No. 18-1109

In the Supreme Court of the United States

JAMES ERIN MCKINNEY,

Petitioner,

v.

ARIZONA,

Respondent.

On Writ of Certiorari to the Supreme Court of Arizona

BRIEF OF *AMICI CURIAE* STATES OF UTAH, ALABAMA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, LOUISIANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, AND TENNESSEE SUPPORTING RESPONDENT

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INTEREST OF *AMICI CURIAE*

This Court's decisions in *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny establish rules for when a new "constitutional rule of criminal procedure applies" retroactively to a State case "on collateral review." *Beard v. Banks*, 542 U.S. 406, 411 (2004). The Court has meticulously honed that inquiry to ensure it protects "the States' interest in finality" of their criminal convictions and sentences. *Id.* at 413. Without that protection, collateral review would "*continually* force[] the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Id.* (internal quotation marks and citation omitted).

Amici States have strong interests in defending *Teague*'s framework from Petitioner's attempt to upend it. If adopted, Petitioner's new rule would exacerbate the significant incursions that federal habeas corpus works on the States' power to enforce their criminal judgments. And it will impose a substantial and heavy burden on the States to relitigate long-since final cases that faithfully applied then-existing law.

SUMMARY OF ARGUMENT

In 1993, an Arizona jury convicted James McKinney of two brutal murders. He was sentenced to death for each crime. At that time, Arizona law provided that a judge, not a jury, decided whether a defendant should be sentenced to death. *See* A.R.S. § 13-703 (1988). This

Court had repeatedly rejected constitutional challenges to that sentencing system.[1]

But nine years after McKinney was sentenced—and six years after his sentence became final—this Court reversed course. It held for the first time that a jury must make the findings necessary to qualify a person for punishment by death. *Ring v. Arizona*, 536 U.S. 584 (2002).[2] This Court later confirmed, however, that *Ring*'s new procedural rule does not apply retroactively to cases—like McKinney's—already final when *Ring* issued. *Schriro v. Summerlin*, 542 U.S. 348 (2004).

McKinney nevertheless wants a new sentencing hearing under *Ring*. *Summerlin* tells him that he cannot get one directly. So he now claims to have discovered a path around *Summerlin*'s barrier.

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[1] *See e.g.*, *Walton v. Arizona*, 497 U.S. 639, 649 (1990) (plurality) ("We thus conclude that the Arizona capital sentencing scheme does not violate the Sixth Amendment."), *overruled by Ring v. Arizona*, 536 U.S. 584 (2002); *Clemons v. Mississippi*, 494 U.S. 738, 745 (1990) ("Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court."); *Hildwin v. Florida*, 490 U.S. 638, 640-641 (1989) (per curiam) ("[T]he Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury."), *overruled by Hurst v. Florida*, 136 S. Ct. 616 (2016).

[2] This Court has never held that the jury must be the one to impose a capital sentence, only that the jury must find each fact necessary to make a person eligible for a sentence of death. *See Ring*, 536 U.S. at 589; *Hurst*, 136 S. Ct. at 619.

This alleged newfound path to *Ring* arises from a Ninth Circuit order granting him conditional habeas relief on a sentencing error unrelated to *Ring*. Arizona responded to that order by asking the Arizona Supreme Court to fix the unrelated error. When the Arizona court did so, McKinney claims, the court "reopened" direct review, transforming his twenty-year-final case into a non-final one.

According to McKinney, that removes his case from *Summerlin*'s retroactivity bar. After all, *Summerlin* applies only to cases on collateral review. And since his case is now allegedly on direct review, *Ring* applies—as does *every new constitutional rule* announced in the 23 years since he was sentenced.

McKinney's argument can be succinctly stated as this syllogism:

- New rules (like *Ring*) apply to cases on direct review.
- His case is again on direct review because the Arizona Supreme Court's actions after the Ninth Circuit's conditional grant of habeas relief reopened his twenty-year-final judgment.
- Therefore, *Ring*'s new rule applies to his case.

See Pet'r Br. 19-20.

The minor premise in McKinney's syllogism is invalid. So his conclusion is invalid too. The Arizona Supreme Court did not reopen his case—or transform his final sentence into a non-final one—by correcting a non-*Ring* error. Concluding otherwise would gut *Teague*'s finality framework, which protects the States'

criminal judgments from unwarranted federal intrusion. It would make those judgments perpetually subject to reopening: Every conditional habeas grant would force States to relitigate convictions under *every new procedural rule* decided since the original conviction became final. McKinney leaves no doubt that he wants *every* new rule to apply—regardless of whether it relates to the error that gave rise to the conditional habeas grant. Pet'r Br. 29 n.4.

If that is correct, this Court will have wasted untold time and effort constructing its *Teague* retroactivity regime. The distinctions between retroactivity rules for direct review and for collateral review will vanish whenever a state court chooses to correct a constitutional error identified in a conditional federal habeas order. Finality will no longer depend on whether a defendant's time for seeking state and federal appellate review has expired; it will depend on whether a federal court finds errors it can conditionally instruct a state court to correct. So much for "*Teague*'s nonretroactivity principle act[ing] as a limitation on the power of federal courts to grant habeas corpus relief to state prisoners," *Banks*, 542 U.S. at 412 (cleaned up), and for "the *Teague* principle protect[ing] . . . the States' interest in finality quite apart from their courts," *id.* at 413.

ARGUMENT

I. The Arizona Supreme Court never reopened McKinney's final sentence, meaning *Ring* does not apply retroactively to his case.

A. "Finality is variously defined; like many legal terms, its precise meaning depends on context." *Clay v. United States*, 537 U.S. 522, 527 (2003). Here, the relevant context is finality "'for purposes of retroactivity analysis.'" *Beard v. Banks*, 542 U.S. 406, 411 (2004) (quoting *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994)). "State convictions are final" for those purposes "'when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.'" *Id.* at 411 (quoting *Caspari*, 510 U.S. at 390).

There is no dispute that McKinney's sentence satisfies each part of that finality standard. McKinney himself concedes that his "conviction became final in 1996, when the time expired to seek certiorari from the Arizona Supreme Court's first review of his conviction." Pet'r Br. 22. And *Ring* does not fall into the class of rare cases that applies retroactively to final state judgments. *Schriro v. Summerlin*, 542 U.S. 348 (2004). These normal retroactivity rules foreclose McKinney's efforts to be resentenced under *Ring*.

B. Even so, McKinney asks the Court to chart a new route around those usual rules. He contends that *Teague*'s retroactivity bar no longer applies to him because the Arizona Supreme Court "reopened [his] criminal case, and [his] conviction became non-final,"

when that court corrected a non-*Ring* error in his sentencing process that the Ninth Circuit identified. Pet'r Br. 23-24.

McKinney's attempt to evade *Summerlin* conflicts with settled finality and retroactivity principles and should be rejected. Nothing the Arizona Supreme Court did in response to the Ninth Circuit's order reopened McKinney's sentence, which became final in 1996 and remains so today.

McKinney's contrary arguments rely principally on *Jimenez v. Quarterman*, 555 U.S. 113 (2009). *See* Pet'r Br. 21-24. *Jimenez* does not do the work McKinney attributes to it.

1. As an initial matter, because finality's "precise meaning depends on context," *Jimenez*, 555 U.S. at 119, *Jimenez*'s specific analytical inquiry makes it inapposite here. The relevant finality context in this case is "final[ity] '*for purposes of retroactivity analysis*.'" *Banks*, 542 U.S. at 411 (quoting *Caspari*, 510 U.S. at 390) (emphasis added). *Jimenez*, in contrast, examined finality in the context of AEDPA's statute of limitations. *See* 555 U.S. at 121 (holding that "where a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review, but before the defendant has first sought federal habeas relief, his judgment is not yet 'final' for purposes of [AEDPA's statute of limitations in] § 2244(d)(1)(A)").

Unlike McKinney, federal courts recognize this distinction's importance. The Eighth Circuit, for instance, observed that "[b]ecause *Jimenez* concerned

the definition of finality in the context of AEDPA's statute of limitations, it would not necessarily affect our review of the [state] supreme court decision . . . which concerned finality for purposes of determining retroactivity." *Losh v. Fabian*, 592 F.3d 820, 825 (8th Cir. 2010). That distinction alone makes McKinney's reliance on *Jimenez* unfruitful.

2. Even if *Jimenez* could shed light on finality in this distinct retroactivity context, it does not support McKinney's proffered conclusion.

a. *Jimenez* held only that "where a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review, but before the defendant has first sought federal habeas relief, his judgment is not *yet* 'final' for purposes of § 2244(d)(1)(A)." 555 U.S. at 121 (emphasis added). In other words, because of the Texas Criminal Court of Appeals' order, Jimenez's case had *never* been final for AEDPA purposes because direct review had not yet concluded. *Id*. at 119 (explaining that "direct review cannot conclude for purposes of § 2244(d)(1)(A) until the 'availability of direct appeal to the states courts' . . . has been exhausted"). In fact, to emphasize *Jimenez*'s "narrow" scope, *id.* at 121, the Court specifically warned against stretching *Jimenez* outside that specific context: "the possibility that a state court may reopen direct review 'does not render convictions and sentences that are *no longer subject to direct review nonfinal*,'" *id*. at 120 n.4 (quoting *Banks*, 542 U.S. at 412) (emphasis added).

McKinney's case differs from *Jimenez* in every material respect. Jimenez's case had "not yet [become]

'final,'" *id.* at 121, because the Texas Court of Criminal Appeals "granted [him] the right to file an out-of-time appeal," *id.* at 117. In contrast, McKinney's case "became final in 1996," Pet'r Br. 22—nearly 20 years before the Arizona Supreme Court responded to the Ninth Circuit's order—and the Arizona Supreme Court never granted McKinney the right to file an out-of-time direct appeal. Rather, the Arizona court's 2016 proceedings corrected (at the State's request) an identified constitutional violation in the process used to reach the still-final sentence. *McKinney*, 426 P.3d at 1205-06.

Those distinctions explain why the Texas Court of Criminal Appeals affirmatively "reopened direct review of" Jimenez's "conviction," 555 U.S. at 120, but why the Arizona Supreme Court did not: Arizona law defines the specific proceedings below as collateral ones, not as direct review. *State v. Styers*, 254 P.3d 1132, 1133-34 & n.1 (Ariz. 2011); *State v. Hedlund*, 431 P.3d 181, 184-85 (Ariz. 2018).

Given those distinctions, McKinney's attempt to draw support from *Jimenez* actually turns *Jimenez* on its head. *Jimenez* establishes a straightforward rule: when a State court action or order reopens under State law what would otherwise be a final conviction, federal courts may conclude that the State conviction is not final. The proper corollary is not the one McKinney presses here—that whenever a State court takes *any* action on a final conviction, it *necessarily* reopens that conviction. Instead, the proper corollary is that when a State court acts or enters an order with respect to a final conviction in a way that State law defines as

collateral to the final conviction, federal courts may conclude that the conviction remains final. In short, "a state court *may* reopen direct review," *Jimenez*, 555 U.S. at 120 n.4 (emphasis added), or it may *not*; and to decide whether it has, federal courts look to the State court's view of whether the State act reopens a final conviction under State law.

That conclusion is the only one true to *Jimenez*'s warning "that the possibility that a state court may reopen direct review 'does not render convictions and sentences that are no longer subject to direct review nonfinal.'" 555 U.S. at 120 n.4 (quoting *Banks*, 542 U.S. at 412). Jimenez's conviction became nonfinal only because the Texas court allowed him to reinstate a right to appeal that he had not timely exercised.

But the Arizona court did not reinstate an unexercised right to direct review. Instead, it used collateral proceedings to correct a non-*Ring* constitutional violation in his sentencing process. McKinney's judgment thus remained final.

That much follows from *Banks* itself. *Banks* rejected a postconviction capital petitioner's request to vary from "conventional notions of finality"—and apply a new rule retroactively on collateral review—because the State court had previously applied a "unique relaxed waiver rule." 542 U.S. at 411 (internal quotation marks omitted). In hewing to traditional retroactivity rules, the Court said a State court's "past discretionary practice of declining to apply ordinary waiver principles in capital cases does not render convictions and sentences that are no longer subject to direct review nonfinal for *Teague* purposes." *Id.* at 412

(cleaned up). What is more, the State high court had "expressly stated, in a capital case, that it would decline to apply" the new rule "retroactively." *Id.*

In short, *Banks* confirms that federal courts look to state law when deciding whether to vary from *Teague*'s retroactivity framework. And here, Arizona law as interpreted by the Arizona Supreme Court confirms that the proceedings correcting the non-*Ring* sentencing error did not reopen McKinney's sentence. *Banks* gives this Court no warrant to disregard that conclusion.

b. Circuit court precedent confirms that reading of *Jimenez* and *Banks*. For example, the Ninth Circuit refused to second-guess Arizona's independent review of another capital case remanded to the State for correction of non-*Ring* sentencing error. *Styers v. Ryan*, 811 F.3d 292 (9th Cir. 2015). In *Styers*, like here, Arizona denied the defendant's motion for resentencing by a jury under *Ring* because the defendant's sentence was final. *Id.* at 298. Noting that "the conditional writ of habeas corpus in this case did not vacate Styers's death sentence," the Ninth Circuit held that "the question whether an independent review under A.R.S. § 13-755 is limited to direct review is a question of statutory interpretation of an Arizona statute." *Id.* at 297 n.5. And because "that question was determined by Arizona's highest court," the Ninth Circuit refused to disturb it, explaining, "[w]e are constrained to defer to the highest state court on a matter of state law and may not construe A.R.S. § 13-755 differently than did the Arizona State Court." *Id.* (citing *Johnson v. Fankell*, 520 U.S. 911, 916 (1997)).

Similarly, the Eighth Circuit has held that Minnesota's determination that a defendant's case was final—and thus that a new rule did not apply retroactively to him—was not contrary to or an unreasonable application of clearly established federal law. *See Losh*, 592 F.3d at 824. In so holding, the Eighth Circuit emphasized that "Minnesota's highest court is plainly competent to determine that a type of appellate review under its own law is not direct." *Id.*

3. Declining to adopt McKinney's new rule also comports with this Court's well-established precedent about the States' sovereign power over their own criminal-justice systems. The Court long ago declared, and has frequently affirmed, that the Constitution "has never been thought" to "establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure." *Spencer v. Texas*, 385 U.S. 554, 564 (1967); *see also Kansas v. Ventris*, 556 U.S. 586, 594 n.* (2009); *Smith v. Robbins*, 528 U.S. 259, 274 (2000). Rather, the States have "historical dominion" over "the development of their penal systems," including their rules of criminal procedure. *Oregon v. Ice*, 555 U.S. 160, 170 (2009).

A State's control over the content and effect of its criminal processes extends fully to State appellate or post-conviction procedures. After all, "there is no federal constitutional right to state appellate review of state criminal convictions." *Estelle v. Dorrough*, 420 U.S. 534, 536 (1975). Whether a defendant can invoke a state appellate process—and what that process entails—constitute paradigmatic state-law questions. So too for questions about State post-conviction review

processes, since States likewise "have no obligation to provide this avenue of relief." *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987).

Given the States' historical primacy and reserved sovereignty in these areas, it would be passing strange to read *Jimenez* as giving federal courts the final say on how state processes and procedures that are not constitutionally required—but exist under state law merely as a matter of state legislative policy—affect the finality of state convictions. McKinney cites no authority giving *Jimenez* that astonishing and unprecedented breadth, which even *Jimenez* itself cautions against.

4. To the extent McKinney relies on other "state and federal courts" (Pet'r Br. 24-26) to support his proffered *Teague* work-around, he similarly misreads those cases. *Griffith v. Kentucky*, 479 U.S. 314, 318 (1987); *Burrell v. United States*, 467 F.3d 160 (2d Cir. 2006); and *State v. Kilgore*, 172 P.3d 373 (Wash. App. 2007), all were cases on direct review. And *United States v. Hadden*, 475 F.3d 652 (4th Cir. 2007), concerned a federal prisoner in federal custody and the court of appeals applied federal law, not retroactivity analysis, to determine it had jurisdiction to consider Hadden's appeal. *Id.* at 662-66. None of these cases addressed whether a state court's processes after federal collateral review reopened state direct review for purposes of retroactivity analysis.

II. Adopting McKinney's proposed rule would work a sea change in retroactivity and finality law far outside the context of *Ring* resentencing in capital cases.

If the departure McKinney's proposed rule would mark from existing finality and retroactivity law is not reason enough to reject it, the sweeping consequences it would impose on State criminal justice systems and sovereign interests further justify rejecting it. In McKinney's own words, he thinks his new rule "entitle[s]" him "to the benefit" not just of *Ring*, but also "of new rules of federal law announced in other cases, and he is entitled to seek a new rule of law in his case." Pet'r Br. 29 n.4. Consider the scope of that suggestion.

A. The full extent of the harms attendant to McKinney's proposal might be best understood in the context of *Teague*'s carefully constructed retroactivity framework. Under *Teague*, new constitutional rules of criminal procedure "appl[y] to all criminal cases still pending on direct review." *Summerlin*, 542 U.S. at 351 (quoting *Griffith*, 479 U.S. at 328). But such new rules apply to cases on collateral review "only in limited circumstances" because new rules of criminal procedure have only a "speculative connection to innocence." *Summerlin*, 542 U.S. at 351-52 (quotation marks and citation omitted) (explaining that "only a small set of 'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding" apply retroactively).

That distinction between retroactivity rules for cases on direct review and for cases on collateral review

respects the proceedings' differing purposes. Collateral review is fundamentally different from direct review. *Keith v. Mitchell*, 455 F.3d 662, 675 (6th Cir. 2006). It is "'not designed as a substitute for direct review.'" *Teague*, 489 U.S. at 306 (quoting *Mackey v. United States*, 401 U.S. 667, 682 (1971) (Harlan, J., concurring in part and dissenting in part)). Rather, it acts only as a "guard against *extreme* malfunctions." *Harrington v. Richter*, 562 U.S. 86, 102-103 (2011) (emphasis added).

And extreme malfunctions almost never occur when the State obtains a "conviction free from federal constitutional error at the time it became final." *Mackey*, 401 U.S. at 693-94. Those cases typically "will be found, upon reflection, to have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing." *Id.*

B. *Teague*'s rules are manifestations of a broader "nonretroactivity principle" that "acts as a limitation on the power of federal courts to grant 'habeas corpus relief to state prisoners.'" *Banks*, 542 U.S. at 412 (quoting *Caspari*, 510 U.S. at 389) (cleaned up). This nonretroactivity "principle protects" more than just "the reasonable judgments of state courts." *Id.* at 413. It represents "also the States' interest in finality quite apart from their courts." *Id.*

That interest explains why retroactively applying new constitutional rules "understandably" frustrates State courts, who "faithfully applied existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands." *Engle v. Isaac*, 456 U.S. 107, 128 n.33 (1982). Retroactively applying new rules "seriously

undermines the principle of finality which is essential to the operation of our criminal justice system" because "it *continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Teague*, 489 U.S. at 309-10 (emphasis in original). Indeed, "no one" benefits from a system that allows "'that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.'" *Id*. at 309 (quoting *Mackey*, 401 U.S. at 691 (Harlan, J., concurring in judgments in part and dissenting in part)).

McKinney's new rule all but obliterates these long-recognized legitimate State interests. He wants "the benefit of new rules of federal law announced" in *every* case since his conviction became final more than two decades ago—even those entirely unrelated to an error in his sentencing process. Pet'r Br. 29 n.4. Those demands simply cannot be squared with this Court's conclusion that the "'interest in leaving concluded litigation in a state of repose'" in most instances outweighs "'the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed.'" *Teague*, 489 U.S. at 306 (quoting *Mackey*, 401 U.S. at 682 (Harlan, J., concurring in part and dissenting in part)).

C. If the Court adopts McKinney's new rule, the costs to the States' legitimate interests would increase exponentially. Those include monetary costs to retry or resentence cases, emotional costs on victims and witnesses, and political costs as the public sours toward

a criminal justice system that never reaches finality. And because it can take a decade or more from a state conviction to a decision on federal collateral review, the chances that a reliable adjudication can again be obtained would be diminished due to the "'erosion of memory' and 'dispersion of witnesses' that occur with the passage of time." *Kuhlmann v. Wilson*, 477 U.S. 436, 453 (1986). That does not even begin to account for the heavy burden McKinney's new rule places on scarce judicial resources, including the threat to the system's capacity to resolve primary disputes.

And cost is not the only value that McKinney's revamped finality rules would violate. The Court's existing finality rules honor the States' "sovereign power to punish offenders." *Isaac*, 456 U.S. at 108. Excessively relaxed finality rules—like those McKinney presses here—improperly intrude on that power by leaving criminals' sentences in a constant state of flux, subject to relitigation under each new criminal procedural rule whenever a state court chooses to fix a constitutional violation in the criminal process after direct review has ended.

Those consequences would not be confined just to capital cases. For example, Utah trial courts must "correct" a defendant's sentence when it, among other things, exceeds the statutory maximum or omits a condition required by statute. *See* Utah R. Crim. P. 22(e)(1). A defendant can file a motion to correct a sentence under this rule at any time, even long after direct and collateral review have concluded. *Id.* 22(e)(3). The trial court is not bound by any certain procedure to correct the error. *Id.* 22(e)(2). But if

"correcting" a sentence under this rule were to mean that the court "reopened" direct review, then trial courts also would be compelled to employ the panoply of new criminal rules arising after the defendant was sentenced, and that may not even relate to the error.

Likewise, in Indiana, because there is no time limit on filing a state post-conviction petition, if petitioners were to obtain a conditional federal habeas order, "they would be able to retroactively revive previously time-barred federal habeas claims." *Turner v. Brown*, 845 F.3d 294, 298 at * (8th Cir. 2017) (holding that state's post-conviction correction of sentence for robbery did not reopen review for murder conviction).

In short, applying constitutional rules that did not exist at the time a conviction became final frustrates the States' "sovereign power to punish offenders." *Isaac*, 456 U.S. at 108. And it "seriously undermines the principle of finality which is essential to the operation of our criminal justice system" because "it *continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Teague*, 489 U.S. at 309-10.

CONCLUSION

The Court should affirm the judgment of the Arizona Supreme Court.

Respectfully submitted.

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