No. 18-1109

IN THE
Supreme Court of the United States

JAMES ERIN MCKINNEY,
Petitioner,
v.

STATE OF ARIZONA,
Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

BRIEF OF AMICUS CURIAE PHILLIPS BLACK, INC. IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

INTEREST OF THE *AMICUS* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT... 2

ARGUMENT... 4

I. UNDER ARIZONA LAW, INDEPENDENT REVIEW OCCURS AS PART OF THE DIRECT APPEAL. 4

II. THE ARIZONA SUPREME COURT'S REFUSAL TO REVIEW PATENT CONSTITUTIONAL ERROR UNDERMINES THE RULE OF LAW.. 6

A. When the Court Below Reopened the Case to Independently Review the Evidence as Part of Direct Review, It Rendered the Case Again Non-Final. 6

B. Failing to Apply the Full Range of Constitutional Protections to the Non-Final Case Undermined the Rule of Law..................... 8

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Atkins v. Virginia, 536 U.S. 304 (2002) 10

Griffith v. Kentucky, 479 U.S. 314 (1987) 3, 7, 8, 9

Hall v. Florida, 572 U.S. 701 (2014) 10

Hurst v. Florida, 136 S. Ct. 616 (2016) 3, 9

Jiminez v. Quarterman, 555 U.S. 113 (2009) 8

Lynch v. Arizona, 136 S. Ct. 1818 (2016) 9

McKinney v. Ryan, 813 F.3d 798 (9th Cir. 2015) 3

Montgomery v. Louisiana, 136 S. Ct. 718 (2016) 6

Moore v. Texas, 137 S. Ct. 1039 (2017) 10

Ring v. Arizona, 536 U.S. 584 (2002) 3, 9

Simmons v. South Carolina, 512 U.S. 154 (1994) 9

State v. Carreon, 107 P.3d 900 (Ariz. 2005) 5

State v. Escalante, 425 P.3d 1078 (Ariz. 2018) 10

State v. Escalante-Orozco, 386 P.3d 798 (Ariz. 2017) 10

State v. Greene, 967 P.2d 106 (Ariz. 1998) 4, 5

State v. Hargrave, 234 P.3d 569 (Ariz. 2010) 2, 4

State v. McKinney, 917 P.2d 1214 (Ariz. 1996) 4, 5

State v. Roseberry, 111 P.3d 402 (Ariz. 2005) 5

State v. Slemmer, 823 P.3d 41 (Ariz. 1991) 6

State v. Spreitz, 945 P.2d 1260 (Ariz. 1997) 4

Strickland v. Washington, 466 U.S. 668 (1984) 10

Teague v. Lane, 489 U.S. 288 (1989) 4

United States v. Howard, 115 F.3d 1151 (4th Cir. 1997) 7

Wiggins v. Smith, 539 U.S. 510 (2003) 10, 11

Statutes

Ariz. Rev. Stat. § 13-4239 5

Ariz. Rev. Stat. § 13-703 4

Ariz. Rev. Stat. § 13-753 10

Ariz. Rev. Stat. § 13-755 4

Other Authorities

Stephen Bright, *Counsel for the Poor: The Death Penalty not for the Worst Crime But for the Worst Lawyer*, 103 Yale L.J. 1835 (1994) 11

Death Penalty Information Center, *Executions by Year* (Mar. 1, 2019) 11

Christopher Dupont & Larry Hammond, *Capital Case Crisis in Maricopa County, Arizona: A Response from the Defense*, 95 Judicature 216 (2012) 11

Equal Justice Initiative of Alabama, Alabama Postconviction Manual (3d ed. 1998) 7

Randy Hertz & James Liebman, 1 Federal Habeas Corpus Practice and Procedure § 3.5 (7th ed.)....................................8

Gregory J. Kuykendall, et al., *Mitigation Abroad: Preparing a Successful Case for Life for the Foreign National Client*, 36 Hofstra L. Rev. 989 (2000) 11

Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. Rev. 699 (2002).............................8

Rules

Ariz. R. Crim. P., Rule 32.9.................................5

BRIEF OF *AMICUS CURIAE*[1]

INTEREST OF THE *AMICUS*

Phillips Black, Inc. consists of independent practitioners collectively dedicated to providing the highest quality of legal representation to prisoners in the United States and sentenced to the severest penalties under law. Phillips Black attorneys have extensive familiarity and experience with litigating complex criminal cases in the state and federal courts, both across the country and in Arizona in particular. They are experts on the interaction of the state and federal courts, teaching law school courses and publishing scholarship on federal courts, state and federal habeas corpus, and the harshest penalties under law.

They have representations originating in over 25 states in cases involving either the death penalty or life without the possibility of parole for a juvenile offense. A number of those representations originate in Arizona, where, in addition to direct representations, they frequently serve as *amici* on important issues of constitutional criminal law and procedure. They have also contributed to the rule of law in Arizona, advocating for the rules governing post-conviction procedure.

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[1] *Amicus* certifies that no party or party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. All counsel of record received timely notice of *Amicus*'s intent to file this brief more than 10 days prior to its due date and all parties consented to filing of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This brief explains that the re-weighing undertaken by the court below was, as a matter of state and federal law, part of direct review. For that reason, the full range of constitutional protections in place at the time of that re-weighing applied. Holding otherwise denigrates the rule of law and fails to ensure that this Court's precedents are fully upheld.

For over 15 years, from 1989 to 2005, the Arizona courts in capital cases declined to consider mitigating evidence unless it had a causal nexus to the underlying crime of conviction. During this timeframe, in 1993, Petitioner James McKinney was sentenced to death by a judge who credited the compelling evidence in mitigation. Although the trial judge credited the evidence, including Petitioner's PTSD, he concluded it was irrelevant to whether Petitioner should be sentenced to death. It was irrelevant because it lacked sufficient causal nexus to the crime.

Petitioner appealed. During the period in which Arizona had judge sentencing in capital cases, the Arizona Supreme Court, "independently review[ed] the aggravating and mitigating circumstances and assesse[d] the propriety of the death sentences." *State v. Hargrave*, 234 P.3d 569, 584 (Ariz. 2010). When that court undertook this responsibility in Petitioner's case in 1996, it considered Petitioner's PTSD irrelevant to its independent review for the same reason the trial judge was bound to do so: it lacked sufficient causal nexus to the crime of conviction.

In 2014, the Ninth Circuit, sitting en banc on Petitioner's federal habeas corpus case, held that Arizona's causal nexus requirement violated the Eighth Amendment's requirement to meaningfully consider mitigating evidence before deciding whether to impose a sentence of death. *See McKinney v. Ryan*, 813 F.3d 798, 819 (9th Cir. 2015). The Ninth Circuit remanded, instructing the District Court to grant the writ with respect to Petitioner's sentence unless the State "corrects the constitutional error in his death sentence and imposes a lesser sentence consistent with law." *Id.* at 827.

Shortly thereafter, the State requested the Arizona Supreme Court to undertake a new independent review of whether death was the appropriate sentence. Petitioner objected that jury resentencing was the appropriate remedy under *Ring v. Arizona*, 536 U.S. 584 (2002) and *Hurst v. Florida*, 136 S. Ct. 616 (2016). The Arizona Supreme Court granted the State's request and concluded that Petitioner's case had long ago become final such that *Ring* and, although they did not address it, presumably *Hurst* did not apply because they are not retroactively applicable to final convictions.

The Arizona Supreme Court then conducted its independent review anew, under the same caption and case number as the appeal, and concluded that a death sentence was, indeed, appropriate.

It is against this backdrop that the questions in this case arise. This brief will explain that as a matter of state law and judicial practice, the independent review process in Arizona is exclusively part of the direct appeal such that the case undergoing such review is not "final" within the framework of *Griffith v. Kentucky*, 479 U.S. 314 (1987) and *Teague*

v. Lane, 489 U.S. 288 (1989). For that reason, the approach of the Arizona Supreme Court is at odds with *Griffith* and *Teague* and undermines the constitutional protections in place at the time it reached its decision.

ARGUMENT

I. UNDER ARIZONA LAW, INDEPENDENT REVIEW OCCURS AS PART OF THE DIRECT APPEAL.

Death sentences imposed by a trial court are reviewed on direct appeal by the Arizona Supreme Court as provided by state statute.[2] *See* Ariz. Rev. Stat. § 13-755; *State v. Greene*, 967 P.2d 106, 113 (Ariz. 1998). For crimes occurring prior to August 1, 2002 the Arizona Supreme Court, "independently review[ed] the aggravating and mitigating circumstances and assess[ed] the propriety of the death sentences." *Hargrave*, 234 P.3d at 584 ; *Greene*, 967 P.2d at 113. Direct appeals entail an examination of the entire record. *State v. Spreitz*, 945 P.2d 1260, 1278 (Ariz. 1997).

In reviewing the trial court's findings the Arizona Supreme Court reweighs the mitigating and aggravating evidence by considering, "the quality and strength, not simply the number, of aggravating and mitigating factors" *Greene*, 967 P.2d at 118 (citing *State v. McKinney*, 917 P.2d 1214, 1225 (Ariz. 1996)). This review has to go beyond a mathematical approach in order to assess the quality of the proven aggravation and mitigation. *See State v. Carreon*,

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[2] Subsequent to Petitioner's trial initial direct appeal the statute was renumbered. *See* Ariz. Rev. Stat. § 13-703 (1993).

107 P.3d 900, 919 (Ariz. 2005). The Arizona Supreme Court conducts this independent reweighing in order to determine, "if the mitigation is sufficiently substantial to warrant leniency in light of existing aggravation." *State v. Roseberry*, 111 P.3d 402, 415 (Ariz. 2005) (citing *Greene*, 967 P.2d at 118-19).

The Arizona Supreme Court followed this same process in addressing this case. The Court specifically referenced the direct review statute and described the standard of "independent review" as "examin[ing] 'the trial courts findings of aggravation and mitigation and the propriety of the death sentence,' [to] determine whether the defendants proffered mitigation, 'is sufficiently substantial to warrant leniency in light of the existing aggravation.'" *McKinney*, 426 P.3d at 1206 (quoting (A)). More broadly, Petitioner's case is the only instance of which *amici* are aware in which the independent review has not also been conducted along with constitutional claims for relief.

Moreover, under Arizona law, there is no other forum in which this review might take place. There is no analogous process for death sentences during post-conviction review. In post-conviction proceedings in capital cases, review in the Arizona Supreme Court is discretionary and, in practice, frequently concluded with a summary denial. Ariz. Rev. Stat. § 13-4239 (discussing process for petitioning for review); Ariz. R. Crim. P., Rule 32.9 (providing for review of decisions in post-conviction proceedings). Nothing akin to the review undertaken here occurs once, as a matter of state law, the conviction is final.

As a matter of state law and practice, the Arizona Supreme Court's independent review takes place during direct review and before the conviction is

final, and that court's language and actions here indicate it was undertaking the review that is part of the direct appeal process.

II. THE ARIZONA SUPREME COURT'S REFUSAL TO REVIEW PATENT CONSTITUTIONAL ERROR UNDERMINES THE RULE OF LAW.

Despite undertaking anew Petitioner's direct review, the Supreme Court of Arizona refused to consider and enforce the developments in constitutional law arising since the end of Petitioner's trial. The court below declined to address any constitutional questions in its 2018 decision in this case, and instead exclusively conducted independent review of the aggravating and mitigating evidence.

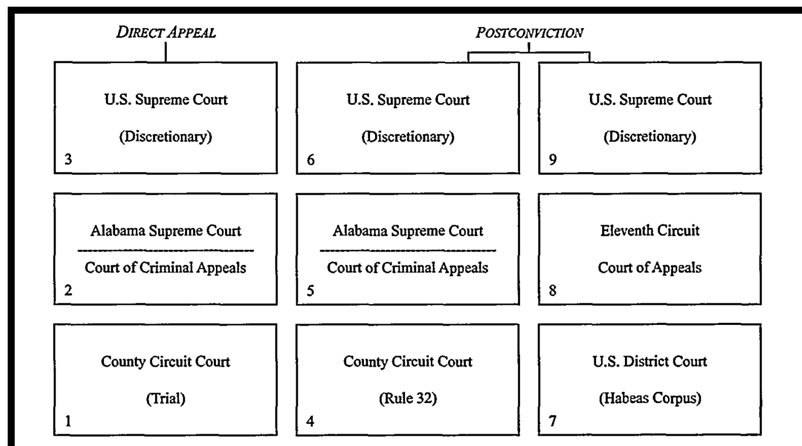
If the Arizona Supreme Court's practice is allowed to stand, the constitutional protections announced during the substantial period in which the causal nexus requirement was in place, 1989 to 2005, would be badly undermined. Beyond that, the basic structures governing retroactivity would be rendered dead letter in Arizona.

A. When the Court Below Reopened the Case to Independently Review the Evidence as Part of Direct Review, It Rendered the Case Again Non-Final.

Arizona has adopted the federal retroactivity standards regarding finality and to which cases a new rule of constitutional law applies. *State v. Slemmer*, 823 P.3d 41, 49 (Ariz. 1991). And regardless, that question is itself a question of federal law. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016) ("The Court's precedents addressing the nature of substantive rules, and their history of

retroactive application, establish that the Constitution requires substantive rules to have retroactive effect . . . ."); *see also United States v. Howard*, 115 F.3d 1151, 1158 (4th Cir. 1997) ("The finality of a conviction is a matter of federal, rather than state law.").

Under the federal standard, a court must impose extant constitutional law to non-final convictions. New rules of constitutional law apply to "all cases, state or federal, pending on direct review or not yet final." *Griffith*, 479 U.S. at 328. Students of habeas corpus law are often encouraged to think of the procedural posture of a case in terms of into which of "nine boxes" in a three by three figure the case falls:



Equal Justice Initiative of Alabama, Alabama Post-conviction Manual 22-23 (3d ed. 1998). Box 1 is the trial court. Box 2 is the state court of last resort on direct review. Box 3 is certiorari review at the end of direct review. Box 4 is post-conviction review in the state trial court. Box. 5 is review of that decision in the state court of last resort. Box 6 is certiorari review of state post-conviction proceedings. Box 7 is

federal habeas corpus review in U.S. District Court. Box 8 is review of federal habeas corpus proceedings in the federal Court of Appeals, and Box 9 is certiorari review of federal habeas corpus proceedings. Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. Rev. 699, 717 n.85 (2002); *see also* Randy Hertz & James Liebman, 1 Federal Habeas Corpus Practice and Procedure § 3.5a (7th ed.) (describing this process).

Persons with cases in Boxes 1, 2, and 3 receive the full range of constitutional protections. Those cases are not yet "final" as a matter of federal law. A conviction becomes final when direct review concludes.

Reopening a previously final case on direct review places the case back in Box 2, rendering it non-final. *See Jiminez v. Quarterman*, 555 U.S. 113, 120 (2009). At that stage, the conviction is "again capable of modification through direct appeal to the state courts and to this Court on certiorari review." *Id.* Once certiorari review or the time for seeking it concludes, the case again becomes final. *Id.* at 120-21.

When the Arizona Supreme Court reopened the case on direct review, it rendered the case again non-final.

B. Failing to Apply the Full Range of Constitutional Protections to the Non-Final Case Undermined the Rule of Law.

The "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Griffith*, 479 U.S. at 322. Put another way, "the integrity of judicial review requires that we apply

that [any new] rule to all similar cases pending on direct review." *Id.* at 322-23. This is the constitutionally mandate balance struck between principles of finality on the one hand and fairness in the administration of the rule of law on the other.

Allowing courts to circumvent these constitutional requirements upsets this balance and undermines the constitutional protections that must be applied in all non-final cases. This case highlights the problem well. Petitioner has sought to invoke his jury trial rights, the protections this Court announced in 2002 and reaffirmed in 2016. *See Ring*, 536 U.S. at 609; *Hurst*, 136 S. Ct. 624. The first of those decisions worked a fundamental change to the structure of capital sentencing in Arizona, ensuring a jury makes all findings necessary to render a defendant eligible for death. *Id.* Yet Petitioner will be unable to invoke those protections because the Arizona Supreme Court declined to acknowledge that Petitioner's conviction was no longer final.

Other constitutional protections with substantial bearing on the administration of capital punishment in Arizona risk being undermined if this sort of end-run is permitted to stand.

Just two years ago, this Court summarily reversed the Arizona Supreme Court's decades-long practice of declining to comply with the core holding of *Simmons v. South Carolina*, 512 U.S. 154 (1994). *See Lynch v. Arizona*, 136 S. Ct. 1818, 1818-19 (2016) (*per curiam*). Despite in 1994 having abolished parole eligibility for first-degree murder, Arizona courts consistently refused to permit evidence of a lack of future dangerousness or, after *Ring*, a jury instruction that the defendant would not be released if the jury did not return a death sentence. *Id.*

Another important change in the administration of capital punishment in Arizona relates to the bar on executing the intellectually disabled. *See Atkins v. Virginia*, 536 U.S. 304 (2002). Under Arizona's statutory scheme, capital defendants have long been ineligible for the death penalty. *See* Ariz. Rev. Stat. § 13-753(A). However, Arizona has not adopted protections that this Court has held are necessary to avoid an unnecessary risk of sending someone who is intellectually disabled to the death chamber.

That is, prior to *Hall v. Florida*, 572 U.S. 701 (2014), Arizona did not require courts to account for standard error of measure in assessing whether a capital defendant has significantly impaired intellectual function. *State v. Escalante-Orozco*, 386 P.3d 798, 811 (Ariz. 2017) *abrogated on other grounds State v. Escalante*, 425 P.3d 1078 (Ariz. 2018). And after *Moore v. Texas*, 137 S. Ct. 1039 (2017), Arizona is yet to disavow its insistence that when determining whether someone is intellectually disabled, scientifically unsupported criteria (such as an assessment of "adaptive strengths") are employed that are likely to reduce the accuracy of the determination. *Escalante-Orozco*, 386 P.3d at 812.

Nationwide, one of the most significant changes to the administration of capital punishment has been the quality of representation at sentencing. This Court's decision in *Wiggins v. Smith*, 539 U.S. 510 (2003) marked an important recognition of the role of defense counsel in performing mitigation investigation as a vanguard against excessive punishment. In *Wiggins*, the Court applied the rule announced in *Strickland v. Washington*, 466 U.S. 668 (1984), and for the first time concluded that trial counsel provided deficient performance in the penalty phase of a

capital sentencing proceeding and that performance prejudiced the defendant. *See Wiggins*, 539 U.S. at 534-36. Many scholars have concluded that the sea change in the quality of representation in capital sentencing is a primary driver of the large reduction in death sentences carried out as compared to only a couple decades ago. Death Penalty Information Center, *Executions by Year* (Mar. 1, 2019) *available at* https://deathpenaltyinfo.org/executions-year (reporting 98 executions 1999 as compared to 25 in 2018); Stephen Bright, *Counsel for the Poor: The Death Penalty not for the Worst Crime But for the Worst Lawyer*, 103 Yale L.J. 1835, 1836 (1994); Gregory J. Kuykendall, et al., *Mitigation Abroad: Preparing a Successful Case for Life for the Foreign National Client*, 36 Hofstra L. Rev. 989, 1000 (2000) (concluding "when the [highly qualified lawyers retained by the Mexican Capital Legal Assistance Program] is involved from the outset . . . the death sentencing rate for Mexican nationals accused of capital crimes is three to five times lower than for death-eligible cases in general.").

Provision of quality counsel has proven to be a particular challenge in Maricopa County, where Petitioner was tried. Christopher Dupont & Larry Hammond, *Capital Case Crisis in Maricopa County, Arizona: A Response from the Defense*, 95 Judicature 216, 218 (2012) (noting that because of charging practices defense counsel would often be required to carry six or more active capital trial cases). Even the most able defense attorneys have struggled to provide competent representation under these circumstances.

Petitioner has noted that the practice adopted here by the Supreme Court of Arizona has allowed

courts on direct review to side-step application of the seminal protections provided against racism in jury selection. Pet. 13, 25. Surely we would no longer countenance intentional discrimination in jury selection when given an opportunity to correct it on direct review.

The same should hold for each of these protections – jury sentencing in capital cases, provision of accurate information about parole and future dangerousness during sentencing, improved reliability in assessing claims of intellectual disability, and dramatic improvements in representation in capital cases – all would be undermined if this Court lets stand the procedure invoked by the lower court here.

This Court should grant review and reaffirm that a conviction is not final when the court as part of direct review is considering its legality. Doing so will ensure that courts apply contemporary constitutional norms when conducting direct review.

CONCLUSION

The Court should grant the petition for certiorari.

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