No. 12-82

IN THE

Supreme Court of the United States

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Petitioner,

v.

ROGER WAYNE MCGOWEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National District Attorneys Association (NDAA) is the world's oldest and largest professional organization representing prosecutors. Its members (found in the offices of district attorneys, state's attorneys, attorneys general, and county and city prosecutors) prosecute criminal violations in every State and territory of the United States. Founded in 1950, the NDAA has sought to provide local prosecutors with a national perspective on issues that appear in their offices nationwide. The NDAA also advocates at the national level regarding those issues. The NDAA's underlying objective, like that of its individual members, is to see justice done under the rule of law.

To that end, the NDAA regularly supports efforts to preserve the honor and integrity of America's state and local prosecuting attorneys and to improve and facilitate the administration of justice. NDAA has a strong interest in enabling prosecutors to perform their duties to their utmost by effectively using the limited resources entrusted to them. It thus urges legislatures to adopt clear and practicable statutes in defining the

1. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that Petitioner and Respondent, upon timely receipt of NDAA's intent to file this brief, have consented to its filing.

responsibilities of prosecutors and urges courts to adopt clear and practicable interpretations of statutory and constitutional texts.

The interests of the NDAA and its members are directly implicated by this important case. The Fifth Circuit's incorrect classification of capital sentencing errors as "structural" unduly burdens prosecutors by requiring resentencing in cases, such as this one, where the erroneous instruction was clearly harmless under the governing legal standard. This harsh and unsustainable rule especially burdens NDAA members in cases where the original sentencing occurred many years ago, making it exponentially more difficult to reproduce the evidence and locate the witnesses who must be summoned if the death sentence is to be successfully secured on remand. In short, the Fifth Circuit's erroneous decision undermines the important efforts of NDAA members to administer justice and needlessly undermines the finality of capital sentences on collateral review. NDAA has a strong interest in seeing this decision reversed.

SUMMARY OF ARGUMENT

The question presented in this case is "[w]hether harmless-error review applies when a capital-sentencing jury is precluded from considering relevant mitigating evidence." Petition ("Pet.") I. That question accepts the premise that the Eighth Amendment requires juries to consider mitigating evidence before imposing the death penalty. *See Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion). But *Lockett* and its progeny have no foundation in the Constitution. *See id.* at 623 (White, J., concurring in part and dissenting in part); *id.* at 633 (Rehnquist,

J., concurring in part and dissenting in part); *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989) (Scalia, J., concurring in part and dissenting in part).

In an appropriate case, the Court should reconsider this line of decisions. In this case, however, the Court should grant the Petition in order to prevent the Fifth Circuit from making matters worse. The Fifth Circuit's conclusion that *Lockett* errors are structural is flatly contradicted by controlling precedent and the decisions of every other circuit to address the issue. Indeed, the decision below is so obviously incorrect that the Court should not waste scarce resources on full briefing and oral argument. The Court should instead summarily reverse the Fifth Circuit's judgment.

Almost all errors that occur during a criminal trial or in the sentencing phase are reviewed for harmlessness. *See Brecht v. Abrahamson*, 507 U.S. 619 (1993). This is especially true in the federal habeas setting given the finality and federalism concerns that collateral review raises. Automatic reversal is a rarely-invoked exception to this general rule. That drastic remedy is appropriate only where the error is structural, *i.e.*, where the error is so egregious that "the entire conduct of the trial from beginning to end is obviously affected." *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). Because this standard is exceedingly difficult to meet, the Court has generally declined to classify criminal sentencing errors as structural. *See, e.g.*, *Calderon v. Coleman*, 525 U.S. 141, 146-47 (1998) (per curium). That is no less true when the sentencing error occurs in capital case. *See, e.g.*, *Clemons v. Mississippi*, 494 U.S. 738, 742-45 (1990).

As it has done in previous cases, the Court should summarily reverse the decision below for classifying a sentencing error as structural without any legal basis for doing so. For example, the Fifth Circuit's conclusion that judicially reviewing the sentencing error for harmlessness would rob the jury of its duty to reach a "reasoned moral judgment," *Nelson v. Quarterman*, 472 F.3d 287, 314-15 (5th Cir. 2006) (en banc), is foreclosed by controlling precedent, *see Clemons*, 494 U.S. at 738. The court also strangely concluded that *Lockett* errors are immune from harmless-error review because of the historical accident that the issue has not arisen before. *Nelson*, 472 F.3d at 314. But neither *Lockett* nor its application in *Penry* was deemed a new rule under *Teague v. Lane*, 489 U.S. 288 (1989). Thus, while a petitioner may raise such a claim on federal habeas, he cannot seriously argue that the claim is novel to avoid harmless-error review. Just like other capital sentencing errors, *Lockett* claims must be reviewed for harmlessness.

The facts of this case show why. The *Lockett* error occurred here not because McGowen was forbidden from presenting mitigating evidence or because the jury was instructed to ignore it—but merely because the trial judge did not foresee that under *Penry* (a decision that would not be decided for another two years) a "special instruction" was required. Pet. App. 22a-24a. That may have been an error under this Court's misguided precedent, but it does not defy review for harmlessness. "McGowen almost certainly would have received the death sentence even if the trial court had anticipated the *Penry* decision … and correctly instructed the jury." Pet. App. 85a.

Yet McGowen is not the only convicted murderer who will benefit from the Fifth Circuit's erroneous ruling.

Because the underlying rule applies to all *Lockett* errors, it may affect many other death sentences that have been imposed throughout Texas, Mississippi, and Louisiana. In Texas alone, nearly 40 death-row inmates may have their sentence automatically vacated. While the state is free to try to seek the death penalty on remand, the plain truth is that in many cases the state will not do so and the death sentence will not be imposed. That concern alone makes this case important.

But automatic reversal imposes heavy costs on the criminal justice system even if the state does proceed with resentencing. Because of this Court's "Byzantine death penalty jurisprudence," *Knight v. Florida*, 528 U.S. 990, 991 (Thomas, J., concurring), the jury must be presented with evidence showing that aggravating circumstances exist. Perhaps decades after the crime, then, the prosecution must locate witnesses (to the extent they remain alive) and reproduce physical evidence in order to convince a new jury (not steeped in the circumstances of the crime) that a death sentence is warranted. The new sentencing proceeding also imposes significant costs on victims' families, which must again relive in open court the violent demise of their loved one.

The harsh consequences resentencing imposes on prosecutors and victims' families may be required when the death sentence was the product of a serious trial error. But automatically reversing capital sentences because of a *Lockett* error undermines the administration of justice without any offsetting justification. AEDPA was enacted to limit relief to those whom have been "grievously wronged." *Brecht*, 507 U.S. at 637. If that phrase is to have any meaning, it should not apply to McGowen. The judgment of the Fifth Circuit should be reversed.

ARGUMENT

I. The Court Should Summarily Reverse The Fifth Circuit's Erroneous Decision.

In a series of decisions, this Court has held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record." *Lockett*, 438 U.S. at 604; *Eddings v. Oklahoma*, 455 U.S. 104, 112-14 (1982); Pet. 3-5 (collecting cases). In *Penry*, the Court applied this rule and declared unconstitutional a Texas capital-sentencing instruction that failed adequately to inform the jury that "it could consider and give effect" to the defendant's mitigating evidence. 492 U.S. at 328; *Johnson v. Texas*, 509 U.S. 350, 364 (1993) ("We agreed that the jury instructions were too limited for the appropriate consideration of this mitigating evidence in light of Penry's particular circumstances.").

As an initial matter, the rule articulated in *Lockett* and applied in *Penry* has no constitutional foundation. The Eighth Amendment does not require juries to consider mitigating evidence before imposing the death penalty. *Lockett*, 438 U.S. at 623 (White, J., concurring in part and dissenting in part) ("[I]t does not violate the Eighth Amendment for a State to impose the death penalty on a mandatory basis when the defendant has been found guilty beyond a reasonable doubt of committing a deliberate, unjustified killing."); *id.* at 633 (Rehnquist, J., concurring in part and dissenting in part) ("Sandra Lockett was fairly tried, and was found guilty of aggravated murder. I do not think Ohio was required to receive any sort

of mitigating evidence which an accused or his lawyer wishes to offer."). The Court has justified this regime by claiming that it ensures that the jury reaches a "reasoned moral response." *Penry*, 492 U.S. at 322. "[B]ut reason has nothing to do with it .... It is an unguided, emotional 'moral response' that the Court demands be allowed—an outpouring of personal reaction to all the circumstances of a defendant's life and personality, an unfocused sympathy." *Id.* at 359. (Scalia, J., concurring in part and dissenting in part).

Although the Court should reconsider this badly reasoned line of decisions in a future case, it need not do so to reverse the decision below. The question presented in this case is not whether *Lockett* and its progeny should be overruled, but whether this Court will permit the Fifth Circuit to compound the problem by treating all *Lockett* errors as structural, thus requiring automatic reversal of a death sentence without *any* showing of actual harm. Pet. App. 25a-26a. It should not. Pet. 22-31. Indeed, the Fifth Circuit's decision is so egregiously wrong that the Court should reverse it through "summary disposition on the merits." Sup. Ct. R. 16.1.

Summary reversal is appropriate where "the lower court result is so clearly erroneous, particularly if there is a controlling Supreme Court precedent to the contrary, that full briefing and argument would be a waste of time." Eugene Gressman *et al.*, Supreme Court Practice 344 (9th ed. 2007); *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (per curiam) (Marshall, J., dissenting) (explaining that summary reversal is appropriate when "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error"). This case easily meets

that standard. The Fifth Circuit's judgment is contrary to controlling precedent and its reasoning has been rejected by every other court to reach the issue.

This Court has held that "most constitutional errors can be harmless." *Fulminante*, 499 U.S. at 306. Thus, a criminal conviction or sentence will not be vacated on federal habeas unless it "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). In other words, "habeas petitioners … are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice." *Id.* (citation omitted). "This standard reflects the presumption of finality and legality that attaches to a conviction at the conclusion of direct review. It protects the State's sovereign interest in punishing offenders and its good-faith attempts to honor constitutional rights, while ensuring that the extraordinary remedy of habeas corpus is available to those whom society has grievously wronged." *Calderon*, 525 U.S. at 145-46 (citations omitted).

Structural error is the exception to this general rule. Because a structural error requires automatic reversal, it is reserved for those rare cases where criminal defendants are deprived of basic protections that "necessarily render a trial fundamentally unfair" such that "no criminal punishment may be regarded as fundamentally fair." *Neder v. United States*, 527 U.S. 1, 8-9 (1999) (quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)); *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993). Structural errors are violations so egregious that the "entire conduct of the trial from beginning to end is obviously affected." *Fulminante*, 499 U.S. at 309-10. The purpose of treating structural

errors as *per se* reversible is thus to protect "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman v. California*, 386 U.S. 18, 23 (1967). In short, "[a]utomatic reversal is strong medicine that should be reserved for constitutional errors that '*always*' or '*necessarily*' produce [fundamental] unfairness." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 159 (2006) (internal citation omitted).

Because of the substantial costs of classifying an error as structural, the Court has taken that step "in a very limited class of cases." *Neder*, 527 U.S. at 8 (citations omitted). Only egregious constitutional violations such as the complete denial of the right to counsel, a biased trial judge, racial discrimination in grand jury selection, denial of the right to self-representation, and denial of a public trial, are deemed structural. *Id.*; Pet. 7 n.2. As these examples show, a structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Fulminante*, 499 U.S. at 310. By contrast, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." *Rose*, 478 U.S. at 579. In light of this legal standard, the Court has become "increasingly wary of recognizing new structural errors." *United States v. Brandao*, 539 F.3d 44, 60 (1st Cir. 2008).

Indeed, the Court has explained that harmless-error review applies even if a particularly serious constitutional error occurs during the trial. In *Neder*, for example, the Court held that "[u]nlike such defects as the complete deprivation of counsel or trial before a biased judge, an

instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair." 527 U.S. at 9. Likewise, the Court held that erroneously defining a criminal offense in jury instructions is a trial error subject to harmless-error review. *See, e.g.*, *California v. Roy*, 519 U.S. 2, 5-6 (1996) (per curiam); *Johnson v. United States*, 520 U.S. 461, 468-69 (1997). More recently, the Court held that providing a jury with alternative theories of guilt where at least one of the theories is invalid constitutes a trial error rather than structural error. *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (per curiam). The Court has even applied the harmless-error standard when a psychiatrist's testimony based on an examination of an uncounseled defendant was presented to a jury during capital sentencing in stark violation of the Sixth Amendment. *Satterwhite v. Texas*, 486 U.S. 249, 259 (1988).

The bottom line is this: even in cases implicating fundamental constitutional rights, the Court has declined to classify errors as structural absent proof that they so pervaded every aspect of a criminal trial that they could not be reviewed for harmlessness. As the Court has explained, the harmless-error rule "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Rose*, 478 U.S. at 577. Accordingly, "while there are some errors to which [harmless-error analysis] does not apply, they are the exception and not the rule." *Id*. at 578.

Lockett errors cannot meet that high standard. In fact, the Court's decisions indicate that all jury-instruction errors during the sentencing phase—including in capital

cases—are subject to harmless-error review. In *Clemens*, for example, the trial court erroneously instructed the jury that it could consider the "especially heinous, atrocious or cruel" nature of the offense as an aggravating factor, and the prosecution argued this point to the jury. 494 U.S. at 742. Nonetheless, the Court upheld the death sentence, roundly rejecting the argument that "the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence." *Id.* at 745 (citing *Cabana v. Bullock*, 474 U.S. 376 (1986)). The Court instead held that reviewing courts have the authority to balance the aggravating and mitigating circumstances *de novo* on direct appeal or decide whether the errors in the jury instructions were harmless. *See id.* at 748-49. Importantly, the Court reached that conclusion even though Clemens had received the death sentence. *Id.*; *see also id.* at 772 (Blackmun, J., concurring in part and dissenting in part).

The Court similarly held that a jury instruction in a capital sentencing that incorrectly described the governor's power to commute the defendant's sentence was a trial error subject to harmless-error review. *Calderon*, 525 U.S. at 146-47. And the Court recently held that a trial judge's failure to instruct a jury that it may not convict on the basis of conduct that was not criminal at the time that it occurred was not structural error as there is "no reason why, when a judge fails to give such an instruction, a reviewing court would find it any more difficult to assess the likely consequences of that failure than with numerous other kinds of instructional errors that [the Court] previously held to be non-'structural.'" *United States v. Marcus*, 130 S. Ct. 2159, 2165 (2010).

Together, these decisions establish that erroneous jury instructions in capital cases—including erroneously instructing the jury regarding its obligation to weigh aggravating and mitigating evidence—are not structural errors under this Court's decisions. *See Washington v. Recuenco*, 548 U.S. 212, 222 (2006) ("Failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error."). Like other sentencing errors, *Lockett* errors do not "defy analysis by 'harmless-error' standards," *Fulminante*, 499 U.S. at 309-10, and thus are not structural. The Fifth Circuit's decision to the contrary is unsustainable.[2]

Summary reversal is also warranted as this Court has already rejected every reason the Fifth Circuit gave for treating *Lockett* errors differently from the welter of cases discussed above. The Fifth Circuit has concluded that a jury would be precluded from making a "reasoned moral judgment" in determining whether death is appropriate

2. The unanimity of opposition to the Fifth Circuit in the other courts of appeals confirms just how misguided the decision below was. Pet. at 14-22. The governing rule in every other circuit to have reached this question is that jury-instruction errors in capital sentencing proceedings—including *Lockett* errors—are not structural and thus are reviewable for harmless error. *See, e.g.*, *Campbell v. Bradshaw*, 674 F.3d 578, 597 (6th Cir. 2010); *Ferguson v. Sec'y for the Dep't of Corrs.*, 580 F.3d 1183, 1200 (11th Cir. 2009); *McGehee v. Norris*, 588 F.3d 1185, 1197 (8th Cir. 2009); *Sims v. Brown*, 425 F.3d 560, 579 (9th Cir. 2005); *Martini v. Hendricks*, 348 F.3d 360, 370-71 (3d Cir. 2003); *Bryson v. Ward*, 187 F.3d 1193, 1205 (10th Cir. 1999); *Green v. French*, 143 F.3d 865, 893 (4th Cir. 1998); *Williams v. Chrans*, 945 F.2d 926, 948-49 (7th Cir. 1991). The Fifth Circuit's decision is not only wrong, then, it sacrifices "uniformity in the law of habeas corpus." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992).

if harmless error review is applied to *Lockett* errors. *Nelson*, 472 F.3d at 314-15. It has also concluded that it would be inappropriate for federal judges to independently weigh the aggravating and mitigating sentencing factors in determining whether death is an appropriate sentence. *Id.* at 315.

These arguments directly contradict *Clemons*. *See supra* at 11. In that case, the Court saw "no reason to believe that careful appellate weighing of aggravating against mitigating circumstances … would not produce 'measured consistent application' of the death penalty or in any way be unfair to the defendant." *Clemons*, 494 U.S. at 748. That is precisely why the Court held that a reviewing court is fully capable of making the determination necessary under the Eighth Amendment for the imposition of the death penalty; namely, whether the defendant killed, attempted to kill, or intended to kill. *Cabana*, 474 U.S. at 386-87. "The decision whether a particular punishment—even the death penalty—is appropriate in any given case is not one that we have ever required to be made by a jury." *Id.* at 385. These decisions are incompatible with the Fifth Circuit's conclusion that it would be inappropriate for a reviewing court to carefully weigh the aggravating and mitigating circumstances to determine whether a death sentence is warranted or instead independently determine whether an incorrect sentencing instruction in a capital case was harmless error. *See id.* at 391 n.6.

The Fifth Circuit also endeavored to distinguish Eighth Amendment violations from other types of constitutional error, noting that the Supreme Court has never applied harmless-error review to *Penry* errors. *See Nelson*, 472 F.3d at 314. But this argument misses the

mark entirely. *Penry* errors are just a routine species of *Lockett* errors. After all, *Penry* errors otherwise would have been barred from being applied on habeas review by *Teague*. *See Penry*, 492 U.S. at 318-19 ("The rule … is not a 'new rule' under *Teague* because it is dictated by *Eddings* and *Lockett*."); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 247-253, 260-65 (2007). *Penry* errors cannot be both "dictated" by controlling precedent and *sui generis*. Pet. 24-25. The correct answer is that there is nothing special or unique about *Penry* errors. Just like other capital sentencing errors, they are subject to harmless-error review. There is no need for the Court to grant full briefing and argument in order to reach that obvious conclusion.

Last, the facts of this case make summary reversal particularly appropriate as there is no question that reversing the Fifth Circuit will lead to affirmance of McGowen's conviction. The court did not deny McGowen the opportunity to present mitigating evidence. McGowen's two sisters testified on his behalf. Pet. 11. Nor did the court instruct the jury to ignore their testimony. To the contrary, the court instructed the jury to consider "all of the evidence" three different times. *See id*. The *Lockett* error instead arose from the court's failure to give the jury a "special instruction" that it must consider the mitigating evidence when deciding whether to impose the death penalty. Pet. App. 22a-23a.

If any error is harmless, it is the one at issue in this case. The jury heard all the mitigating evidence that McGowen had to offer and was instructed to consider it. The jury imposed the death sentence not because of an instructional problem, but because (as McGowen's counsel

essentially conceded) the many aggravating factors clearly outweighed the weak mitigating evidence offered during the sentence phase. Pet. 10-11. "The prosecution convincingly argued that the only way to stop McGowen's escalating criminality was for the jury to return a death sentence." Pet. App. 53a. The district court therefore concluded that "McGowen almost certainly would have received a death sentence even if the trial court had anticipated the *Penry* decision … and correctly instructed the jury." *Id.* 85a. This is precisely the type of "immaterial error" that should not be used to overturn a conviction on collateral review. *Rose*, 478 U.S. at 577; *see, e.g.*, *Smith v. Spisak*, 130 S. Ct. 676, 693 (2010) (Stevens, J., concurring in part and concurring in the judgment).

As this case illustrates, the notion that a *Lockett* error always undermines a capital sentencing proceeding in such a fundamental way that "no criminal punishment may be regarded as fundamentally fair" borders on the frivolous. *Neder*, 527 U.S. at 8-9. The Fifth Circuit's decision is simply unsustainable as a matter of law and logic. Scheduling a case such as this for full briefing and oral argument would be a waste of judicial resources. The Court has summarily reversed lower courts on questions involving this family of issues on several occasions. *See, e.g.*, *Roy*, 519 U.S. at 5-6 (per curiam); *Hedgpeth*, 555 U.S. at 58 (per curiam); *Calderon*, 525 U.S. at 146-47 (per curiam). *Calderon* is especially instructive as the Court summarily reversed the Ninth Circuit for refusing to apply harmless-error review to an erroneous jury instruction that misled the jury in a capital sentencing. 525 U.S. at 147. There is no reason to treat this case any differently. The judgment of the Fifth Circuit should be summarily reversed.

II. The Fifth Circuit's Decision Imposes Significant Burdens On Prosecutors And Jeopardizes The State's Ability To Secure A Death Sentence Given The Passage Of Time.

Irrespective of whether the Court schedules the case for full briefing and argument, or summarily reverses the Fifth Circuit, the importance of overturning the decision below cannot be overstated. This is not just another *Penry* case. The question presented by this petition—whether *Lockett* errors are structural or trial errors—is not a Texas-specific issue. *See supra* at 12 n. 2. And there can be no question that the Fifth Circuit's structural-error analysis applies to all *Lockett* errors because, as noted above, *Penry* is merely an application of *Lockett* to a Texas jury instruction. *See id.* at 14. The Fifth Circuit's decision to treat *Lockett* errors as structural thus goes far beyond *Penry* and implicates every capital sentence where the jury was denied the ability to consider or give meaningful effect to a defendant's mitigating evidence. Correcting the Fifth Circuit's erroneous decision is therefore a matter of national importance.

More fundamentally, classifying *Lockett* errors as structural will have a devastating ripple effect. As an initial matter, the Fifth Circuit's structural error ruling will impact a significant number of cases. Because *Penry* is not a new rule under *Teague*, *see supra* at 14, the Fifth Circuit's structural error holding applies to a large number of older cases in which the death penalty was imposed. McGowen, for example, was originally sentenced to death twenty-five years ago. Pet. 11. The problem, however, is by no means unique to this case. The nature of collateral review in capital cases practically assures

that more than a decade will have passed between when the death sentence was imposed and when federal habeas review is complete. In 2010, for example, the time between sentence and execution averaged just under fifteen years and there were 108 individuals on death row who had been awaiting execution for over twenty-eight years. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, Capital Punishment, 2010 – Statistical Tables 12, 16 (2011), available at http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2236.

Because of this delay between conviction and the execution of the death sentence, there is every reason to believe that the Fifth Circuit's misguided decision will mandate resentencing in a large number of capital cases without any demonstration that the *Lockett* error was prejudicial. In Texas, there are approximately twenty-four individuals currently on death row who were sentenced under Texas's Article 37.071 and thus have potentially valid *Lockett* claims. Pet. 35. An additional twelve individuals await resentencing in Texas after their capital sentences were vacated in light of the Fifth Circuit's structural error holding. *See id.* And there is every reason to believe that the Fifth Circuit's ruling will have similar consequences in Louisiana and Mississippi. In other words, this is not an abstract concern: the volume of death sentences implicated by the Fifth Circuit's ruling alone makes this an important petition.

In turn, the process of resentencing this large group of convicted murderers will impose substantial costs on state prosecutors and cause unneeded pain to victims' families. This Court has itself noted that a litany of costs attributable to the "automatic reversal" of a criminal

"conviction regardless of the lack of prejudice." *United States v. Mechanik*, 475 U.S. 66, 71 (1986). The Court explained in detail:

> The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences. The passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. Thus, while reversal may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution and thereby cost society the right to punish admitted offenders. Even if a defendant is convicted in a second trial, the intervening delay may compromise society's interest in the prompt administration of justice and impede accomplishment of the objectives of deterrence and rehabilitation. These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial.

Id. at 72 (citations and alterations omitted); *see also Kuhlmann v. Wilson* 477 U.S. 436, 453-54 (1986) ("When a prisoner is freed on a successive petition, often many years after his crime, the State may be unable successfully

to retry him. This result is unacceptable if the State must forgo conviction of a guilty defendant through the erosion of memory and dispersion of witnesses that occur with the passage of time that invariably attends collateral attack.") (citations omitted).

All of those concerns are applicable here. The Fifth Circuit's structural error holding allows for only one remedy: resentencing. In a non-capital case, resentencing may not be particularly burdensome because on remand the sentencer can rely on the original record from the guilt phase of the trial. By contrast, resentencing in death-penalty cases requires the state prosecutor to essentially relitigate the entire case given the need to establish the existence of aggravating factors under this Court's Eighth Amendment jurisprudence. *See Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994).

Thus, the prosecution must call witnesses, introduce physical evidence, make a closing argument, and so on. Just as "[t]he spectacle of repeated trials … inevitably places burdens on the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources," *Morris v. Slappy*, 461 U.S. 1, 15 (1983), so too does resentencing. These costs include the "erosion of memory and dispersion of witnesses that accompany the passage of time … , and the frustration of society's interest in the prompt administration of justice." *Brecht*, 507 U.S. at 637 (citations omitted). And in the context of capital sentencing, these costs are multiplied ten-fold by the long delays inherent in the collateral review process and the fact that a resentencing hearing requires a completely new jury lacking the context normally gained from the guilt phase of the trial.

To make matters worse, "retrials following the grant of habeas relief ordinarily take place much later than do retrials following reversal on direct review." *Id.* In this case, the delay has been more than twenty-five years. This greatly exacerbates the costs and difficulties for prosecutors seeking resentencing on remand. As the petitioner points out, this burden is so great that prosecutors may simply agree to a life sentence rather than face the costly prospect of a resentencing hearing where they might not even succeed given the time that has passed since trial. Pet. 34; *cf. Engle v. Isaac*, 456 U.S. 107, 128 (1982) ("While a habeas writ may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution.").

To be sure, this difficult set of circumstances may be unavoidable when a criminal trial or sentencing hearing is infected with prejudicial error. But in a case like this, where the error had no effect on the defendant's sentence, *see supra* at 14-15, these burdens needlessly undermine the "prompt administration of justice," *Mechanik*, 475 U.S. at 72. Justice should be meted out equally to the equally deserving. The structural-error approach undermines this principle by allowing some defendants to escape from their sentences simply because it is too difficult to retry them after the long delays of collateral review.

Automatically vacating capital sentences in the absence of prejudicial error also places a heavy burden on victims' families. The ordeal of repeating a trial is a factor "not to be ignored by the courts." *Morris*, 461 U.S. at 14. By repeating the sentencing phase of a capital case, victims' families are required to relive their horrors yet another time to secure a just sentence. In particular, they must once again give victim impact statements to the jury. "Of

course, inconvenience and embarrassment to witnesses cannot justify failing to enforce constitutional rights of an accused: when *prejudicial error* is made that clearly impairs a defendant's constitutional rights, the burden of a new trial must be borne by the prosecution, the courts, and the witnesses; the Constitution permits nothing less. But in the administration of criminal justice, courts may not ignore the concerns of victims." *Id.* (emphasis added).

Finally, the Fifth Circuit's decision contravenes the intent of AEDPA, which was enacted in part "to address the acute problems of unnecessary delay and abuse in capital cases." H.R. No. 104-518, at 111 (1996). By treating *Lockett* errors as structural, the Fifth Circuit returns to the "piecemeal and repetitious litigation," the "years of delay between sentencing and a judicial resolution," and the "lack of finality" that plagued collateral review before the enactment of AEDPA. *See* Committee Report and Proposal from the Judicial Conference of the United States Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, 135 Cong. Rec. S24694 (daily ed. Oct. 16, 1989). What is more, automatically vacating sentences in the absence of prejudice adds no additional element of fairness or precaution to the process; it merely adds delay. In short, vacating prejudice-free sentences does nothing to further the historical purpose of habeas—namely, to "afford relief to those whom society has 'grievously wronged[.]'" *Brecht*, 507 U.S. at 637. It was his many victims—not McGowen—who were grievously wronged.

* * *

The Fifth Circuit's decision is legally unsustainable and imposes substantial burdens on the criminal justice system without any offsetting justification. In the context

of collateral review, it is perfectly appropriate for the Court to weigh the costs and benefits of different error standards. *See Brecht*, 507 U.S. at 637. The sizable costs attributable to classifying an error as structural counsel strongly against taking that exceedingly rare step here. It is one thing to retain a poorly reasoned constitutional rule, but it is quite another to contribute further to "this Court's Byzantine death penalty jurisprudence," *Knight*, 528 U.S. at 991 (Thomas, J., concurring), by making a violation of that rule grounds for automatic reversal. This is especially true given how alarmingly high the costs of classifying a *Lockett* error as structural are for prosecutors, victims' families, and the people of Texas. Thus, whether the Court grants full briefing and argument or instead chooses to summarily reverse the Fifth Circuit, the decision below cannot be allowed to stand.

CONCLUSION

For the reasons set forth herein and in the petition, *amicus curiae* the National District Attorneys Association respectfully requests that the Court grant the petition for a writ of certiorari and summarily reverse the judgment of the Fifth Circuit.

Respectfully submitted,

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