October Term 2020
No. 20-7988

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT POYSON,
Petitioner,

vs.

STATE OF ARIZONA,
Respondent.

On Petition for Writ of Certiorari to the
Arizona Supreme Court

CAPITAL CASE
REPLY BRIEF OF PETITIONER

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July 26, 2021

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I. THE DECISION BELOW CONTRADICTS THE DECISIONS OF THIS COURT

In its Brief in Opposition, Arizona fails to address the relevant question presented—whether the *individualized* capital sentencing requirement guaranteed by the Eight Amendment is violated when a State, whether by statute or judicial pronouncement, *predetermines* that non-causally connected mitigation is never entitled to more than minimal weight.

While a sentencer is free to give substantial weight or minimal weight to proffered mitigation in a particular case, as part of its individualized consideration of a defendant's character and record, *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982), the sentencer, including an appellate court on review, may not predetermine or prejudge the weight to be accorded mitigating evidence. Nor may the sentencer assign essentially no weight to mitigation, as the Arizona Supreme Court did in Mr. Poyson's case and as has been that court's practice in independent review cases since it began following *Tennard v. Dretke*, 542 U.S. 274 (2004). Arizona argues "there is no mandate on the weight to be assigned by the capital sentencer; or by a reviewing court during reweighting on collateral review, as happened here." Brief in Opposition (BIO) at 5 (citing *McKinney v. Arizona*, 140 S. Ct. 702 (2020); *Clemons v. Mississippi*, 494 U.S. 738, 741 (1990)). This Court, however, has set a floor, below which a sentencing court may not constitutionally discount mitigation. *E.g. Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *McKoy v. North Carolina*, 494 U.S. 433 (1990).

Next, Arizona relies on *Kansas v. Marsh*, 548 U.S. 163 (2006) for the proposition that the Arizona Supreme Court's independent review passes constitutional muster. *Marsh*, however, does not hold that the sentencer and reviewing court is free to ignore decisions of this Court and predetermine that non-causally connected mitigation receives so little weight as to be insigifnicant to the snetnecing decision. Arizona also asserts, incorrectly, that the Arizona Supreme Court's independent review of Mr. Poyson's death sentence was "approved" of by this Court in the *McKinney* opinion. This overstates this Court's holding in *McKinney*, which this Court identified as "narrow." 140 S. Ct. at 706. *McKinney* simply holds that Arizona may conduct a reweighing of mitigating and aggravating factors in collateral proceedings. *Id*. at 709. Nothing in the *McKinney* opinion suggests that the Arizona Supreme Court's long-term practice of assigning no weight to mitigation unless it is causally connected to the crime is constitutional.

To the extent that Respondent argues the Arizona Supreme Court is free to assign virtually no weight to Mr. Poyson's mitigating evidence, BIO at 6, Respondent is incorrect. While the *Styers* opinion from the Ninth Circuit affirms the sentencer's discretion to assign "little weight" to mitigation, Mr. Poyson has demonstrated that the Arizona Supreme Court's practice is not to assign little weight, but instead to fail to give "meaningful consideration" to all mitigation that is not causally connected to the crime. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007).

Arizona's statement that the Arizona Supreme Court "conducted a thorough review" of Mr. Poyson's mitigation is belied by the record. The Arizona Supreme Court treated Mr. Poyson's mitigation the way it does in every case in which an independent review is required since *Tennard*—the court identified the mitigation, found it was proven, and then disregarded the mitigation as meaningless because there was no nexus to the crime. Despite the bright line standards this Court has established, Arizona has continued to evade them. Post-*Tennard*, Arizona substituted its outright refusal to consider mitigation unless it had a nexus to the crime, to a systematic predetermination that certain categories of mitigation, for instance, child abuse and mental illness, are to be afforded insubstantial weight, unless the mitigation was a cause in fact of the capital offense. *See State v. Prince*, 250 P.3d 1145, 1170–71 (Ariz. 2011) (although Prince's childhood was affected by severe poverty and undisputed ongoing sexual abuse and molestation, the mitigation would be given little weight because of a lack of evidence between childhood trauma and the murder); *State v. Pandeli*, 161 P.3d 557, 575 (2007) "Pandeli's difficult childhood and extensive sexual abuse, while compelling, are not causally connected to the crime" and therefore the evidence is not significant); *State v. Garcia*, 226 P.3d 370, 391 (Ariz. 2010) (although Garcia's father was a heroin dealer who used drugs and shot up in front of his children, his father was often drunk and terrorized his family, once hanging Garcia on a hook and stabbing him with a screw driver and the father left Garcia and the family without food and hungry, the mitigation would be given "little weight absent a showing that it

affected the defendant's conduct in committing the crime"); *State v. Armstrong*, 189 P.3d 378, 392 (Ariz. 2008) (mental health evidence afforded "little mitigating weight")

The Arizona Supreme Court's decision in *State v. Hedlund*, 431 P.3d 181, 187–88 (Ariz. 2018) demonstrates the extent to which the *predetermination* of the weight to be accorded mitigation evidence is unwaveringly applied. Like Poyson, the severe trauma endured by Hedlund was of immense proportions.

> When he lived with his biological mother and stepfather, McKinney Sr., until the age of six or seven, he and his siblings were subjected to extreme neglect. They ate only if they were able to get food themselves, and, when they did, it was often moldy and rotten. They were rarely clothed and, when they were, it was in "filth-encrusted clothes." They lived and slept surrounded by animal feces and urine. Hedlund's mother "would stack used [feminine hygiene products] around rooms in the house" and never cleaned the children's diapers.
>
> The children were not allowed to have food unless approved by their stepmother and were beaten if they ate or drank without her permission. She also frequently locked them out of the house, typically without adequate clothing and with no food or water for hours at a time and in temperatures upward of 100 degrees.
>
> Their stepmother, often with the help of her daughter, beat the children daily with objects ranging from "belts with steel prongs" to "wire hangers" and cooking pans. In one incident, McKinney Sr.'s dog attacked Hedlund, resulting in over 200 stitches to his face. The next morning, his stepmother woke Hedlund and beat him for an hour "because it cost[ ] her money to take him to the hospital."
>
> During one instance, their stepmother grabbed McKinney by the wrist, lifted him into the air, and began beating him with a piece of garden hose. Hedlund "jumped on her arm and was begging her, 'Momma, stop it. Momma, stop it.' " The stepmother flung Hedlund onto the sidewalk, where he hit the back of his head, and then hit him across the face with the hose. Not only did he protect, or try to protect, his siblings from his stepmother's abuse, he also tried to protect his sisters from McKinney, who would often hit them with boards, shovels, and rakes.

> Dr. Holler explained that Hedlund's childhood abuse caused lasting neuropsychological impairments, as reflected, in part, by a disparity in his IQ scores. Hedlund's verbal IQ—associated with the left side of the brain—was 91, but his performance IQ—associated with the right side—was 78. The low performance IQ is indicative of difficulty "using good judgment and avoiding getting [oneself] into severe difficulties."

Id., at 191–92 (Vasquez, J., dissenting). Despite Hedlund's horrific childhood and cognitive impairments, the Arizona Supreme Court applied its predetermined categorical measure of the evidence and gave it "little weight." *Id.*, at 187.

Likewise, in Mr. Poyson's case, the Arizona Supreme Court discounted, to the point of irrelevance, substantial mitigation, not because of its *individualized* consideration of that mitigation in this case, but because its own jurisprudence ties the mitigating weight of such evidence to "the age of the defendant at the time of the murder and the causal connection between the abuse and the crime committed." Pet.App. 10a (citing *Prince*, 226 Ariz. at 541). The court's prejudgment of the weight of Mr. Poyson's mitigation does not satisfy the Eighth Amendment.

II. THE ARIZONA SUPREME COURT'S FAILURE TO INDEPENDENTLY CONSIDER THE AGGRAVATION CONFLICTS WITH DECISIONS OF THIS COURT

Arizona argues that the lower court "conducted an exhaustive second independent review, consistent with" this Court's decisions in *Clemons v. Mississippi*, 494 U.S. 738 (1989) and *McKinney*. The petitioner in the recent *McKinney* decision, however, was in a significantly different posture than Mr. Poyson. In the *McKinney* independent review, the Arizona Supreme Court *did* independently review the aggravators, consistent with its obligation under A.R.S. § 13-755(A). *State v. McKinney*, 426 P.3d 1204, 1206 ("In conducting our independent

review in pre-*Ring* cases like this, we examine 'the trial court's findings *of aggravation* and mitigation and the propriety of the death sentence'…") (quoting A.R.S. §13-755(A)) (emphasis added); *Id.* ("There is no reasonable doubt as to the aggravating circumstances found by the trial court regarding Mertens' murder.") That this Court approved of the independent review procedure in Mr. McKinney's case has no bearing on the question presented here. In Mr. Poyson's case, and in the *Hedlund* case before his, the Arizona Supreme Court refused to determine whether the aggravators were supported by the record. Pet.App. 4a; *Hedlund*, 431 P.3d at 184 ("[O]ur review is limited to considering the mitigating factors without the causal nexus requirement and reweighing them against the established aggravator.")

The independent review procedure examined by this Court in *McKinney* complied with Arizona's statutory scheme. Without explanation, that procedure was abandoned in the *Hedlund* case and in Mr. Poyson's case. The only distinction between those opinions is the author—Justice Gould wrote the Court's opinion in *McKinney*, while Justice Bolick drafted the opinion in Mr. Poyson's case and the majority opinion in *Hedlund*. The decision in this case conflicted with *Clemons* and *McKinney*.

III. CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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