+No. 24-6336

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Kerri Chamberlin
Counsel of Record
Michelle DeWaelsche
Office of the Legal Advocate
222 N. Central Ave, Ste. 154
Phoenix, AZ 85004
(602) 506-4111

kerri.chamberlin@maricopa.gov
michelle.dewaelsche@maricopa.gov

Counsel for Petitioner

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INTRODUCTION

The Brief in Opposition mischaracterizes Petitioner's claims as a request for "general error correction." Opp. 10. Contrary to Respondent's contention, certiorari should be granted because, in misconstruing *Witherspoon v. Illinois*, 391 U.S. 510 (1968), *Morgan v. Illinois*, 540 U.S. 719 (1992), and their progeny, the Arizona Supreme Court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Further, whether less deference should be given to trial judges' rulings on for-cause challenges in capital cases in states that have eliminated peremptory strikes is "an important question of federal law that has not been, but should be, settled by this Court." *Id.*

Respondent concedes that the Arizona Supreme Court used an abrogated standard from *Witherspoon* when ruling on Petitioner's for-cause challenge under *Morgan*. Opp. 15. Respondent does not contest that the "irrevocably committed" language quoted by the Arizona Supreme Court from a footnote in *Witherspoon* was abrogated in *Wainwright v. Witt*, 469 U.S. 412 (1985) in favor of the less onerous standard set forth in *Adams v. Texas*, 448 U.S. 38 (1980). Opp. 11-12. Nor does Respondent dispute that the opinion below improperly cites the defunct *Witherspoon* standard to resolve a *Morgan* challenge. Nonetheless, Respondent contends that the court's review was sufficient because the citation to the abrogated rule is only a "guidepost" that leads to the proper standard in *Morgan*. Opp. 14. This contention is faulty for several reasons.

Respondent's interpretation of the opinion below would mean that the Arizona Supreme Court has construed this Court's precedent to hold that a defendant's burden to strike a death-leaning juror is more onerous than the government's burden to strike a life-leaning juror. Given that the government's *legitimate interest* in an impartial jury (*Witt*, 469 U.S. at 416) is inferior to a Defendant's *constitutional right* to an impartial jury (U.S. CONST. amends. VI, XIV), the Arizona Supreme Court's decision thus creates a constitutional quandary. The opinion below would allow the government to remove life-leaning jurors whose views on the death penalty "prevent or substantially impair" their ability to decide the case according to their instructions and oaths under the *Adams/Witt s*tandard, whereas a defendant could only remove jurors who state they would *automatically* vote for death upon conviction under the

Morgan standard. The result of such a rule would allow the seating of the type of "jury uncommonly willing to condemn a man to die" that this Court denounced in *Witherspoon*. 391 U.S. at 520-21.

Respondent next uses circular logic to claim that abuse-of-discretion review is adequate to provide meaningful appellate review in the absence of peremptory strikes because "Jur[or] 17 was adequately examined and found not to be impaired" to the extent necessary to warrant removal. Opp. 20-22. In other words, because the trial court allowed questioning of the juror before denying the motion to strike for cause – even though the trial judge himself admitted it was a "close" call and the defense had no peremptory strikes with which to remove the juror – the Arizona Supreme Court's deference to the trial judge's discretion was appropriate. This can hardly be considered meaningful appellate review where a trial court's decision must be affirmed even where, as here, the judge expressed serious concerns about the venireperson's impartiality. When the trial court's decision on a for-cause strike is the equivalent of a coin flip, abuse-of-discretion review is equivalent to no review at all.

Further, Respondent asserts that because peremptory strikes are not guaranteed by the Constitution, Arizona's elimination of them does not require less deferential scrutiny of for-cause challenges. Opp. 19-22. This claim mischaracterizes Petitioner's argument, alleging that it "is based on the false premise that peremptory challenges are constitutionally necessary to ensure a fair and impartial jury." Opp. 12. Petitioner acknowledges that this Court has held that there is no constitutional

right to peremptory challenges. *See, e.g., Ross v. Oklahoma*, 487 U.S. 81, 85 (1988). However, Petitioner has not raised the issue that elimination of peremptory strikes violates the Constitution.

In the absence of peremptory challenges, heightened scrutiny of for-cause challenges is essential because, as this Court has recognized, trial judges make mistakes when ruling on motions to strike for cause. *See, e.g., Ross*, 487 U.S. at 85 (finding biased juror "should have been excused for cause and that the trial court erred in failing to do so"). Peremptory strikes have long been regarded as a necessary safety net to allow defendants to correct those mistakes to ensure an impartial jury. *See Pointer v. United States*, 151 U.S. 396, 414-15 (1894). Indeed, defendants are compelled to do so or risk waiver of the issue on appeal. *See State v. Rubio*, 219 Ariz. 177, 180-81 ¶¶ 5-7 (Ariz. App. 2008) (citing *Ross*, 487 U.S. at 88-89; *United States v. Martinez-Salazar*, 528 U.S. 304, 307, 317 (2000); *State v. Hickman*, 205 Ariz. 192 (2003) (noting defendants must cure the trial court's failure to remove a biased juror or waive the issue on appeal)). Peremptory challenges are the only mechanism for safeguarding the constitutional right to an impartial jury available to defendants when motions to strike for cause are improperly denied. Respondent presents no compelling reason why Arizona's removal of peremptory challenges also removes the heightened scrutiny this court has historically extended to peremptory strikes because they are so closely tied to the right to an impartial jury.

This case presents an opportunity for this Court to not only clarify the correct standard under *Morgan*, but to also set forth the proper level of scrutiny appellate

courts should use when reviewing for-cause strikes in states that have eliminated or are contemplating the elimination of peremptory strikes.

ARGUMENT

I. Petitioner asks this Court to clarify the standard in Morgan and remand to the Arizona Supreme Court to apply the proper standard.

A. Respondent concedes that the Arizona Supreme Court's use of the *Witherspoon* "irrevocably committed" standard was error.

Respondent concedes that the Arizona Supreme Court cited abrogated language from *Witherspoon* when evaluating whether the trial court abused its discretion by refusing to strike Juror 17 for cause under *Morgan*. Opp. 14. Nonetheless, Respondent contends that the error was "immaterial" because the Arizona Supreme Court also cited to *Morgan* in its analysis and because Juror 17 was subject to *voir dire* questioning and found not to be impaired. Opp. 13-19. Both contentions fail.

1. Respondent's argument misreads the opinion below.

Respondent dismisses as "immaterial" Petitioner's claims that the opinion below not only uses an abrogated standard of review, but also misstates the law by asserting that improper removal of jurors for their views "for or against" the death penalty would amount to structural error. Opp. 14. However, Respondent's arguments do not withstand scrutiny. First, Respondent claims that Petitioner "simply misreads" the following sentence:

> In fact, excusing a juror because of his "views on capital punishment" is structural error that requires reversal, *State v. Ring*, 204 Ariz. 534, 552 ¶ 46 (2003), unless the juror is "irrevocably committed" to vote for or against the death

> penalty "regardless of the facts and circumstances." *Davis v. Georgia*, 429 U.S. 122, 123 (1976) (internal quotation mark omitted) (quoting *Witherspoon v. Illinois*, 391 U.S. 410, 522 n.21 (1968)); *see also Morgan*, 504 U.S. at 728-29.

In a feat of linguistic acrobatics, Respondent claims that the "opening clause" simply "sets out the *Witherspoon* guidepost[,]" and that the second part of the sentence – the part containing the abrogated "irrevocably committed" language from *Witherspoon* – "is divorced from" the opening clause and "sets the other guidepost, consistent with *Morgan*, that a juror may be removed for cause if they are resolute on the ultimate question." Opp. 14. This tortured reading of the sentence ignores one important word – "unless." The word "unless" is a conjunction which renders the sentence conditional, meaning the second clause is dependent on the first. Respondent's claim that the dependent clause is somehow "divorced" from the main clause is simply wrong.

Next Respondent argues that because *Witt's* "substantially impaired" jurors would necessarily also include jurors who are "irrevocably committed[,]" "[i]t is therefore of no moment" that the court below used the abrogated language. Opp. 15. However, the court's use of an abrogated standard *is the issue*. At the very least, the court was confused as to the standard set forth in this Court's decisions in *Witherspoon*, *Witt*, and *Morgan*, which tainted its analysis. The opinion below takes a "throw everything at the wall and see what sticks" approach to a determination of constitutional dimension – one which deprived Petitioner of his right to an impartial jury. For this reason, the decision cannot stand.

2. The Arizona Supreme Court's *Morgan* analysis is deficient.

The purported *Morgan* analysis in the opinion below is deficient, which can be demonstrated by unpacking paragraph 76. The court's *Morgan* analysis entirely relies upon the Arizona Supreme Court's prior application of *Morgan* in *State v. Johnson*, 247 Ariz. 166 (2019). In Petitioner's case, *Johnson's Morgan* analysis is deficient. The Arizona Supreme Court cited to *Johnson* to support its conclusion "that a potential juror's response that the death penalty is the appropriate penalty under a hypothetical means the potential juror cannot be fair or impartial as explained in *Morgan*." Pet.App.A ¶ 76. However, what was merely a hypothetical in *Johnson* closely matches the facts of Petitioner's case – an "intentional, premeditated killing of an innocent victim" with no justification or defense. *Johnson*, 247 Ariz. at 196 ¶ 107.

While the *Johnson* court found the hypothetical in that case "misleading" because it "presupposed guilt and an aggravating circumstance" and "omitted mitigation[,]" the same cannot be said here because the hypothetical mirrors Petitioner's case. *Id.* ¶ 111. Thus, when Juror 17 stated in *voir dire* that based on the hypothetical it was "pretty cut and dry" and he would "definitely have to lean towards the death penalty, but not every case is that cut and dry[,]" he did not know that the hypothetical – cold-blooded, premeditated murder of an innocent victim with no justification – *was* the case. Pet.App.A 24a.

The Arizona Supreme Court's reliance on *Johnson*, therefore, is misplaced. Under *Morgan*, the defendant must, upon request, be granted permission to question

venirepersons to identify biases that would disqualify them from serving on a jury. That was done here, and the *voir dire* uncovered that Juror 17 "had already formed an opinion on the merits" that he would "definitely" lean toward imposing the death penalty based on the hypothetical. Pet.App.A 24a (Juror 17 responds to hypothetical, "Well, based on that scenario, everything was pretty clear, cut, and dry. So definitely I would lean towards the death penalty in that case."); s*ee Morgan*, 504 U.S. at 729. He may have made other contradictory statements, but this response to the hypothetical that parallelled the facts of the case was sufficient to disqualify Juror 17 under *Morgan*.

B. Respondent's argument would either preclude defendants from removing *death-leaning*, as opposed to *death-committed* jurors, altogether, or would impose a higher burden on defendants seeking to remove death-leaning jurors for cause than on the State when seeking removal of life-leaning jurors.

Arguing that because "Juror 17 was at worst a 'death leaning juror[,]'" and a "proclivity toward death is not enough to trigger the protections of the Fourteenth Amendment" under *Morgan*, the Respondent insists the Arizona Supreme Court did not err. Opp. 13. However, under *Witt*, the government only has to show that a *life-leaning* juror is "substantially impaired" in order to trigger its "legitimate interest in excluding those jurors whose opposition to capital punishment would not allow them to view the proceedings impartially." *Witt*, 459 U.S. at 416. In contrast, Respondent claims a defendant has no right to remove "a *death-leaning*" juror at all – only one "who would vote for death in any circumstance." Opp. 13. This cannot be the intent of this Court's holding in *Morgan*.

The *Morgan* Court noted that some post-*Witherspoon* courts were allowing the government to pose *voir dire* questions regarding a venireperson's inclination against the death penalty, while refusing to allow defendants to ask similar questions regarding a venireperson's inclination toward the death penalty. *See Morgan*, 504 U.S. at 722-23. The *Morgan* decision endeavored to level the playing field by allowing "reverse-*Witherspoon*" questions during *voir dire*. *Morgan*, 504 U.S. at 724-25. However, the term "reverse-*Witherspoon*" is a misnomer, as the majority relied upon the standard set forth in *Adams*, and confirmed in *Witt*. *Id.* at 728-29. The Arizona Supreme Court, on the other hand, employed a true "reverse-*Witherspoon*" analysis in concluding that Juror 17 was not "irrevocably committed" to, and would not "automatically" impose, death. Pet.App.A ¶¶ 75-77. The opinion forgoes the less stringent *Adams/Witt* standard in favor of the abrogated "irrevocably committed" standard *Witherspoon* required. *Witt*, 469 U.S. 850-51 (noting, "In general, the [*Witherspoon*] standard has been simplified.").

Further, Respondent's argument that "the trial court's obligation only extended to striking for cause those venire members who would vote for death in any circumstance" imposes on defendants the "extremely high burden" that this Court found too onerous to place on the government in *Witt*. Opp. 13. *See Witt*, 469 U.S. at 850-51 (noting *Adams* standard releases government from "extremely high burden of proof"). If being "irrevocably committed" to vote against death is too onerous a standard for the government to meet to warrant removal for cause, surely being inclined to "vote for death in any circumstance[,]" as Respondent proposes, is also too

onerous a standard for defendants, who have a constitutional right to an impartial jury as opposed to the government's mere "legitimate interest" in one. *Id.*

II. While peremptory challenges are not of constitutional origin, this Court has long found that they warrant constitutional scrutiny. Arizona's removal of peremptory challenges should not remove such scrutiny because for-cause challenges now have no checks and balances, justifying heightened review.

Respondent claims that Petitioner's entire argument is faulty because it "is based on the false premise that peremptory challenges are constitutionally necessary to ensure a fair and impartial jury." Opp. 20. However, that claim ignores that this Court has long afforded constitutional scrutiny to cases raising issues involving peremptory challenges. *See, e.g., Batson v. Kentucky*, 476 U.S. 79, 91 (1986) (granting certiorari to address limitations on peremptory challenges that violate the Equal Protection Clause); *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988) (granting certiorari "to consider the Sixth and Fourteenth Amendment implications of the trial court's failure to remove [a biased juror] for cause and petitioner's subsequent use of a peremptory challenge to strike [the biased juror]").

This Court has also acknowledged that "the trial court has a serious duty to determine the question of actual bias, and a broad discretion in its rulings on challenges therefor…. In exercising its discretion, the trial court must be zealous to protect the rights of an accused." *Witt*, 469 U.S. at 429-30 (quoting *Dennis v. United States*, 339 U.S. 162, 168 (1950)). This need for the "zealous" protection of defendants' right to an impartial jury by trial judges is even more urgent in the absence of peremptory strikes.

If the Arizona Supreme Court's holding is allowed to stand, trial judges who find a venireperson's answers "concerning" and who acknowledge their decision on a for-cause strike as a "close" call will never face meaningful review of that decision. In other words, if a trial judge does not act zealously to protect a defendant's right to an impartial jury when denying a motion to strike a biased juror for cause, that decision will stand unless the decision was "clearly untenable, legally incorrect, or amounts to a denial of justice." Pet.App.A ¶ 71. That is a very high bar. In decisions such as this that are close calls, a reviewing court would be hard-pressed to ever find an abuse of discretion.

Defendants, even in the absence of peremptory challenges, remain constitutionally entitled to a fair and impartial jury. *Ross*, 487 U.S. at 85 (noting although the use of peremptory challenge to remove juror the court should have removed for cause is not constitutional error, "[h]ad [the biased juror] sat on the jury that ultimately sentenced petitioner to death . . . the sentence would have to be overturned."). Thus, although this Court has held that peremptory challenges are not required by the Constitution, it has also recognized the important role peremptory strikes have historically served in guaranteeing the constitutional right to an impartial jury. *See Batson*, 476 U.S. at 91 (citing *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (citing *Stilson v. United States*, 250 U.S. 583, 586 (1919))).

Respondent cites to *Witt* for the proposition that abuse-of-discretion review of decisions on for-cause strikes is sufficient despite Arizona's elimination of peremptory challenges. Opp. 20-21. However, *Witt* – and every other case this Court has

considered in this vein – involved a situation in which peremptory challenges were available to correct a trial judge's error. The fact that this Court found abuse-of-discretion review adequate in cases where peremptory strikes were available as a safeguard to ensure the constitutional right to an impartial jury is of little persuasive value in a case in which no such safeguard exists.

CONCLUSION

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

Respectfully submitted this 27th day of February, 2025.

/s/ Kerri Chamberlin
Kerri Chamberlin
Counsel of Record
Michelle DeWaelsche
Maricopa County Office of the Legal Advocate
222 N. Central Ave., Ste. 154
Phoenix, Arizona 85004
(602) 506-4111
kerri.chamberlin@maricopa.gov
michelle.dewaelsche@maricopa.gov
Attorneys for Petitioner