

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**

—◆—
**AMICUS CURIAE BRIEF OF THE
CAPITAL PUNISHMENT CENTER OF
THE UNIVERSITY OF TEXAS SCHOOL OF
LAW IN SUPPORT OF THE PETITIONER**

—◆—
JORDAN M. STEIKER*
JIM MARCUS
THEA POSEL
RAOUL D. SCHONEMANN
CAPITAL PUNISHMENT CENTER
UNIVERSITY OF TEXAS
SCHOOL OF LAW
727 East Dean Keeton Street
Austin, TX 78705
(512) 232-1346
JSteiker@law.utexas.edu
JMarcus@law.utexas.edu
TPosel@law.utexas.edu
RSchonemann@law.utexas.edu

Attorneys for Amicus Curiae

**Counsel of Record*

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INTEREST OF *AMICUS CURIAE*¹

This *amicus curiae* brief is submitted by the Capital Punishment Center at the University of Texas at Austin School of Law (“the Center”). The Center sponsors academic events, pursues research projects concerning the administration of the death penalty, particularly in Texas, and houses the Capital Punishment Clinic, which provides direct representation and assistance to indigent prisoners on Texas’s death row. Faculty within the Center teach courses on capital punishment law, capital defense representation, capital trial preparation, and mitigation investigation.

The Center’s concern in this case stems from its strong commitment to the presentation and consideration of mitigating evidence in capital cases. Texas has had more than its share of difficulties in this area. The Texas capital statute enacted post-*Furman v. Georgia*, 408 U.S. 238 (1972), failed to facilitate juror consideration of many types of mitigating evidence, especially evidence unlikely to diminish a defendant’s future dangerousness, such as evidence of a difficult background or of psychiatric or intellectual impairment. Thirty years ago, in *Penry v. Lynaugh*, 492 U.S. 302 (1989), this Court recognized the inadequacy of the

¹ No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Both parties have granted blanket consent to the filing of *amicus* briefs in support of either or neither party.

Texas statute as applied to a death-sentenced inmate who had presented evidence of his intellectual disability and abusive upbringing. Despite this Court's intervention, only a few death-sentenced inmates with virtually identical claims under *Penry* were afforded relief in the ensuing years. The United States Court of Appeals for the Fifth Circuit ("Fifth Circuit"), like the Arizona Supreme Court in this litigation, steadfastly imposed a threshold "nexus" test of constitutional relevance: unless an inmate could show that his criminal act was "attributable" to his mitigating evidence, the Fifth Circuit regarded such evidence as not constitutionally mitigating (and hence as not an adequate predicate for relief under *Penry*).

Our Clinic represented many death-sentenced inmates with *Penry* claims in state and federal court, including five cases in this Court: *Tennard v. Dretke*, 542 U.S. 274 (2004); *Smith v. Texas*, 543 U.S. 37 (2004) (*Smith I*); *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Brewer v. Quarterman*, 550 U.S. 286 (2007); and *Smith v. Texas*, 550 U.S. 297 (2007) (*Smith II*). In *Tennard*, this Court emphatically rejected the Fifth Circuit's nexus test as having "no basis in our precedents." 542 U.S. at 287. This Court explained that a state cannot bar or limit the consideration of mitigating evidence simply because the defendant cannot establish a clear causal link between the evidence and the crime. *Id.* at 285. Accordingly, this Court reversed the Fifth Circuit's conclusion that Tennard's evidence of intellectual limitations was constitutionally irrelevant because he had not proven that his crime was attributable to

his intellectual impairment. On remand to the Fifth Circuit, that court concluded, in line with *Penry*, that the jury had been unable to give effect to Tennard’s evidence of intellectual impairment. Accordingly, the case was returned to the state trial court for resentencing, and Tennard and the Harris County District Attorney’s Office subsequently agreed that Tennard would serve a life sentence.

We are concerned that the Arizona Supreme Court’s disposition of this case and similar cases – if allowed to stand – will deny Arizona death-sentenced inmates their right to meaningful consideration of mitigating evidence supporting a sentence less than death. For over a decade, the right to individualized sentencing in Texas was underenforced – until this Court’s decisions in *Tennard*, *Smith I*, *Abdul-Kabir*, *Brewer*, and *Smith II* insisted upon its protection – and we offer this brief to avoid a similar course in Arizona.



SUMMARY OF ARGUMENT

This case presents two questions: first, whether the independent review conducted by the Arizona Supreme Court following the decision by the United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”) is properly viewed as part of the direct review of McKinney’s sentence and hence subject to the full enforcement of prevailing constitutional norms, including the right to jury factfinding encompassed in *Ring v. Arizona*, 536 U.S. 584 (2002); and, second, whether

an appellate court can correct the sentencer's failure to consider and give effect to McKinney's substantial mitigating evidence of his abused background and subsequent post-traumatic stress disorder ("PTSD"). Our brief focuses on the latter question. The Arizona Supreme Court's decision to conduct its own independent review of McKinney's sentence, rather than to remand for a new sentencing proceeding, is inconsistent with this Court's longstanding approach to curing violations of the right to individualized sentencing. An appellate court is not capable of giving full and meaningful effect to McKinney's mitigating evidence by reviewing the testimony in the trial court record. Moreover, that record itself was shaped and infected by the Arizona Supreme Court's "nexus" requirement, which independently necessitates a new sentencing proceeding. Finally, as it undertook its independent review, the Arizona Supreme Court inappropriately discounted the mitigating significance of McKinney's PTSD based on a perceived lack of nexus to his crime, reproducing the same error that the Ninth Circuit appropriately sought to correct.

Given that McKinney is plainly entitled to a resentencing in the trial court under this Court's decisions, the clearest path to resolving this case is to remand for resentencing. The Court need not decide whether the proceedings in the Arizona Supreme Court were part of the direct review process (triggering full application of prevailing constitutional norms) because Arizona law mandates a jury for capital resentencing and, in any case, the State cannot plausibly

claim that a trial resentencing proceeding is outside of the direct review process.

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ARGUMENT

Resentencing In A Trial Court Is The Sole Appropriate Remedy When A Sentencer Was Precluded At Trial From Giving Meaningful Consideration To A Capital Defendant’s Significant Mitigating Evidence.

At trial, McKinney presented extensive evidence of his abuse as a child and resulting PTSD. McKinney was regularly beaten with switches, cords, and belts and witnessed his siblings being beaten as well. Pet. App. 22a–23a. He was also subjected to emotional abuse, and he and his siblings were frequently locked out of the house without food and sometimes water, despite temperatures well over 100 degrees. *Id.* at 23a. A defense psychologist at trial testified that McKinney’s abuse, as well as his witnessing the abuse of his siblings, contributed to his suffering from PTSD. *Id.* at 25a. In sentencing McKinney to death, the trial judge did not consider and give effect to his evidence of PTSD because he had not demonstrated that his condition “in any way significantly impaired Mr. McKinney’s conduct.” *Id.* at 29a (emphasis and internal quotation marks omitted). In so doing, the trial judge was being faithful to longstanding Arizona judicial doctrine barring consideration of non-statutory mitigation absent a proven causal nexus to the crime. *Id.* at 38a–42a.

The Arizona Supreme Court in its independent review of McKinney's sentence likewise gave no weight to McKinney's PTSD because there was no evidence that the condition "impaired [his] ability to conform his conduct to the law." *Id.* at 31a (internal quotation marks omitted). The Ninth Circuit, consistent with this Court's decision in *Tennard*, held that the refusal to give any effect to McKinney's evidence of PTSD violated his right to individualized sentencing. Rather than return McKinney's case to the trial court for resentencing, the Arizona Supreme Court once again performed an "independent review" of McKinney's sentence, and again concluded that McKinney's mitigating evidence was insufficient to justify a sentence less than death. Instead of giving McKinney's evidence of severe abuse and PTSD no weight as it did in its earlier decision, this time the Arizona Supreme Court discounted that evidence because of its purported lack of a causal connection to McKinney's crime.

A. This Court Has Never Permitted An Appellate Court To Cure A Death Verdict In Which The Sentencer At Trial Was Precluded From Giving Meaningful Consideration To Significant Mitigating Evidence.

In 1976, this Court rejected mandatory death penalty schemes, declaring that capital sentencers must be permitted to consider, as mitigating, evidence of a defendant's character and background. *Woodson v. North Carolina*, 428 U.S. 280 (1976). Over the past 43

years, this Court has enforced the right to individualized sentencing in numerous contexts, including state sentencing schemes that failed to permit consideration of certain types of mitigation (*see, e.g., Lockett v. Ohio*, 438 U.S. 586 (1978); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Penry v. Lynaugh*, 492 U.S. 302 (1989)), capital sentencers who refused to consider or give effect to particular mitigating evidence (*see, e.g., Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Skipper v. South Carolina*, 476 U.S. 1 (1986)), and state schemes that imposed “unanimity” requirements before mitigating evidence could be considered (*see, e.g., Mills v. Maryland*, 486 U.S. 367 (1988); *McKoy v. North Carolina*, 494 U.S. 433 (1990)). Time and again, this Court has made clear that the appropriate remedy for a trial court’s failure to consider mitigating evidence is a new sentencing proceeding. *Skipper*, 476 U.S. at 8 (overturning death sentence and allowing state to seek a new death sentence “provided that it does so through a new sentencing hearing at which petitioner is permitted to present any and all relevant mitigating evidence”); *Hitchcock*, 481 U.S. at 399 (same); *Penry*, 492 U.S. at 328 (“[o]ur reasoning in *Lockett* and *Eddings* thus compels a remand for resentencing so that we do not ‘risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty’”) (citations omitted); *Mills*, 486 U.S. at 384 (“The possibility that petitioner’s jury conducted its task improperly is great enough to require resentencing”); *McKoy*, 494 U.S. at 442 (quoting *Mills* and *Eddings* for the proposition that “[b]ecause the sentencer’s failure to consider all of the mitigating evidence risks erroneous imposition of the

death sentence . . . it is our duty to remand this case for resentencing”) (internal quotation marks and citations omitted).

The Arizona Supreme Court’s appellate reconsideration of McKinney’s sentence does not amount to the “new sentencing hearing” or “resentencing” contemplated by these decisions. Capital sentencing requires the decisionmaker to hear evidence and observe witnesses. As this Court observed in *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985), “appellate court[s], unlike a capital sentencing jury, [are] wholly ill-suited to evaluate the appropriateness of death in the first instance.” McKinney is entitled to have a *sentencer* listen to his evidence of abuse, abandonment, and resulting PTSD and decide whether he deserves death or a lesser sentence. Because the trial judge to whom that evidence was presented felt constrained to ignore it, McKinney is entitled to a new sentencing proceeding in which the evidence is heard, observed, and evaluated. The Arizona Supreme Court, in contrast, is suited only to “affirm” or “reverse” a sentencing decision, as the first page of its opinion-order in this case reflects: “Sentence Affirmed.” Pet. App. 1a. It is not suited to assess the demeanor and credibility of witnesses – a function essential to evaluating the power and significance of mitigating evidence.

The limited (and now essentially defunct) role of appellate courts in reweighing aggravating and mitigating evidence in the context of error under *Clemons v. Mississippi*, 494 U.S. 738 (1990), does not support the Arizona Supreme Court’s failure to remand for

resentencing. In *Clemons*, the jury had been able to consider and give effect to *all* of the defendant’s mitigating evidence. The jury subsequently found that the aggravating factors outweighed the mitigating factors and imposed a death sentence. 494 U.S. at 742–43. The error in that case was on the aggravating side: one of the two statutory aggravating factors found by the jury (that the killing was “especially heinous, atrocious or cruel”) was deemed unconstitutionally vague. Because the Mississippi scheme explicitly invited jurors to weigh aggravating and mitigating factors, and an impermissibly vague aggravating factor was in the mix of factors found by the jury, this Court concluded that the jury might have placed improper weight on the vague aggravating factor. Under those circumstances, this Court authorized the Mississippi courts to reweigh the aggravating and mitigating factors (removing from consideration the improperly vague factor) to determine whether the jury’s sentence of death should still stand.

In *Clemons*, the jury had heard all of the evidence in the case and had reached a judgment that death was appropriate. The jury had found the existence of a valid aggravating factor (such that the death penalty was appropriately narrowed) and had not considered any improper evidence at all. 494 U.S. at 754–55 n.5 (“there is no serious suggestion that the State’s reliance on [the unconstitutionally vague aggravating factor] led to the introduction of any evidence that was not otherwise admissible in either the guilt or sentencing phases of the proceeding”). The error in *Clemons*

was quite technical, perhaps even hyper-technical: the constitutional concern was that the inclusion of a vague statutory aggravating factor might have distorted the decisionmaking process, even though the jury had not considered any inappropriate *evidence*. In a separate line of cases, the Court had held that the inclusion of an unconstitutionally vague factor in a “threshold” sentencing scheme – in which the jury was not explicitly directed to weigh aggravating and mitigating factors – was not error at all, so long as one valid aggravating factor had been found by the sentencer. *Zant v. Stephens*, 462 U.S. 862 (1983).

Subsequent to *Clemons*, this Court reconciled these somewhat divergent precedents by jettisoning the requirement that a state court must do anything at all to save a death sentence where an impermissibly vague aggravating factor was included in the mix of factors at sentencing (and the jury found at least one constitutionally valid aggravating factor), as long as the jury did not consider any *evidence* that was otherwise improperly before them. *Brown v. Sanders*, 546 U.S. 212, 220 (2006) (“An invalidated sentencing factor . . . will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.”). In sum, *Clemons* “error” is no longer even viewed as error after *Sanders*, because in such circumstances the defendant was not deprived of a fair sentencing proceeding at trial. *Clemons* does not speak to whether an

appellate court can cure the failure to consider mitigating evidence at trial by deciding for itself whether such evidence justifies a life sentence. The many Court decisions *directly* insisting upon resentencing in such circumstances, including *Eddings*, *Skipper*, *Penry*, *Hitchcock*, *Mills*, and *McKoy*, have not been overruled sub silentio by one (overruled) decision authorizing “appellate reweighing” in a context where the Court now recognizes there was no constitutional error at all.

B. Resentencing In The Trial Court Is Essential In This Case Because The Trial Record Does Not Fairly Capture McKinney’s Mitigating Evidence.

By the time of McKinney’s trial, Arizona’s rule precluding consideration of non-statutory mitigation without a demonstrable nexus to the offense was well established. *See* Pet. App. at 38a–42a. At McKinney’s sentencing, all of the participants – the defense, the prosecution, and the trial judge who would make the sentencing decision – labored under the view that McKinney’s evidence of his abuse and resulting PTSD could be considered only insofar as McKinney established a firm causal link between that evidence and his crimes. The defense sought to establish such a nexus through McKinney’s expert witness, a psychologist. *See, e.g.*, JA 124–26, 129–30. The prosecution insisted that the “key question” regarding McKinney’s PTSD was whether it “affect[ed] him” at the time of the crimes. *Id.* at 286. The judge himself questioned the defense psychologist to determine whether a link

between McKinney's PTSD and his behavior could be clearly established. *See id.* at 256.

The nexus rule, though, creates an impossible burden. Requiring a defendant to establish a firm connection between his history of abuse and resulting PTSD, on the one hand, and the commission of a particular crime, on the other, rests on an unrealistic account of human behavior. Psychiatrists and psychologists can offer diagnoses of mental disease; they can also inform us about typical behaviors associated with those diagnoses. They cannot, however, determine whether a particular individual engaged in a specific behavior *because* of his disease. Influences on human behavior are too numerous and amorphous to establish such a firm causal link. This Court's rejection of a nexus requirement rested in part on its skepticism about the overly deterministic account of human behavior on which it rests. As this Court held in *Tennard*, sentencers must be permitted to reach their own conclusions about how mitigating evidence affects culpability and blameworthiness. Requiring a defendant to pass some threshold requirement of causality before permitting a sentencer to consider mitigating evidence deprives the defendant of a common-sense assessment of that evidence.

In this case, McKinney could have sought a sentence less than death based on evidence of his extensive abuse and resulting PTSD along numerous dimensions *apart* from whether such evidence could confidently be said to have "caused" him to commit his crimes. He might have argued, for example, that a defendant who has experienced extensive abuse and who suffers from

PTSD has had fewer opportunities to live a fulfilling and connected life. He might have argued that his status as a victim of repeated criminal abuse makes him less deserving of severe punishment. He might have insisted that the State's failure to protect him from extensive abuse and resulting trauma undermines its legitimacy in seeking the ultimate punishment. And he might have observed that a death-sentenced inmate with PTSD will suffer excessively (in comparison to other death-sentenced inmates) in the notoriously harsh conditions of Arizona's death row. But Arizona's unconstitutionally restrictive approach to mitigation ensured that the focus of McKinney's sentencing proceeding was solely on whether the defense could convincingly show that his crime was attributable to his abuse and resulting PTSD. That burden was both unfair and unmeetable. Worse still, in the context of this case, the nexus requirement prevented the development of a record documenting the full dimensions of McKinney's mitigation. For the Arizona Supreme Court merely to reevaluate McKinney's mitigating evidence in a second independent review does not remedy the constitutional error in this case, because the trial record does not document the many potentially mitigating aspects of McKinney's evidence. The Arizona nexus requirement distorted the presentation of evidence at trial, and McKinney must be afforded the opportunity to present his mitigating evidence without the restrictive nexus lens hovering over the proceeding.

C. Even If Appellate Review Of McKinney's Death Sentence Could Potentially Cure The Error In This Case, The Arizona Supreme Court's Independent Review Again Failed To Give Appropriate Consideration To McKinney's Mitigating Evidence.

In its independent review following the Ninth Circuit's decision, the Arizona Supreme Court observed that it "must consider and weigh all mitigation evidence regardless of whether it bears a causal nexus to the underlying murders." Pet. App. at 4a. But it discounted McKinney's evidence of PTSD because it bore "little or no relation to his behavior" during his offenses. *Id.* at 5a; *see also id.* at 8a ("we place minimal weight on McKinney's mitigation" and "note again that there is little or no connection between McKinney's mitigation and his behavior during the murder"). Just as in its previous review, the Arizona Supreme Court insisted that evidence of severe abuse and resulting PTSD is of little significance unless a defendant can demonstrate how it caused him to commit his crime. Again, the Arizona Supreme Court imposed an impossible burden: McKinney was required to show that his crime was attributable to his abuse and trauma for that court to give it any meaningful weight.

But just as the nexus test fails as a threshold test of constitutional relevance, it also fails as a means of assessing the weight of a defendant's mitigation. It is impossible to determine whether and how much a history of abuse and resulting PTSD contributes to criminal behavior. That is why a nexus test is inappropriate

in gauging the relevance or significance of mitigating evidence. Instead of insisting upon proof that McKinney's abuse and PTSD caused him to commit his offenses, the Arizona Supreme Court should have recognized as a matter of common sense and reasonable inference that a person with such a background is less morally culpable than those who have not experienced abuse and developed PTSD. Rather than focus on *causation*, the Arizona Supreme Court should have evaluated the *severity* of McKinney's abuse and the *accuracy* of the PTSD diagnosis, neither of which that court appeared to question. *Id.* at 5a ("The record shows that he endured a horrific childhood."); *id.* ("McKinney also experienced severe neglect."); *id.* ("McKinney also suffered from Post-Traumatic Stress Disorder . . . at the time of the murders."); *id.* (McKinney's psychologist indicated that his "PTSD was caused by the abuse and trauma he experienced as a child").

This Court's own approach to mitigation is instructive. In *Porter v. McCollum*, 558 U.S. 30 (2009), the state court had denied relief on Porter's claim of ineffective assistance of counsel based on trial counsel's failure to present evidence of childhood abuse and trauma related to military service. The state court had ruled that Porter's evidence of childhood abuse was not significant given his age (54) at the time of the offense and discounted as well the significance of Porter's evidence of trauma related to his military service. In Porter's federal habeas corpus proceedings, the court of appeals rejected the claim of ineffective assistance, holding that the state court had not been unreasonable

in discounting the significance of Porter's mitigation. This Court reversed, holding that the state court should not have minimized evidence of "the kind of troubled history we have declared relevant to assessing a defendant's moral culpability." 558 U.S. at 41 (internal quotation marks and citation omitted). *Porter* makes clear that evidence of significant abuse and trauma is invariably important to the sentencing decision and should not be dismissed as otherwise. *Id.* at 43 (declaring that "the Florida Supreme Court, following the state postconviction court, unreasonably discounted the evidence of Porter's childhood abuse and military service").

The Ninth Circuit, adhering to *Tennard's* emphatic rejection of a nexus approach to mitigation, returned this case to the Arizona Supreme Court so that McKinney's evidence could be considered without that unjustified restriction. The Arizona Supreme Court's subsequent independent review adheres to its position that a defendant's evidence of severe abuse and PTSD is of little consequence unless he can explicitly connect that evidence to his particular crime. That decision is contrary to common sense and inconsistent with this Court's longstanding approach to mitigating evidence, which allows sentencers to draw reasonable inferences regarding the significance of mitigating evidence regardless of whether expert testimony establishes a causal link to the offense. The decision is also unfaithful to the mandate and should not stand, even if this

Court were to agree that resentencing in the trial court is not required.



CONCLUSION

Given the failure of the sentencer to consider and give effect to McKinney's evidence of extensive abuse and resulting PTSD, this case should have been returned to the trial court for resentencing. This Court's decisions unanimously and unambiguously support that result. The Arizona Supreme Court's attempt to cure the error through its independent review is flawed in three respects: that Court cannot give adequate effect to McKinney's mitigating evidence by simply combing through the trial transcript; the record itself has been distorted by Arizona's inappropriate nexus rule; and the Arizona Supreme Court continues to adhere to the proposition – explicitly rejected by this Court in *Tennard* – that evidence of severe abuse and PTSD is not significantly mitigating absent testimony linking such evidence to the commission of the crime.

The clearest path to resolving this case is to remand for resentencing. Arizona law mandates a jury in resentencing cases. Ariz. Rev. Stat. Ann. §13-752(O). Hence, remanding for resentencing obviates the need for this Court to determine whether the proceedings in the Arizona Supreme Court were part of the direct review of McKinney's sentence, entitling him to the enforcement of prevailing constitutional norms, including

the right to a jury under *Ring v. Arizona*, 536 U.S. 584 (2002).

Respectfully submitted,

JORDAN M. STEIKER*

JIM MARCUS

THEA POSEL

RAOUL D. SCHONEMANN

CAPITAL PUNISHMENT CENTER

UNIVERSITY OF TEXAS

SCHOOL OF LAW

727 East Dean Keeton Street

Austin, TX 78705

(512) 232-1346

JSteiker@law.utexas.edu

JMarcus@law.utexas.edu

TPosel@law.utexas.edu

RSchonemann@law.utexas.edu

Attorneys for Amicus Curiae

**Counsel of Record*