

No. 18-1109

IN THE
Supreme Court of the United States

JAMES ERIN MCKINNEY,
Petitioner,

v.

STATE OF ARIZONA,
Respondent.

On Writ of Certiorari to the
Arizona Supreme Court

**BRIEF OF THE RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER AS *AMICUS*
CURIAE IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

The MacArthur Justice Center (“MJC”) is a not-for-profit organization founded by the family of J. Roderick MacArthur to advocate for civil rights, and for a fair and humane criminal justice system. MJC has represented clients facing myriad civil rights injustices, including issues concerning habeas corpus, unlawful confinement, and the treatment of incarcerated people. MJC has an interest in the sound and fair administration of the criminal justice system.

¹ No counsel for a party authored this brief in whole or in part. No party or counsel for a party, nor any person other than *amicus curiae*, made a monetary contribution intended to fund the preparation or submission of this brief. The parties have filed blanket consent with the Court.

MJC submits this brief to address the first question presented, to detail the incoherence and pragmatic difficulties that would result if this Court were to adopt the decision below.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this Court's modern habeas and retroactivity jurisprudence, it has endeavored to draw clear lines, and to preserve them. That end is not just pragmatic, as it might be in other contexts. It is driven by a history and experience of the disorder that results when the determination of applicable law is governed by a system of exceptions and issue-by-issue determination. The Court's preference for clear lines also reflects the fact that habeas, by its nature, governs our most sacred values: at a minimum, liberty and, in this case, life.

Accordingly, in its modern habeas jurisprudence, this Court's conception of finality is a binary one:

1. Cases pending on direct review are not final. To resolve the defendant's guilt or sentence in this posture, a court applies current procedural law. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).
2. Cases pending on postconviction are final. To resolve the legality of the defendant's confinement, a court considers whether he was afforded the procedural rights that existed at the time direct review was completed. *Teague v. Lane*, 489 U.S. 288, 310 (1989).

That binary model has made it easy for parties and courts to determine the relevant procedural law as a case moves through the criminal justice system: Upon

the completion or expiration of direct review, a defendant proceeds across the finality line. When a defendant succeeds on postconviction, he crosses back to the non-finality side. *Jimenez v. Quarterman*, 555 U.S. 113, 120 (2009) (observing that “once [a court] reopen[s] direct review” the defendant’s criminal judgment is “no longer final”). This is not just crisp formalism, it’s crisp logic: A defendant who succeeds on postconviction has succeeded in undermining the finality of his conviction or sentence.

A clear rule as to finality, and therefore as to what law applies, is essential to procedural fairness in the new trial or sentencing. And it is also essential for downstream review of the new proceeding. Under this Court’s present rule, both are straightforward: When trying or sentencing a defendant after an earlier conviction or sentence has been shown infirm, the judge applies the same procedures as on any other day in his or her courtroom. Review of that proceeding then follows as it would for any other determination of guilt or punishment.

The Arizona Supreme Court’s rule would make a mess of this. Departing from the binary model, it adopted an issue-specific notion of finality that more closely resembles the ad-hoc principles of retroactivity this Court abandoned as unworkable in *Griffith* and *Teague*. As set forth below, that sort of backslide would introduce incoherence into the modern retroactivity framework. And, on the practical side, it would produce confusion and arbitrariness in new trials and sentencing proceedings, and in the downstream review of those proceedings.

Consistent with sound administration of the criminal justice system, the Court should reverse.

ARGUMENT**I. Arizona’s Approach Would Muddle The Clear Line This Court Has Drawn.**

The Arizona Supreme Court’s conception of federal habeas law in this and its preceding case, *State v. Styers*, 254 P.3d 1132, 1133 (Ariz. 2011), conflicts with basic premises of modern habeas and retroactivity law. Its rule would muddle the clear line this Court has drawn between direct review and post-conviction. Habeas and retroactivity law can be perilous as it is; where the Court has adopted a clear line, it should preserve it.

After a state trial judge sentenced Petitioner to death in 1992, the Arizona Supreme Court conducted *de novo* direct review of Petitioner’s conviction and sentence. *See* Ariz. Rev. Stat. § 13-755. Everyone agrees that upon the Arizona Supreme Court’s affirmance and the expiration of the time to petition for certiorari in 1996, Petitioner’s conviction and sentence became final. Everyone also agrees Petitioner then proceeded to postconviction, where he succeeded in showing that his then-final sentence had been premised on a violation of procedural rights to which he was entitled at the time of his sentencing. Pet. App. 58a-59a (holding that Petitioner’s sentencing proceeding violated *Eddings v. Oklahoma*, 455 U.S. 104 (1982)). As is customary when a federal court grants habeas relief, the Ninth Circuit issued a conditional writ to give the prosecution an opportunity to “replace [the] invalid judgment with a valid one.” *Jennings v. Stephens*, 135 S. Ct. 793, 799 (2015) (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 87 (2005) (Scalia, J., concurring)). Under the order, Petitioner was entitled to release unless Arizona “vacate[d] the

sentence and impose[d] a lesser sentence consistent with law” or “correct[ed] the constitutional error in his death sentence.” Pet. App. 68a.

Following Petitioner’s success in undermining his sentence on postconviction, the State sought to skip the state trial court and instead have the Arizona Supreme Court determine whether Petitioner should be sentenced to death. The court agreed and repeated the *de novo* direct review procedure it had previously used. Pet. App. 2a.² In the course of this new direct review, the question arose as to what procedural law applies to resolve the controversy before the Court (*i.e.*, whether Petitioner should be sentenced to death). In the Arizona Supreme Court’s view, the fact that Petitioner’s sentence had been “final” on a previous occasion was a relevant factor in the choice of law question. Pet. App. 3a-4a. It reasoned that it was not required to follow this Court’s decision in *Ring v. Arizona*, 536 U.S. 584 (2002), because Petitioner’s first, infirm death sentence became “final’ before the decision in *Ring*.” Pet. App. 3a-4a.

The Arizona Supreme Court thus envisioned a state in which Petitioner’s sentence could be non-final (and, in fact, not even determined in the first instance), so as to allow the reweighing required by *Eddings*, yet “final” in some meaningful sense as to other procedural rules (*Ring*). *Id.* That’s not a thing.

² This brief focuses exclusively on the first question presented and therefore it assumes the Arizona Supreme Court did not commit constitutional error by refusing Petitioner a trial court proceeding. Petitioner provides compelling reasons why the failure to provide an actual resentencing proceeding was itself reversible error. *See* Pet’r Br. 33-47.

This Court’s caselaw has drawn a clear line between postconviction review of a final conviction or sentence and direct review of a non-final conviction or sentence. When a criminal defendant is subject to a final conviction and sentence, he can undermine the finality of those judgments only to the extent he was denied a right “dictated by precedent existing at the time the defendant’s conviction became final.” *Teague v. Lane*, 489 U.S. 288, 301 (1989) (emphasis omitted). That rule is subject to the limited exceptions for changes in substantive criminal law or procedural rules so “watershed” that their absence undermines finality. *Id.* at 311-12; *see also Welch v. United States*, 136 S. Ct. 1257, 1264 (2016) (discussing these exceptions). When the adjudication underlying a state court’s final conviction or sentence was not obtained “in accordance with the Constitution as interpreted at the time of th[ose] proceedings,” the case is sent back for retrial or resentencing—indeed, this is the “leading purpose of federal habeas review.” *Graham v. Collins*, 506 U.S. 461, 467 (1993).

When a defendant is not subject to a final conviction or sentence, resolution of his guilt or punishment issues takes place according to “current law.” *Griffith v. Kentucky*, 479 U.S. 314, 326 (1987). This, of course, means that a criminal defendant whose prosecution or direct review lasts years may be entitled to the application of new rules issued during or long after his trial took place. *See id.* at 327-28 (directing lower courts to apply *Batson*, which it decided three years after the defendant’s trial, to his case on remand). And it similarly means that a person who has succeeded in undermining the finality of, and has therefore reopened, his conviction or sentence may be entitled to a new adjudication of his guilt or punishment under

current law. Applied here, the outcome is straightforward: When the Arizona Supreme Court engaged in its reweighing under *Eddings*, Petitioner was not subject to a final sentence. Indeed, the whole point of the reweighing was to *reach* a sentence in the first instance. Having undermined the finality of his sentence on postconviction, Petitioner was entitled to the application of current law, including *Ring*.

This clear, binary conception of finality is not just a matter of pragmatism. It follows directly from Justice Harlan’s retroactivity framework, which this Court adopted in *Teague* and *Griffith*. The very purpose of the *Teague* framework, for instance, is to identify the class of rules for which finality must give way—*i.e.*, where “the need for finality in criminal cases” is overcome by “the countervailing imperative to ensure that criminal punishment is imposed only when authorized by law.” *Welch*, 136 S. Ct. at 1266. In his seminal opinions in *Desist v. United States*, 394 U.S. 244 (1969), and *Mackey v. United States*, 401 U.S. 667 (1971), Justice Harlan explained that the very purpose of “[h]abeas corpus always has been a collateral remedy, providing an avenue for upsetting judgments that have become otherwise final.” *Id.* at 682-83 (Harlan, J., concurring in part and dissenting in part). In other words, the very inquiry on postconviction is whether “the competing interest in readjudicating convictions” outweighs the “interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision.” *Id.* at 683; *see also id.* at 693 (explaining that the reason a new substantive rule applies retroactively is because it represents an “instance where finality interests

should yield”). Thus, by definition cases sent back to direct review are non-final.

Once back on direct review, the clear requirement to apply current law is, again, not just pragmatic. As Justice Harlan wrote, so long as the criminal process is not settled on a final judgment, the idea of being “a court of law,” entails “applying the Constitution to resolve every legal dispute within [its] jurisdiction on direct review” and “mandates that [it] apply the law as it is at the time, not as it once was.” *Id.* at 681. Indeed, he explained, if a court had “the power to disregard current law in adjudicating” controversies “that have not already run the full course,” it would be “quite simply an assertion that [the court’s] constitutional function is not one of adjudication but in effect of legislation.” *Id.* at 679. On direct review, courts apply the Constitution “because [they] are bound to,” not just when they “deem it appropriate, useful, or wise,” the “sort of choice [that] may permissibly be made by a legislature.” *Id.*

No less than any other “court of law,” once Petitioner’s criminal judgment returned to the direct-review side of the line, the Arizona Supreme Court’s adjudication of federal constitutional law entailed “the responsibility of adjudicating cases or controversies according to the law of the land.” *Id.* at 678. As this Court made clear in *Griffith*, this rule governs “all cases, state or federal, pending on direct review or not yet final.” *Griffith*, 479 U.S. at 328. Or, as the Chief Justice more recently expressed: “[T]he question whether a particular ruling is retroactive is itself a question of federal law. . . . State courts are therefore bound by our rulings on whether our cases construing federal law are retroactive.” *Danforth v. Minnesota*, 552 U.S. 264, 291-92 (2008) (Roberts, C.J.,

dissenting). This Court has reaffirmed that precept, explaining that its retroactivity jurisprudence is founded “upon constitutional premises” and “[t]hat constitutional command is, like all federal law, binding on state courts.” *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016).

When the Arizona Supreme Court was weighing whether to impose death as Petitioner’s sentence, his sentence was, by definition, not final. The controversy before the Court should have been resolved in accordance with current law. The Court should reject the incoherence of holding otherwise.

II. Arizona’s Issue-Specific Finality Resembles The Approach This Court Jettisoned In *Griffith*. It Would Create A Mess In The Adjudication Of Guilt And Punishment Following Habeas Relief, And In Downstream Review Of Those Proceedings.

In place of the crisp line that this Court has drawn between direct review and postconviction, the Arizona Supreme Court subscribed to an issue-specific notion of finality: Petitioner’s sentence was non-final so as to allow the court to decide on a brand-new sentence, but it “was ‘final’” with respect to *Ring*. Pet. App. 3a-4a. Or, as the Arizona Supreme Court has said differently, because “[t]he Ninth Circuit found error only in [the court’s] asserted failure to consider a potential mitigating factor,” there was “no reason or need to” apply current law as to other issues, such as whether to “have a jury consider” aggravating factors. *Styers*, 254 P.3d at 1134 (emphasis omitted).

To be sure, a retroactivity scheme which conceives of finality as an issue-specific construct would not be novel. This Court used to allow lower courts to treat

finality in that manner, which ultimately led to the approach articulated in *Linkletter v. Walker*, 381 U.S. 618 (1965). After decades of experience and numerous Justices imploring that such an approach led to “incompatible rules and inconsistent principles” and “must be rethought” to be made consistent “with the basics of the judicial tradition,” this Court finally abandoned that approach as unworkable. *Desist*, 394 U.S. at 258, 268-69 (Harlan, J., dissenting); *see also Teague*, 489 U.S. at 302, 305 (accepting that the issue-specific conception in *Linkletter* had “not led to consistent results” and had “led to unfortunate disparity”); *Griffith*, 479 U.S. at 322 & n.9; *United States v. Johnson*, 457 U.S. 537, 545 n.9 (1982) (collecting 27 separate opinions over a 15-year period).

Given this Court’s prior experience with an issue-specific notion of finality that “became almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim,” *Mackey*, 401 U.S. at 676 (Harlan, J., concurring in part and dissenting in part), Arizona’s position ought give this Court great pause. In fact, the particular issue-specific exception it seeks in this case would cause demonstrable confusion.

When a criminal defendant succeeds on postconviction and the case returns to the direct review side of the line, the new trial or sentencing court generally holds a proceeding to adjudicate the defendant’s guilt or sentence. Under this Court’s current framework, the task for the court is straightforward: Apply current procedural law—which the court applies on any other day—to resolve the defendant’s guilt or punishment. New appellate and postconviction review of that conviction and/or sentence then proceed as they do following any other trial or sentencing proceeding.

Arizona's view would disrupt that routine system. Instead, after a defendant succeeds in undermining his conviction or sentence on postconviction review, the trial or sentencing court would correct the one error identified on postconviction and rewind time to hold a proceeding that otherwise looks like it would have at the time the defendant's prior, infirm conviction and sentence became final. The parties and court would roll back this Court's caselaw, and presumably also binding lower court caselaw, years if not decades. The State does not begin explain how judges—who may not have been on the bench at the time the earlier judgment became final—can be expected to reliably construct that jumbled proceeding. On top of that, subsequent appellate review and postconviction proceedings arising from the post-habeas adjudication would have to ask the needlessly complex questions of (1) what the law required on a particular procedural question at the time the defendant's earlier, infirm conviction became final; and (2) whether the new trial or sentencing proceeding sufficiently complied with that potentially obsolete procedure.

Sometimes this added layer of complexity will inure to the benefit of the prosecution. Here, for instance, the Arizona Supreme Court applied its rule to hold that Petitioner's new sentencing proceeding could take place without regard to his Sixth Amendment right to have a jury decide whether he receives the ultimate penalty. Other times (and maybe even more often), it would provide fertile ground for the defendant to challenge his post-habeas trial or sentencing. Consider, for instance, a criminal defendant who is convicted before *Crawford v. Washington*, 541 U.S. 36 (2004) (adopting a new test for determining whether the admission of evidence violates the

Confrontation Clause), and then obtains guilt-phase relief on unrelated grounds. Depending on the facts, the defendant may *prefer* that the admissibility of evidence be determined under the obsolete rule in *Ohio v. Roberts*, 448 U.S. 56 (1980). Assuming the trial court failed to apply it, the defendant would be entitled to appeal, and direct review would proceed on the court’s failure to apply an obsolete standard.

Irrespective of who it benefits, the uniform effect is greater indeterminacy and arbitrariness. Consider Johnny Paul Penry’s criminal proceedings for the purposes of illustration. Mr. Penry’s conviction and death sentence first became final in January 1986. *See Penry v. Texas*, 474 U.S. 1073 (1986) (denying certiorari from direct review). This Court granted post-conviction relief because Mr. Penry had been denied certain procedural rights to which he was entitled at the time his death sentence was imposed. Indeed, this Court granted relief based on the exact same error as the Ninth Circuit did here: the state court had prevented the consideration of certain mitigating evidence in violation of *Eddings*. *See Penry v. Lynaugh*, 492 U.S. 302, 318 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

Following this Court’s grant of postconviction relief, the state court afforded Mr. Penry a new sentencing hearing and a jury sentenced him to death again. That second death sentence became final in 1995 and, on postconviction review, this Court again granted certiorari and again reversed Mr. Penry’s death sentence. *Penry v. Johnson*, 532 U.S. 782 (2001). In doing so, the Court applied the “reasonable likelihood” standard it had adopted for the first time in *Boyde v. California*, 494 U.S. 370, 380 (1990)—well after Petitioner’s first death sentence became final,

but the law at the time his second death sentence was imposed. *Penry*, 532 U.S. at 800.

But consider the sort of antiquated sideshow Arizona's position could entail. The Texas Court of Criminal Appeals later identified a constitutional error in the imposition of Mr. Penry's sentence a third time and this Court denied certiorari from the grant of habeas relief in 2006. The prosecution of Mr. Penry's case thus continued through 2008, when the parties settled his case. In Arizona's view, had Mr. Penry been retried, Texas courts would have adjudicated his sentence in accordance with the procedural law offered at the time his conviction originally became final, 22 years earlier. For example, when the court empaneled a jury for the penalty phase (as Texas courts had done from the beginning), the prosecution would have been perfectly entitled to invoke a person's race as a basis for striking him or her from the jury, simply because *Batson v. Kentucky*, 476 U.S. 79 (1986), had been decided after Mr. Penry's original conviction became final. That is not how guilt or punishment is adjudicated in the 21st century, and it is the opposite of what this Court's clear framework requires.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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