and *Morgan* to explain that a juror may be removed for cause if they are "irrevocably committed" to voting for or against the death penalty in spite of the facts and circumstances. Pet. App. 29. And this portion of the sentence is divorced from the court's recognition that excluding a juror solely based on their views amounts to structural error. Instead, it sets the other guidepost, consistent with *Morgan*, that a juror may be removed for cause if they are resolute on the ultimate question.

Granted, *Witt* abrogated the *Davis* "irrevocably committed" language. *See Witt*, 468 U.S. at 424–26. But the Court's move away from this language was

required "because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Id.* at 424. And while *Witt* allows for potential jurors to be removed for cause even where they do not emphatically state that they would always vote for life, it still allows for the removal of potential jurors that do make such statements. It is therefore of no moment that the Arizona Supreme Court quoted the abandoned "irrevocably committed" language to describe *Witherspoon*, because "irrevocably committed" potential jurors may still be removed for cause under *Witherspoon*.

The Arizona Supreme Court did not err by describing the standards set in *Witherspoon* and *Morgan* in this way, and it did not create a circumstance where structural error can occur in favor of the State. But even if it had, Montoya's arguments concerning the practical obstacles to conferring structural error in favor of the State, Petition at 12–13, do not compel review because those questions are not before this Court.

Ultimately, it is immaterial whether the Arizona Supreme Court misstated the *Witherspoon* standard by invoking the "irrevocably committed" language from *Davis* because Montoya claimed that the trial court abused its discretion by denying his for-cause motion under *Morgan*—a different standard. While this Court relaxed the *Witherspoon* standard in *Witt*, the *Morgan* standard continues to ask solely whether a venire person would automatically impose the death penalty in all circumstances. *See Morgan*, 504 U.S. at 729 ("A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of

aggravating and mitigating circumstances as the instructions require him to do."). The Arizona Supreme Court thus applied the correct standard under *Morgan*, even if it was looking to *Davis*'s "irrevocably committed" language in its analysis. And in any event, as described below, Montoya's claim here fails under any standard.

C. Juror 17 was not impaired.

Morgan affords capital defendants the opportunity to voir dire prospective jurors to ascertain whether those venire members would automatically vote to impose death. 504 U.S. at 733 ("We deal here with petitioner's ability to exercise intelligently his complementary challenge for cause against those biased persons on the venire who as jurors would unwaveringly impose death after a finding of guilt"), 735 ("Any juror who would impose death regardless of the facts and circumstances of conviction cannot follow the dictates of law"), 736 ("Petitioner was entitled, upon his request, to inquiry discerning those jurors who, even prior to the State's case in chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty."). Montoya had the opportunity to do so here. *See* Pet. App. 54a–94a.

As recounted above, Juror 17 gave the following responses on the questionnaire: (1) "rated his overall opinion of the death penalty at ten, strongly in favor, on a scale of one to ten," Pet. App. 24a; (2) "wrote that he felt the death and natural life penalties should be imposed based on the severity and circumstances of the crime," *id*; (3) "indicated that he agreed with the law regarding mitigating circumstances, he did not believe that people who plead guilty to first degree

murder should always be sentenced to death, and he would not automatically vote for the death penalty without considering mitigation," *id*; (4) "wrote that the State's decision to seek the death penalty should not be based on whether a defendant accepts responsibility for a crime," *id*. at 26a; (5) "wrote that he had strong feelings about people who abuse hard drugs, specifically the actions they take to maintain their habits," *id*; and (6) "wrote that people who abuse over-the-counter medications need to seek help and that he thought marijuana should be legalized." *Id.*

And during voir dire Juror 17 explained that he would "lean towards the death penalty" for a "[c]old-blooded, meant-to-do-it murder of an innocent victim," Pet. App. 55a–56a, but explained that "not every case is that cut and dry." Pet. App. 55a–56a. Juror 17 also described how he would consider things like mental illness and emotional arousal in deciding whether the death penalty is appropriate, *see id*. at 56a–57a, and explained that "I said the death penalty should be considered…. I didn't say it was—it should be automatic." *Id*. at 58a. Finally, Juror 17 commented that he would consider acceptance of responsibility, but that "the circumstances dictate whether it should be applied or not." *Id*. 58a–59a.

Juror 17's answers on the questionnaire and during voir dire make clear that he had not predetermined that death was the only option. Instead, his assertion that the death penalty was not automatic and his repeated statements that he would consider the facts and circumstances show that he was not impaired under *Morgan*. The trial court, who was in the best position to observe Juror 17 and his

demeanor during voir dire, did not abuse its discretion in denying Montoya's motion to strike Juror 17 for cause.

II. MOTIONS TO REMOVE FOR CAUSE ARE NOT SUBJECT TO MORE SEARCHING REVIEW, EVEN IN THE ABSENCE OF PEREMPTORY CHALLENGES.

A. The decision to eliminate peremptory challenges.

As this Court recognized in *Batson v. Kentucky*, 476 U.S. 79, 86 (1986), "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." The Court thus crafted a procedure through which criminal defendants could challenge the propriety of the State's peremptory challenges. *See id.*, at 96–98. And "[i]n the decades since *Batson*, this Court's cases have vigorously enforced and reinforced the decision, and guarded against any backsliding." *Flowers v. Mississippi*, 588 U.S. 284, 301 (2019).

Despite *Batson*, problems have endured. And for decades, members of this Court and others have suggested a potential solution—abolish peremptory strikes altogether. Previewing this option, Justice Goldberg made clear that the right to exercise peremptory challenges must yield to the Fourteenth Amendment right to an impartial jury. *Swain v. Alabama*, 380 U.S. 202, 244 (1965) (Goldberg, J. dissenting) ("Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former."). Next, Justice Marshall argued in *Batson* that "[t]he decision today will not end the racial discrimination that peremptories inject

into the jury-selection process," and that the "goal can be accomplished only by eliminating peremptory challenges entirely." *Batson v. Kentucky*, 476 U.S. 79, 102–03 (1986) (Marshall, J. concurring). Justice Breyer continued what Justices Goldberg and Marshall began, explaining that it was time to "reconsider Batson's test and the peremptory challenge system as a whole." *Miller-El v. Dretke*, 545 U.S. 231, 273 (2005) (Breyer, J. concurring); *see also Rice v. Collins*, 546 U.S. 333, 344 (2006) (Breyer, J. concurring) ("I have argued that legal life without peremptories is no longer unthinkable.").

Through its rulemaking authority, the Arizona Supreme Court recently made Arizona the first state in the nation to eliminate the use of peremptory challenges in both criminal and civil trials. Pet. App. 48a–53a.

B. The absence of peremptory challenges does not compel more searching review.

This Court has "long recognized that peremptory challenges are not of constitutional dimension." *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988). *See also Gray v. Mississippi*, 481 U.S. 648, 663 (1987) ("Peremptory challenges are not of constitutional origin."); *Georgia v. McCollum*, 505 U.S. 42, 57 (1992) ("This Court repeatedly has stated that the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial."). In the face of such unambiguous authority, Montoya speculates that the Constitution calls for enhanced appellate review of *Morgan* challenges where a state has elected to eliminate peremptory challenges. Petition at 14. But Montoya cannot conjure such a right into existence. Because Montoya received meaningful

appellate review of his claim and because he was afforded the opportunity to voir dire Juror 17 on the *Morgan* question, Montoya was afforded all he was constitutionally due.

1. *Abuse of discretion review is appropriate.*

As this Court has recognized on "numerous occasions," trial courts are in the best position to root out bias during voir dire. *See Patton v. Yount*, 467 U.S. 1025, 1038 (1984) ("[T]he determination is essentially one of credibility, and therefore largely one of demeanor. As we have said on numerous occasions, the trial court's resolution of such questions is entitled, even on direct appeal, to 'special deference.'") (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 500 (1984)). Montoya fails to answer why trial court judges, who are so well suited to assess demeanor and credibility when ruling on for-cause strikes in other contexts, cannot perform the task with equal aptitude in the absence of peremptory strikes (and in the context of a *Morgan* challenge). Nor can he persuasively answer that question, because his argument is based on the false premise that peremptory challenges are constitutionally necessary to ensure a fair and impartial jury.

The review conducted by the Arizona Supreme Court here is consistent with the type of review, albeit in the opposite context, envisioned by this Court in *Witt*. There, this Court outlined how crucial the trial court's perspective of the venire is in determining whether a potential juror lacks impartiality:

> What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death

> sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.… [T]his is why deference must be paid to the trial judge who sees and hears the juror.

469 U.S. at 424–26. There is no functional difference, at least in terms of the trial court's ability to observe demeanor, between abuse of discretion review for a *Witherspoon-Witt* challenge or for a *Morgan* challenge.

In this vein, Montoya's reliance on *Gray* is misplaced. *See* Petition at 15. There, this Court held that the State's avowal that they would have struck a juror with a peremptory if the trial court denied its for-cause motion was insufficient to end the inquiry, because that "would insulate jury selection from meaningful appellate review." 481 U.S. at 665. This Court rejected the argument, holding that the harmless-error analysis focused on whether a particular juror was erroneously excluded, not simply whether the composition of the jury panel as a whole could have been affected by the trial court's ruling. *Id.* at 664–65. If the latter inquiry had been chosen, appellate review would be effectively foreclosed in that instance, because the State could often demonstrate that the improperly struck juror would have been removed even in the absence of trial court error. The *Gray* problem simply does not apply here, because the State is not arguing harmless error review applies or that it would have exercised a peremptory strike had the trial court not ruled erroneously.

And neither does *Ross v. Oklahoma* demonstrate that abuse of discretion review is improper. Montoya notes that in *Ross*, this Court found no error there

because the petitioner was able to exclude a biased juror through the exercise of a peremptory challenge. Petition at 17–18. The juror at issue in *Ross*, however, stated unequivocally "that if the jury found petitioner guilty, he would vote to impose death automatically." *Ross*, 487 U.S. at 84. The *Ross* court therefore previewed the *Morgan* rule by opining that reversal would have been required because the juror would automatically vote to impose the death penalty despite the trial court's instructions to the contrary. *See, e.g.*, *Morgan*, 504 U.S. at 729. The peremptory strike in *Ross* was merely "a means to achieve the end of an impartial jury," 487 U.S. at 88, and the impartiality of the jury that sat in judgment of the defendant was the central inquiry. *Ross* therefore does not dictate the result here, because Jury 17 was adequately examined and found not to be impaired in the same manner as the juror in *Ross*.

Montoya may complain about the Arizona Supreme Court's ultimate disposition, but he cannot deny that he was afforded appellate review.

2. *The trial court was not obligated to sua sponte voir dire Juror 17.*

While the Constitution does not compel the availability of peremptory strikes, "those challenges have traditionally been viewed as *one means* of assuring the selection of a qualified and unbiased jury." *Batson*, 476 U.S. at 91 (emphasis added). Another mechanism designed to ensure an impartial jury is, of course, adequate voir dire. *See Morgan*, 504 U.S. at 729 ("[P]art of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors."). Montoya does not dispute that he was given the opportunity to voir dire on the

Morgan question, but he maintains that "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." Petition at 17 (citing *Witt*, 469 U.S. at 423). *Witt*, however, holds that "it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality," and then "the trial judge's duty to determine whether the challenge is proper." 469 U.S. at 424. So where Montoya complains that the voir dire of Juror 17 was inadequate, he can only place the blame on trial counsel rather than the trial judge.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted this 13th day of February, 2025.

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